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## The Drug-Free Federal Workplace: A Question of Reasonableness

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## THE DRUG-FREE FEDERAL WORKPLACE: A QUESTION OF REASONABLENESS

Drug surveillance testing in the workplace has become the focal point of growing national concern over substance abuse and is the subject of increasing litigation.<sup>1</sup> During the past five years, testing programs have expanded from the armed forces, where they have been in place for over a decade,<sup>2</sup> to various national security, law enforcement, and public safety agencies, as well as the private sector.<sup>3</sup> On September 15, 1986, President Reagan issued Executive Order No. 12,564, requiring drug surveillance testing for federal employees who occupied sensitive positions.<sup>4</sup> The National Treasury Employees Union (NTEU) immediately challenged the order,

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1. See CIVIL DIVISION, U.S. DEP'T OF JUSTICE, ISSUE NO. 1, DRUG PREVENTION LITIGATION REPORT 1-3 (Sept. 19, 1986) [hereinafter DRUG PREVENTION LITIGATION REPORT].

2. See, e.g., *Williams v. Secretary of the Navy*, 787 F.2d 552 (Fed. Cir. 1986); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

3. See, e.g., *Mack v. United States*, 653 F. Supp. 70 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 120 (2d Cir. 1987); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985). By November 1986, over 35% of the Fortune 500 companies had established drug surveillance programs, usually in conjunction with educational and rehabilitative assistance. See *Wall St. J.*, Nov. 11, 1986, § 2, at 39, col. 4.

4. Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,890 (1986). The order defined employees occupying sensitive positions as follows:

(1) An employee in a position that an agency head designates Special Sensitive, Critical Sensitive, or Non-Critical Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10,450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12,356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. § 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

51 Fed. Reg. at 32,892-93. Nearly half the 2.7 million civilians employed by federal executive agencies fall within the scope of this definition. See *Drug Testing Stall Tactics*, *Washington Post*, Mar. 18, 1987, at D2, col. 4.

claiming that the surveillance program would violate the Administrative Procedure Act and the Civil Service Reform Act, and that the procedures prescribed in the order violated the fourth amendment.<sup>5</sup>

Unlike private-sector programs, government-operated surveillance constitutes state action, enabling opponents to invoke the talismanic protections of the fourth amendment.<sup>6</sup> Although the essential function of the fourth amendment is to protect citizens from unjustified and arbitrary government intrusion, "[t]he course of true law pertaining to [the amendment] . . . has not . . . run smooth."<sup>7</sup> The fourth amendment logically divides into two clauses and lends itself to a multiplicity of interpretations.<sup>8</sup> Since its seminal opinion in *Boyd v. United States*,<sup>9</sup> the United States Supreme Court has struggled to define the relationship between the general proscription clause, which bars unreasonable searches and the second clause which contains specific mandates of probable cause and warrant. The result has been an imprecise balancing of governmental and individual interests. Although the Court has strained to establish a preference for warrant-based searches, it also has recognized a separate power for warrantless searches in the general proscription clause.

Focusing on federal drug surveillance testing in the context of the warrantless search doctrine, this Note examines the Supreme Court's fourth amendment jurisprudence and then analyzes current drug surveillance litigation. Closing with a detailed consideration of Executive Order No. 12,564, this Note concludes that executive agency drug surveillance programs that adhere to the

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5. *National Treasury Employees Union v. Reagan*, 651 F. Supp. 1199 (E.D. La. 1987) (denying government's motion to dismiss). The National Treasury Employees Union represents employees of the federal government. The union consists of approximately 120,000 members. 1 *ENCYCLOPEDIA OF ASSOCIATIONS* 481 (K. Gruber ed. 1987).

6. The fourth amendment provides:

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 Warrants 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.

U.S. CONST. amend. IV.

7. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

8. J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 42-43 (1966).

9. 116 U.S. 616 (1886).

principles of the Executive Order should pass constitutional muster.

### DEVELOPMENT OF THE WARRANTLESS SEARCH

Notwithstanding its preeminence during the Revolutionary period,<sup>10</sup> the issue of search and seizure lay dormant throughout the nation's first century. Until the late nineteenth century, statutory and common law generally confined the use of warrants to the

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10. The fourth amendment's strictures on search and seizure were drafted in response to the Anglo-American experience. Although the common-law origins of the warrant are ill-defined, the extensive use of general warrants of search and seizure by Tudor and Stuart monarchs, primarily to silence criticism in the press, is well documented. *See* 1 W. LAFAYE, *SEARCH AND SEIZURE* 3-4 (2d ed. 1987); J. LANDYNSKI, *supra* note 8, at 19-48; N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13-78 (1970); T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 24-35 (1969). Virtually uninterrupted by the Protectorate and the Restoration, the widespread use of this general search power was not curtailed effectively until the middle of the eighteenth century. J. LANDYNSKI, *supra* note 8, at 24-30; T. TAYLOR, *supra*, at 25, 34-35. Following two particularly onerous trials in which the judiciary roundly criticized governmental abuses, the House of Commons recognized "that general warrants were an arbitrary exercise of governmental authority against which the public had a right to be safeguarded," and severely restricted the Crown's ability to issue them. N. LASSON, *supra*, at 38-39 (citing *Entick v. Carrington*, 19 Howard's State Trials 1029 (1765); *Wilkes v. Wood*, 19 Howard's State Trials 1153 (1763)). *See* T. TAYLOR, *supra*, at 34-35. Despite this proscription, the scope of general arrest warrants and the power to issue writs of assistance remained unimpaired. J. LANDYNSKI, *supra* note 8, at 30.

Writs of assistance, although generally not used in England, were the subject of profound resentment in the American colonies. Issued to the Crown's customs officers, the writs provided unfettered authority to enter buildings in search of contraband. Although no mention of the writs is found among the grievances enumerated in the Declaration of Independence, their use was a predominant issue in that era. The organized merchants of Boston, represented by James Otis, Jr., opposed the reissue of these writs upon the ascendance of George III, and when the Continental Congress petitioned the King for redress of grievances in 1774, abuse of the search power was a prominent issue. *See* 1 W. LAFAYE, *supra*, at 4; J. LANDYNSKI, *supra* note 8, at 31; T. TAYLOR, *supra*, at 35-38.

Preoccupation with the search power extended into the early Federalist period, and when the Philadelphia Convention submitted its draft of the Constitution for ratification, the lack of restriction on that power was widely denounced. Before the Convention opened, six of the thirteen proposed states had adopted constitutions containing bills of rights, each restricting the use of search warrants. 1 W. LAFAYE, *supra*, at 1-5; J. LANDYNSKI, *supra* note 8, at 38-42; T. TAYLOR, *supra*, at 41-44. In response to the widespread criticism, President Washington urged the first Congress to focus on the addition of such a bill to the Constitution. 1 W. LAFAYE, *supra*, at 5. Drafts of the proposed amendments were submitted to the states in 1789, and the Bill of Rights, with its guarantee against unreasonable search and seizure, was ratified in December 1791. J. LANDYNSKI, *supra* note 8, at 42.

seizure of stolen goods or dangerous and adulterated substances.<sup>11</sup> Warrantless searches incident to arrest and in execution of customs inspections went unchallenged.<sup>12</sup> Constrained by the infrequent exercise of federal criminal jurisdiction and the absence of the right to appeal from state criminal proceedings, the Supreme Court published only four opinions prior to 1886 that considered the search power.<sup>13</sup> In that year, the Court delivered its opinion in *Boyd v. United States*<sup>14</sup> and set the course for subsequent fourth amendment jurisprudence.

In *Boyd*, the Court rejected the government's assertion that searches based on a properly issued warrant were per se reasonable.<sup>15</sup> Grounding its opinion on the principles of the fourth and fifth amendments, the Court appeared to narrow the scope of warrant-based searches by applying an overlaid standard of reasonableness.<sup>16</sup> The Court's focus on the "reasonableness clause" of the fourth amendment later became the touchstone in its restructuring of the search and seizure analysis.

Following *Boyd*, significant procedural changes spawned a proliferation of search and seizure litigation. In 1891, Congress authorized criminal appeals to the Supreme Court.<sup>17</sup> At the same time, the federal and state governments began to establish professional police forces and codify criminal procedure. The search warrant was altered concomitantly to a general-purpose law enforce-

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11. See T. TAYLOR, *supra* note 10, at 44.

