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The National Collegiate Athletic Association, Random Drug-Testing, and the Applicability of the Administrative Search Exception

Craig H. Thaler

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NOTE

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, RANDOM DRUG-TESTING, AND THE APPLICABILITY OF THE ADMINISTRATIVE SEARCH EXCEPTION

It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens.¹

Honorable Alvin B. Rubin

I. INTRODUCTION

At the Eightieth National Collegiate Athletic Association (NCAA)² convention, the NCAA instituted a detailed drug-testing program³ authorizing the NCAA Executive Committee⁴ to drug test student-athletes who compete in NCAA championships and certified

¹ Thaler: The National Collegiate Athletic Association, Random Drug-Testing

² The NCAA is "a voluntary, unincorporated association of nearly one thousand four-year colleges and universities." Arlosoroff v. NCAA, 746 F.2d 1019, 1020 (4th Cir. 1984). The NCAA promulgates and implements rules and regulations concerning "minimum standards for scholarship, sportsmanship, and amateurism." Id; see also NATIONAL COLLEGIATE ATHLETIC ASS'N CONST. art. 2 (setting forth the purposes and fundamental policy of the NCAA) [hereinafter NCAA CONST.].

³ See infra note 164 (citing the preface to the 1987-88 NCAA Drug Testing Program); NCAA Prepares to Test Athletes for Drug Use, JET, Oct. 13, 1986, at 51; Selcraig, The NCAA Goes After Drugs, SPORTS ILLUSTRATED, Oct. 6, 1986, at 75.

⁴ See NCAA CONST., supra note 2, art. 5, § 2 (defining the NCAA Executive Committee). A general responsibility of the Executive Committee is to "[t]ransact the business and administer the affairs of the Association in accordance with the policies of the Association and the Council." Id. at art. 5, § 2(c)(1).
postseason football contests. The NCAA’s decision to authorize the random selection of student-athletes raises important fourth amendment concerns which do not exist with a selection system based upon reasonable suspicion. Contrary to many drug-testing programs instituted throughout the United States, the NCAA does not limit itself to testing individuals based upon reasonable suspicion. The NCAA selects student-athletes for drug-testing based upon a system of random selection, position of finish, or suspicion.

The purpose of this Note is to examine whether the NCAA drug-testing program is a reasonable search and seizure under the fourth amendment. In order to facilitate a comparative analysis with those cases which have held random drug-testing to be constitutionally reasonable, Section II provides an overview of the NCAA drug-testing program.
drug-testing program. As a preliminary matter, it is necessary to determine whether the fourth amendment's constraints apply to the NCAA as a state actor, and if so, whether the submission of urine for the detection of drugs is a "search" for fourth amendment purposes. Thus, Section III of this Note discusses the applicability of the fourth amendment to the NCAA, and Section IV discusses whether drug-testing should be characterized as a search for fourth amendment purposes.

Drug-testing programs not requiring individualized suspicion have generally been held unconstitutional. Where the administrative search exception applies, however, individualized suspicion is not required and the search need only be reasonable. In Section V the administrative search exception and an overall standard of reasonableness are applied to the NCAA drug-testing program. Consequently, this Note concludes that the NCAA drug-testing program is

reasonable under the fourth amendment. See Schall v. Tippecanoe County School Corp., 679 F. Supp. 833, 857-58 (N.D. Ind.) (high school athletes), aff'd, 864 F.2d 1309 (7th Cir. 1988); O'Halloran v. University of Wash., 679 F. Supp. 997, 1002-05 (W.D. Wash.) (discussing the likelihood of success on the merits of a challenge to the NCAA drug-testing program), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988).

11. See infra notes 18-42 and accompanying text; see also infra notes 230-44 and accompanying text (describing the NCAA drug-testing program).

12. See infra notes 43-78 (discussing state action theory and its applicability to the NCAA).

13. See infra notes 79-97 (discussing whether the submission of urine is a search for fourth amendment purposes).


15. See infra notes 207-09 and accompanying text.

16. See infra notes 161-257 and accompanying text.
a reasonable search under the fourth amendment despite the lack of a warrant or individualized suspicion.\textsuperscript{17}

II. THE NCAA DRUG-TESTING PROGRAM

Each year, prior to participation in NCAA intercollegiate competition, each student-athlete signs a consent form acknowledging an understanding of the NCAA drug-testing program.\textsuperscript{18} In addition, the student-athlete consents to be tested according to the rules and regulations promulgated by the NCAA.\textsuperscript{19} Refusal to sign the consent form automatically results in ineligibility for participation in all intercollegiate competition.\textsuperscript{20}

The drug-testing program permits NCAA officials to collect urine on specific occasions.\textsuperscript{21} The urine specimens are then sent to NCAA-certified laboratories\textsuperscript{22} for detection of specific substances banned by the NCAA Executive Committee.\textsuperscript{23} The NCAA tests only those athletes who compete in NCAA championships and certi-
fied postseason football contests. As a result, drug-testing only occurs shortly before or after championship events. The NCAA may require a student-athlete to submit a urine specimen based upon a system of random selection, position of finish, suspicion, or playing time. The method of selection which the NCAA intends to use, and the particular postseason events where the NCAA intends to conduct drug-testing, are provided in The NCAA News received by all member institutions. In addition, the details of subsequent modifications are made available to member institutions.

