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Mandatory Drug Testing For Federal Employees And Private Employees In Government Regulated Industries: Is Drug Testing Without Probable Cause Unconstitutional?

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MANDATORY DRUG TESTING FOR FEDERAL EMPLOYEES AND PRIVATE EMPLOYEES IN GOVERNMENT REGULATED INDUSTRIES: IS DRUG TESTING WITHOUT PROBABLE CAUSE UNCONSTITUTIONAL?

On September 15, 1986, President Ronald Reagan issued Executive Order 12564, instructing the director of each executive agency to implement a drug testing plan (plan) for federal agency employees.[1] The most controversial aspect of the plan authorizes testing of certain classes of employees without probable cause[2] or reasonable suspicion[3] to believe that the employees have

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1. *See* Exec. Order No. 12564, 50 Fed. Reg. 32,889 (1986). The purpose of President Reagan's Executive Order 12564 (Order) authorizing drug testing for federal employees is to identify and to rehabilitate federal employees who use drugs and thus to create a drug-free federal workplace. *Id*; President's Message to Congress Transmitting Proposed Legislation, 22 WEEKLY COMP. PRES. DOC. 1194 (Sept. 15, 1986). Each agency director, in addition to implementing testing procedures for federal employees, must provide educational services regarding drug abuse, training of supervisory personnel for detection of illegal drug use among federal employees, and referral services for rehabilitation of identified drug users. Exec. Order No. 12564, 50 Fed. Reg. 32,890 (1986). The Order forbids the testing of federal employees to procure evidence for use in criminal prosecutions. *Id.* at 32,892.

The Order permits disciplinary action against identified drug users, but agency directors may not discharge from government service an identified drug user unless the employee refuses to participate in a drug rehabilitation program or continues to use illegal drugs. *Id.* at 32,891.

Executive Order No. 12564 is part of a comprehensive plan of the Reagan Administration to curtail the incidence of drug trafficking in the United States. *Reagan: Drugs Are the 'No. 1' Problem*, NEWSWEEK, August 11, 1986, at 18. In March 1986, the President's Commission on Organized Crime (Commission) recommended that private employers and the federal government initiate drug testing programs for employees to discourage drug use in the United States. *Battling the Enemy Within*, TIME, March 17, 1986, at 52. Acting on the Commission's recommendation, President Reagan submitted proposed legislation to Congress to deter drug trafficking and included a provision to permit drug testing of federal employees. *See* CONG. Q., Sept. 20, 1986, at 2192 (discussing legislative proposals). After heated debate in the Congress, Congress deleted from the proposed legislation the provision for testing of federal employees. CONG. Q., Oct. 25, 1986, at 2699. The Executive Order, however, is binding on executive agencies. CONG. Q. Sept. 20, 1986, at 2192.

2. *See* U.S. CONST. amend. IV. The fourth amendment of the United States Constitution provides in part for the right of persons "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, . . ." and that government agents not execute a search unless they first obtain a warrant supported by probable cause. *Id.*

To establish probable cause, the person seeking a search warrant must produce substantial evidence that the item sought is related to criminal activity and will be found in the area to be searched. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, § 3.3, at 110 (West 1985).

3. *See* Terry v. Ohio, 392 U.S. 1, 30-31, (1968). The reasonable suspicion standard, first enunciated by the Supreme Court in *Terry v. Ohio*, permits a police officer to conduct a limited search of a person for weapons if a police officer observes conduct that, in light of experience, leads the officer to suspect that the person is involved in criminal activity and is armed and dangerous. *Id.*

Since the Supreme Court decision in *Terry v. Ohio*, other courts have established the

engaged in the use of illicit drugs.[4] Critics of the testing plan argue that the plan constitutes an unreasonably intrusive invasion of the employees' right to privacy.[5] Proponents of the President's plan, however, not only have endorsed drug testing for federal employees, but have advocated drug testing for private employees who undertake employment in federally-regulated industries.[6] Despite the worthy objective of the plan to create a drug-free federal work place, however, emerging case law indicates that the proposals to implement drug testing plans for both groups of employees constitutes a search under the fourth amendment and, therefore, must comport to the reasonableness standard that the fourth amendment demands.[7]

The fourth amendment of the United States Constitution provides for the protection of an individual's reasonable expectation of privacy against arbitrary or random government intrusion.[8] In interpreting the scope of the

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reasonable suspicion standard as the appropriate standard to govern other types of searches as well. *See, e.g.*, Security & Law Enforcement Employees v. Carey, 737 F.2d 187, 205 (2d Cir. 1984)(reasonable suspicion is required to conduct strip searches of correctional officers); *infra* note 44 and accompanying text (reasonable suspicion is required to conduct drug testing of public employees).

4. *See* Exec. Order No. 12564, 50 Fed. Reg. 32,890 (1986). The Executive Order authorizing drug testing for federal employees defines "sensitive" positions as those positions that an agency director determines involve law enforcement, national security, the protection of public property, public health or safety, or other functions requiring a high degree of trust and confidence. *Id.* at 32,892. The Order also requires mandatory testing for all personnel who have access to classified information or who serve under presidential appointment. *Id.* Personnel who do not hold a sensitive position may be tested only upon reasonable suspicion to believe that an employee uses illegal drugs. *Id.* at 32,890.

5. *See* U.S. NEWS & WORLD REPORT, March 17, 1986, at 58 (subjecting all federal employees to random drug testing violates fundamental principle of fairness); L.A. Daily J., Sept. 23, 1986, at 4, col. 1 (drug testing without cause establishes dangerous precedent and is repugnant to United States Constitution); L.A. Daily J., Sept. 18, 1986, at 4, col. 1 (random drug testing of federal employees would result in unprecedented invasion of civil liberties of government workers); Meyer, *Federal Drug Testing and Constitutional Rights*, Christian Sci. Monitor, Sept. 17, 1986, at 14, col. 1 (testing of employees without probable cause is violative of fourth amendment proscription against unreasonable search and seizure); N.Y. Times, May 3, 1986, at A1, A32, col. 3 (statements of union representatives of federal employees that drug testing violates fourth amendment).

6. *See Congressional Study Finds Drug Tests of U.S. Employees Are "Costly and Useless,"* CORRECTIONS DIG., July 2, 1986, at 7, col. 1 (statement by spokesman for U.S. Senator Paula Hawkins, (R-Fla.), advocating drug testing for federal employees); *see also* U.S.A. Today, Feb. 3, 1987, at 8A, col. 1 (advocating random drug testing of train operators, air traffic controllers, and commercial airline pilots); L.A. Daily J., July 22, 1986, at 4, col. 3 (advocating drug testing to reduce drug use by public employees). *Workers Drug Test Provoking Debate*, N.Y. Times, May 3, 1986, at A1, A32, col. 3 (citing statement by attorneys for federal agencies explaining that fourth amendment does not prohibit drug testing for public safety employees, particularly air traffic controllers).

7. *See infra* notes 23-43 and accompanying text (urinalysis drug testing for municipal fire fighters constitutes fourth amendment search); notes 45-51 and accompanying text (urinalysis drug testing for municipal police officers constitutes fourth amendment search).