12. See *Carroll v. United States*, 267 U.S. 132, 150-53 (1926); T. Taylor, *supra* note 10, at 44.

13. J. LANDYNSKI, *supra* note 8, at 49; N. LASSON, *supra* note 10, at 106. See *Ex Parte Jackson*, 96 U.S. 727 (1877); *Murray's Lessee v. Hoboken Improvement Corp.*, 59 U.S. (18 How.) 272 (1855); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806).

14. 116 U.S. 616 (1886).

15. *Id.* at 621-22. The district court had ordered the defendants, merchants accused of evading tariff payments on certain goods, to surrender invoices documenting the transactions. That order had been issued on the request of the district attorney, pursuant to customs revenue laws. *Id.* at 617-18. The court held that the compulsory production of private, incriminating records was an unjustified "invasion of [the] indefeasible right of personal security." *Id.* at 630. The *Boyd* decision effectively created a zone of privacy that precluded seizure of personal papers otherwise useful as evidence. The Court overturned this decision, however, in *Andresen v. Maryland*, 427 U.S. 463 (1976).

16. *Boyd*, 116 U.S. at 622-33.

17. J. LANDYNSKI, *supra* note 8, at 49.

ment instrument.<sup>18</sup> With adoption of the exclusionary rule,<sup>19</sup> criminal defendants found both the means and the incentive to challenge searches, particularly those not supported by warrant.

Faced with these developments and lacking substantial precedent with which to resolve the developing conflicts, courts seized on *Boyd* and its inference that a warrant was an essential prerequisite to a finding of reasonableness.<sup>20</sup> These courts viewed warrantless searches as inimical to basic protections against arbitrary intrusion, and couched their validations of warrantless searches in terms of exceptions to the rule.<sup>21</sup> By the mid-1960s, the Supreme Court had allowed so many exceptions that search warrants were necessary only in special situations.<sup>22</sup> The Court's decisions relied increasingly on the distinction between reasonable and unreasonable intrusions, balancing the justifications for intrusion against the "indefeasible" right of personal security. The Court thus allowed the specific requirements of probable cause and warrant to lose vitality.

### *Administrative Searches*

In *Frank v. Maryland*,<sup>23</sup> the Court expanded the warrantless search exception to include administrative inspections. The state of Maryland had convicted and fined a homeowner for interfering with a city health department inspection of his residence.<sup>24</sup> Noting the common use and historical acceptance of such inspections, the Court refused to categorize the city's action as a search under the fourth amendment.<sup>25</sup> It reasoned that administrative inspections

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18. T. TAYLOR, *supra* note 10, at 45.

19. See *Weeks v. United States*, 232 U.S. 383 (1914).

20. T. TAYLOR, *supra* note 10, at 46.

21. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk searches permitted where not practicable to secure warrant); *Frank v. Maryland*, 359 U.S. 360 (1959) (administrative searches permitted without warrant) (subsequently overruled in *Camara v. Municipal Court*, 387 U.S. 532 (1967)); *Agnello v. United States*, 269 U.S. 20 (1925) (search incident to arrest beyond body of arrestee permitted without warrant); *Carroll v. United States*, 267 U.S. 132 (1925) (search of automobile permitted). The perception that search warrants are the primary safeguard against arbitrary government intrusion belies the framers' original fear of overreaching general warrants. See T. TAYLOR, *supra* note 10, at 46.

22. T. TAYLOR, *supra* note 10, at 48.

23. 359 U.S. 360 (1959) (overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967)).

24. *Id.* at 361-62.

25. *Id.* at 368-73.

"touch[ed] at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection."<sup>26</sup> The Court limited its holding, however, to a narrowly defined class of administrative searches that were "hedged about with safeguards designed to . . . cause . . . the slightest restriction on [the individual's] claim[] of privacy."<sup>27</sup> Although the Court's opinion expanded the reach of reasonable intrusions, its underlying concern with the relationship between probable cause and the issuance of warrants was well placed.

Eight years later, in *Camara v. Municipal Court*,<sup>28</sup> the Supreme Court reversed *Frank* and revived the requirement of a general warrant. Holding that administrative inspections required a warrant in order to establish constitutional validity, the Court declared that a "reasonable government interest," such as community health and safety, would establish "probable cause to issue a suitably restricted search warrant."<sup>29</sup> The dissent argued against adoption of the "synthetic search warrant" rejected in *Frank* and chided the majority for failing to recognize the independent potency of the general proscription against *unreasonable* searches.<sup>30</sup>

Of greatest import in *Camara* was not the Court's restriction of the administrative search exception, but rather the Court's willingness to define reasonableness in terms that stopped short of probable cause.<sup>31</sup> In attempting to provide internal consistency for its interpretation of the fourth amendment, the Court all but abandoned its construction in *Boyd* and dramatically reduced the standard of probable cause.

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26. *Id.* at 367. The Court applied the principles and protections of the fourth amendment against the state through the fourteenth amendment. *Id.* at 365-66.

27. *Id.*

28. 387 U.S. 523 (1967). In a companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), the Court also restricted administrative inspections on commercial properties. In light of exceptions and clarifications issued in later decisions, the vitality of *See* has been somewhat diminished. *See, e.g.,* *Donovan v. Dewey*, 452 U.S. 593 (1981).

29. *Camara*, 387 U.S. at 539.

30. *See v. City of Seattle*, 387 U.S. at 546 (Clark, J., dissenting). Justice Clark was joined by Justices Harlan and Stewart in a single dissent written for both *Camara* and *See*.

31. *See Camara*, 387 U.S. at 534-39.

*The Stop and Frisk Doctrine*

Just one year after *Camara*, the Court overtly embraced the general proscription clause as the primary control on government intrusions and reemphasized a less rigorous standard of probable cause. In *Terry v. Ohio*, the Court addressed fourth amendment issues in the context of a procedure known as stop and frisk.<sup>32</sup> The appellant had been convicted of carrying a concealed weapon on the basis of evidence obtained when a Cleveland plainclothes policeman detained him and subjected him to a "pat-down" search.<sup>33</sup> The trial court had denied the appellant's motion to suppress the evidence, finding that the detective's extended observation of Terry and two companions provided reasonable suspicion on which to justify the detention and search.<sup>34</sup> The Supreme Court affirmed the trial court's decision to admit the evidence. Focusing on the intrusiveness of the detention and pat-down, the Court enunciated a two-tier test of reasonableness. Against Justice Douglas's lone dissent,<sup>35</sup> the Court declared that a warrantless search was constitutionally valid if it "was justified in its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place."<sup>36</sup> In balancing the government's interest in law enforcement against the individual's right to be free from government intrusion, the Court held that the policeman's extended observation of Terry provided sufficient "specific and articulable facts which, taken together with rational inferences from those facts," warranted the initial intrusion.<sup>37</sup> The Court then validated the stop and frisk procedure by characterizing the pat-down search as minimally intrusive and reasonably related to the policeman's interest in self-protection.<sup>38</sup>

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32. 392 U.S. 1 (1968). Stop and frisk describes an on-the-street stop, cursory interrogation, and pat-down search for weapons. *Id.* at 12.

33. *Id.* at 4-7.

34. *Id.* at 5-9.

35. *Id.* at 35 (Douglas, J., dissenting).

36. *Id.* at 20.

37. *Id.* at 21.

38. *Id.* at 30-31.



Inherent in the Court's reasoning in *Terry* is a sliding-scale analysis of reasonableness,<sup>39</sup> in which "the specific content and incidents of [fourth amendment rights] must be shaped by the context in which [they are] asserted."<sup>40</sup> After *Terry*, the fourth amendment did not bar all intrusions, but acted merely as a limitation on the scope of justifiable searches. This balancing approach articulated in *Terry* has been applied broadly to justify warrantless searches,<sup>41</sup> creating a continuum of such lesser standards as reasonable suspicion or belief,<sup>42</sup> preservation of time-sensitive evidence,<sup>43</sup> application of standardized procedures involving neutral criteria,<sup>44</sup> de minimis or nonintrusive searches,<sup>45</sup> and even per se reasonableness.<sup>46</sup> The result of this balancing approach has been to deemphasize the fourth amendment's requirement of probable cause and focus instead on the reasonableness of the intrusion.<sup>47</sup> A proper analysis of federal drug surveillance programs thus requires that these programs be scrutinized within the sliding scale of reasonableness.

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39. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).

40. *Terry*, 392 U.S. at 9, quoted in *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975). See also *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) ("where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the court has] not hesitated to adopt such a standard").

41. *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal, 1984-1985*, 74 Geo. L.J. 499, 512-13 (1986).