The urine specimen is divided into two bottles and is then sent to a NCAA certified laboratory which conducts a urinalysis of the first sample by using a gas chromatography/mass spectrometry process. Any positive result leads to the urinalysis of the same sample by another laboratory staff member. If a similar positive result oc-

24. See National Collegiate Athletic Ass'n Const., Bylaws, art. 2, § 2(m)-(t) (detailing the certification process) [hereinafter NCAA Bylaws]; see also supra note 5 (discussing when the Executive Committee may drug test student-athletes).

25. See supra note 5.

26. NCAA Pamphlet, supra note 8, at 13. The NCAA drug-testing committee recommends the methods of selection which are then subject to the approval of the Executive Committee. Id. § 4.1. In football, the NCAA tests twenty-two players based on playing time and fourteen based on reasonable suspicion. Telephone interview with Frank D. Uryasz, Director of Sports Sciences at the NCAA National Office (Jan. 9, 1989) [hereinafter Uryasz Interview]. During the NCAA basketball tournament, the NCAA tests eight players from the first round teams and then tests the two teams who compete in the final round. Selcraig, supra note 3, at 24. In NCAA track meets, the top three finishers in a particular race will be tested as will two randomly selected athletes. Uryasz Interview, supra; see Selcraig, supra note 3 at 24. The method of selection within a particular sport depends on the nature of that sport. Uryasz Interview, supra. For instance, the selection of athletes based on position of finish would not be feasible during a soccer championship.

27. NCAA Exec. Reg., art. 1, § 7(a); see also infra notes 221-24 and accompanying text (discussing the NCAA's testing procedures in 1987 which provided member institutions with sufficient notice).

28. NCAA Exec Reg., supra note 5, art. 1, § 7(a).

29. NCAA Pamphlet, supra note 8, at 14 (reprinting § 5.2.6 "Specimen-Collection Procedures").

30. See supra note 22 and accompanying text.

31. See infra notes 238-42 and accompanying text.

32. NCAA Pamphlet, supra note 8, at 16 (reprinting § 7.1.1 "Notification of Results"). By using different laboratory staff members, the NCAA intends to overcome possible human errors. See Morgan, Problems of Mass Urine Screening for Misused Drugs, 16 J. Psychoactive Drugs 305, 313-14 (1984) (noting the problems with laboratory quality control); Stein, Laessig & Indriksons, An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts, 1973 Wis. L. Rev. 721, 730-40 (discussing the errors caused by instrumentation and unqualified personnel). Additionally, the NCAA uses the most modern and accurate testing centers available. See supra note 22 and accompanying text.

The NCAA's testing procedures are "very similar to those of the International Olympic
curs, a subsequent urinalysis of the second specimen will be conducted. If the urinalysis of the second specimen is positive, the student-athlete will be ineligible for further participation in postseason competition and if the student-athlete tests positive after being restored to eligibility, he or she shall be charged with the loss of one season of postseason eligibility in all sports and shall remain ineligible for postseason competition at least through the succeeding academic year.

In addition to the detailed procedures concerning student selection, chain of custody, and notification of results, the student-athlete is given the precise results of the urinalysis and the opportunity to appeal his results within twelve hours of the analysis of the first specimen. Lastly, the NCAA program has guidelines for the release of information. Member institutions are not compelled to publicly release the names of any athletes who test positive and NCAA officials will only obtain and use enough information to prop-

Committee, which were drawn up in the late sixties, amended in the early seventies and have since been well accepted by the International Sport Governing Bodies and several national organizations.” Affidavit of Dr. Robert Dugal, ¶ 25, at 13, O'Halloran v. University of Wash., 679 F. Supp. 997 (W.D. Wash.), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988) [hereinafter DUGAL AFFIDAVIT]. The procedures utilized by the International Olympic Committee are almost identical to the NCAA's testing procedures. See Johnson & Moore, The Loser, SPORTS ILLUSTRATED, Oct. 3, 1988, at 26-27 (discussing the International Olympic Committee's testing procedures as they related to Ben Johnson's urine specimen).

33. NCAA Pamphlet, supra note 8, at 16 (reprinting § 7.2.2.1 “Notification of Results”). The second specimen must be tested within 24 hours after telephone notification of the student-athlete. Id.

