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File Drug Program

THE LEGAL IMPLICATIONS OF URINALYSIS TESTING

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LEGAL IMPLICATIONS OF URINALYSIS TESTING

I.

INTRODUCTION

The Department of the Navy has instituted an aggressive program to eliminate drug abuse among its civilian employees. This program is essential because of the very real dangers to the safety of personnel, the risk of destruction of property, and the significant impairment of the Navy's day to day operations caused by employees who are under the influence of drugs on the job or are otherwise affected by drug use. These deleterious effects on the reliability and readiness of naval personnel and units are especially acute where civilian employees who use or abuse drugs are engaged in the performance of duties which are critical to the mission of the Navy and Marine Corps or to the protection of public safety. Consequently, the key feature of the Navy's anti-drug program is the urinalysis testing of civilian employees in "critical jobs." "Critical jobs" are those positions which fall within one or more of the following categories:

(1) Law enforcement positions;

(2) Positions involving national security, or the internal security of the Navy, in which drug abuse could cause disruption of military operations, destruction of property, threats to the safety of personnel, or have the potential for unwarranted disclosure of classified information; or

(3) Positions involving protection of property or persons from harm.

Examples of such duties includes duties aboard ships and aircraft; duties that involve the handling of weapons, or entry into nuclear spaces; fire, casualty and security control; air and sea traffic control; the operations of vehicles or other machinery; and any other similar functions that involve the operation, maintenance or repair of military systems or equipment. A complete listing of the positions which have been identified as "critical jobs" is attached as Appendix _____. For employees occupying positions which have been identified as "critical jobs", urinalysis testing will be conducted generally in two circumstances:

First, urinalysis testing will be conducted whenever there is probable cause to believe that an employee in a "critical job" is under the influence of drugs on the job. Second, since drug use or abuse off the job adversely affects job performance and because it is not possible, solely on the basis of observation, to determine in every circumstance whether an employee is under the influence of drugs, employees in "critical jobs" will be subjected to periodic testing.__/

No force is authorized to compel employees to submit to testing. Accordingly, employees may refuse to submit to the urinalysis testing. However, employees who refuse to submit to either probable cause or periodic testing testing will face

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__/ Urinalysis testing is also authorized before appointment or selection to a critical job and in connection with safety investigations. These testing circumstances are not discussed separately because they are sufficiently similar to the probable cause and periodic testing. Testing of applicants is similar to periodic testing because it is conducted in the absence of individualized suspicion. Testing in connection with safety investigations closely resembles probable cause testing.

administrative and disciplinary actions based on their refusal to undergo urinalysis testing. Administrative action will normally consist of detail to non-critical duties. Disciplinary action may include removal from the federal service.

Employees whose urinalysis test results are confirmed to be positive also face the same administrative and disciplinary action.__/

It is anticipated that employees will raise a number of legal objections to the Navy's urinalysis testing program in a variety of forums, including the Merit Systems Protection Board (MSPB) and the Federal Courts.__/ Accordingly, this memorandum will discuss the constitutional and other legal issues which employees are expected to raise regarding the Navy urinalysis testing program.__/ This memorandum should be used to prepare responses to those challenges.

__/ In addition, when the preliminary results of probable cause testing are positive, temporary administrative action in the form of reassignment to non-critical duties may be taken until further confirmation of the test results. If the test results are not confirmed, no disciplinary action may be taken, and the temporary administrative action is rescinded.

__/ This memorandum will not discuss issues relating to bargaining aspects of the program under the Federal Labor Management Relations Act, 5 U.S.C. § 7101 et seq. Those issues will be addressed in a separate memorandum. There also will be no discussion of potential litigation in connection with the Equal Employment Opportunity Commission (EEOC). Rather, the issue of Handicap Discrimination which could be raised before the EEOC will be discussed in relation to litigation before the Federal Courts and the MSPB.

__/ The issues discussed are those which are reasonably anticipated to arise as well as those which actually have been raised in connection with a suit seeking to enjoin the Department of the Army's urinalysis testing program. That case is National Federation Employees v. Weinberger, C.A. No. 86-0681 (D.D.C. filed March 13, 1986).

II.

FOURTH AMENDMENT ISSUES

A. GENERAL FOURTH AMENDMENT PRINCIPLES

Employees are likely to assert the claim that the Navy's urinalysis testing program runs afoul of the Fourth Amendment's prohibition against unreasonable searches and seizures.__/ In order fully to understand why these Fourth Amendment claims must fail, it will be helpful to begin with a statement of general principles relating to the Fourth Amendment.

1. The Purpose Of The Fourth Amendment Is To Protect Against Arbitrary Government Invasions Into Individuals' Privacy.

"The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). "The Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, . . . and was intended to protect the 'sanctity of a man's home and the privacies of life . . . from searches under unchecked general authority.'" Stone v. Powell, 428 U.S. 465, 482 (1976) (citations and footnote omitted).

__/ 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 person or things to be seized.

2. The Fourth Amendment Is Violated Only When There Is A Search Within The Meaning Of The Amendment And That Search Is Unreasonable.

a. Two Questions Must Be Addressed

A determination as to whether a particular action comports with or violates the Fourth Amendment embraces two discrete questions. The first one is whether the Fourth Amendment applies at all, i.e., whether there has been a search or seizure within the meaning of the Fourth Amendement. The second question is addressed only if there has been such a Fourth Amendment search or seizure. It is whether the search was reasonable. The legal principles for determining each of these issues are set forth below.

b. To Be A Search Within The Fourth Amendment There Must Be Government Action Which Intrudes On Legitimate Expectations Of Privacy.

The issue of whether an action constitutes a search within the meaning of the Fourth Amendment itself embraces two discrete issues. First, the action at issue must be governmental--as opposed to private--action. Second, that governmental action must be shown to intrude into a "justifiable", "reasonable", or "legitimate expectation of privacy" of an individual. Smith v. Maryland, 442 U.S. 735, 740 (1979); Katz v. United States, 389 U.S. 347 (1967).

With regard to the requirement that there be governmental action, the claim is sometimes made that the Fourth Amendment is implicated only by governmental action when that governmental action has a law enforcement purpose, and that the Fourth Amendment does not apply to governmental action with a civil

purpose. See New Jersey v. T.L.O., 105 Ct. 733, 740 (1985). Shoemaker v. Handel, 619 F. Supp. 1089, 1097-98 (D.N.J. 1985) (Shoemaker v. Handel II). However, the Supreme Court has rejected such an argument and has held that the Amendment's prohibitions extend to all governmental action, regardless of whether the purpose of such action is related to investigation of criminal activities or some civil purpose. Id.