42. See *T.L.O.*, 469 U.S. 325 (search of high school student); *Terry*, 392 U.S. 1 (stop and frisk search).

43. See *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (blood alcohol testing).

44. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (administrative inspections).

45. See *Hayes v. Florida*, 470 U.S. 811 (1985) (fingerprints); *United States v. Dionisio*, 410 U.S. 1, 8-18 (1973) (voice exemplars).

46. See *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (border search).

47. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

## APPLICATION TO FEDERAL DRUG TESTING: STRIKING THE BALANCE

*Analysis Under Terry v. Ohio*

The constitutional validity of federal drug testing under the Court's analysis of search and seizure will depend largely on the treatment given to threshold issues. Absent some action that can properly be classified as a "search" or "seizure", the fourth amendment's protections against unreasonable intrusion will not be implicated.<sup>48</sup> In that context, "search" and "seizure" become terms of art that afford courts broad discretion in interpretation.<sup>49</sup> Although proponents of drug surveillance testing may attempt to seize on the limits of these terms to exclude drug testing from the umbrella of constitutional protection, this focus is misplaced and serves only to truncate the *Terry* analysis. Such an approach fails to consider the broad spectrum of factors that might justify or preclude intrusion.

The first level of the *Terry* analysis requires a delicate balance between the individual's reasonable expectation of privacy and those government interests underlying the intrusion. Factors examined in this balancing should include the scope of the privacy expectation, the frequency of the conduct subject to control or intrusion, and the quality of the government interests involved.<sup>50</sup> Viewed in this manner, the reasonableness standard may also require courts to measure the factual justification for intrusion against an objective standard of cause.<sup>51</sup>

Contrary to Justice Brennan's assertion that government interests must be extraordinary before courts can legitimately engage in a balancing test,<sup>52</sup> the judiciary has routinely justified intrusions on the basis of interests characterized as merely important or sub-

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48. See, e.g., *Maryland v. Macon*, 472 U.S. 463, 468-69 (1985); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Roaden v. Kentucky*, 413 U.S. 496 (1973).

49. See *United States v. Jacobsen*, 466 U.S. 109 (1984). "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed"; a seizure takes place only if there is "some meaningful interference with the individual's possessory interests in that property." *Id.* at 113.

50. See *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1010 (D.C. 1985) (Nebeker, J., concurring); Defendant's Opening Brief at 34-38, *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987).

51. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

52. *New Jersey v. T.L.O.*, 469 U.S. 325, 356-57 (Brennan, J., dissenting).

stantial.<sup>53</sup> Broad expectations of privacy have limited recognition<sup>54</sup> because society demands that an individual surrender some degree of privacy to advance the community's broader interests.<sup>55</sup> Courts therefore have recognized a wide range of circumstances in which limited intrusion is justified. These include situations of pervasive regulation,<sup>56</sup> government employment that explicitly limits individual privacy expectations,<sup>57</sup> and statutory authorization of unannounced regulatory inspections.<sup>58</sup> The goal of eliminating drug abuse in the federal workplace may well be viewed as another circumstance justifying intrusion into an individual's privacy expectations. The Supreme Court has characterized drug abuse prevention as a strong state interest.<sup>59</sup> When applied to federal employees, that interest is reinforced by the collateral concerns of the effective discharge of government responsibilities,<sup>60</sup> the nature of employees' duties,<sup>61</sup> internal order and discipline,<sup>62</sup> and minimization of the public's exposure to risk.<sup>63</sup>

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53. See *Donovan v. Dewey*, 452 U.S. 594 (1981) (mineworker's health and safety a substantial interest); *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979) (public confidence in government official's integrity an important interest).

54. See generally Banzhaf, *How To Make Drug Tests Pass Muster*, NAT'L L.J., Jan. 12, 1987, at 13.

55. *Winston v. Lee*, 470 U.S. 753, 759 (1985).

56. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

57. *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979) (upholding constitutionality of Ethics in Government Act requirement that certain officials file personal financial statement annually), *cert. denied*, 449 U.S. 1076 (1981); *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977) (prison's general warning of entry search policy applied even to federal corrections officer); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (upholding regulation limiting privacy interest in lockers assigned to postal employees); *United States v. Donato*, 269 F. Supp. 921 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3d Cir. 1967) (upholding regulations limiting privacy expectation of U.S. Mint employees).

58. *Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding inspection of underground mines pursuant to Federal Mine Safety and Health Act of 1977).

59. *United States v. Place*, 462 U.S. 696, 704-05 (1983) (validating "canine sniff" search).

60. See *Committee for GI Rights v. Callaway*, 518 F.2d 466, 474-75 (D.C. Cir. 1975); *United States v. Collins*, 349 F.2d 863, 867-68 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966); *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

61. See *Mack v. United States*, 653 F. Supp. 70 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 120 (2d Cir. 1987).

62. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351-52 (1985); *Committee for GI Rights*, 518 F.2d at 474-75; *Storms v. Coughlin*, 600 F. Supp. 1214, 1219 (S.D.N.Y. 1984).

63. See *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. App. 1985).

Balanced against government motivations is the individual's expectation of privacy;<sup>64</sup> in this instance, security of the body. Urination normally occurs in private, and "[o]ne does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds."<sup>65</sup> Although the Supreme Court has clearly established that individuals retain a privacy expectation as to the integrity of their bodies, the Court has sanctioned intrusions such as the forced taking of blood samples.<sup>66</sup> In spite of the fundamental nature of the privacy interest at issue, a sufficient government interest therefore may validate a limited intrusion under the auspices of a drug surveillance program.

The conclusion that the Constitution permits urinalysis testing under some circumstances leads logically to the second tier of the analysis. After finding that an intrusion is justified in its inception, the court must scrutinize the scope of the interference with respect to the circumstances underlying the justification. This second level of analysis has generally functioned as the barrier to drug surveillance programs. In the context of a non-drug-related fourth amendment claim, the Supreme Court held that "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive."<sup>67</sup> Fraught with catchwords, this phrase encompasses the mechanisms and means of search, the dissemination and use of findings, the impact on the individual subject to the intrusion, and any controls on the frequency of the interference. This broad range of factors is complicated by the subjective interpretation of legal scholars, the varying purposes and circumstances surrounding implementation of surveillance programs, and a dearth of Supreme Court decisions on the issue. The result has been a collection of

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64. Such an expectation of privacy has two components: first, the actual or subjective expectation of the individual, and second, "that the expectation be one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). For the purposes of this Note, the subjective expectation of privacy is presumed.

65. *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

66. *See Schmerber v. California*, 384 U.S. 757 (1966).

67. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

diverse lower court opinions on the constitutionality of drug surveillance programs.

#### RECENT URINALYSIS CASES: SCOPE OF THE INTRUSION AND UNDERLYING POLICIES

Several recent cases have involved a challenge to drug surveillance programs that include urinalysis. The next section will focus on the scope of intrusions permitted by the courts as well as the policies underlying these decisions.

Early decisions involving drug surveillance testing of military personnel<sup>68</sup> and public transportation employees<sup>69</sup> validated such intrusions and provided the foundation on which subsequent decisions rest. In *Committee for GI Rights v. Callaway*, several enlisted members of the Army's European Command filed a class action suit challenging the constitutionality of the drug abuse prevention plan initiated by the Secretary of Defense.<sup>70</sup> The program, which was implemented by directive, mandated treatment for personnel found to be drug abusers. It also provided for administrative and disciplinary action when circumstances indicated a violation of the law or Army regulations.<sup>71</sup> In addition, the program authorized military authorities to inform other government agencies, on request, when individuals were discharged for illicit drug use.<sup>72</sup>

Although *Callaway's* concern with the rights of military personnel limits its precedential value, it is instructive in its use of the *Terry* analysis. The United States Court of Appeals for the District of Columbia Circuit emphasized that military personnel were "entitled to the protection[s] of the Fourth Amendment,"<sup>73</sup> but rejected warrant procedures as an unduly burdensome precondition on the unannounced inspections authorized under the plan. In reaching its decision, the court noted that an absolute warrant re-

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68. *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

69. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).

70. *Committee for GI Rights*, 518 F.2d at 468.

71. *Id.* at 468-70.

72. *Id.* at 470.