34. NCAA Bylaws, supra note 24, art. 5, § 2(a). The NCAA recommends the following statement should be released when inquiries are made concerning a student-athlete's ineligibility due to a positive finding: “The student athlete in question was found in violation of the NCAA eligibility rules and has been declared ineligible for postseason competition.” NCAA Pamphlet, supra note 8, at 17 (reprinting § 7.5 “Notification of Results”). Member institutions keep positive results so confidential that it is virtually impossible to obtain accurate statistics. Uryasz Interview, supra note 26.

35. NCAA Bylaws, supra note 24, art. 5, § 2(b).

36. See NCAA Pamphlet, supra note 8, at 13 (reprinting §§ 4.0-4.7 “Student Athlete Selection”).

37. See id. at 15 (reprinting §§ 6.0-6.3 “Chain of Custody”).

38. See id. at 16-17 (reprinting §§ 7.0-7.5 “Notification of Results”).

39. See id. at 16-17 (reprinting § 7.2.2.2, providing for a student-athlete's opportunity to appeal). In addition, the student-athlete is given the opportunity to attend the testing of the second specimen, or the NCAA will arrange for a surrogate to represent the student-athlete if requested. Id. at 17 (reprinting §§ 7.2.2.3-7.2.2.4). The surrogate or the testing institutions representative will attest by signature as to the code number on the second bottle as well as attesting that the second specimen was not subject to tampering. Id. at 17 (reprinting § 7.2.2.5).
erly decide if the individual should be declared ineligible. The information permitted to be utilized is outlined in the Buckley Amendment Consent which the student-athlete signs along with a student eligibility statement and the drug consent form.

III. STATE ACTION

The fourth amendment is enforceable against the states through the Due Process Clause of the fourteenth amendment. Under the state action theory, the conduct must be sufficiently attributable to the state in order for it to be susceptible to federal constitutional restraints. In cases employing the theory, certain private entities

40. NCAA PAMPHLET, supra note 8, at 7. The NCAA consent form, reprinted infra note 195, provides, in relevant part, the following: "You understand that this consent and the results of your drug tests, if any, will only be disclosed in accordance with the Buckley Amendment Consent." Id.; see infra note 194 (discussing the Buckley Amendment Consent); see also Capua v. City of Plainfield, 643 F. Supp. 1507, 1515 (D.N.J. 1986) (finding drug-testing program unconstitutional where no guidelines for confidentiality existed); cf. Whalen v. Roe, 429 U.S. 589, 600 (1977) (implying that individuals have a right to privacy in personal medical information); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (characterizing employee medical records as being within the ambit of materials entitled to privacy protection).

41. NCAA PAMPHLET, supra note 8, at 6; see also infra note 194 (discussing the Buckley Amendment Consent).

42. See infra notes 193, 195 and accompanying text.

43. See Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). The fourteenth amendment provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, §1. In Ker v. California, 374 U.S. 23 (1962), the Supreme Court reaffirmed that "the Fourth Amendment is enforceable against . . . [the states] by the same sanction of exclusion as is used against the Federal Government," by the application of the same constitutional standard prohibiting 'unreasonable searches and seizures.'" Id. at 30-31 (quoting Mapp, 367 U.S. at 655).

44. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). The state action requirement "assure[s] that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis in original). The fourteenth amendment does not extend to "private conduct abridging individual rights." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). Consequently, the Supreme Court has definitively stated that "[t]he Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Blum, 457 U.S. at 1003 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)); see Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1981) (stating that the fourteenth amendment "applies to acts of the states, not to acts of private persons or entities." (citing Civil Rights Cases, 109 U.S. 3, 11 (1883); Shelley v. Kraemer, 334 U.S. 1, 13 (1948))). As a result, a fourth amendment claim may proceed only if the alleged conduct constitutes state action. See Hawkins v. NCAA, 652 F. Supp. 602, 606 (C.D. Ill. 1987) (finding that "[e]very to Plaintiffs' Due Process and Equal Protection claims is the issue of whether the NCAA's actions constitute state action."); O'Halloran v. University of Wash., 679 F. Supp. 997, 1001 (W.D. Wash.) (noting state action is the first issue to be considered), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988).
have been considered to be state actors and, therefore, susceptible to federal constitutional restraints. The determination of whether conduct is private action or state action can be decided only by analyzing all of the relevant facts and circumstances. While a detailed factual analysis of the NCAA is beyond the scope of this Note, it should be noted that the basis upon which earlier cases found the NCAA to be a state actor has been significantly eroded by the Supreme Court's decisions in *Blum v. Yaretsky*, *Rendell-Baker v. Kohn*, and more recently, *NCAA v. Tarkanian*. Using an entanglement theory analysis, early cases found the NCAA to be a state actor due to its extensive regulation and supervision of intercollegiate athletics. The entanglement theory is pre-

45. See, e.g., *Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (concluding that a private park had a public character and therefore the trustees were treated as state actors); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-26 (1961) (finding that a private restaurant located on a publicly owned parking building was a state actor); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 462-63 (1952) (reasoning that a private railway company was a state actor where it was regulated by the Public Utilities Commission); *Shelly v. Kraemer*, 334 U.S. 1, 13-14, 23 (1948) (holding that judicial enforcement of a private agreement created state action); *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946) (finding a privately owned town was a state actor where it had all the attributes of a municipality). But cf. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-59 (1974) (finding a private utility was not a state actor despite heavy regulation by the state); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-79 (1972) (finding a private club was not a state actor despite its regulation by the state liquor board).