8. *See* Katz v. United States, 389 U.S. 347, 351 (1967). In *Katz v. United States* the

fourth amendment's protection, courts have indicated that an individual's interest in preserving personal integrity against arbitrary government intrusion is one of the most fundamental interests to which the fourth amendment extends protection.[9] Bodily intrusions and searches of individuals implicate fundamental notions of personal privacy and human dignity. Because searches of the individual are among the most severe intrusions on an individual's privacy interest, courts generally have sanctioned such intrusions only in closely circumscribed situations.[10]

The government's plans to implement drug testing for federal employees and private employees engaged in federally-regulated industries implicates the protection of the fourth amendment because individuals maintain a legitimate expectation of privacy in the contents of bodily fluids.[11] In *Schmerber v. United States*,[12] for example, the United States Supreme Court indicated that the extraction of a blood sample for the purpose of determining the defendant's blood alcohol content constituted a search within the purview of the fourth amendment.[13] In *Schmerber*, a police officer investigating an automobile accident arrested the driver of the automobile at a hospital while the driver received treatment for injuries he had sustained in the accident.[14] The officer had observed both the accident scene and the

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United States Supreme Court explained that the fourth amendment of the United States Constitution extended protection against arbitrary intrusion not only to certain physical areas, such as one's home or office, but also to that which a person seeks to preserve as private. *Id.* Personal property or conversations that a person knowingly exposes to the public, for example, do not enjoy protection of the fourth amendment. *Id.*

Expounding upon the opinion of the majority in *Katz*, Justice Harlan proposed a two-part test for determining whether a person has a legitimate expectation of privacy and thus enjoys fourth amendment protection. *Id.* at 361 (Harlan, J., concurring). To have a legitimate expectation of privacy, an individual must exhibit an actual, subjective expectation of privacy regarding the object of the search, and the individual's expectation must be one that society regards as reasonable. *Id.*

9. *See* Schmerber v. United States, 384 U.S. 757, 772 (1966)(integrity of individual's person is cherished value of society); Wolf v. Colorado, 338 U.S. 25, 27-29 (1949)(security of one's privacy against arbitrary intrusion is basic to free society); United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir. 1978)(human body enjoys fullest protection of fourth amendment); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-9, at 913 (1978)(right of privacy fully embraces interest in privacy of human body).

10. *See* Bell v. Wolfish, 441 U.S. 520, 558 (1979)(visual body cavity searches are inherently offensive and permissible only when absolutely necessary); United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978)(greater physical intrusion requires greater degree of justification for search); *infra* notes 17-21 and accompanying text (extraction of blood sample for alcohol content determination is permissible only upon clear indication of intoxication).

11. *See* Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.N.J. 1986)(urinalysis can constitute infringement on reasonable expectation of privacy), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986); Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984)(same); *infra* note 13 and accompanying text (explaining that drawing of blood sample infringes on reasonable expectation of privacy); *infra* note 24 and accompanying text (fire fighters maintain legitimate expectation of privacy in discharge of urine).

12. 384 U.S. 757 (1966).

13. *Id.* at 767.

14. *Id.* at 768-69.

condition of the defendant at the hospital shortly after the time of the accident and had probable cause to believe that the driver was intoxicated.[15] The officer, without procuring a warrant, directed an attending physician to extract a blood sample from the defendant for determination of the defendant's blood alcohol content.[16]

Although the Court in *Schmerber* concluded that the officer had acted reasonably in ordering the extraction of blood from the defendant, the Court indicated that extraction of fluids from beneath the body's surface implicated fundamental interests in human dignity and privacy protected by the fourth amendment.[17] The Court recognized that exigent circumstances precluded the feasibility of obtaining a warrant before ordering the extraction.[18] Moreover, the Court in *Schmerber* acknowledged that the procedure produced little discomfort and minimal risk of harm to the defendant.[19] Nevertheless, the Court indicated that the fourth amendment forbade a forced blood extraction simply upon the likelihood that the sample would reveal evidence of intoxication.[20] The interest in preserving the integrity of an individual's body against wanton intrusion justified the Court's holding in *Schmerber* that only a clear indication that the blood sample would yield evidence of intoxication justified the inherently intrusive search.[21]

Federal courts that have considered the constitutionality of state and municipal sponsored testing schemes that require public employees to submit

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15. *Id.* In *Schmerber v. United States*, the police officer who arrived at the scene of the accident shortly after the accident occurred smelled liquor on the defendant's breath. *Id.* at 769. The officer testified that the defendant's eyes appeared blood shot and watery, indicating that the driver was intoxicated. *Id.*

16. *Id.* at 758.

17. *Id.* at 767.

18. *Id.* at 770. In *Schmerber v. United States*, the United States Supreme Court explained that the fourth amendment ordinarily requires that a police officer secure a warrant from a neutral and detached magistrate before executing a search. *Id.* The Court, however, explained that, in this case, exigent circumstances justified the officer's ordering the extraction of blood before obtaining a warrant. *Id.* at 770-71. Through observation of the defendant's condition, the officer could have had probable cause to believe that the defendant was intoxicated. *Id.* at 768-70. Moreover, if the officer had delayed blood extraction until he had obtained a warrant, the officer risked destruction of the evidence, because blood alcohol content begins to diminish shortly after a person stops ingesting alcohol. *Id.* at 770-71.

19. *Id.* at 771. The Supreme Court in *Schmerber* concluded that a blood test was a reasonable means of determining the defendant's blood alcohol content. *Id.* Blood tests are a routine medical practice and common procedure in most physical examinations. *Id.* Furthermore, the test occurred in an aseptic environment under the direction of a physician and involved little risk of infection to the defendant. *Id.* at 771-72.

20. *Id.* at 769-70. The Supreme Court in *Schmerber v. United States* rejected the respondent's contention that the extraction of blood from the petitioner was a search incident to a lawful arrest. *Id.* At common law, police could perform a limited search of a suspect for weapons or evidence under his direct control before taking him into custody. *Id.* The Supreme Court in *Schmerber*, however, stated that the right to search a suspect incident to a lawful arrest did not permit an intrusion beneath the body surface simply to discover whether the defendant was intoxicated. *Id.*

21. *Id.* at 770.

to urinalysis have found that urinalysis, like blood testing, constitutes an infringement on an individual's legitimate expectation of privacy.[22] In *Capua v. City of Plainfield*,[23] for example, the United States District Court for the District of New Jersey determined that a mandatory drug testing program requiring City of Plainfield fire fighters to submit to random urinalysis constituted an infringement on the fire fighters' legitimate expectation of privacy.[24] The district court found that the act of urination is a personal and intimate act, and most individuals generally discharge urine without intending to expose themselves or the contents of their urine to the public.[25] Moreover, the district court in *Capua* noted that urinalysis is a sophisticated procedure that can reveal personal and medical information to which the City did not need to have access.[26] The district court in *Capua* therefore concluded that compelling an individual to produce a urine specimen for the purpose of urinalysis is a search within the meaning of the fourth amendment.