73. *Id.* at 476.

quirement would undermine the effectiveness of such inspections.<sup>74</sup> Focusing on the Army's national security mission, the court declared that the "fundamental necessity for obedience . . . may render permissible within the military that which would be constitutionally impermissible outside of it."<sup>75</sup>

After determining that the reasonableness standard applied,<sup>76</sup> the court embarked on a balancing test to determine the validity of the intrusion. It weighed the increased incidence of drug abuse in the armed forces, the underlying concern for health and fitness, and the Army's attempts to minimize the impact of the inspection on individual dignity and privacy against the privacy expectations retained by the service members. The court concluded that the challenged searches were "reasonable and constitutionally permissible."<sup>77</sup>

Just one year later, the ambit of drug surveillance testing was extended to public transportation employees. In a terse, four-page opinion, the United States Court of Appeals for the Seventh Circuit rejected a union challenge to a Chicago Transit Authority regulation in *Division 241 Amalgamated Transit Union v. Suscy*.<sup>78</sup> The regulation required employees to submit to blood and urine testing if they were involved in "any serious accident" or were suspected of being intoxicated or under the influence of narcotics.<sup>79</sup> Both the refusal to submit to testing and positive test results were grounds for discharge.<sup>80</sup> Because the Transit Authority administered the test on the basis of articulable suspicion, the court applied a balancing test to weigh the government interest against the employees' "reasonable expectation of privacy with regard to submitting to blood and urine tests."<sup>81</sup> The court concluded that the Transit Authority's "paramount interest" in the safety of mass

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74. *Id.* at 477.

75. *Id.* at 474.

76. *Id.* at 476 (citing *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *Camara v. Municipal Court*, 378 U.S. 523, 539 (1967)).

77. *Id.* at 476-77.

78. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

79. *Id.* at 1266-67.

80. *Id.*

81. *Id.* at 1267 (citing *United States v. Cogwell*, 486 F.2d 823, 835 (7th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974)).

transit customers "certainly outweigh[ed] any individual interest in refusing to disclose evidence of . . . drug abuse."<sup>82</sup>

After *Suscy*, drug surveillance litigation lay dormant for nearly a decade. Its resurgence began with a pro se challenge to the urinalysis program instituted in the New York State prison system. In *Storms v. Coughlin*,<sup>83</sup> four inmates of the Ossining Corrections Facility attacked the procedures used to select and subject prisoners to a program of daily, random drug testing.<sup>84</sup> The plaintiffs asserted that the system used to generate random test subjects was constitutionally infirm and challenged the intrusiveness of sample collection methods and the reliability of the Syva EMIT (Enzyme Multiplied Immunoassay Technique) testing process.<sup>85</sup> The court applied a *Terry* analysis and ruled that the intrusion on human dignity and privacy consequent to urinalysis testing was substantially outweighed by the legitimate goal of internal security and the policies of the correctional facility.<sup>86</sup> The court reserved judgment however, on the challenge to the Syva EMIT test. Although it found that the reliability of the test had not adversely affected the plaintiffs, it intimated that a consideration of this factor would be proper in the second tier of a *Terry* analysis.<sup>87</sup>

The lone infirmity found in the New York system was the method of generating random test subjects. Corrections officers would choose the particular prisoners to be tested each day by "randomly" selecting name cards from a tote board in the office.<sup>88</sup>

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82. *Id.*

83. 600 F. Supp. 1214 (S.D.N.Y. 1984).

84. *Id.* at 1216.

85. *Id.* at 1216-17. The Syva EMIT test operates on a biochemical principal. Antibodies that react to trace elements of drugs are added to the urine sample. A photometer is used to measure the resulting substance, which is then compared against known values to indicate the presence or absence of drugs in the urine. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 203, 205 n.12 (1986).

86. *Id.* at 1218, 1221. Although convicted prisoners do not surrender all constitutional protections on incarceration, their status and the need for internal order in prisons limit those retained rights. See *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Although somewhat discomfoting, the analogy is clear: by their status as employees of the government, personnel in particularly sensitive positions must yield some portion of their privacy expectation in favor of government interests.

87. *Storms*, 600 F. Supp. at 1225-26. The court noted that the plaintiffs could still challenge the use of the EMIT test under the fourth amendment. *Id.*

88. *Id.* at 1216.

Noting the risks of abuse and unnecessary harrassment inherent in that system, the court ordered prison officials to discontinue its use.<sup>89</sup> The court did not address the constitutionality of a computer program being developed by prison officials to effect a truly random selection process.<sup>90</sup> The result of Judge Haight's decision was not to invalidate the New York system entirely, but merely to define the scope and mechanics of a constitutionally valid testing program.

The next challenge to drug surveillance testing occurred in *Allen v. City of Marietta*.<sup>91</sup> Six employees of a municipal utility service challenged their discharge for drug abuse. Each plaintiff had submitted a urine sample that had tested positive for the presence of marijuana trace elements. The city had initiated the testing after a utility superintendent noted a correlation between personnel identified by an informant as drug abusers and a series of unexplained injuries.<sup>92</sup> Rather than grounding its opinion in the causal issue, the United States District Court for the Northern District of Georgia relied on a "government employee" exception to the warrant requirement.<sup>93</sup> The court balanced the employees' expectation of privacy against the government's rights as an employer and its concern for the safety of its employees and the public.<sup>94</sup> Declaring that "the government has the . . . right . . . to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties," the court held that employees retained no reasonable expectation of privacy in the face of a government search conducted "for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities."<sup>95</sup> The only limitation on the city's broad authority to investigate matters affecting employee perform-

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89. *Id.* at 1226.

90. *Id.* at 1216, 1223. Drawing conclusions from the tenor of Judge Haight's opinion, it is logical to conclude that if the computer program had been installed at the time of the challenge, the court would not have ruled the New York program unconstitutional.

91. 601 F. Supp. 482 (N.D. Ga. 1985).

92. *Id.* at 484.

93. *Id.* at 489.

94. *Id.*

95. *Id.* at 491.



ance was a prohibition on inquiries undertaken primarily for a criminal investigatory purpose.<sup>96</sup>

The *Allen* opinion at first appears to sanction testing only when based on evidence of on-the-job use.<sup>97</sup> Evidence offered regarding off-duty use, the breadth of the court's language, and the strength of the government's interest, however, may indicate a contrary conclusion. When a sufficient nexus exists between off-duty use and on-the-job performance, courts should logically be able to expand the scope of intrusion. Such a nexus clearly exists when the employee uses a drug outside the workplace and subsequently reports for work while subject to any of the drug's physiological or psychological effects.<sup>98</sup> A special relationship between off-duty activities and on-the-job responsibilities thus may justify expanding the scope of surveillance.

Perhaps the most influential urinalysis decision to date, *McDonnell v. Hunter*,<sup>99</sup> arose on a challenge to an Iowa Department of Corrections policy that subjected employees to various searches, including blood and urine testing.<sup>100</sup> At the outset of its opinion, the court tersely rejected the Department's suggestion that fourth amendment protections were not implicated when the search was not incident to a criminal investigation.<sup>101</sup> Applying the *Terry*

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96. *Id.*

97. See Miller, *supra* note 85, at 221.

98. See Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983). In its analysis of service connection, a jurisdictional matter, the court addressed off-duty (off-the-job) use and performance, stating:

[I]ndeed, in many instances the drug[s] will enter the military installation in their most lethal form—namely, when they are coursing through the body of a user. . . .

We are convinced that, even when a servicemember uses a psychoactive drug in private while he is on extended leave far away from any military installation, that use is service connected, if he later enters a military installation while subject to any physiological or psychological effects of the drug.

*Id.* at 80 (citation omitted) (quoting United States v. Trottier, 9 M.J. 337 (C.M.A. 1980)).

The court's logic here reflects the overall concern with drug abuse—the physiological and psychological impact on work performance. An on-the-job limitation of objective standards of suspicion ignores that concern.

99. 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

100. *Id.* at 1125.