48. See, e.g., *Howard Univ.*, 510 F.2d at 217 (finding that the NCAA's conduct was sufficiently entwined with governmental policies to make it state action); *Parish v. NCAA*, 506 F.2d 1028, 1031-32 (5th Cir. 1975) (holding that the NCAA's activities constituted action taken under the color of state law); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251, 1254 (9th Cir. 1974) (determining that the NCAA's regulatory operations showed sufficient evidence to lead to the existence of state action); *Jones v. NCAA*, 392 F. Supp. 295, 298 (D. Mass. 1975) (stating that, "actions of the N.C.A.A., declaring student-athletes ineligible to participate in intercollegiate hockey, constituted state action . . . "); *Buckton v. NCAA*, 366 F. Supp. 1152, 1156 (D. Mass. 1973) (noting that private institutions, when performing action that is governmental in nature, are constrained by the requirements of the Constitution).

52. See, e.g., *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir.), cert. dismissed, 434 U.S. 978 (1977); *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Parish*
mised on the idea that indirect involvement by state governments could convert what would otherwise be private action into state action. In Blum v. Yaretsky, however, the Court effectively eliminated this premise. The question before the Court was whether a nursing home's involuntary discharge or transfer of Medicaid patients without certain procedural safeguards constituted state action. Although the nursing homes were extensively regulated and funded by state officials, the Court concluded that such behavior by the state could not convert private conduct into conduct reasonably attributed to the State. Only in limited circumstances where there is a sufficient nexus between the alleged conduct and the state, where the state has exercised coercive power, or where significant encouragement influences the alleged conduct, will the state be held responsible for conduct that is otherwise private. In addition, the Court noted the requisite nexus may exist if the private entity exercises a power traditionally attributed to the state. Similarly, in Rendell-Baker v. Kohn, the Court relied on the Blum analysis in

53. Graham v. NCAA, 804 F.2d 953, 958 (6th Cir. 1986). An entanglement theory analysis will find the contested conduct to be state action where "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Howard Univ., 510 F.2d at 217 (quoting Evans v. Newton, 382 U.S. 296, 299 (1966)). In short, the private actor is so intertwined with the state entity that the private actor is considered to be engaged in a public function. The entanglement theory developed from a line of cases known as the "high school athletic program cases." Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); see Hawkins v. NCAA, 652 F. Supp. 602, 607 (C.D. Ill. 1987) (discussing the high school athletic program cases).

55. Id. at 1004.
56. Id. at 1003.
57. Id. at 1004.
58. Id.
59. Id.

60. Id.; see e.g., Parish v. NCAA, 506 F.2d 1028, 1032-33 (5th Cir. 1975) (holding that the NCAA is performing a traditional governmental function and if "the NCAA were to disappear tomorrow, [the] government would soon step in to fill the void."); Howard Univ. v. NCAA, 510 F.2d 213, 219-20 (D.C. Cir. 1975) (finding the NCAA to be governmental in character). But see Scanlan, supra note 47, at 901 (stating that the rules and regulations promulgated by the NCAA can only be attributed to the "general will of the NCAA's mixed membership" and therefore were not conduct reasonably attributed to a uniform governmental body).

order to find that no state action existed. The issue in Rendell-Baker was whether a private school’s discharge of employees constituted state action. Although the private school received funds from the state and was required to comply with various state regulations, neither the state’s funding nor the existence of extensive regulations could convert the school’s conduct into state action. Moreover, the school’s decision to discharge employees was neither compelled nor influenced by the existing state regulations. Although the school’s role as an educator was a public function, it was not a function exclusively attributed to the state.

Relying upon Blum and Rendell-Baker, several courts have subsequently concluded that the NCAA is not a state actor. In Arlosoroff v. NCAA, the Fourth Circuit found the NCAA’s regulatory function was not coerced or directed by state regulations or funding, and the alleged conduct was not traditionally reserved to the State. It was “not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action.”