The requirement that the individual demonstrate that the governmental action intrude upon "legitimate" or "reasonable" expectations of privacy is also a two part demonstration. First, the individual must establish that he has exhibited an actual, subjective expectation of privacy, i.e., that he seeks to preserve something as private. Smith v. Maryland, 442 U.S. at 740. Second, he must show that his "subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable", whether, in the words of the Katz [v. United States, 389 U.S. 347 (1967)] majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." Id. __/ The reasonableness or legitimacy of a privacy expectation is determined by balancing the interests of society against the individual interests at stake. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984).

__/ Normally, the second factor--whether a subjective privacy expectation is reasonable in the view of society--is controlling. Hudson v. Palmer, 104 S. Ct. 3194, 3199 n.7 (1984).

c. A Search That Is Reasonable Does Not Violate The Fourth Amendment

While a showing of governmental action which intrudes upon "legitimate" privacy expectations is necessary in order to establish the applicability of the Fourth Amendment, such a showing does not automatically render a search violative of that Amendment. Rather, a search does not violate the strictures of the Fourth Amendment as long as it is "reasonable."

The determination of the reasonableness of a search "is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). Generally, however, it involves a two step process. First, consideration must be given to whether the decision to conduct the search should be evidenced by a warrant. This requirement flows from the Fourth Amendment's warrant clause, and the general rule here is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara v. Municipal Court, 387 U.S. at 528-29.

After giving consideration to the warrant requirement, the determination of the reasonableness of a search involves a balancing of competing public and private interests:

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which

> the search entails. Camara v. Municipal Court, supra, 387 U.S. at 536-537, 87 S. Ct., at 1735. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

New Jersey v. T.L.O., 105 S. Ct. at 741.__/ Usually, this balancing of competing interests will favor the government when the courts determine that there is "probable cause" to initiate a search, since "'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." Camara v. Municipal Court, 387 U.S. at 534. However, there are certain situations where searches conducted on less than probable cause will be reasonable because of the balance of interests in those situations. "[W]hat is reasonable depends on the context within which a search takes place." New Jersey v. T.L.O., 105 S. Ct. at 741; Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975).

Having set forth the general principles which govern Fourth Amendment search and seizures, it is now appropriate to discuss how they apply to the particular circumstances involved in the Navy's urinalysis testing program.

__/ In conducting this balancing "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Shoemaker v. Handel II, 619 F. Supp at 1098.

B. URINALYSIS TESTING CONSTITUTES A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

It is clear that the Navy's urinalysis testing program invokes the protections of the Fourth Amendment for those employees who will be tested. Although the purpose of the testing program -- the investigation of employee misconduct having effects on job safety -- is civil in nature, it is the type of governmental activity which has been found to implicate the Fourth Amendment. See New Jersey v. T.L.O., 105 S. Ct. at 740; Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978); Camara v. Municipal Court, 387 U.S. at 528.

Furthermore, civilian employees have expectations of privacy upon which urinalysis testing intrudes. The courts have recognized that the taking of bodily fluids, such as urine samples, does, to some degree, intrude on privacy expectations which are recognized as "justifiable", "reasonable", or "legitimate". See Schmerber v. California, 384 U.S. 757, 767 (1966) (a blood test plainly constitutes a search). The taking of bodily fluids impinges on two distinct privacy expectations, privacy expectations in the contents of an individual's urine and privacy expectations regarding the manner in which is normally discharged. As one court has explained:

> urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One 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, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory

> to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids. Therefore, governmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment. Allen v. City of Marietta, 601 F. Supp. 482, 488-89, (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983).

McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (D. Ia. 1985)

Moreover, the fact that the urinalysis will be conducted on civilian employees does not alter the legitimacy of the expectations of privacy with regard to the taking of urine samples. Civilian employees do not lose all expectations of privacy merely because they accept government employment. See Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985). Compare New Jersey v. T.L.O., 105 S. Ct. at 742 (school children retain expectations of privacy) with Hudson v. Palmer, 104 S. Ct. at 3201 (prisoners have no expectations of privacy in their cells). However, their expectations of privacy may not be so great as those of private citizens. See Turner v. Fraternal Order of Police, 500 A.2d, 1005 1008 (D.C. App. 1985).

Consequently, as numerous courts have recognized, since urinalysis testing involves governmental action which intrudes, to some degree, on employees' privacy expectations, it constitutes a search within the meaning of the Fourth Amendment. To conclude that urinalysis testing does implicate the Fourth Amendment, however, merely begins, rather than ends, the inquiry. It must

still be determined whether, under the circumstances, the testing is reasonable. Since the circumstances giving rise to periodic testing differ from those leading to probable cause testing, the reasonableness of each type of testing will be discussed separately below. However, as it will be established, the conclusion drawn regarding each type of testing will be the same. The urinalysis testing is reasonable and, consequently, does not violate the Fourth Amendment.

C. PERIODIC URINALYSIS TESTING IS REASONABLE

1. The Circumstances Of The Search

The relevant circumstances by which the constitutionality of random urinalysis will be judged may be summarized briefly. The urinalysis testing will be conducted periodically at times determined by the Commanding Officer of an installation. The Commanding Officer will also determine, by neutral criteria, the employees to be tested. In other words, the Commanding Officer will not base his decision to test a specific employee by relying on particular individual characteristics of that employee. Once the Commanding Officer has determined who and when to test, he will issue orders to his subordinates who will actually conduct the tests. Those orders will explicitly set forth the procedures to be followed by the subordinates, and they allow no room for the exercise of discretion on the part of the subordinates. As is evident from this summary, the periodic testing does contemplate issuance of a functional warrant by the Commanding Officer, but it is not conducted based on probable cause, or, indeed any individualized suspicion.

2. The Fourth Amendment's Warrant Requirement Is Fulfilled In The Context Of Periodic Urinalysis Testing.

a. No Warrant Is Required For Periodic Urinalysis Testing Because Warrantless Searches Are Reasonable In A Pure Employment Context As Part Of A Legitimate Inquiry Into The Use Of Drugs By Employees.