Although the district court in *Capua* stated that urinalysis was an infringement of the fire fighters' reasonable expectation of privacy, the court acknowledged that the fourth amendment would not prohibit the search if the search was reasonable.[27] As the *Capua* court noted, determining the reasonableness of a search is not a mechanical process, but instead involves a weighing of the state's need to execute the particular search against the infringement on an individual's privacy that the search entails.[28]

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22. *See* Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 879-80 (E.D. Tenn. 1986)(fire fighters maintain legitimate expectation of privacy in discharge and contents of urine); Allen v. City of Marietta, 601 F. Supp. 482, 488 (N.D. Ga. 1985)(municipal employees); Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984)(correction officers); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1986)(same); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985)(municipal police officers); Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 793 (N.Y. Sup. Ct. 1986)(same); *see also infra* note 24 and accompanying text (public employees maintain legitimate expectation of privacy in discharge and contents of urine).

23. 643 F. Supp. 1507 (D.N.J. 1986).

24. *Id.* at 1513; *see infra* notes 25-26 and accompanying text (explaining that individuals maintain legitimate expectation of privacy in expelling urine).

25. Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *accord* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 732 (S.D. Ga. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984); City of Palm Bay v. Bauman, 475 So.2d 1322, 1324-25 (Fla. Dist. Ct. App. 1985); Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 792 (N.Y. Sup. Ct. 1986).

26. Capua v. City of Plainfield, 647 F. Supp. at 1513; *see* Note, *Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy*, 13 J. LEGIS. 269, 279 (1986). A urine specimen, in addition to revealing the presence of drug particles in an individual's body, also can yield information regarding one's medical history of venereal disease, epilepsy, schizophrenia and the subject's susceptibility to heart disease and sickle cell anemia. Note, *supra*, at 279.

27. Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

28. *Id.*; *accord* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)(explaining factors court must consider in determining constitutionality of search); Illinois v. Lafayette, 462 U.S. 640,

In assessing the reasonableness of a search, a court must consider the extent to which the intrusion infringes on an individual's personal privacy, the government's justification for initiating the search, the place in which the search occurs and the manner in which the government conducts the search.[29] To constitute a reasonable search, the *Capua* court stated, the state's interest in conducting the search must outweigh the infringement on individual rights that the search causes.[30]

The court in *Capua* recognized that the City of Plainfield had a weighty interest in ensuring that drug use did not hamper the fire fighters' performance.[31] Fire fighters and other safety officers must be able to perform their duties adequately.[32] Drug use among the fire fighters would impair the fire fighters' ability to function properly. The City of Plainfield, as the fire fighters' employer, bore responsibility for ensuring that the fire fighters were fully capable of protecting the general public from fires.[33] Drug testing of the employees, therefore, would enable the City to identify those employees who were unfit for public service as firemen.[34]

Against the legitimacy of the City's interest, the court in *Capua* weighed the extent to which the urinalysis intruded upon an individual's right to privacy and determined that the intrusion was extreme.[35] The court determined that compelling an individual to urinate in the presence of a Fire Department official who verified the authenticity of the sample was a humiliating and embarrassing experience.[36] The lack of procedural safeguards in administering the test jeopardized the confidentiality of test results.[37] Moreover, because the officials had administered the tests in a dragnet manner, the officials had placed against each fire fighter a presumption of guilt and forced him to rebut the presumption.[38]

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644 (1983)(same); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983)(same); Delaware v. Prouse, 440 U.S. 648, 654 (1979)(same); Terry v. Ohio, 392 U.S. 1, 21 (1968)(same).

29. Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986)(citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

30. *Id.*

31. *Id.* at 1516.

32. *Id.* at 1519.

33. *Id.* at 1516.

34. *Id.*

35. *Id.* at 1514; *see supra* notes 24-26 and accompanying text (explaining why drug testing through urinalysis constitutes relatively high degree of bodily intrusion of fire fighters' privacy interest).

36. Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986). As the United States District Court for the District of New Jersey noted in *Capua v. City of Plainfield*, body surveillance is essential and standard procedure during administration of a urine drug test. *Id.*

37. *Capua*, 643 F. Supp. at 1520. In *Capua v. Plainfield*, the Plainfield Fire Department had not established regulations to ensure that the identities of fire fighters whose drug tests indicated positive results would remain confidential. *Id.* Once they have incriminating evidence of drug use, government entities may not be able to withhold that evidence from prosecuting agents. *Id.* The court in *Capua* concluded that the testing plan subjected the fire fighters to the risk of criminal prosecution, thus making the testing procedure more intrusive. *Id.*

38. *Id.* at 1516-17.

In balancing the extent of the intrusion of an individual's right to privacy that urinalysis represented against the City's interest in ensuring that the City's fire fighters remained free from drug-induced impairment, the district court in *Capua* found that the means by which the City attempted to achieve the goal were unreasonable.[39] The City had not justified the need for the search by demonstrating that drug use within the Fire Department or among individual fire fighters had undermined the preparedness of the Fire Department.[40] On the contrary, the Fire Department had a satisfactory service record.[41] The testing procedure, however, constituted an extreme deprivation of the fire fighters' privacy interest.[42] The court in *Capua*, therefore, concluded that the need for the testing did not outweigh the extent of the intrusion and permanently enjoined the Fire Department from continuing the urine testing program unless the Fire Department officials had at least an individualized, reasonable suspicion to believe that a fire fighter was under the influence of drugs.[43]

The decision in *Capua* is consistent with the vast majority of federal and state court decisions that have held that testing a public employee for drugs without reasonable suspicion to believe that the employee is under the influence of drugs violates the fourth amendment prohibition against unreasonable searches and seizures.[44] In *Penny v. Kennedy*,[45] the United States District Court for the Eastern District of Tennessee enjoined the Commissioner of Fire and Police for the City of Chattanooga from conducting department-wide urinalysis of City police officers in the absence of reasonable suspicion to believe that a police officer was under the influence of narcotics.[46] In *Penny*, the court acknowledged that the City of Chattanooga had a legitimate interest in preserving the integrity of the City police from the debilitating effects of drugs.[47] The Police Chief, however, had not established a nexus between drug use among police officers and a threat to the City's interest.[48] The Chief of Police stated that he believed ninety

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39. *See infra* notes 40-42 and accompanying text (discussing constitutional infirmities of drug testing plan).

40. *Capua*, 643 F. Supp. at 1519.

41. *Id.*

42. *Id.* at 1518.

43. *Id.* at 1522.

44. *See* Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 883 (E.D. Tenn. 1986)(testing of firemen is unconstitutional in absence of reasonable suspicion of drug use); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008-09 (D.C. 1986)(same); City of Palm Bay v. Bauman, 475 So.2d 1322, 1326 (Fla. Dist. Ct. App. 1985)(city must have reasonable suspicion of drug use to test city police officers); Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 799 (N.Y. Sup. Ct. 1986)(same); *infra* notes 45-51 and accompanying text (reasonable suspicion needed to subject city police officers to drug testing).

45. 648 F. Supp. 815 (E.D. Tenn. 1986).

46. *See infra* notes 48-50 and accompanying text (explaining that testing of police officers was unreasonable without reasonable suspicion).