62. Id. at 839-43.
63. Id. at 838.
64. Id. at 840-41. Utilizing the Blum analysis, the Court noted the relationship between the school and its staff did not change despite the state funding of tuition. Id.
65. Id. at 841.
66. Id. at 842. Once the conduct is considered to be a public function, the inquiry does not stop. Only when the conduct is a function which is “traditionally the exclusive prerogative of the State . . .” will state action be held to exist. Id. (emphasis in original) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).
68. 746 F.2d 1019 (4th Cir. 1984).
69. Id. at 1022; see also supra note 67 (listing cases rejecting the entanglement theory).
70. Arlosoroff, 746 F.2d at 1022.
71. Id; accord Graham v. NCAA, 804 F.2d 953, 958 (6th Cir. 1986); O’Halloran v. University of Wash., 679 F. Supp. 997, 1002 (W.D. Wash.), rev’d on other grounds, 856 F.2d 1375 (9th Cir. 1988); Hawkins v. NCAA, 652 F. Supp. 602, 609 (C.D. Ill. 1987); McHale v. Cornell Univ., 620 F. Supp. 67, 69 (N.D.N.Y. 1985); see also Lock & Jennings, supra note 22, at 584-87 (1986) (discussing the inapplicability of the state action theory to the NCAA); Scanlan, supra note 47, at 897-902 (discussing the inapplicability of the state action theory to the NCAA). Significantly, the court in Arlosoroff noted that “earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Su-
In *NCAA v. Tarkanian*, the question before the Court was whether the NCAA's influence over the conduct of a state university converted the NCAA into a state actor. In a 5-4 decision, the Court rejected the theory that a state university's adoption of NCAA rules could transform the NCAA into a state actor since the NCAA was unable to "directly discipline Tarkanian or any other state university employee." In addition, the Court rejected the assertion that the NCAA's rule making authority was a traditional government function.

Although the Court in *Tarkanian* rejected the argument that rules and regulations directing a public university's disciplinary actions were state action, the question still remains open in the context of the NCAA drug-testing program since it directly disciplines the individual rather than the university. If the NCAA's disciplinary sanctions are activities traditionally associated with a public university, the NCAA may be engaging in conduct reasonably attributed to the state. Consequently, this Note assumes the NCAA to be a state actor in order to examine the important fourth amendment issues raised by the NCAA drug-testing program. In addition, a search and seizure analysis remains relevant since a plaintiff precluded from asserting a federal constitutional claim may still challenge the NCAA program based upon the relevant state constitutional provision prohibiting unreasonable searches and seizures.

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73. *Id.*
74. *Id.* at 465 (footnote omitted).
75. *Id.* at 465 n.18.
76. The Court in *Tarkanian* noted that lower federal courts have unanimously held the NCAA not to be a state actor subsequent to the Court's decisions in Blum v. Yaretsky, 457 U.S. 991 (1982), and Rendell-Baker v. Kohn, 457 U.S. 830 (1982). 109 S. Ct. at 457 n.5. As the dissent correctly pointed out, however, none of those cases addressed the theory which was before the Court in *Tarkanian*. *Id.* at 467 n.2 (White, J., dissenting). In addition, the facts in Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984), "on which the subsequent decisions principally rely," would not have raised the issue which was before the Court in *Tarkanian*. *Tarkanian*, 109 S. Ct. at 467 n.2 (White, J., dissenting); see supra note 67 (listing those cases rejecting the entanglement theory).
77. As the Court noted in *Tarkanian*, "[a] state university without question is a state actor. When it decides to impose a serious disciplinary sanction . . . it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." *Id.* at 462 (citing Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972); see also supra notes 60-62, 66 and accompanying text.
78. See, e.g., LeVant v. NCAA, No. 619209 (Cal. Super. Ct., March 10, 1987) (no published opinion) (challenging the NCAA drug-testing program as an invasion of privacy under the California state constitution which affords its citizens a greater right to privacy).
IV. THE FOURTH AMENDMENT

A. Urine Testing as a Search Under the Fourth Amendment

The primary purpose of the fourth amendment\(^9\) is to secure the rights of individuals\(^8\) against unreasonable searches and seizures.\(^81\) Consequently, a fourth amendment analysis of the NCAA's drug-testing program must begin with the determination of whether the taking of urine for the purposes of drug analysis constitutes a "search and seizure" within the meaning of the fourth amendment. A search occurs when an intrusion violates an expectation of privacy that society considers reasonable.\(^82\) A seizure takes place when there is a meaningful interference with an individual's possessory interest in the object being seized.\(^83\)

LeVant, a temporary restraining order was granted when Simone LeVant, captain of the women's diving team at Stanford University, challenged the constitutionality of the NCAA program. See NCAA Wants Drug Testing, Newsday, Aug. 12, 1988, at 157, col. 1; Incident or Precedent, SPORTS ILLUSTRATED, March 23, 1987, at 18; Newman, Another NCAA Fumble, SPORTS ILLUSTRATED, Dec. 7, 1987, at 100. Although the court found certain aspects of the NCAA program to be unconstitutional, the challenge came under the California state constitution which, "unlike the fourth amendment, grants individuals an explicit right of privacy, not merely one that is implicit or penumbral." Brock & McKenna, Drug Testing in Sports, 92 DICK. L. REV. 505, 547 (1988) (footnote omitted); see supra note 47, at 902 (asserting that plaintiffs may still prevail under the relevant state constitution); cf. Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 79 (1980) (permitting the plaintiffs to bring a first amendment claim under the state constitution despite the inability of the plaintiff to bring the same claim under the federal constitution for lack of state action).