101. *Id.* at 1127. Note the similarity between the Department's position and the court's limitation on authorized search authority in *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

analysis, the court found that the paramount justification for the Department's testing policy was security in the corrections facility and held that this interest was sufficient to reduce the scope of employees' reasonable expectations of privacy.<sup>102</sup> The court did not doubt that the Department could constitutionally search all persons entering correctional facilities, but held that the Iowa program was so intrusive as to preclude validation.<sup>103</sup>

The fundamental flaw in the Iowa program was a lack of standards for implementation and testing.<sup>104</sup> Without any enumerated guidelines, "it appear[ed] that any institutional officer [could] authorize or make a search or demand for blood or urine . . . [with] unfettered discretion."<sup>105</sup> That flaw was not sufficiently neutralized by the Department's assertion that employees were not "asked to submit to [testing] unless there [was] some articulable reason to believe" a problem existed.<sup>106</sup> The court concluded that a foundation of "reasonable suspicion" had to underlie any testing.<sup>107</sup> This standard has since become the lynchpin in any analysis of drug surveillance programs.<sup>108</sup>

The final challenges to drug surveillance testing in 1985 took place at the state level. In *City of Palm Bay v. Bauman*, the Florida District Court of Appeals modified and affirmed a permanent injunction that prohibited the city from conducting urinalysis testing of police officers and firefighters.<sup>109</sup> Balancing the coextensive nature of the employees' private and professional lives with the government's interest in employee and public safety, the court held that all drug surveillance testing not performed as part of a routine medical examination had to be based on the reasonable suspicion standard articulated in *McDonell*.<sup>110</sup> The court of appeals also expanded the time during which employees were subject

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102. *McDonell*, 612 F. Supp. at 1128.

103. *Id.* at 1128-29.

104. *Id.* at 1128 n.4.

105. *Id.*

106. *Id.* at 1126.

107. *Id.* at 1130.

108. See, e.g., *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

109. *Id.* at 1323.

110. *Id.* at 1324-26. The court of appeals rejected the lower court's mandate of probable cause as the objective standard.

to suspicion to include off-duty periods.<sup>111</sup> The court based its rejection of an on-the-job use limitation on the indefinite boundaries between the private and public lives of firefighters and police officers.<sup>112</sup>

The District of Columbia Court of Appeals employed a similar analysis in *Turner v. Fraternal Order of Police*,<sup>113</sup> in which it validated urinalysis testing of police officers. That court held that police officers, because of the nature of their duties and their impact on public safety, retained a diminished privacy expectation.<sup>114</sup> In striking a balance between public and individual interests, the court affirmed the propriety of a testing system that subjected officers to urinalysis testing on reasonable suspicion founded in objective fact.<sup>115</sup> *Turner* apparently follows *Bauman* in rejecting an on-the-job limitation to surveillance. Although the court did not specifically address the issue, the requirement that testing be related merely to fitness indicates that no such on-the-job limitation was placed on the reasonable suspicion standard.<sup>116</sup>

Drug surveillance litigation proliferated in 1986, with courts delivering opinions in nearly twenty cases.<sup>117</sup> The challenged programs ranged from testing of teachers who sought tenure<sup>118</sup> to urinalysis of Customs Service officers prior to promotion.<sup>119</sup> Only one court invalidated drug surveillance testing in its entirety.<sup>120</sup> Other programs faced limitations ranging from a relatively high

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111. *Id.* at 1326.

112. Miller, *supra* note 85, at 226.

113. 500 A.2d 1005 (D.C. App. 1985).

114. *Id.* at 1008.

115. *Id.* at 1008-09.

116. *Id.* at 1009. See also Miller, *supra* note 85, at 227.

117. See Banzhaf, *supra* note 54, at 24.

118. Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (N.Y. App. Div. 1986), *aff'd*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

119. National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).

120. That decision subsequently was vacated. *Id.*

probable cause standard<sup>121</sup> to reasonable suspicion<sup>122</sup> to a relaxed standard requiring no causal showing.<sup>123</sup>

In *Jones v. McKenzie*,<sup>124</sup> the United States District Court for the District of Columbia considered a bus attendant's challenge to dismissal for alleged drug abuse. The District of Columbia school system initiated urinalysis testing of employees in 1984 because of a significant increase in absenteeism and the discovery of drug paraphernalia in employee restrooms.<sup>125</sup> The program provided for urinalysis screening as a part of regular physical exams and also called for termination of employment on a confirmed finding of illicit drug use.<sup>126</sup>

The plaintiff in *Jones* was discharged after a computerized EMIT urinalysis and a manual repetition of the same test detected the presence of drug residues in her urine.<sup>127</sup> The salient factor in the district court's reversal of the discharge was the school system's failure to make adequate provision for confirmation of the initial test result. Although the court could have relied on *Terry* to reverse the plaintiff's discharge,<sup>128</sup> it grounded its opinion instead on procedural due process. The directive implementing the urinalysis program required confirmation of a positive test result before the employee was dismissed. The court noted that both the manufacturer of the EMIT test and other toxicology authorities recommended confirmation by an alternate test method.<sup>129</sup>

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121. *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (testing of school bus attendant).

122. *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986) (police officers); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986) (city firefighters); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (firefighters); *Patchogue-Medford Congress of Teachers*, 119 A.D.2d 35, 505 N.Y.S.2d 888; *King v. McMickens*, 120 A.D.2d 351, 502 N.Y.S.2d 679 (1986), *aff'd sub nom. Perez v. Ward*, 69 N.Y.2d 840, 507 N.E.2d 296, 514 N.Y.S.2d 703 (1987) (corrections officers); *Caruso v. Ward*, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986) (police officers and Organized Crime Bureau personnel).

123. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) *cert. denied*, 107 S. Ct. 577 (1986) (horse racing industry).

124. 628 F. Supp. 1500 (D.D.C. 1986).

125. *Id.* at 1502.

126. *Id.* at 1502-03.

127. *Id.* at 1503.

128. *Id.* at 1504-07.

129. *Id.* at 1505-06.

Citing various organizations and courts that had rejected the use of the immunoassay as the sole testing process, the court ruled that manual repetition of the EMIT procedure was not sufficient to confirm positive test results.<sup>130</sup> On that basis, the court overruled the plaintiff's termination as "arbitrary and capricious" and clearly in violation of the directive and applicable law.<sup>131</sup> As an adjunct to its due process analysis, the court examined the plaintiff's fourth amendment claims. Loosely embracing the second tier of the *Terry* analysis, it concluded that a higher objective standard than "reasonable suspicion" had to be met in order to justify intrusion into a bus attendant's privacy.<sup>132</sup>

On its face, the district court's decision appears to be limited to its facts: because the District of Columbia school system failed to comply with its regulations regarding discharge of employees, the plaintiff's due process rights were violated. A closer reading of *Jones*, however, reveals its import to the topic of this Note. A number of drug surveillance challenges have focused on the reliability of the EMIT test, and opinions have been sharply divided.<sup>133</sup> The reliability of the urinalysis testing process and its impact on the individual are factors that clearly fall within the second tier of the *Terry* analysis. In light of the *Jones* decision, drug surveillance programs should include procedures for testing specimens by at least two different testing processes.

On the heels of the apparent retrenchment in *Jones*, a federal district court in New York validated the constitutionality of drug surveillance testing. In *Mack v. United States*,<sup>134</sup> the United States District Court for the Southern District of New York balanced an investigative agent's privacy expectation against the interests of his employer, the Federal Bureau of Investigation (FBI). The court recognized the FBI's compelling and vital interest in protecting classified information and national security, as well as the Bureau's interest in assuring that agents were not subject to

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130. *Id.* at 1506. *Cf.* *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1509-14, 1514 n.16 (S.D.N.Y. 1985) (repetition of EMIT testing validated); *Jensen v. Lick*, 589 F. Supp. 35, 38-39 (D.N.D. 1984) (reliance solely on EMIT test does not violate due process).

131. *Jones*, 628 F. Supp. at 1506.

132. *Id.* at 1508.

133. *Id.* at 1505-07.

134. 653 F. Supp. 70 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 120 (2d Cir. 1987).

compromise and corruption due to drug abuse.<sup>135</sup> The court ruled that the plaintiff's special employment relationship with the FBI, as well as its published drug abuse policy, limited his privacy interests.<sup>136</sup> Finding the methods used for collection of the urine sample to be minimally intrusive, it held that the search was reasonable under the fourth amendment.<sup>137</sup>

Three months later, in *Shoemaker v. Handel*, the United States Court of Appeals for the Third Circuit considered a New Jersey Racing Commission regulation that permitted the State Racing Steward to subject jockeys to breathalyzer and urinalysis testing.<sup>138</sup> In the underlying case, the federal district court had explicitly performed the two-step *Terry* analysis in upholding the regulation.<sup>139</sup> That court had ruled that the pervasive regulation of the horse racing industry, along with New Jersey's strong interests in the integrity and safety of the sport, justified the challenged intrusion.<sup>140</sup> The district court did not directly address the intrusiveness of drug surveillance testing, choosing instead to balance the program's strict controls, purpose, and confidentiality against the jockey's diminished expectation of privacy.<sup>141</sup>

Rather than adopting the district court's construction of the case, the court of appeals grounded its opinion on the administrative search exception.<sup>142</sup> This approach did not substantively alter the *Terry* analysis, however, because it required a balancing between public and private interests and a finding of reasonableness as to the scope of the intrusion.<sup>143</sup> Here the Third Circuit followed the district court's reasoning and held that the challenged testing was constitutionally valid.<sup>144</sup>

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135. *Id.* at 75.