47. Penny v. Kennedy, 648 F. Supp. 815, 817 (E.D. Tenn. 1986).

48. *Id.* at 816-17. In *Penny v. Kennedy*, the Chattanooga Chief of Police ordered all

percent of the police officers in the Department did not have a drug problem.[49] Moreover, the Chief of Police offered no conclusive evidence to show that the remaining ten percent of the police officers who allegedly used drugs had a drug problem and thereby weakened the integrity or preparedness of the Police Department.[50] The court, therefore, concluded that the substantial intrusion in subjecting the Department to urinalysis was unjustifiable in its inception and thus unconstitutional.[51]

In holding that local and federal government entities can test public employees on the standard of reasonable suspicion of drug use, rather than the more stringent probable cause standard, courts have conceded that the government's interest in promoting public safety justifies some infringement on a public employee's privacy interest.[52] Public employees do not surrender all constitutional rights simply because they undertake public employment.[53] The balancing of the government's interest in public safety and a public employee's privacy interest, however, demands that a public employee surrender some degree of fourth amendment protection for the benefit of the public.[54] The reasonable suspicion standard, courts conclude, accommodates the government's interest in promoting public safety and the integrity of the government service by permitting government entities to investigate potentially dangerous behavior on a lesser showing of cause than needed to investigate the activity of a private citizen.[55]

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360 members of the Police Department to submit to urinalysis in March 1985. *Id.* at 816. Two of the officers tested positive. *Id.* Based on unsupported rumors that some of the officers had altered their urine samples, the Chief of Police ordered all members of the Police Department to undergo another urinalysis. *Id.* The plaintiff then filed suit to enjoin the Police Department from administering the second test. *Id.*

49. *Id.* at 816. Several weeks before trial, the Police Chief in *Penny v. Kennedy* stated that he was uncertain whether drug use among police officers of the Chattanooga Police Department threatened the ability of the officers to perform their duties. *Id.*

50. *Id.* at 816-17.

51. *Id.* at 817.

52. *See infra* notes 53-55 and accompanying text (explaining rationale for selecting reasonable suspicion as appropriate standard governing drug testing of public employees).

53. Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985); *see also* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 736-37 (S.D. Ga. 1986) (Department of Defense civilian employees retain fourth amendment protection after assuming public employment); Lovvorn v. City Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986)(municipal fire fighters); Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 798 (N.Y. Sup. Ct. 1986)(municipal police officers).

54. Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); *see also* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 733 (S.D. Ga. 1986)(public employee has expectation of privacy that is diminished in comparison to expectation of privacy of private citizens); Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 796 (N.Y. Sup. Ct. 1986)(police officers, by reason of nature of their duties, should anticipate a diminished expectation of privacy in drug testing).

55. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 733 (S.D. Ga. 1986); *see also* Penny v. Kennedy, 648 F. Supp. 815, 817 (E.D. Tenn. 1986)(testing of municipal police officers is unconstitutional unless supervisor has reasonble suspicion of drug use); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 883 (E.D. Tenn. 1986)(testing of

Despite the consensus among courts that the testing of public employees without individualized suspicion violates the fourth amendment, President Reagan's Executive Order 12564 (President's directive) authorizes drug testing of federal employees in positions of public safety without a showing of probable cause or reasonable suspicion to believe that the employees are under the influence of drugs.[56] The directive instructs the director of each federal agency to determine whether employees in that particular agency classify as "sensitive" employees. The directive potentially applies to one million, one hundred thousand federal employees who have positions that could be classified as "sensitive."[57]

Supporters of mandatory drug testing have offered several arguments to support their position. One supporter, for example, argues that mandatory drug testing does not violate the fourth amendment if the testing is for the purpose of promoting employee discipline.[58] According to this commentator, a search must comport to fourth amendment standards only if the search is incident to a criminal investigation.[59] The purpose of the President's directive is to identify and rehabilitate, but not prosecute, federal workers who are drug users.[60] Therefore, drug testing of public employees, the proponent argue, need not comply with the fourth amendment's demand that a search be reasonable and based on probable cause.

Although the President's directive does prohibit federal agencies from testing employees for the purpose of gathering evidence in a criminal investigation, a search incident to the drug testing directive is not outside the scope of the fourth amendment simply because the search is noncriminal in nature.[61] The purpose of the fourth amendment is to protect an individual against governmental intrusion.[62] The scope of the fourth amendment's

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fire fighters is unconstitutional in absence of reasonable suspicion); Capua v. City of Plainfield, 643 F. Supp. 1507, 1517-18 (D.N.J. 1986)(permitting testing of municipal fire fighters on reasonable suspicion of drug use); Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 796-97 (N.Y. Sup. Ct. 1986)(permitting testing of municipal police officers on reasonable suspicion of drug use).

56. *See supra* notes 1-3 and accompanying text (discussing Executive Order authorizing drug testing for federal employees who occupy sensitive positions in federal government).

57. *A Question of Privacy*, NEWSWEEK, Sept. 29, 1986, at 18.

58. *See id.* at 21. The attorney for the Boston Police Department, which instituted mandatory drug testing for all City police officers, maintains that the fourth amendment does not apply to the efforts of a government employer to discipline government employees who engage in illicit behavior. *Id.* The attorney, therefore, believes that the Boston Police Department's testing scheme is outside the purview of fourth amendment protection. *Id.*

59. *Id.*

60. *See supra* note 1 and accompanying text (discussing Executive Order's purpose to identify and rehabilitate drug users in federal government).

61. *See* McDonell v. Hunter, 612 F.Supp. 1122, 1127-28 (S.D. Iowa 1985)(fourth amendment is fully applicable to drug testing program even if purpose of drug testing program is not to gather evidence of criminal conduct), *aff'd*, 809 F.2d 1302 (8th Cir. 1987); *see also* Camara v. Municipal Court, 387 U.S. 523, 530 (1967)(individual enjoys full protection of fourth amendment even when suspected of only noncriminal behavior).

62. Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

protection, therefore, does not shift because an individual is not the subject of a criminal investigation.[63] The fourth amendment's prohibition against unreasonable searches and seizures, therefore, is applicable to the drug testing directive, regardless of the purpose for which the government initiates the search.

Other advocates of mandatory drug testing for public employees have argued that, even if drug testing constitutes a search within the meaning of the fourth amendment, the government, as an employer, should have the same ability to investigate employee misconduct as employers in the private sector.[64] In support of this argument, proponents have argued that private employers may require employees to submit to drug testing as a condition of employment.[65] Moreover, a private employer can test employees even if the employer has no reason to believe that employees are under the influence of narcotics.[66] In effect, proponents of drug testing argue that, upon assuming government employment, public employees implicitly waive protection of the fourth amendment.[67]

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63. *See* McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985)(person and property are fully protected by fourth amendment regardless of whether individual is subject of criminal investigation), *aff'd*, 809 F.2d 1302 (8th Cir. 1987).

64. *See* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 736-37 (S.D. Ga. 1986). In *American Federation of Government Employees v. Weinberger*, the defendant, the Department of Defense, implemented a drug testing plan for civilian employees of the Department. *Id.* at 728. The plaintiff union, representing civilian security officers at Fort Stewart Army Base in Georgia, challenged the testing plan as an unreasonable search and seizure and violative of the fourth amendment. *Id.* at 730-31.