79. The Supreme Court has determined that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' . . . in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'" Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)) (footnotes omitted); see supra note 9 (quoting the fourth amendment).

80. See Katz v. United States, 389 U.S. 347 (1967). In Katz, the Court concluded that the "Fourth Amendment protects people- and not simply 'areas'-against unreasonable searches and seizures . . . ." Id. at 353.

81. The fourth amendment is not a general prohibition of all searches and seizures. The Constitution only prohibits those searches determined to be unreasonable. Terry v. Ohio, 392 U.S. 1, 9 (1968); see infra notes 207-57 and accompanying text (discussing the reasonableness test and its application to the NCAA).

82. O'Connor v. Ortega, 107 S. Ct. 1492, 1497 (1987). Legitimate expectations of privacy will differ according to the factual circumstances. Id. As the Court noted in O'Connor:

We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion."

Id. (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)).

In *Schmerber v. California*, the Supreme Court determined that the involuntary taking of blood was a search, and therefore the searching entity was required to meet the reasonableness standard under the fourth amendment. The Court reasoned that since the extraction of blood by the police was an intrusion into the human body, the intrusion was held to be a search and seizure. 

Unlike the extraction of blood, however, an individual routinely discharges urine as a waste product. Consequently, the taking of urine is unlikely to be characterized as a seizure since the submission of urine for drug-testing does not normally interfere with an individual's possessory interest in that urine. Nevertheless, in *Skinner v. Railway Labor Executives' Ass'n.*, the Supreme Court recently determined that the taking of blood or urine for purposes of drug-testing can be characterized as a search because an individual has an expectation of privacy concerning the information which such analysis may reveal. Similar to the extraction of blood, an individual

85. Id. at 767.
86. Id. at 767-70.
87. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), aff'd, 109 S. Ct. 1384 (1989). The Fifth Circuit noted, however, that "urine excreted for a drug test . . . is not expected to be a waste product, flushed down the toilet. Indeed, precautions are taken in the test procedure to prevent the sample from being thus disposed of." *Id.*
88. *Id.* at 176 (noting that compulsory urine testing is unlikely to be characterized as a seizure). Most courts that address the issue of whether the testing of urine for the presence of drugs is a search focus on the individual's legitimate expectation of privacy rather than whether a meaningful interference with and individual's possessory interest in their urine has occurred. However, in *Skinner v. Railway Labor Executives' Ass'n.*, 109 S. Ct. 1402, 1413 (1989), the Supreme Court stated that "[t]aking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the [individual's] possessory interest in his bodily fluids." *Id.* Nonetheless, since the Court already concluded that the submission of urine for drug testing was a search, the Court did not find it necessary to characterize the intrusion as a seizure. *Id.* at 1413 n.4. In *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1010-11 (D.C. 1985) (Nebeker, J., concurring), Associate Justice Nebeker found urine testing was not a search, but concluded that the "appropriate analysis begins with determining whether the seizure of urine interferes with the affected officer's possessory interest in that urine." *Id.* Pursuant to this analysis, Justice Nebeker concluded that the submission of urine was not a seizure under the fourth amendment. *Id.; see supra* text accompanying note 83.
90. *Id.* at 1413. While the Court in *Skinner* noted that the submission of urine for drug-testing was not a surgical intrusion beneath the skin like the blood testing procedure in *Schmerber*, the "chemical analysis of urine, like that of blood can reveal a host of private medical facts . . . ." *Id.* The Fifth Circuit has noted that "[i]n a civilized society, one's anatomy is draped with constitutional protections." United States v. Afanador, 567 F. 2d 1325, 1331 (5th Cir. 1978). Individuals additionally have a constitutional right to privacy concerning
“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.”

Urination itself is considered to be an extremely private activity. "There are few activities in our society more personal or private than the passing of urine . . . . It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."  

Lastly, when a particular intrusion violates a legitimate expectation of privacy, courts are additionally concerned with the existence of unbridled discretion and lack of standards. If the submission of urine for drug-testing was not determined to be a search, these concerns, which reflect the underlying purposes of the fourth amendment, would be seriously undermined. In effect, a court would be permitting a particular entity unbridled discretion. The searching party would not be required to adhere to any standards or procedures considered constitutionally reasonable at the expense of personal medical information. See Whalen v. Roe, 429 U.S. 589 (1977); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980).