The Supreme Court has recognized that, notwithstanding the Fourth Amendment's warrant clause, warrants are not necessary in every case. See, e.g., New Jersey v. T.L.O., 105 S. Ct. at 743 (warrantless searches of school children are reasonable); Marshall v. Barlow's, Inc., 436 U.S. 307 (1979) (warrantless searches of closely regulated industries); Terry v. Ohio, 392 U.S. 1 (1968) (immediate danger to police officers or to the community renders warrantless search reasonable); Schmerber v. California, 384 U.S. 757 (1966) (risk of destruction of evidence justifies warrantless search). In line with the Supreme Court's precedents in this area, one court has found that "[o]ne of the exceptions to the warrant requirement which appears to have emerged is a class of cases involving searches of government employees. Allen v. City of Marietta, 601 F. Supp. at 489 (N.D. Ga. 1985).

In the Allen case, the court reviewed a line of cases involving warrantless searches of government employees. It found that when the government undertook a search of an employee for a law enforcement investigatory purpose the search was unreasonable in the absence of a warrant. Id. at 489-90. See United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951); United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972), aff'd in part and rev'd in part, 479 F.2d 290 (2d Cir. 1973), rev'd, 415 U.S. 239 (1974). However,

"where the purpose of the search is not to gather evidence of a crime unrelated to the employee's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities[,]" a warrantless search is reasonable. Allen v. City of Marietta, 601 F. Supp. at 491. See United States v. Collins, 349 F.2d 863 (2d Cir. 1965), cert. denied, 383 F.2d 960, reh'g denied, 384 U.S. 947 (1966); United States v. Bunkers, 521 F.2d 1217 (9th Cir. 1975), cert. denied, 423 U.S. 989 (1975); United States v. Sanders, 568 F.2d 1175 (5th Cir. 1978); United States v. Grisby, 335 F.2d 652 (4th Cir. 1964); United States v. Donato, 269 F. Supp. 921 (E.D. Pa. 1967), aff'd, 379 F.2d 288 (3d Cir. 1967). Construing this precedent, the Allen court upheld a warrantless urinalysis of city employees because it found that it was conducted in a purely employment context unrelated to any criminal investigation or procedure:

> The City has a right to make warrantless searches of its employees for the purpose of determining whether they are using or abusing drugs which would affect their ability to perform safely their work with hazardous materials. The court finds, therefore, that the urinalysis tests administered in this case were not ureasonable searches in violation of the fourth amendment.

Allen v. City of Marietta, 601 F. Supp. at 491.

The exception to the warrant requirement found by the Allen court clearly would apply to the Navy's periodic urinalysis testing. As with Allen, the Navy's urinalysis testing is conducted in a purely employment context. It has no criminal or law

enforcement investigatory purpose. That this is so may readily be demonstrated by reference to the Navy's implementing instruction.

The implementing instruction states that its purpose

> is to focus enforcement and personnel resources and the attention of managers and supervisors on those aspects of the civilian drug and alcohol abuse problem which affect military personnel readiness and mission performance, and to ensure in every instance that strong corrective measures are taken to promote the efficiency of the service.

It clearly relates solely to mission performance. Nowhere is there mention of conducting law enforcement activities. Later, in describing the actions to be taken on the basis of positive urinalysis results, the instruction speaks only in terms of administrative and disciplinary actions related to the job. It neither requires nor contemplates that the urinalysis results will be used to prosecute employees in a criminal proceeding. Since the urinalysis testing will be conducted in a purely employment context, therefore, it falls within an exception to the warrant requirement. Allen v. City of Marietta, 601 F. Supp. at 491.

b. No Warrant Is Required For Periodic Testing Because Employees In Critical Jobs Effectively Consent To Such Testing

The Allen exception is not the sole basis for concluding that a warrant is not required for periodic urinalysis testing of government employees. An exception to the search warrant requirement also has been recognized for "pervasively regulated businesses" and closely related industries "long subject to close superivision and regulation." See Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1972);

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). See also Shoemaker v. Handel, 608 F. Supp. 1151, 1155-56 (D.N.J. 1985) (Shoemaker v. Handel I). In such industries the pervasiveness and long standing nature of the government regulation mean that those choosing to enter the business must be aware of the close supervision. Their knowledge of the pervasive regulation diminishes their expectations of privacy. Accordingly, those who engage in such industries effectively consent to intrusions such as searches in the absence of a warrant. Id. The Supreme Court has explained the principles governing this exception in the following way:

> Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v. United States, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade) and firearms (Biswell) are industries of this type; when an entreprenauer embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.
>
> Industries such as these fall within the "certain carefully defined classes of cases," referenced in Camara, 387 U.S. at 528. The element that distinguishes these enterprises from ordinary businesses in a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. Businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. The businessmen in a regulated industry in effect consents to the restrictions placed upon him. Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973).

Marshall v. Barlow's, Inc, 436 U.S. at 313.

This regulated industry exception to the warrant requirement will apply so as to allow urinalysis testing of Federal employees in the absence of a warrant. Certainly, it may be demonstrated that Federal employment is heavily regulated. This is especially true of critical jobs within government agencies where there are regulations concerning the continuing suitability of employees to occupy those positions. In particular, medical testing of employees to assure safety on the job is an essential part of this comprehensive regulation of employees in those positions. Similarly, it may be shown that these regulations are of longstanding duration. Consequently, just as those in private industry are deemed to consent to the regulations, civilian employees should be viewed as consenting, in effect, to the requirement to submit to urinalysis testing. Cf. Shoemaker v. Handel I, 608 F. Supp. at 1155-56 (jockeys fall within the regulated industry exception to the warrant requirement because of the pervasive and longstanding regulation of the horseracing industry).

Moreover, the regulated industry exception to the warrant requirement would appear especially to apply to those employees designated to be in critical jobs as a result of their involvement with the custody and control of national security classified information or nuclear weapons. Those who are entrusted with such information or weapons are exposed to such government oversight that they could have no reasonable exceptation of privacy in the contents of their urine. The government conducts searching inquiries into the backgrounds of those being considered for

such positions of trust. A person's habits, from his drinking patterns to his financial dealings to his sexual practices, come under continuing government scrutiny. Anyone who accepts a position involving access to classified information voluntarily chooses to subject himself to the full range of this regulation.