65. *Id.* at 736-37. In support of the plan to test civilian employees at Fort Stewart Army Base, the Department of Defense in *American Federation of Government Employees* argued that the fourth amendment unduly burdened the government's ability to regulate employee conduct and to discover misconduct relevant to worker performance. *Id.*

The Department of Defense contended that the purpose of the search was not to gather evidence for a criminal prosecution, but to determine whether the security officers were fit to perform their public duty. *Id.* The Department of Defense, therefore, argued that government employers should have the same ability to test for drug use as an employer in the private sector. *Id.*

According to some researchers, drug use in the private sector has become a blight to employers in the private sector. *Battling the Enemy Within*, TIME, March 17, 1986, at 52, 53. According to the Research Triangle Institute, a prominent research organization, drug abuse among employees in the private sector resulted in a $60 billion cost to the United States economy in 1983, representing a 30% increase from 1980. *Id.* Drug abusers are three times more likely to sustain work-related injuries than are nonusers. *Id.* Private employees who use drugs are more likely to pilfer from a company's assets to support a drug habit. *Id.*

To curb the deleterious effects of drug use in the private sector, private employers have instituted drug testing programs to identify employees who are drug users. *Id.* About one-fourth of the Fortune 500 companies already screen applicants for drugs. *Id.*

66. *See* Note, *supra* note 26, at 272 n.23. In a survey of Fortune 500 companies, 13% of the companies indicated that they conducted random drug tests of employees to discover drug use. *Id.* Despite expert opinions that the practice of randomly testing employees is ineffective in large portions of the United States work force, the practice of screening workers for drug use increases daily. *Id.* at 270 n.12.

67. *See, e.g.*, Caruso v. Ward, 133 Misc. 2d 544, ____, 506 N.Y.S.2d 789, 793 (N.Y.

Although proponents' assert that public employees relinquish fourth amendment protection when they assume public employment, case precedent has established firmly, that, while the government may regulate public employment, the government may not require a job applicant to waive constitutionally protected rights as a precondition of employment.[68] Furthermore, the government may not require public employees to consent to an unconstitutional search as a condition of continued employment.[69] The proponents of the drug testing directive, therefore, must establish that the drug testing plan is constitutionally reasonable before the government can require a public employee to undergo urinalysis drug testing.[70]

Despite vehement opposition to the President's directive authorizing drug testing for federal employees, other proponents of mandatory drug testing have advocated that the government expand the scope of the drug testing plan to include drug testing for private employees who are engaged in government-regulated industries, primarily in the transportation industry.[71] These proponents have argued that testing of certain classes of private employees, such as commercial airplane pilots or train operators, is not unreasonable, despite the lack of individualized suspicion to believe that a particular employee is under the influence of drugs.[72] Private employees engaged in public transportation assume direct responsibility for the safety

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Sup. Ct. 1986). In *Caruso v. Ward*, the plaintiff, as president of the Patrolmen's Benevolent Association of New York City, sought an order enjoining the New York City Police Department (Department) from implementing a random drug testing program for current and future members of the Department's Organized Crime Bureau (OCB). *Id.* at 791. The Department argued that the Department could require OCB employees to consent to the testing as a condition of their employment. *Id.* at 793.

68. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 804-06 (1977)(statute conditioning office in political party on waiver of fifth amendment privilege is unconstitutional); Lefkowitz v. Turley, 414 U.S. 70, 82 (1973)(statute conditioning access to public benefits on waiver of fifth amendment privilege is unconstitutional); Perry v. Sindermann, 408 U.S. 593, 598 (1972)(state may not condition employment upon waiver of first amendment right of free speech); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926)(government may not condition access to public benefits on relinquishment of constitutional rights); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 736 (S.D. Ga. 1986)(government may not condition public employment on waiver of fourth amendment right).

69. *See* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 736 (S.D. Ga. 1986)(government may not condition public employees' continued employment upon relinquishment of fourth amendment right); Armstrong v. Commissioner of Correction, 545 F. Supp. 728, 731 (N.D.N.Y. 1982)(consent to unlawful body searches as condition of correction facility officers' continued employment is unconstitutional).

70. *See* National Treasury Employees Union v. Von Raab, No. 86-3833 (5th Cir. Apr. 22, 1987)(WESTLAW, Allfeds database)(efforts to reduce incidence of drug use among federal employees must conform to constitutional standards).

71. *See infra* notes 72-75 and accompanying text (discussing proponents' reasoning for implementing mandatory drug testing for private employees in federally-regulated industries).

72. *See Random Drug Tests Ensure Public Safety*, USA Today, Feb. 3, 1987, at 8A, col. 1 (advocating random urinalysis for employees of government-regulated transportation industries); Danforth, *We Must Put Public Safety First*, USA Today, February 3, 1987, at 8A, col. 2 (citing need for government-sponsored drug testing for pilots, air traffic controllers and transportation employees).

of passengers and the care of public and private property.[73] Drug use among public transportation employees would impair the government's interest in providing for the safety of passengers. Random urinalysis, proponents argue, is the only effective means of identifying those individuals who use drugs and who, therefore, are more likely to cause serious harm to the public.[74] An overriding interest in public safety, these proponents conclude, justifies testing private employees who serve in public transportation capacities without cause to believe that an employee is under the influence of narcotics.[75]

Representatives of transportation employees opposed to the proposal to test private employees in federally-regulated industries contend that government-sponsored drug testing without cause represents an unreasonable intrusion on the employees' right to privacy.[76] According to one representative, the public has a legitimate expectation to a safe transportation system.[77] Drug use among transportation employees admittedly jeopardizes the government's interest in safety.[78] Despite the potential threat to public safety, however, the representative contends that mandatory drug testing will subject thousands of innocent employees to a substantial invasion of privacy.[79] Mass drug testing of private employees without individualized suspicion, he concludes, is repugnant to fourth amendment jurisprudence.[80]

Despite the contention that testing transportation employees for drugs is unconstitutional in the absence of individualized suspicion of drug use, a search can be constitutional without individualized suspicion if requiring individualized suspicion before executing a search would frustrate a compelling government interest in public safety.[81] Courts have created exceptions

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73. *Random Drug Tests Ensure Public Safety*, *supra* note 72, at 8A, col. 1.

74. *See Random Drug Tests Ensure Public Safety*, *supra* note 72, at 8A, col. 1 (random drug testing of transportation employees is essential to protecting safety of travelling public); *see also* Danforth, *supra* note 72, at 8A, col. 2 (same).

75. Danforth, *supra* note 72, at 8A, col. 2.

76. *See infra* notes 77-80 and accompanying text (discussing drug testing opponents' objections to mandatory drug testing for transportation employees).

77. *See* Mann, *Random Drug Tests Violate Workers' Rights*, USA Today, February 3, 1987, at 8A, col. 5 (statement by Lawrence Mann, attorney who represents railway labor unions); *see also* Chapman, *Drug Testing Is Easy, Quick-and Wrong*, USA Today, February 3, 1987, at 8A, col. 5 (drug testing of transportation employee violates employee's right to privacy); *Alcohol and Drug Abuse Seen as Key Issue in Railroad Safety*, N.Y. Times, Jan. 19, 1987, at A10, col. 2 (discussing transportation labor unions' opposition to drug testing for transportation employees).

78. Mann, *supra* note 77, at 8A, col. 5.

79. *Id.*; *see also* Chapman, *supra* note 77, at 8A, col. 5 (inaccuracy of drug test results subjects innocent transportation employees to risk of wrongful termination of employment).