136. *Id.*

137. *Id.*

138. *Shoemaker*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

139. *Shoemaker v. Handel*, 619 F. Supp. 1089, 1102 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir.), *cert denied*, 107 S. Ct. 577 (1986).

140. *Id.*

141. *Id.* at 1101-04.

142. *Shoemaker*, 795 F.2d at 1136. *See supra* notes 23-31 and accompanying text.

143. *Id.* at 1142. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321-24 (1978) (requiring warrant pursuant to OSHA inspection).

144. *Shoemaker*, 795 F.2d at 1142-43.

*Shoemaker's* true importance lies in its validation of random testing, in which the normal prerequisite of individualized suspicion is discarded. The district court had recognized that prerequisite as a means to ensure proper balancing between public goals and individual privacy interests.<sup>145</sup> The court, however, also declared that

"[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to insure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"<sup>146</sup>

Without elaborating on the factors that precluded the use of the individualized suspicion standard in this case, the court ruled that the purpose, strict confidentiality, and detailed administrative procedures of the Racing Commission's drug surveillance program afforded adequate protection against unconstrained discretion.<sup>147</sup>

Similarly, the court of appeals offered little to substantiate or explain the elimination of the objective standard in its conclusory treatment of the random testing issue.<sup>148</sup> Considered in the context of the decisions that preceded *Shoemaker*, the opinions of the district court and the court of appeals defy the logic that governments must justify random testing with interests of significantly greater magnitude than those presented by the New Jersey Racing Commission.

In *Capua v. City of Plainfield*<sup>149</sup> and *Louvorn v. City of Chattanooga*,<sup>150</sup> problems with detailed administrative regulation and the scope of discretion led to the invalidation of drug surveillance testing of public safety officers. In *Capua*, city officials subjected officers of the city police and fire departments to mandatory urinalysis testing without prior notice.<sup>151</sup> Officials administering the test observed the collection process and those officers whose samples

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145. *Shoemaker*, 619 F. Supp. at 1100.

146. *Id.* at 1101 (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

147. *Id.* at 1101-04.

148. *Shoemaker*, 795 F.2d at 1142-43.

149. 643 F. Supp. 1507 (D.N.J. 1986).

150. 647 F. Supp. 875 (E.D. Tenn. 1986). See *infra* notes 162-166 and accompanying text.

151. *Capua*, 643 F. Supp. at 1511-12.

revealed the presence of controlled substances were forced to resign and threatened with criminal sanction.<sup>152</sup> Prior to conducting the tests, the city had promulgated no written directive, department policy, or regulation to establish the basis of testing or prescribe standards and procedures for the use of test results.<sup>153</sup>

In its analysis of the challenged action, the United States District Court for the District of New Jersey characterized the government's interest in the safety of its officers and the public as a vital and laudable goal<sup>154</sup> and balanced that interest against the officers' privacy expectations. The court characterized the observation of the collection process as a breach of bodily integrity and the greatest possible invasion of privacy, and held that the government's relatively innocuous interest in the public's perception of its safety officers was not sufficient to justify such an intrusion.<sup>155</sup> The court suggested that even had the government's interest weighed more heavily toward justification of the intrusion, the Plainfield program would nonetheless have been invalidated because it did not provide sufficient notice, clearly delineated methods, or adequate procedural safeguards.<sup>156</sup> Finally, the court distinguished the facts in *Capua* from those that had justified the administrative search exception in *Shoemaker*.<sup>157</sup> The court found that the Plainfield fire and police departments were not subject to pervasive regulation and thus retained a greater privacy interest than the jockeys in *Shoemaker*.<sup>158</sup> On the basis of these judgments, the court determined that drug surveillance screening not based on an individualized suspicion was unreasonable and constitutionally infirm.<sup>159</sup>

The *Capua* decision is flawed in its balancing of individual and government interests because it failed to consider adequately the city's interest in the safety of both its employees and the public. A proper application of the *Terry* analysis, however, probably would not have achieved a different result. As the United States Supreme

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152. *Id.* at 1512.

153. *Id.* at 1511-12.

154. *Id.* at 1511.

155. *Id.* at 1519.

156. *Id.* at 1511.

157. *Id.* at 1518.

158. *Id.* at 1519.

159. *Id.* at 1520.



Court stated in *Bell v. Wolfish*, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."<sup>160</sup> It is a fact-oriented analysis that requires the court to balance discrete factors subjectively.<sup>161</sup>

In *Lovvorn v. City of Chattanooga*, the United States District Court for the District of Tennessee considered facts strikingly similar to those in *Capua*. After engaging in the *Terry* analysis, the court invalidated the Chattanooga drug testing program for lack of clearly defined standards and methods.<sup>162</sup> The court in *Lovvorn* recognized that firefighters had a "somewhat diminished expectation of privacy"<sup>163</sup> in the face of the city's compelling interest in a drug-free fire department,<sup>164</sup> but held nevertheless that in "the absence of [adequate] safeguards to insure that the tests [were] not subject to the standardless discretion of . . . fire officials"<sup>165</sup> the city could interfere with employees' privacy interests only on the basis of an objective standard of individualized suspicion.<sup>166</sup>

In a challenge that may have a great impact on the administration's plan for a drug-free federal workplace, the National Treasury Employees Union attacked the constitutionality of a drug testing program implemented by the United States Customs Service.<sup>167</sup> That program required Customs Service employees who sought promotion to certain positions to submit to urinalysis drug testing. In order to prevent falsification or adulteration of samples, the implementing directive and mandated "close but not 'direct' " observation during the sample collection process.<sup>168</sup>

In granting injunctive and declaratory relief, the United States District Court for the Eastern District of Louisiana characterized urinalysis testing as "utterly repugnant to the . . . Constitution"

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160. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

161. *Id.*

162. *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879-83 (E.D. Tenn. 1986).

163. *Id.* at 880.

164. *Id.* at 879.

165. *Id.* at 882.

166. *Id.*

167. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987).

168. *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 382 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987). Employees provided their samples free from direct visual observation, but with an observer in the restroom with them. 816 F.2d at 173-74.

and held that the Customs Service's drug surveillance plan violated its employees' fourth amendment and due process rights.<sup>169</sup> The district court dismissed the significance of the Service's interest in a drug-free environment<sup>170</sup> and found urinalysis testing to be such a gross and degrading invasion of privacy that it constituted an overly intrusive interference.<sup>171</sup> In addition, the court ruled that the testing processes, the Syva EMIT and gas-chromatography/mass-spectrometry tests, were "so fraught with dangers of false . . . readings as to deny the Customs workers due process of law."<sup>172</sup> The court order permanently enjoined the Customs Service from conducting urinalysis testing without a showing of probable cause.<sup>173</sup>

The district court's analysis in *National Treasury Employees Union v. Von Raab* is disjointed and undisciplined, and fails to balance adequately the interests involved. The court's finding that illicit drug use presented no threat to legitimate government interests ignores the law enforcement mission of the Customs Service.<sup>174</sup> Despite the subjective nature of the reasonableness analysis, the Customs Service's interest in a drug-free law enforcement agency should justify some degree of intrusion. In light of previous case law,<sup>175</sup> the district court's treatment of the government's interests in *National Treasury Employees Union* and its mandate of a probable cause standard appear unsupportable.

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169. *National Treasury Employees Union*, 649 F. Supp. at 386-89, 391. The court also ruled that the program violated Customs employees' fifth amendment rights and rejected any consent granted as tainted by coercion. *Id.* at 387-88. The testimonial and communicative nature of urinalysis testing will not be discussed here, as the ambit of this Note is limited to the fourth amendment and immediately related issues presented by drug surveillance testing.

170. *Id.* at 390.

171. *Id.* at 387.

172. *Id.* at 390.

173. *Id.* at 391.

174. The Customs Service is a law enforcement agency charged with preventing illicit drugs from entering the United States. Service members are sometimes required to carry firearms or have access to classified information. See *National Treasury Employees Union*, 816 F.2d at 173.

175. *E.g.*, *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986) (city's compelling interest in drug-free fire department would justify urinalysis drug testing based on reasonable suspicion).