In addition, the close scrutiny to which the government subjects those in such positions is of such long duration that anyone accepting such a position must reasonably be aware that the same scrutiny will be focused on them. Because of this, any person accepting a position involving custody and control of classified information or nuclear weapons in effect consents to the government scrutiny. For these reasons, then, it would be particularly appropriate to apply this exception to the warrant requirement to those employees.

c. Assuming Arguendo A Warrant Is Required For Periodic Urinalysis Testing, The Warrant Requirement Is Fulfilled By The Commanding Officer's Authorization.

i. The Purpose Of The Warrant Requirement Is To Prevent Arbitrary Searches.

The fundamental purpose underlying the Fourth Amendment's warrant requirement is to prevent government officials in the field from exercising "unbridled discretion . . . as to when to search and whom to search." Marshall v. Barlow's, Inc., 436 U.S. at 323; Camara v. Municipal Court, 387 U.S. at 532. As the Supreme Court has stated, "[t]he requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Schmerber v. California,

384 U.S. at 770. The warrant provides assurances that the search is reasonable, is authorized by a statute or administrative scheme, and delimits the scope and object of the search. Marshall v. Barlow's, Inc., 436 U.S. at 307; Camara v. Municipal Court, U.S. at 532. It also serves as a badge of authority for the official, and it provides a vehicle for the individual being searched to challenge the decision to search at a later time. Camara v. Municipal Court, 387 U.S. at 532.

ii. The Authorization By The Commanding Officer Serves The Same Purposes As Those Served By A Warrant.

Although a Commanding Officer is not technically a magistrate, his review of the facts and authorization to conduct periodic urinalysis testing serves all the purposes intended by the warrant requirement. His neutral determination as to when and whom to subject to urinalysis prevents officials in the field from conducting urinalysis at their whim whenever and upon whomever they please. It assures that the decision to conduct urinalysis testing will be an "informed, detached and deliberate determination," Schmerber v. California, 384 U.S. at 770, made by one removed from the pressures of the field. Furthermore, the requirement to have the Commanding Officer authorize the periodic testing assures that the testing will be conducted only as authorized by the Navy's program. Finally, his authorization will evidence to the employees the authority under which those who conduct the test are are operating, and it will allow the employee to challenge the decision to search at a later time.

iii. The Courts Have Held That A Commanding Officer Qualifies As A Neutral And Detached Magistrate To Issue Warrants.

Since the purposes of the warrant requirement are fulfilled, the fact that a Commanding Officer is not technically a magistrate does not preclude a finding that the Commanding Officer's authorization is, in effect, a warrant which fulfills the constitutional warrant requirement. Indeed, there is judicial authority for the proposition that a Commanding Officer may act in the stead of a magistrate to authorize searches on government installations. See United States v. Banks, 539 F.2d 14, 16-17 (9th Cir. 1976), cert. denied, 429 U.S. 1024 (1976) ("The position of the Commanding Officer . . . is unlike that of the attorney general in Coolidge and the deputy commander in Saylor, who were actively in charge of the investigations when they authorized the warrants. . . . He qualified as a neutral and detached magistrate for the purpose of determining probable cause.") (emphasis added). See also United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975) (The military has authority to search civilian employees on base and "need not be bound by all of the procedural formalities that are imposed upon civilian law enforcement agencies."). Accordingly, authorization by the Commanding Officer fulfills the Fourth Amendment's warrant requirement.

Having demonstrated that the Fourth Amendment's warrant is fulfilled in the context of periodic urinalysis testing, the next step is to determine whether it is also reasonable.

3. Periodic Urinalysis Testing In The Absence Of Individualized Suspicion Is Reasonable Under The Circumstances.

a. Probable Cause Is Not Required To Conduct Periodic Urinalysis Testing.

As explained above, the constitutionality of any particular search depends on whether it is "reasonable", and the determination of the reasonableness of a search requires a balancing of the need to search against the invasion entailed by the search. New Jersey v. T.L.O., 105 S. Ct. at 741; Camara v. Municipal Court, 387 U.S. at 536-37. Normally, the balance of these interests will be struck in favor of the reasonableness of a search where the decision to search was based on "probable cause." See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). "However, 'probable cause' is not an irreducible requirement of a valid search . . . Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonablenss that stops short of probable cause, [the Supreme Court has] not hesitated to adopt such a standard." New Jersey v. T.L.O., 105 S. Ct. at 743. Rather than imposing a rigid standard, such as "probable cause," the Court has looked to see whether the search was justified at its inception and whether it was reasonable in scope. Id. at 743-44, citing Terry v. Ohio, 392 U.S. 1, 20 (1968).

Periodic urinalysis testing does not depend on any showing of individualized suspicion regarding the employees being tested. Indeed, it deliberately avoids the invocation of testing upon individualized suspicion by basing the determination to test on

neutral factors.__/ As with the probable cause requirement, however, the courts do not adhere to a rigid requirement of individualized suspicion:

> [A]lthough "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." United States v. Martinez-Fuerte, 428 U.S. 543, 560-561, 96 S. Ct. 3074, 3084, 49 L. Ed. 2d 1116 (1976). See also Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" Delaware v. Prouse, 440 U.S. 648, 654-655, 99 S. Ct. 1391, 1396-1397, 59 L. Ed. 2d 660 (1979) (citation omitted).

New Jersey v. T.L.O., 105 S. Ct. at 744 n.8. An examination of the government and individual interests implicated in

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__/ This is important because as one court said regarding state regulations which stripped racing stewards of any discretion as to the selection of jockeys to be subjected to urinalysis:

> There is considerable evidence that a testing approach which requires some element of individualized suspicion would actually increase the ability of the steward to act in an arbitrary and unreasonable manner by enabling him to select jockeys for testing without any clearly defined and objective behavorial criteria for detecting impairment.

Shoemaker v. Handel II, 619 F. Supp. at 1103 (original emphasis).

periodic testing, as well as an explanation of the safeguards present, will demonstrate the reasonableness of the periodic urinalysis testing.

The governmental interests served by periodic urinalysis testing are crucial. The testing serves to protect the public against the well documented threats to safety and property posed by those who are affected by drug usage or abuse. The vital nature of such interests in protecting the public safety has been recognized by the Supreme Court. See, e.g., Delaware v. Prouse, 440 U.S. 648, 658 (1979) (because of the danger to life and property posed by vehicular traffic, "the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, . . . and vehicle inspection requirements are being observed."); Camara v. Municipal Court, 387 U.S. at 535, 537 (the "governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety."). See also Shoemaker v. Handel II, 619 F. Supp. at 1102 ("the state has a vital interest in ensuring that horse races are safely and honestly run").