Despite an individual's privacy interest in the information which the urine specimen may reveal, the submission of urine for drug testing is not violative of the fifth amendment which provides, in relevant part, that "[n]o person shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V, cl. 3. In Schmerber, 384 U.S. at 765, the Supreme Court held that use of blood test results did not infringe upon the fifth amendment since blood test results are neither "testimony nor evidence relating to some communicative act or writing . . . ." Id; see Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510, 1527-28 (D. Neb. 1987), aff'd, 844 F.2d 562, 566 (8th Cir. 1988); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985); Scanlan, supra note 47, at 905-06.

The primary purpose of the fourth amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, 387 U.S. at 528, see supra note 79.
the substantial privacy interest associated with the submission of urine for drug-testing. Consequently, in *Skinner* the Supreme Court agreed with the general consensus among those courts who have addressed the issue and concluded that urinalysis should be characterized as a search for the purposes of the fourth amendment.

B. Requirements Under the Fourth Amendment

In general, the fourth amendment requires that a search be conducted pursuant to a search warrant based upon probable cause.

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95. National Treasury Employees Union, 816 F.2d at 176 (noting that if a search or seizure were not found, the government would be receiving a virtual "carte blanche" to drug test individuals).

96. *Skinner*, 109 S. Ct. at 1413. It is well established that "[u]rinalysis drug testing is a search and seizure within the meaning of the Fourth Amendment. The federal and state courts that have ruled on the constitutionality of urinalysis drug testing have been virtually unanimous in this conclusion." Guiney v. Roache, 686 F. Supp. 956, 958 (D. Mass. 1988); accord Kamisar, *The Fourth Amendment in an Age of Drug and AIDS Testing*, 32 LAW QUADRANGLE NOTES 40, 42 (1987) (finding almost every court which has addressed the issue has concluded that urinalysis is a search); see, e.g., National Treasury Employees Union, 816 F.2d at 170; Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988); O'Halloran v. University of Wash., 679 F. Supp. 997 (W.D. Wash. 1988), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988); Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988), aff'd, 864 F.2d 1309 (7th Cir. 1988); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986), aff'd, 846 F.2d 1539 (6th Cir. 1988); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), aff'd as modified, 809 F.2d 1302 (8th Cir. 1987); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985); City of Palm Bay v. Bauman, 473 So. 2d 1322 (Fla. Dist. Ct. App. 1985). But see Lovvorn, 846 F.2d at 1554 (Guy, J., dissenting). Judge Guy begins with the premise that "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *Id.* at 1552 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)). Thus, as Judge Guy states, "'[t]he real question . . . is the interplay between voluntary and involuntary 'exposure' within the context of the fourth amendment.'" *Id.* at 1554. Since an employee voluntarily donates a urine sample at the request of the employer, fourth amendment protections are not invoked. *Id.* at 1552. Several courts have accepted that the submission of urine is a search under the fourth amendment without questioning or independently analyzing the issue. See *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987); *Spence v. Farrier*, 807 F.2d 753 (8th Cir. 1986); *Railway Labor Executives' Ass'n v. Long Island R.R. Co.*, 651 F. Supp. 1284 (E.D.N.Y. 1987); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), aff'd, 70 N.Y.2d 57, 510 N.E. 2d 325, 517 N.Y.S.2d 456 (1987).

97. *See National Treasury Employees Union*, 109 S. Ct. at 1391; *Skinner*, 109 S. Ct. at 1414; *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The fourth amendment states in relevant part: "'[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no warrants shall issue, but on probable cause . . . .'" U.S. CONST. amend. IV.
The primary purpose of the warrant requirement is to protect individuals from arbitrary and standardless searches by law enforcement officers in the field. Without a warrant, a searching entity may intrude upon an individual's privacy without any justification or belief that incriminating evidence will be found. By substituting the judgment of the individual conducting the search with the judgment of a disinterested judge or magistrate, the warrant requirement effectively eliminates the possibility of arbitrary and standardless invasions.

The probable cause standard ensures that a search or seizure will only take place where the intruding entity can point to specific facts and circumstances surrounding a particular person which justifies the intrusion. The mere possibility of discovering incriminating evidence has never been considered constitutionally reasonable. Although the probable cause standard has generally been required in the criminal context, the Supreme Court has determined that even in circumstances where a search or seizure is not done for criminal purposes, "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." In the context of drug testing, the requirement of individualized sus-

98. *Skinner*, 109 S. Ct. at 1415; United States v. United States Dist. Court, 407 U.S. 297, 316 (1972); Johnson v. United States, 333 U.S. 10, 13-14 (1948); see supra notes 79, 94 (discussing the fundamental purpose of the fourth amendment); *infra* notes 228-31 (citing cases where courts' concern was arbitrary and unbridled discretion).