On appeal, the United States Court of Appeals for the Fifth Circuit rejected the district court's analysis and vacated the injunction.<sup>176</sup> Although the court did not apply the *Terry* analysis in its traditional two-tier format, each of the test's essential elements was examined. The court found that the use of controlled substances by Customs Service employees frustrated that agency's law enforcement function, undermined the Service's integrity, and posed a serious safety threat.<sup>177</sup> It deemed those factors sufficient to justify the intrusion of drug surveillance testing.<sup>178</sup> In support of that conclusion, the court noted that the "test [was], to some extent, consensual"<sup>179</sup> and pointed to the government's right to assure the integrity and competence of its workforce.<sup>180</sup>

In its review of the scope and manner of testing, the program's administrative strictures, and the scientific processes employed, the court found no factors that would render the contemplated search unreasonable.<sup>181</sup> Of greatest import in the Fifth Circuit's opinion is the court's limited consideration of the individualized suspicion standard. Noting that "[i]n certain limited situations, the balance of interests precludes insistence upon 'some quantum of individualized suspicion,'"<sup>182</sup> the court weighed the government's interest in ensuring the integrity of employees in sensitive positions against the employees' expectation of privacy, and refused to uphold the district court's requirement of an individualized standard of probable cause.<sup>183</sup> This most recent rejection of a probable cause standard is in accord with the first urinalysis decision published in 1987.

In *McDonell v. Hunter*, the United States Court of Appeals for the Eighth Circuit approved the use of "reasonable suspicion" as the individualized standard, but rejected its application in cases

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176. *National Treasury Employees Union*, 816 F.2d at 182.

177. *Id.* at 178.

178. *Id.*

179. *Id.* The test was required only of those employees who sought transfers to certain positions. *Id.*

180. *Id.* See also *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1986) (city's interest in safety of its employees and public justified urinalysis drug testing program).

181. *National Treasury Employees Union*, 816 F.2d at 175-180.

182. *Id.* at 176-77 (footnote omitted).

183. See *id.* at 176-80.

involving "limited uniform and random testing."<sup>184</sup> Focusing on the status of corrections officers as government employees, the court of appeals found that warrantless searches "directly relevant to the employee's performance of his duties and the government's performance of its duties" were reasonable and constitutionally valid.<sup>185</sup> In reaching its decision, the court held that "the state's interest in safeguarding the security of its correctional institutions" was at least as strong as the state interest presented in *Shoemaker v. Handel*,<sup>186</sup> and that corrections officers retained a diminished expectation of privacy due to the special responsibilities of their occupation.<sup>187</sup> The court then ruled that uniform and systematic random testing was the least intrusive and only satisfactory means justified by the public interest.<sup>188</sup>

Although the court of appeals in *McDonell* failed to specify the administrative requirements of such a testing system, it implicitly adopted the procedures used in *Shoemaker*. Declaring that "[s]election must not be arbitrary or discriminatory,"<sup>189</sup> the court ordered that strict guidelines be established to protect confidentiality and ensure reliability.<sup>190</sup> Implicitly recognizing the concerns noted by the court in *Allen v. City of Marietta*,<sup>191</sup> the court of appeals rejected the district court's on-the-job use limitation and held that testing was permissible when the government suspected that illicit drug use had occurred within twenty-four hours of the required test.<sup>192</sup>

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184. *McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir. 1987).

185. *Id.* (citing *United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951); *Allen v. City of Marietta*, 601 F. Supp. 482, 489-90 (N.D. Ga. 1985)).

186. 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

187. *McDonell*, 809 F.2d at 1306 (quoting *Security and Law Enforcement Employees Dist. Council 82 v. Carey*, 737 F.2d 187, 202 (2d Cir. 1984)).

188. *Id.* at 1308.

189. *Id.*

190. *Id.* at 1309.

191. 601 F. Supp. 482, 489-91 (N.D. Ga. 1985). *See supra* notes 95-96 and accompanying text.

192. *McDonell*, 809 F.2d at 1309.

THE DRUG-FREE FEDERAL WORKPLACE: ANALYSIS OF THE PRESIDENTIAL ORDER

Executive Order No. 12,564 is a broad statement of presidential findings and policy issued to demonstrate federal leadership in combatting drug abuse. Although it is not an implementing directive by itself, the order grants authority to heads of executive agencies to "establish a program to test for the use of illegal drugs by employees in sensitive positions."<sup>193</sup> Although the directive allows some discretion in determining the criteria and extent of testing,<sup>194</sup> that authority is circumscribed by judicial standards delimiting the scope of drug surveillance programs.

In order to establish the principles on which the federal drug surveillance program rests, the President prefaced the text of the order by enumerating nearly a dozen policy goals the administration seeks to achieve. These include preserving bureaucratic efficiency, maintaining public confidence, protecting against threats to public and employee health and safety, and preventing the compromise of national security and law enforcement.<sup>195</sup> Based on these policies, the order requires each executive agency to establish a drug surveillance program that affords "due consideration of the rights of the government, the employee, and the general public."<sup>196</sup> With the broad objective of eliminating illicit drug use by federal employees, the order specifies general agency responsibilities, procedures, administrative standards, and the grounds for testing employees.<sup>197</sup>

*Agency Responsibilities*

The President's order specifically assigns responsibilities for both internal programs and government-wide coordination. Section two of the order charges agency heads to develop surveillance programs consisting of four basic elements: training of supervisory personnel in identification and control of illicit drug use, provision for employee self-referral and supervisory referral, an Employee

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193. Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,890 (1986).

194. *Id.*

195. *Id.*, 51 Fed. Reg. at 32,889.

196. *Id.*, 51 Fed. Reg. at 32,890.

197. *Id.*

Assistance Program to coordinate rehabilitation, and identification of illegal drug use via "testing on a controlled and carefully monitored basis."<sup>198</sup> The directive also requires each agency plan to include a statement of policy that addresses "expectations regarding drug use and the action to be anticipated in response to identified drug use."<sup>199</sup>

The Director of the Office of Personnel Management is further charged with developing a model Employee Assistance Program, ensuring that appropriate coverage for drug abuse is included in the Federal Employee Health Benefits Program, and coordinating the government's drug awareness and education program.<sup>200</sup> The order also directs the Attorney General of the United States to review agency programs and provide advice on implementation of these programs.<sup>201</sup> The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for testing.<sup>202</sup>

With the exception of the policy statement, the above-noted provisions are not directly attributable to urinalysis case precedent. Although the policy statement may have been a reaction to the concerns regarding notice enunciated in *Capua v. City of Plainfield*,<sup>203</sup> the distribution of agency responsibilities and general program outlines apparently are intended as a general plan to create an efficient, rehabilitation-based program to eradicate the effect of illicit drug use on federal agencies.

### *Programs, Procedures, and Administrative Actions*

Sections three through five of the order detail the elements of the federal drug surveillance plan that are critical to analysis of a fourth amendment challenge. The order sets forth those factors that make up the first step of the *Terry* analysis: justification for intrusion on the individual's privacy. It directs agency heads to es-

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198. *Id.*

199. *Id.*

200. *Id.*, 51 Fed. Reg. at 32,892.

201. *Id.*, 51 Fed. Reg. at 32,890.

202. *Id.*, 51 Fed. Reg. at 32,891.

203. 643 F. Supp. 1507 (D.N.J. 1986). In characterizing the intrusiveness of urinalysis testing, the court found the absence of notice of testing and procedures to be critical. *Id.* at 1511-12.

establish testing programs "based upon the nature of the agency's mission and its employees' duties . . . and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position."<sup>204</sup> This language clearly requires the agency head to quantify and balance the government's interests against those of the employee. In order to support the system of supervisory and self-referral, the order also prescribes a voluntary testing plan.<sup>205</sup>

The order authorizes employee testing in five specified circumstances: voluntary submission, follow-up to counselling or rehabilitation through the Employee Assistance Program, reasonable suspicion that an employee has used illegal drugs, examination subsequent to an accident or unsafe practice, and application for employment.<sup>206</sup> A sixth circumstance justifying testing—random screening—can be inferred from the structure and language of the order.<sup>207</sup> Voluntary and follow-up testing are firmly grounded in principles of consent. The objective criteria of reasonable suspicion and post-accident examinations flow directly from *McDonell v. Hunter*<sup>208</sup> and *Division 241 Amalgamated Transit Union v. Suscy*,<sup>209</sup> respectively. Although four of these circumstances appear to justify intrusion, both testing of applicants and random surveillance programs require additional scrutiny.