The substantiality of the public interest in utilizing periodic, randomly timed urinalysis testing to protect the public safety and property is heightened by the fact that drug use among civilian employees in critical jobs cannot otherwise be controlled effectively. Urinalysis testing programs are effective at identifying drug users, and they act as a powerful deterrent to keep employees from using drugs. To require urinalysis testing

based only on individualized suspicion, however, would be impractical. Drug users could take care to avoid detection merely by avoiding use on the job. However, the lingering effects of their drug use, which may not be readily observable to their co-workers or supervisors, may still have devastating effects on their ability to perform their jobs safely. Cf. United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 (1976) (traffic check points away from the border. are the only effective means of controlling illegal immigration).

Balanced against the government's vital interests in protecting the public sector and property is the intrusion into privacy expectations entailed in urinalysis testing. As noted above, there may be some objective intrusion into privacy expectations when employees are subjected to urinalysis testing. Some cases suggest that government employees have no reasonable expectations of privacy with regard to submitting to urinalysis testing because of the government interest in discovering employee misconduct. See Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.) cert. denied, 429 U.S. 1029 (1976) (hereinafter Amalgamated Transit Union v. Suscy) (in view of the government's interest "in protecting the public by insuring that bus and train operators are fit to perform their jobs . . . members of plaintiff Union can have no reasonable expectation of privacy with regard to submitting to blood and urine tests."); Allen v. City of Marietta, 601 F. Supp. at 491 (because a governmental employer has "rights to discover and prevent employee misconduct relevant to the employee's

performance of her duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature"). However, the courts do recognize that urinalysis testing does implicate interests in human dignity and privacy due to the fact the government must observe the employee providing the urine sample. See McDonnell v. Hunter, 612 F. Supp. at 1127 ("urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expecatation of privacy"). However, the intrusion is not significant or severe. See Turner v. FOP, 500 A.2d at 1009 ("The intrusion of a urinalysis test requires a normal bodily function for this purpose. This is not an extreme body invasion.") But see Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984) ("being forced under threat of punishment to urinate into a bottle held by another is purely and simply degrading.").

The factor which plays a crucial role in determining the balance between these competing factors--and thus the reasonableness of periodic urinalysis testing--is the absence of any discretion on the part of the officials in the field. The critical importance of an absence of discretion on the part of the officials in the field in striking the balance between competing interests has been recognized by the Supreme Court:

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See Delaware v. Prouse, 440 U.S. 648, 654-655 (1979); United

> States v. Brignoni-Ponce, supra, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual or that the seizure must be carried out pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers. Delaware v. Prouse, supra, at 663. See United States v. Martinze-Fuerte, 428 U.S. 543, 558-562 (1976).

Brown v. Texas, 443 U.S. 47, 51 (1979) (emphasis added). Moreover, the absence of standards limiting the discretion of officials conducting urinalysis testing has been viewed by at least one lower court as the factor rendering such testing unreasonable. See McDonnell v. Hunter, 612 F. Supp. at 1128 n.4.

To be sure, in some cases in which the Supreme Court has allowed searches in the absences of individualized suspicion based on the presence of "other safeguards" to limit the discretion of offices in the field, the intrusion into privacy expectations has been less severe than the entailed in urinalysis. See United States v. Martinez-Fuerte, 428 U.S. at 557-58 (checkpoint stop entailed only a brief detention and limited quetioning but no search). However, the Court has recognized that even intrusive searches or seizures may be justified in the absence of individualized suspicion by limiting the discretion of officials in the field. For example, in Delaware v. Prouse, 440 U.S. at 657, 663, the Court found that random automobile stops were unreasonable because the physical and psychological intrusions occasioned by random stop were not minimal, but stated that its holding did "not preclude the State of Delaware or other States from developing

methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." (Emphasis added.)

As explained above, officials conducting the periodic urinalysis testing exercise no discretion. They merely follow the explicit directions of the Commanding Officer. Since the officials in the field have no discretion to exercise, the employees are assured that their privacy expectations will be invaded no more than necessary to achieve the legitimate and compelling interest of protecting public property and safety. Accordingly, urinalysis testing in the absence of individualized suspicion is reasonable.

4. Assuming Arguendo That Probable Cause Is Required, The Requirement Is Met Here By A Neutral Administrative Plan For Testing.

Even where "probable cause" is deemed necessary to make a search reasonable under the Fourth Amendment, the government is not always required to make a particularized showing of suspicion. Rather, as the Supreme Court has recognized, the nature of the search must be considered, to determine what facts may fulfill the "probable cause requirement." Camara v. Municipal Court, 387 U.S. at 534-38. While in a criminal investigation context, a high threshold showing of particularized suspicion is required to establish "probable cause", in other contexts, unrelated to the criminal process, "[p]robable cause in the criminal law sense is not required." Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978). See also Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1223-25 (D.C. Cir. 1981). "Where considerations of

health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." Id. at 538, quoting Frank v. Maryland, 359 U.S. at 383 (Douglas, J. dissenting).

The Court's decision in Camara provides a good explanation of the reasons underlying this principle as well as of the kind of facts which will establish probable cause in this context. There, the Supreme Court pointed out that, in a criminal investigation, the police might seek to recover specific stolen goods, but that the public interest inherent in such an investigation would not "justify a sweeping search of an entire city conducted in the hope that these goods might be found." Id. at 535. Rather, a search for such goods is reasonable only when there is probable cause to believe they will be uncovered in a particular dwelling. Id.

The Court then contrasted that situation with the circumstances surrounding an inspection program "aimed at securing city-wide compliance with minimum physical standards for private property." Id. There, the "primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." Id. The court then recognized that the only effective way to achieve that public interest was "through routine periodic inspections of all structures." Id. at 535-36. Consequently, the housing agency's decision to conduct an area inspection was "unavoidably

based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building." Id. at 536.