80. Mann, *supra* note 77, at 8A, col. 5.

81. *See* McMorris v. Alioto, 567 F.2d 897, 900 (9th Cir. 1978)(upholding requirement that all persons entering San Francisco courthouse submit to check of persons and baggage for explosives); United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973)(permitting government official to search all boarding passengers of airlines on unsupported suspicion to thwart potential hijackers).

to the requirement of individualized suspicion, for example, by permitting regulatory inspections of residential housing,[82] and security screenings of individuals entering courthouses,[83] or boarding commercial aircraft.[84] In each case, the purpose of the search is to ensure compliance with regulatory requirements[85] or to discover and prevent future harm to the public,[86] but not to gather evidence for use in criminal prosecution. Permitting the search in the absence of individualized suspicion was the only effective, yet least intrusive, means of enforcing compliance with the regulatory requirement or precluding a demonstrated threat to the safety of persons or property.[87]

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82. *See infra* note 87 and accompanying text (discussing regulatory scheme for entering and inspecting residential housing without individualized suspicion of housing violations).

83. *See* McMorris v. Alioto, 567 F.2d 897, 900 (9th Cir. 1978). In *McMorris v. Alioto*, the United States Court of Appeals for the Ninth Circuit upheld the validity of a security procedure that required all persons entering a San Francisco courthouse to pass through a metal detector. *Id.* A visitor to the building who activated the device could leave the building without further search or investigation. *Id.* at 899. If a visitor who activated the device still wanted to enter the building, he could empty his pockets of all metal items and pass through the metal detector again. *Id.* If the visitor activated the metal detector the second time, the visitor could enter the building only if he submitted to a frisk search. *Id.* Security officers could conduct the frisk, however, only if the visitor gave explicit consent. *Id.*

Security officers also inspected briefcases and parcels that visitors carried into the courthouse. *Id.*

84. *See* United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973). In *United States v. Skipwith*, the United States Court of Appeals for the Fifth Circuit held that a warrantless search conducted at the boarding gate of an international airport was reasonable even if the federal agents merely suspected that a passenger was a hijacker. *Id.*

85. *See* Camara v. Municipal Court, 387 U.S. 523, 525-26 (1967)(search to enforce minimum housing standards promulgated through city ordinance).

86. *See* United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973). In *United States v. Skipwith*, the United States Court of Appeals for the Fifth Circuit noted that an increased incidence of plane hijackings, and the substantial threat to public safety that hijackings created, justified an airport security procedure requiring all persons who enter boarding terminals to submit to a search of their person and baggage before boarding the aircraft. *Id.* at 1276.

In defining the permissible scope of an airport pre-boarding search, the court in *Skipwith* determined that federal marshals conducting the search could require individuals to empty their pockets as well as to undergo a frisk of their persons. *Id.* at 1277. The court in *Skipwith* acknowledged that the search was highly intrusive. *Id.* at 1275. Moreover, the court noted that a search of one's bag or person can yield incriminating evidence. *Id.* A hijackers' ability to conceal explosives or weapons in seemingly innocuous articles such as toothpaste tubes or fountain pens justified the thoroughness of the search. *Id.*

In *McMorris v. Alioto*, the United States Court of Appeals for the Ninth Circuit noted that threats of violence directed at courthouses, as well as bombings of other government buildings, justified screening all persons entering a San Francisco courthouse for explosives or weapons. McMorris v. Alioto, 567 F.2d 897, 900 (9th Cir. 1978).

87. *See* Camara v. Municipal Court, 387 U.S. 523, 537-38 (1967). In *Camara v. Municipal Court*, the United States Supreme Court, in concluding that a regulatory search of a residence was reasonable even though the inspector did not have individualized suspicion of housing violations, reasoned that housing inspectors would not be able to establish individualized suspicion of housing violations, such as faulty wiring, simply by inspecting the outside premises of each house. *Id.* On the contrary, housing inspectors discover violations only after

Recent drug-related tragedies in the railroad industry support the creation of an administrative search exception permitting regular drug testing of private railroad employees who are directly responsible for public safety. Drug use among transportation employees already has jeopardized a legitimate interest in public safety.[88] Government officials speculate that recent accidents in public transportation, resulting in loss of life and substantial damage to private property, were the result of drug-induced impairment of railroad employees.[89] A proposal to implement regular testing of employees whose jobs are safety-related, therefore, would protect a legitimate governmental interest by identifying individuals who are likely to jeopardize public safety.

Although a compelling interest in public safety justifies an exception to the requirement of individualized suspicion to test transportation employees, an administrative search is unreasonable unless procedural safeguards adequately ensure that a search is not conducted in an oppressive or discriminatory manner.[90] An exception to the requirement of individuated suspicion

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entering the building and conducting an inspection. *Id.* Requiring city inspectors to demonstrate probable cause to believe that a particular dwelling violated a city housing ordinance, therefore, was unduly burdensome and frustrated the city's interest in enforcing compliance with housing standards. *Id.*

Despite the substantial intrusion to boarding passengers that a pre-boarding screening entailed, the United States Court of Appeals for the Ninth Circuit in *United States v. Skipwith* concluded that federal agents could subject all boarding passengers to a search in the absence of individualized suspicion that the individual was a hijacker. United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973). The court determined that the hijacker profile was an unreliable means of identifying hijackers because not all hijackers were readily identifiable or matched the profile's characteristics. *Id.* at 1276. The court concluded, therefore, that uniform screening of all passengers, regardless of whether they appeared suspicious, was the only reliable and effective means of averting the threat of hijacking. *Id.*

88. *See Alcohol and Drug Abuse Seen as a Key Issue in Railroad Safety, supra* note 77, at A10 col. 2. According to the United States Department of Transportation, drug or alcohol abuse among railroad employees caused 48 train wrecks between 1975 to 1985. *Id.* In those incidents, 37 people were killed and 80 people were injured. *Id.*

Drug use among railroad employees has become a concern of legislators. *See id.* United States Congressman James Florio (D-N.J.), who has introduced several major pieces of rail legislation in Congress, has indicated that drug use in the railroad industry has become a "serious problem." *Id.*; *see also* Danforth, *supra* note 72, at 8A, col. 2 (statement by U.S. Senator Jack Danforth, (R-Mo.), advocating regular drug testing for railroad employees).