Although not presented with the issue at trial, the district court in *McDonell* addressed job applicant testing with a footnote. Amending its holding that urinalysis testing required a basis of reasonable suspicion, the court declared that "[t]he Fourth Amendment . . . does not preclude taking a body fluid specimen

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204. Exec. Order No. 12,564, 51 Fed. Reg. at 32,890 (1986).

205. *Id.*

206. *Id.*

207. *Id.* Section 3(c) states, in part: "[i]n addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances. . . ." *Id.* Subsection (a) mentions no *specific* circumstances authorizing testing; subsection (b) addresses voluntary testing. *Id.* Because subsection (c) authorizes testing on the basis of reasonable suspicion of use, as part of a post-accident examination, and during the course of rehabilitation through the Employee Assistance Program, authority to test under subsection (a) necessarily extends beyond those boundaries. The language regarding frequency and criteria for testing in subsection (a) may be broad enough to allow for random urinalysis testing.

208. 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

209. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

as part of a pre-employment physical.”<sup>210</sup> The court offered no rationale for this assertion, but the fact that such specimens are normally required for a full physical examination supports the court’s position.<sup>211</sup> Further, without benefit of an on-the-job observation, the potential employer has no less intrusive means by which to protect its interests.<sup>212</sup> *McDonell* therefore suggests that a government agency may test applicants for the presence of illicit drugs without additional implication of fourth amendment protections.

With the exception of its sanction in the armed forces,<sup>213</sup> courts have validated random or blanket urinalysis testing in only three instances. In *Shoemaker v. Handel*, the court of appeals extended the balancing test to its logical limits and held that a sufficiently compelling government interest would preclude the requirement of an objective standard of individualized suspicion to protect individual privacy interests.<sup>214</sup> The court ruled that privacy interests could be protected from arbitrary interference by other safeguards.<sup>215</sup> The Eighth Circuit explicitly accepted that reasoning in its modification of the district court’s judgment in *McDonell v. Hunter*.<sup>216</sup> In contrast, the Fifth Circuit seems to have embraced the holding in *Shoemaker* by its silence in *National Treasury Employees Union v. Von Raab*.<sup>217</sup> Both courts apparently determined that the procedural and administrative safeguards inherent in the testing program would provide adequate protection to individual privacy interests.<sup>218</sup> These decisions support a conclusion that a

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210. *McDonell*, 612 F. Supp. at 1130 n.6.

211. Miller, *supra* note 85, at 236-37.

212. *Id.* at 237.

213. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1985).

214. *Shoemaker v. Handel*, 795 F.2d 1136, 1142-43 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986). The author does not intend to imply that the court’s analysis is unfounded, as the Supreme Court has recognized that such an approach may be required by the circumstances at issue. See *Delaware v. Prouse*, 440 U.S. 648, 654-55.

215. *Shoemaker*, 795 F.2d at 1142-43.

216. 809 F.2d 1302 (8th Cir. 1987) “[U]rinalysis may be performed uniformly or by systematic random selection. Selection must not be arbitrary or discriminatory.” *Id.* at 1308.

217. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987). The court never described its requirement of alternative safeguards in so many words. See *id.* at 176-80.

218. *Id.*, *McDonell*, 809 F.2d at 1308-09.



government interest of sufficient magnitude will justify random urinalysis testing.

The second prong of the *Terry* analysis, dealing with the scope of intrusion, requires an examination of the procedures and personnel actions mandated in the order. Each agency must provide sixty days' notice to its employees prior to implementation of any program, and it must allow employees the opportunity to exercise self-referral or submit medical documentation that would support a legitimate use of specific drugs.<sup>219</sup> In addition, the order requires testing programs to include procedures for retention of records and specimens, for retesting, and for the protection of the confidentiality of test results and related medical and rehabilitation records.<sup>220</sup> Finally, collection procedures must allow individual privacy, unless circumstances justify a belief that the individual might adulterate or substitute the specimen.<sup>221</sup>

The use of test results is limited to personnel actions. The order declares that "[a]gencies are not required to report to the Attorney General for investigation or prosecution . . . [information] received as a result of the operation of drug testing programs."<sup>222</sup> When an individual's test results are positive, agencies are authorized to take "appropriate personnel action," including referral to the Employee Assistance Program for rehabilitation, to institute disciplinary action, or to discharge the individual from employment.<sup>223</sup> Disciplinary action is not mandatory when the employee either voluntarily submits to testing (or identifies himself) or obtains counselling and rehabilitation subsequent to identification and refrains from subsequent use. The order requires termination when an employee refuses to seek counselling and rehabilitation or fails to refrain from use after identification.<sup>224</sup> The federal plan therefore effectively mandates discharge following a second finding of illicit drug use.

The option of making a referral to rehabilitation and taking concurrent personnel action is modified by the requirement that em-

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219. Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,890-91 (1986).

220. *Id.*, 51 Fed. Reg. at 32,891.

221. *Id.*

222. *Id.*, 51 Fed. Reg. at 32,892.

223. *Id.*, 51 Fed. Reg. at 32,891.

224. *Id.*

employees occupying sensitive positions be removed until completion of rehabilitation.<sup>225</sup> Agency heads are granted discretion to reinstate an employee as part of a rehabilitation program, subject to a determination that the return "would not pose a danger to public health or safety or the national security."<sup>226</sup>

The order also authorizes evidentiary use of test results in any adverse action against the employee, but prescribes confirmation of the results by admission or a second analysis of the same specimen prior to initiation of proceedings.<sup>227</sup> In light of the decision in *Jones v. McKenzie*,<sup>228</sup> if initial screening is done with the Syva EMIT test, department programs should require confirmation by an alternative testing process. Finally, agencies must also allow rebuttal of a positive test result by "other evidence that an employee has not used illegal drugs."<sup>229</sup>

The order's procedural and administrative provisions delineate the general structure envisioned for executive agency drug surveillance programs, and they appear to provide some safeguards for the protection of employee privacy interests. By addressing the concerns of notice and confidentiality while seeking to minimize intrusion and afford procedural safeguards, the order incorporates judicial mandates into an efficient, effective program to eradicate drug abuse in the federal workplace.

### CONCLUSION

Illicit drug use has a debilitating effect on a significant portion of the nation's work force and causes immeasurable losses in productivity each year. In the federal work force, drug abuse poses an unparalleled threat to public health and safety and to the integrity of law enforcement and national security agencies.

Executive Order No. 12,564 embodies the recognition that urinalysis testing, in combination with education and rehabilitation programs, is the most effective means to identify and combat

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225. *Id.*

226. *Id.*

227. *Id.*

228. 628 F. Supp. 1500 (D.D.C. 1986).

229. Exec. Order No. 12,564, 51 Fed. Reg. at 32,891. One alternative form of evidence is the concurrent blood test, which is currently employed by the Federal Railroad Administration to confirm postaccident test results. See Miller, *supra* note 85, at 235.

drug abuse in the federal work force. Because the order arguably includes the most controversial element of drug testing—random screening<sup>230</sup>—and because it also contemplates the taking of specimens without a search warrant, a balancing test must be applied under the analysis enunciated by the Supreme Court in *Terry v. Ohio*.<sup>231</sup> Constitutional validation of the drug surveillance plan requires a qualitative assessment of government interests in comparison with the individual's reasonable privacy expectations. If the government interests are of sufficient magnitude, intrusion may be justified. The analysis in *Terry* also requires an examination of the methods, the objectives, and the degree of intrusion to ensure that the government's interference with individual privacy is reasonably related to its purported goal.<sup>232</sup>

Any challenge to Executive Order No. 12,564 must initially suffer from a lack of ripeness. As the order merely authorizes federal agencies to initiate and implement drug surveillance programs, it is an inherently general description of the contemplated plan. The *Terry* analysis requires a balancing of discrete factors, and therefore necessarily implicates a fact-specific analysis. Because the order is not sufficiently fact specific, any challenge to the federal drug surveillance program must await implementation of a specific agency directive.

By its terms, any order in compliance with Executive Order No. 12,564 will fulfill the first tier of the *Terry* analysis and a substantial degree of the second level.<sup>233</sup> The key to the validation of federal drug surveillance testing will then be the judiciary's reaction to the intrusiveness of urinalysis testing and its qualitative assessment of the scope of the intrusion.

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230. See *supra* note 207.

231. 392 U.S. 1 (1968).

232. See *supra* notes 50-66 and accompanying text.

233. See *supra* notes 39-47 and accompanying text.