As a result of these factors, as well as the long history of public and judicial acceptance of such inspections and the limited nature of their intrusions, the court found that such area inspections are reasonable and the "probable cause" requirement is fulfilled "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with a particular dwelling." The Court then stated that

> [s]uch [legislative or administrative] standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Camara v. Municipal Court, 387 U.S. at 538. /

It is particularly apt to apply the reasoning of Camara to the context of periodic urinalysis testing. The purpose of the periodic testing is unrelated to any criminal investigation. Rather, its purpose is to secure Navy-wide compliance with regulations prohibiting drug use or abuse. The primary interest

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/ In Marshall v. Barlow's, Inc., the Supreme Court found that the probable cause requirement would be fulfilled in the context of governmental safety inspections by a "showing that a specific business ha[d] been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area". Id. at 321.

at stake is to prevent the development of conditions which present dangers to public safety and property. Furthermore, the only effective way of achieving this public interest is through the periodic urinalysis testing of all employees in critical jobs. These circumstances are remarkably analogous to considerations present in the Camara case. Consequently, it is logical that urinalysis testing would be reasonable under the same circumstances as the area housing inspections of Camara case, that is, when reasonable legislative or administrative standards are satisfied.

The periodic urinalysis testing program contemplates such reasonable administrative standards. The Commanding Officer is free to order urinalysis testing based on the passage time, the nature of the critical job, or the safety record within all critical jobs, among other things. However, his decision to order periodic urinalysis will not depend on the condition of a particular employee. These factors are reasonable in light of the circumstances present and the interests being served. Camara v. Municipal Court, 387 U.S. at 538. Moreover, the testing is limited to only those employees who could create dangerous situations through their use or abuse of drugs. Cf. Jones v. McKenzie, C.A. No. 85-1624, slip op. at 17-20 (D.D.C. Feburary 25, 1986) (urinalysis in the absence of particularized suspicion found unreasonable where the government did not demonstrate a need to test a class of employees not involved in safety).

Consequently, they fulfill the probable cause requirement and render periodic urinalysis testing "reasonable" within the meaning of the Fourth Amendment. Id.

D. PROBABLE CAUSE URINALYSIS TESTING IS REASONABLE.

1. Circumstances Of The Search

The Navy's urinalysis testing program contemplates that testing will occur whenever there is probable cause to believe that an employee is under the influence of a controlled substance while on the job. When there is such probable cause the Commanding Officer of the employee's installation may authorize urinalysis testing of the particular employee suspected.

2. The Fourth Amendment's Warrant Requirement Is Fulfilled In The Context Of Probable Cause Urinalysis Testing.

a. No Warrant Is Required For Probable Cause Urinalysis Testing.

The arguments presented in sections II C.2.a and II C.2.b. regarding the applicability of exceptions to the warrant requirement for periodic testing apply with equal force to probable cause urinalysis testing. Accordingly, they will not be repeated here. There is, however, an additional reason for concluding that a warrant is not required in the context of probable cause testing which is inapplicable to periodic testing.

As the Supreme Court has stated in analyzing whether a warrant is required, "the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."

Camara v. Municipal Court, 387 U.S. at 533. Under this standard, the Court has dispensed with the warrant requirement when the delay incident to obtaining a warrant would have threatened the destruction of the evidence sought to be preserved. See Schmerber v. California, 384 U.S. at 770. See also Turner v. Fraternal Order of Police, 500 A.2d, 1005, 1009n.8 (D.C. App. 1985) ("As a practical matter, this type of evidence [gathered from urinalysis] might be dissipated if the testing process were to be delayed by a cumbersome procedure, such as a search warrant."). Similarly, it has relaxed it where, in the context of a search of a student at school, "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."). New Jersey v. T.L.O., 105 S. Ct. at 743.

Urinalysis testing upon probable cause presents a circumstance appropriate for relaxing the warrant requirement. As with the blood test in Schmerber, the delay incident to seeking out a civilian magistrate - who may be at some great distance from isolated naval installations - could threaten the destruction of the evidence sought to be preserved. See Turner v. FOP, 500 A.2d at 1009 n.8. Moreover, the requirement to obtain the approval of a civilian magistrate would unduly interfere with the swift procedures needed so as to protect the public safety from employees who may pose a danger as a result of drug usage. Accordingly, it should be concluded that no warrant is required under those

circumstances. Indeed, at least one Federal court has reached that conclusion. See Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976) [hereinafter Amalgamated Transit Union v. Suscy] ("Because of the nature of the [blood and urine] tests required, no warrant is necessary."). See also McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (urinalysis testing of Department of Corrections employees on the basis of reasonable suspicion in the absence of a warrant was found to be reasonable); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (the court found warrantless urinalysis testing of city employees to be reasonable based, in part, on the fact the results would not be used in criminal proceedings).

b. Assuming Arguendo A Warrant Is Required For Probable Cause Urinalysis Testing, The Warrant Requirement Is Fulfilled By The Commanding Officer's Authorization.

The arguments presented in Section II C.2.c to the effect that a Commanding Officer may act as a neutral and detached magistrate to issue a warrant in the context of periodic urinalysis testing apply with equal force in the context of probable cause urinalysis testing.

3. Probable Cause Urinalysis Testing Is Reasonable.

As explained above, the touchstone for determining whether a particular search comports with the Fourth Amendment is the reasonableness of the search. New Jersey v. T.L.O., 105 S. Ct. at 741. In turn, the reasonableness of a search requires balancing the need to search against the invasion which the search entails. Camara v. Municipal Court, 387 U.S. at 536-37. In striking the balance between the need to search and the invasion

into privacy interest, "probable cause" normally "is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." Camara v. Municipal Court, 387 U.S. at 534. In other words, even the most intrusive invasion into privacy expectations will be reasonable, under the Fourth Amendment, if there is probable cause to believe fruits or evidence of a crime will be found. Under this standard, there should be no doubt that probable cause urinalysis testing is reasonable.

Indeed, the courts which have considered the issue have upheld urinalysis testing of government employees as reasonable based on probable cause, or, indeed, a standard less onerous than that of probable cause. They have found urinalysis testing to be reasonable when there is merely "reasonable suspicion" as to whether an employee is under the influence of a controlled substance. For example, in Amalgamated Transit Union v. Suscy, the court found that urinalysis of city bus drivers involved in any serious accident or suspected of being under the influence of narcotics was reasonable: "Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." Amalgamated Transit Union v. Suscy, 538 F.2d at 1267. Similarly, in McDonnell v. Hunter, the court concluded that

> the Fourth Amendment allows [the government] to demand of an employee a urine, blood, or breath specimen for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light

> of experience, that the employee is then under the influence of alcoholic beverages or controlled substances.