89. *See Alcohol and Drug Abuse Seen as Key Issue in Railroad Safety, supra* note 77, at A10, col. 2. Three major railway accidents within the last three years are believed to have been drug-related. *Id.* Traces of cocaine and marijuana were found in a urine specimen of a railroad signal operator who was on duty when two Amtrak trains collided in New York City in July 1984. *Id.* In that accident, one person was killed and 125 passengers were injured. *Id.*

Officials investigating the cause of a train collision in Wyoming in 1984 reported that 6 of the 12 train crew members tested positive for drugs. *Id.*

Three of six train crew members involved in a commuter train wreck in December 1986 tested positive for cocaine and marijuana. *Id.*, at col. 6. Thirty-seven people were injured in the accident. *Id.*

90. *See* Camara v. Municipal Court, 387 U.S. 523, 532 (1967). In *Camara v. Municipal Court*, the United States Supreme Court, in assessing the reasonableness of a regulatory scheme

creates the potential that officials conducting a search will exercise unbridled discretion in executing a search.[91] As one commentator explains, an official authorized to test employees for drugs, for example, selectively could administer the test to harass members of a certain political or ethnic group.[92] To minimize the possibility of abuse, procedural devices must check the discretion of the executing officer so that the officer impartially administers the tests only to protect against the perceived threat to public safety.[93]

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for entering and inspecting private dwellings, indicated that the search was reasonable only if procedural safeguards protected the occupants of the premises from random and arbitrary invasions of privacy. *Id.* at 532-34. The Court in *Camara* concluded that regulatory searches of private dwellings were reasonable because promulgated standards described the classes of dwellings that were subject to routine inspection. *Id.* at 538. Moreover, inspectors, before executing the search, had to obtain a warrant from an independent magistrate who verified that the particular premises to be searched were subject to the housing code's regulations. *Id.*

91. *See* Delaware v. Prouse, 440 U.S. 648, 655 (1979). In *Delaware v. Prouse*, the United States Supreme Court held that a police officer's stopping an automobile driver to check the driver's identification was violative of the fourth amendment unless the officer had reasonable suspicion to believe that the operator was violating the law. *Id.* at 663.

In *Prouse*, a police officer had stopped the driver at random to check the driver's license and vehicle registration. *Id.* at 650. The officer seized marijuana in plain view on the floor of petitioner's automobile. *Id.* The arresting officer testified at a hearing to suppress the marijuana that, before stopping the car, the officer had not observed the driver committing an infraction. *Id.* The trial court suppressed the seized marijuana because the police officer had stopped the driver without cause to believe the driver had violated the law. *Id.* at 651. The Delaware Supreme Court affirmed the trial court's decision. *Id.*

On appeal to the United States Supreme Court, the petitioner argued that randomly stopping automobile operators to check identification furthered a legitimate government interest in public safety. *Id.* at 658. Random checks identified automobile operators who were unlicensed and cars that were not in compliance with minimum safety requirements. *Id.* The state's interest in preventing harm to the public, the petitioner concluded, outweighed the intrusion to the individual that the stop entailed. *Id.* at 659.

In rejecting the petitioner's argument, the United States Supreme Court determined that the means by which the state sought to promote the safety interest were unreasonable. *Id.* at 659-61. The Court indicated that the petitioner had not offered empirical data demonstrating that the practice of randomly checking motor operators was an effective method of identifying unlicensed operators or unregistered vehicles. *Id.* Moreover, the state had not established standards to check the officers' discretion in selecting drivers for document inspection. *Id.* at 661. Permitting police officers to stop and inspect a motorist randomly would subject the motorist on the open highway to the risk of an overintrusive or abusive search.

The Court in *Prouse* did not preclude the state from developing procedures for spot checks of automobiles that did protect motorists from the risk of abusive searches. *Id.* at 663. As an example, the Court indicated that procedures establishing a fixed checkpoint at which all on-coming automobiles were stopped for document inspection would be reasonable. *Id.* at 663.

92. Banzhaf, *How to Make Drug Tests Pass Muster*, NAT'L L.J., Jan. 12, 1987, at 13, 24, col. 1.

93. *See* United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973). The United States Court of Appeals for the Fifth Circuit in *United States v. Skipwith* indicated that circumstances minimizing the potential for abusive searches were a significant factor contributing to the reasonableness of an airport security procedure in which all boarding passengers of commercial aircraft were subject to a search of their person and baggage. *Id.* The court in *Skipwith* noted that the search was supervised, and that the search occurred within view of

To curb arbitrary application of drug testing of transportation employees, the government must promulgate standards that strictly regulate the manner in which officials conduct drug testing.[94] An employee, for example, would need to know which officials can request an employee to submit to drug testing and the frequency with which employers can test employees. Moreover, officials must use neutral, not discriminatory, criteria in selecting employees for drug testing.[95] By fully informing employees about drug testing procedures, employees would be able to resist attempts to administer drug tests to harass or oppress employees.

Opponents of drug testing for railroad employees concede that, while testing of railroad employees without probable cause would serve a vital public interest in safety, a plan authorizing testing of all employees without probable cause is unreasonable because less sweeping means of identifying drug-impaired employees are equally effective.[96] Individuals in public safety capacities are under the close supervision of superiors and coworkers.[97] A public safety employee under the influence of narcotics would manifest behavior that would amount to reasonable suspicion that he was intoxicated.[98] Opponents of mandatory drug testing for railroad employees, therefore, conclude that testing only upon reasonable suspicion does not burden unduly the government's efforts to identify individuals who are likely to jeopardize public safety.[99]

While most courts agree that requiring reasonable suspicion to test public employees for drugs does not hamper the government's ability to protect public safety, a recent study indicates that requiring reasonable suspicion before conducting a drug test would hamper the government's ability to

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the public and under the scrutiny of airline representatives, who had a substantial interest in ensuring that federal agents did not harass boarding passengers. *Id.* The court concluded that, in this situation, the agents were more likely to respect the fourth amendment rights of the passengers than if the search occurred in a remote area of the airport and out of public view. *Id*; *see* McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978)(administrative search of persons entering courthouse must be limited and no more invasive than necessary to protect against the danger sought to be avoided).

94. *See* Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)(in situations in which search occurs absent individualized suspicion, other safeguards must ensure that individual's privacy is not subject to whim of officer conducting search).

95. *See id.* at 662 (regulatory search unsupported by individualized suspicion must be executed pursuant to neutral criteria); *Skipwith*, 482 F.2d at 1275 (intrusiveness of airport security screening is minimized if persons are selected for search on basis of neutral criteria).

96. Mann, *supra* note 77, at 8A, col. 5; *see infra* notes 97-99 and accompanying text (discussing rationale for assertion that testing employees only upon reasonable suspicion does not burden government's ability to protect interest in public safety).

97. Capua v. City of Plainfield, 643 F. Supp. 1507, 1518 (D.N.J. 1986)(police officers and fire fighters are under constant observation of superiors).

98. *See* Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 883 (E.D. Tenn. 1987)(fire fighters who use drugs would incur financial difficulties or have high incidence of absenteeism, creating reasonable suspicion of drug use); Capua v. City of Plainfield, 643 F. Supp. 1507, 1518 (D.N.J. 1986)(drug use among fire fighters would become apparent through adverse effects on fire fighters' performance).

99. Mann, *supra* note 77, at 8A, col. 5.

provide for public safety. In a study conducted by the Stanford University School of Medicine, researchers studied the effects of marijuana on airplane pilots' ability to perform routine flight and landing operations using flight simulators.[100] Twenty-four hours after the pilots smoked marijuana, the pilots' performance was impaired, yet the pilots' disability was apparent only after they had attempted to maneuver the planes.[101] Although the test results are inconclusive, the researchers believe that the use of marijuana may impair a individual's ability to perform complex mechanical tasks such as operating heavy equipment or railway switching procedures for at least twenty-four hours after smoking.[102] Insisting upon demonstrable signs of intoxication before the government may test for drugs, therefore, could undermine the government's ability to detect drug-impaired individuals who perform safety-related functions before they cause harm to the public.