McDonnell v. Hunter, 612 F. Supp. at 1130 (emphasis added) (footnote omitted). Additionally, in Turner v. FOP, 500 A.2d at 1008-1009, the court upheld urinalysis testing of police officers on the basis of "suspected drug use" which was short of probable cause. See also Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (urinalysis testing of employees involved in accidents who were suspected of using marijuana was reasonable).__/

These cases indicate that the balance between the governmental interest in protecting public safety and property and the individual privacy interests at stake is appropriately struck in favor of the government intrusion when the facts reasonably

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__/ In upholding the reasonableness of urinalysis testing upon probable cause or reasonable suspicion, the courts have rejected the idea that a higher standard than probable cause which applies to intrusions into the body, see Schmerber v. California, 384 U.S. at 770 (the "clear indication" standard), would apply to the taking of urine samples. In doing so, they have refused to accept the premise underlying the argument, i.e., that urinalysis testing is as intrusive as body searches or other searches into the body's integrity. See Amalgamated Transit Union v. Suscy, 538 F.2d at 1267 ("the conditions under which the intrusion is made and the manner of taking the [urine] samples are reasonable."); Shoemaker v. Handel, 608 F. Supp. 1151, 1158 (D.N.J. 1985) ("breathalyzer tests and urinalysis are considered less intrusive than body cavity and strip searches and those searches which have been identified as intruding upon the 'integrity of the body'"); Allen v. City of Marietta, 601 F. Supp. at 488 ("the extraction of blood from an unwilling defendant is qualitatively difference from a requirement that an individual provide the government samples of his biological waste products"). But see Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1985) (urinalysis is analogous to a blood test because interests in human dignity and privacy "are plainly implicated when an inmate is forced to perform in the presence of a prison guard what it ordinarily regarded as private bodily function . . . being forced to urinate into a bottle held by another is purely and simply degrading.").

support a suspicion of drug use.__/ Since the Navy's program employs an even higher level of suspicion, there can be little doubt as to its "reasonableness." Consequently, it is consistent with the Fourth Amendment.

__/ These factors may arise from observation of the employee, see McDonnell v. Hunter, 612 F. Supp. at 1130, or from the mere fact of an accident or mishap, see Amalgamated Transit Union v. Suscy 538 F.2d at 1267; Sanders v. Washington Metropolitan Area Transit Authority, C.A. No. 84-3072 (Jan. 9, 1986).

III.

THE URINALYSIS TESTING PROGRAM DOES NOT OFFEND EMPLOYEES' CONSTITUTIONAL RIGHT TO PRIVACY

A. The Constitutional Right To Privacy Is A Very Narrow One.

In addition to claims under the Fourth Amendment's search and seizure provisions, employees may assert that the Constitution protects individuals from invasions of their privacy by governmental officials. Employees may then claim that the urinalysis testing program constitutes an unreasonable invasion of this right to privacy because it forces employees to release to the government private details of their medical history, it requires them to provide urine samples in the presence of others, and because it intrudes unreasonably into their private lives. However, just as the employees' search and seizure claims must fail because the governmental intrusion is reasonable, so must employees' right of privacy claims fail. Indeed, employees will be unable to show, for the most part, that the constitutional right of privacy affords them any protection with respect to the intrusions entailed in the urinalysis testing program.

1. There Are Two Strands To The Right To Privacy

There is a constitutional right to privacy. It is a right which is not tied to any one constitutional amendment within the Bill of Rights, but, rather, it "has been found under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, and the 'penumbra of the Bill of Rights.'" Simmons v. Southwestern Bell Telephone Co., 452 F. Supp. 392, 394 (W.D. Ok 1978), aff'd, 611 F.2d 392 (10th Cir. 1979) (footnotes omitted). See, e.g., Stanley v. Georgia, 394 U.S. 557, 565 (1969); Terry v. Ohio, 392 U.S. 1,

8-9 (1968); Katz v. United States, 389 U.S. 347, 350 n.5 (1967); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Boyd v. United States, 116 U.S. 616, 630 (1886). However, the parameters of the right to privacy have been narrowly drawn. See Shermco Industries v. Secretary of the Air Force, 584 F. Supp. 76, 103 (N.D. Tx. 1984). It protects only two categories of interests. Id. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). The first strand of the right to privacy - the interest in non-disclosure of personal matters - is referred to as the "confidentiality" strand. See Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979). The second strand - the interest in making certain kinds of important decisions - may be called the "autonomy" strand of the right to privacy. Id. at 1128.

2. The Autonomy Strand Protects Only Fundamental Decisions

Regarding the autonomy strand, the Supreme Court has made clear that the kinds of choices protected by this strand of the right to privacy are only those which are "fundamental" or implicit in the concept of ordered liberty," see Palko v. Connecticut, 302 U.S. 319, 325 (1937), and those are choices relating only to marriage, procreation, contraception, family relationships, and child rearing and education. See Paul v. Davis, 424 U.S. 693, 713 (1976); J.P. v. DeSanti, 653 F.2d 1080, 1087 (6th Cir. 1981); Reilly v. Leonard, 459 F. Supp. 291, 300 (D. Ct. 1978).

3. The Confidentiality Strand Protects Against Public Disclosure Of Private Information

The confidentiality strand of the right to privacy protects against disclosure of personal information relating to decisions protected by the autonomy strand, but is broader in its protections. J.P. v. DeSanti, 653 F.2d at 1088-90. The confidentiality strand also protects against disclosure of information relating to the exercise of an individual's constitutional rights, such as the individual's First Amendment rights. Id. Additionally, it protects against disclosure of other sensitive personal information, although such information may not be directly related to a particular constitutional right being exercised by the individual. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 457-58 (1977) (right to privacy encompasses interest in nondisclosure of the President's personal family papers); United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-80 (3d Cir. 1980) (medical records are within ambit of the the confidentiality strand); Fadjo v. Coon, 633 F.2d 1172, 1174-75 (5th Cir. 1981) (private details of a person's life are protected); Plante v. Gonzalez, 575 F.2d at 1134 (the privacy of one's personal affairs is protected). However, the confidentiality strand is not limitless, "the Constitution does not encompass a general right to nondisclosure of private information." J.P. v. DeSanti, 653 F.2d at 1090.

By applying these concepts to the circumstances surrounding urinalysis testing, it will be demonstrated that the Navy's urinalysis testing program does not violate this right of its civilian employees.

B. There Is No Fundamental Interest In Or Right To Use Controlled Substances.

It is crystal clear that the autonomy strand of constitutional right to privacy affords employees no protection regarding the use of drugs because there is no fundamental right to possess or use the controlled substances the presence of which the urinalysis testing program seeks to determine. See National Organization For the Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 132-134 (D.D.C. 1980) and cases cited therein at 134 n.28; Wolkind v. Selph, 495 F. Supp. 507, 516 (E.D. Va. 1980) aff'd, 649 F.2d 865 (4th Cir. 1981). Since the use of controlled substances does not relate to a fundamental choice, the government is precluded neither from prohibiting the use of those substances by its employees nor from attempting reasonably to discover which employees are using them. J.P. v. DeSanti, 653 F.2d at 1090.__/

__/ Alternatively, employees may argue that their right to privacy is infringed because they will be chilled from taking certain kinds of medication if their use of the medication would be discovered by the government through urinalysis testing. This chilling effect, the argument goes, deprives them of autonomy regarding fundamental decisions as to medical care. This argument should be rejected out of hand because the Supreme Court rejected it thusly in Whalen v. Roe, 429 U.S. at 603. There, the Court considered an argument that a requirement to report prescriptions of controlled drugs to state authorities would deprive individuals of their ability to acquire and use such medication on the advice of their physicians. The Court, however, noted that the state reporting requirement did not limit the choice to use such medications. Accordingly, it found no infringement on the right to privacy. Here, similarly, the urinalysis testing program does not preclude employees from choosing to use medications, and, therefore, does not interfere with employees' right to autonomy in seeking medical care. Id.

C. There Is No Threat To Employees' Confidentiality Interests.

1. The Government Inquiry Into Drug Usage By Its Employees Is Reasonable.

The confidentiality strand of the right to privacy normally protects against governmental public disclosure of an individual's private affairs. However, the right of privacy also encompasses "the right of the individual to be free in his private affairs from governmental surveillance and intrusion." Whalen v. Roe, 429 U.S. at 599 n.24, quoting, The private I, the University of Chicago Magazine, 7, 8 (autumn 1976). Although some commentators have viewed this aspect of the right to privacy as a separate strand, id., the Supreme Court has treated it as being part of the confidentiality strand. See Nixon Administrator of General Services; 433 U.S. at 457-58. See also Plante v. Gonzalez, 575 F.2d at 1132-34. Regardless of its characterization, the Supreme Court has also made clear that this right against governmental surveillance and intrusion is subsumed and "directly protected by the Fourth Amendment." Whalen v. Roe, 429 U.S. at 599 n.24. Consequently, the reasonableness of any requirement to disclose matters to the government is determined by balancing the intrusion into personal affairs against the public interest requiring the intrusion. See Nixon v. Administrator of General Services, 433 U.S. at 458. See also O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977); Fadjo v. Coon, 633 F.2d at 1176.

Under this standard, it is clear that the governmental inquiry into its employees' drug use is reasonable. In this regard, there may be some intrusion into the private affairs of

Federal employees. The employee must give the urine sample in the presence of another and the government may learn of legal and illegal drug use by the employee. However, those intrusions are far outweighed by the critical nature of the public interest in safety and the protection of property which requires the intrusion. Moreover, the intrusion is strictly circumscribed so as to minimize exposure of the employee's body and to obtain only information which has a direct bearing on an employee's on the job performance and his or her ability to do the job safely. Cf. Shoemaker v. Handel I, 608 F. Supp. 1151, 1160 (D.N.J. 1985); (it was reasonable to require jockeys to disclose the legal medications they were taking, but it was unreasonable to require disclosure of the nature of the illness requiring the medication). Shuman v. City of Philadelphia, 470 F. Supp. 449, 458-460 (E.D. Pa. 1979) ("In the absence of a showing that a policeman's private, off-duty personal activities have an impact upon his on-the-job performance, we believe that inquiry into those activities violates the constitutionally protected right of privacy." (footnote omitted)).

2. There Are Safeguards Against Public Disclosure Of The Results Of The Urinalysis Testing.

Employees may also raise concerns over the public dissemination of the results of urinalysis testing. Those concerns, however, are ill founded and do not, in any event, rise to the level of an impermissible invasion of privacy.

In the first place, the Navy's urinalysis testing contains safeguards against public disclosure of the results of the urinalysis tests. The reporting procedures require strict

confidentiality with disclosure being made only to those with a need know. Cf. Shoemaker v. Handel I, 608 F. Supp. at 1160-61. Such precautions against public disclosure have been viewed by the courts as protecting validity attack grounded in the right to privacy. See Whalen v. Roe, 429 U.S. at 600-602 (the mere possibility of unauthorized public disclosure of medical information was not sufficient for the Court to find a statute requiring the reporting of certain prescriptions to be invalid on its face as violating rights to privacy). See also Plante v. Gonzalez, 575 F.2d at 1133; Shoemaker v. Handel I, 608 F.2d at 1161; Shermco Industries v. Secretary of the Air Force, 584 F. Supp. 76, 103 (E.D. Pa. 1984).

It is true, of course, that the results of urinalysis testing will become public knowledge in certain circumstances. Employees who test positive in preliminary tests will be reassigned to non-critical jobs pending confirmation, and employees whose urine is confirmed to be positive may be reassigned or removed from the Federal service. The fact that such information may become known to the public, however, does not mean there has been an invasion of the right to privacy. In Paul v. Davis, 424 U.S. 693, 712-13 (1976), the Supreme Court held that the publication of an official act--such as would be involved in the reassignment or removal of an employee who tested positive on a urinalysis test--does not violate the right to privacy. Its holding there was unequivocal:

> He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability

> to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713.__/ See also Reilly v. Leonard, 459 F. Supp. 291, 300-301 (D. Ct. 1978.) Accordingly, no privacy invasion occurs simply because the public may become aware of an employee's positive urinalysis test results as a result of the official act of reassigning or removing the employee.

__/ Although the individual in Paul v. Davis had been arrested, his guilt or innocence had never been determined judicially.