Although proponents of testing insist that mandatory urinalysis testing is the only reliable and effective means of identifying individuals who are under the influence of drugs, critics contend that drug testing for employees exposes innocent persons to the risk of false accusations of drug use.[103] The most common method used to test employees for drugs is the enzyme multiplied immunoassay technique (EMIT) test, which detects the presence of marijuana in the test subject's urine.[104] The EMIT test, however, is a

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100. *See* Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325, 1325 (1985) In a test conducted by researchers at Stanford University Medical Center to measure the effects of marijuana on pilots' performance 24 hours after smoking marijuana, each of 10 licensed private pilots, all experienced users of marijuana, were given the equivalent of a strong social dose of marijuana at 9:00 a.m. on the day before the researchers began the flight testing. *Id.* at 1326. At 8:00 a.m. the next day, the pilots were required to perform a standard maneuver entailing a simple landing procedure. *Id.* The maneuver required the pilots to take off, climb to 700 feet, make two turns and execute a landing. *Id.* at 1326. The experiment was conducted in a computerized laboratory designed specifically for conducting research of pilot performance. *Id.* at 1325.

101. *Id.* at 1328. The pilots participating in the test conducted by researchers at Stanford University School of Medicine experienced significant impairment in aligning and landing the plane on the flight simulator runway. *Id.* Although only one pilot failed to land the plane, the researchers emphasize that under actual flight conditions, the pilots' impairment would cause the pilots to crash more frequently. *Id.*

Despite the changes in the pilots' performance, the pilots reported no subjective awareness of impairment, mood change or alertness 24 hours after smoking the sample of marijuana. *Id.*

102. *Id.* at 1328.

103. *See* Chapman, *supra* note 77, at 8A, col. 5 (drug tests are unreliable indicators of drug use and drug testing for employees in public transportation exposes employees to false accusation of drug use); Mann, *supra* note 77, at 8A, col. 5 (drug testing of railroad employees is ineffective means of identifying drug users).

104. *See* Note, *supra* note 26, at 273. Employers favor the enzyme multiplied immunoassay technique (EMIT) test primarily because the EMIT test does not require a technical interpretation of test results, and an employer or supervisor can administer the test. *Id.* at 273 n.29. Employers also favor the use of the EMIT test because the test is relatively inexpensive, costing an employer less than five dollars to administer the test. *Id.* at 273. In addition to identifying the presence of marijuana, the EMIT test also detects the presence of cocaine, barbiturates, amphetamines, and several other substances. *Id.*

relatively unsophisticated test, and commentators have criticized the EMIT test as an inaccurate and unreliable indicator of drug use.[105] The EMIT test's inability to detect drug use accurately, therefore, is a significant factor that militates against an administrative search exception for testing public employees, because the tests would not serve a rational purpose.[106]

Although the EMIT test is an unreliable indicator of drug use, precautionary measures can substantially minimize the risks associated with EMIT test's use. A more sophisticated testing apparatus, for example, can verify the accuracy of an EMIT test result with one hundred percent accuracy.[107] Confirming the results of an EMIT test substantially reduces the risk of an employee wrongfully facing the adverse consequences of a positive test result. When used in conjunction with confirmatory test procedures, the EMIT test can be a reliable method of detecting drug use.[108]

Determining the constitutionality of mandatory drug testing programs without individualized suspicion for public employees and private employees in public service capacities involves a balancing of the government's interest in testing for drugs against the individual's interest in privacy.[109] In balancing the interests, courts should consider the significance of the particular interest the government seeks to promote through testing, the justification or need for initiating a drug testing program, and the degree of personal invasion

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105. *See* Note, *Is Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV., 1451, 1456-60 (1986)(discussing various flaws in EMIT test's reliability as drug detector). The EMIT test can register a positive test result even though the subject has not used illicit drugs. *Id.* at 1458. Individuals who have taken nonprescription cough or cold medicines, for example, can yield a positive test result. Note, *supra* note 26, at 274. Moreover, an individual who has an unintentional exposure to marijuana, due to passive inhalation, for example, also risks a positive result for marijuana. *Id.* at 274 and n.40. Finally, the EMIT test also cannot distinguish accurately between THC, the marijuana trace element, and a body substance in dark-skinned persons that resembles the marijuana element, thus exposing blacks and hispanics to greater risk of falsely testing positive for marijuana. Note, *supra*, at 1459.

Other studies reveal the EMIT test's failure to detect the presence of narcotics in individual's who had used drugs, thus undermining further the EMIT test's credibility. *See* Hansen, Caudill & Boone, *Crisis in Drug Testing*, 253 J.A.M.A. 2382 (1985). The Centers for Disease Control monitored the 13 laboratories that process EMIT tests. *Id.* The Center for Disease Control reported the following rates of error in detecting commonly abused drugs: 0% to 100% for cocaine, 11% to 94% for barbiturates, and 19% to 100% for amphetamines. *Id.*

106. *See* McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978)(to be constitutional, administrative search of persons entering courthouse must be reasonably effective in discovering object of search).

107. *See* Note, *supra* note 26, at 273. Gas chromatography-mass spectrometry (GC/MS) is most commonly used to verify the results of the EMIT test. *Id.* Private employers have hesitated to verify EMIT tests with GC/MS only because GC/MS costs between $50-$100 to perform. *Id.*

108. *See* Storms v. Coughlin, 600 F. Supp. 1214, 1221 (S.D.N.Y. 1984). In *Storms v. Coughlin*, the United States District Court for the Southern District of New York emphasized the need for confirmation of all positive EMIT test results. *Id.* The court enjoined the use of positve EMIT test results in prison disciplinary hearings unless the tests were confirmed by an alternate means of analysis. *Id.*

109. *Supra* note 28 and accompanying text.

that the program entails.[110] Every search must be justified at its inception, however, and unless the government establishes a nexus between drug use and an impairment of a government interest, a drug testing program would be an unnecessary invasion of personal privacy and, therefore, unconstitutional.[111]

Although drug testing without individualized suspicion in most circumstances would violate a fundamental principal of fourth amendment jurisprudence, drug testing without individualized suspicion can be reasonable if the testing promotes a legitimate need in preserving public safety.[112] Under those circumstances in which the balance between the government's interest and the individual's fourth amendment interest in privacy precludes insistence upon some showing of individualized suspicion, however, courts have demanded that procedural safeguards ensure that the individual's rights are not subject to arbitrary or indiscriminate government intrusion.[113] Standards that establish nondiscriminatory guidelines for testing employees, for example, are an essential element of a constitutional testing program. Established guidelines ensure that a testing program, while promoting a legitimate safety interest, does not infringe unduly upon an employee's fourth amendment right to be free from unreasonable searches and seizures.

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110. *Supra* note 29 and accompanying text.

111. Capua v. City of Plainfield, 643 F. Supp. 1506, 1516-17 (D.N.J. 1986).

112. *See supra* note 83 and accompanying text (threats of violence against government buildings warranted mandatory search of all persons entering courthouse); *supra* note 84 and accompanying text (explaining that threat of harm associated with hijackings justifies exception to requirement of individualized suspicion to search all passengers boarding commercial aircraft).

113. Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)(quoting Camara v. Municipal Court, 387 U.S. 523, 532 (1967)).