99. See *Skinner*, 109 S. Ct. at 1415; *Terry* v. Ohio, 392 U.S. 1, 21 (1968); *Katz* v. United States, 389 U.S. 347, 358-59 (1967); *Johnson*, 333 U.S. at 13-14. As the Court noted in *Terry*:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

392 U.S. at 21 (footnote omitted).

100. *Ybarra* v. Illinois, 444 U.S. 85, 91 (1979); *Terry*, 392 U.S. at 21 (1968). The requirement of specificity is central to the Supreme Court's "Fourth Amendment jurisprudence." *Id.* at 21 n.18. For a partial listing of Supreme Court cases requiring particularized suspicion, see *id.* at 21 n.18.

101. An individual's interest "in human dignity and privacy which the Fourth Amendment protects forbids any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber* v. California, 384 U.S. 757, 769-70 (1966); see also *Capua* v. City of Plainfield, 643 F. Supp. 1507, 1517 (D.N.J. 1986) (finding a search unreasonable where drug-testing was conducted on the mere possibility of discovering misconduct).

102. See *Ybarra*, 444 U.S. at 85.

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picion has traditionally been termed "reasonable suspicion."\textsuperscript{104} Although the Supreme Court has continually emphasized that searches conducted without a warrant are \textit{per se} unconstitutional,\textsuperscript{105} a few well defined exceptions have been developed.\textsuperscript{106} In developing these exceptions, the Supreme Court has taken a practical approach.\textsuperscript{107} Consequently, a warrant may be dispensed with under those circumstances where special needs make the warrant requirement impracti-
The necessity of a warrant requirement based on probable cause has been dispensed with in circumstances where "the burden of obtaining the warrant is likely to frustrate the governmental purpose behind the search," there is consent, or the search is made pursuant to a well-defined administrative regulatory scheme. However, where warrantless searches have been permitted, courts have generally required probable cause or individualized suspicion. Despite this general requirement, the Supreme Court has not conclusively stated that individualized suspicion is an irreducible requirement of a valid search. Random searches have been permitted


110. See Davis v. United States, 328 U.S. 582, 593-94 (1946). In order for consent to be valid, it must be voluntary. In order to determine if consent is voluntary, a court must often undergo a difficult and amorphous case-by-case analysis involving all the facts and circumstances. See United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); Feliciano v. City of Cleveland, 661 F. Supp. 578, 593-596 (N.D. Ohio 1987) (discussing implied and actual consent in the context of drug-testing). For an analysis of the consent doctrine as it relates to college athletic drug-testing programs, see Note, An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment, 60 S. Cal. L. Rev. 815 (1987) (authored by Sally Lynn Meloch).

111. See infra notes 117-28 and accompanying text.


113. See T.L.O., 469 U.S. at 342 n.8; Camara v. Municipal Court, 387 U.S. 523, 538 (1967). In T.L.O., the Court noted that "[w]here 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, we have not hesitated to adopt such
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.'"114 The latter exception to the warrant requirement, generally labeled the administrative search exception,115 embraces these requirements and has been utilized in order to justify a warrantless search without the requisite individualized suspicion.116

C. The Administrative Search Exception

The administrative search exception has traditionally been applied to searches of property in order to further the purposes of, or enhance compliance with, a regulatory scheme.117 However, the administrative search exception has recently been applied and analogized to random drug-testing programs involving government employees,118 employees in potentially dangerous situations,119 and

a standard." 469 U.S. at 341.

114. Id. at 342 n.8 (citing Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)). Because the searches were conducted on the basis of individualized suspicion, the Court did not find it necessary to decide whether a search without individualized suspicion was unconstitutional. Id.

115. In National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), aff'd, 109 S. Ct. 1384 (1989), the Fifth Circuit acknowledged that the "Supreme Court has ... recognized that, to ensure compliance with a regulatory scheme applicable to highly regulated industries, the government may undertake inspections . . . without any degree of individualized suspicion." 816 F.2d at 179 (footnotes omitted). Similarly, in Schall v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988) the Seventh Circuit noted the Supreme Court "has approved of warrantless, suspicionless searches of commercial premises operating in certain 'heavily regulated industries.'" Id. at 1309.


117. See, e.g., New York v. Burger, 107 S. Ct. 2636, 2643 (1987) (upholding an administrative search under a statute authorizing warrantless inspections of a vehicle dismantling businesses); Donovan, 452 U.S. at 603-06 (finding a search under the Mine Safety and Health Act constitutional absent a warrant); Biswell, 406 U.S. at 316 (allowing warrantless searches under the Gun Control Act); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970) (concluding that "Contress has broad power to design . . . powers of inspection under liquor laws.").

118. See National Treasury Employees Union 816 F.2d at 170 (Customs Service employees); American Fed'n of Gov't Employees v. Dole, 670 F. Supp. 445 (D.C. Cir. 1987) (Department of Transportation employees); see also Kessler, U.S. Orders Drug Testing, Newday, Nov. 15, 1988, at 3, col. 1.

119. See Policemen's Benevolent Ass'n v. Township of Wash., 850 F.2d 133 (3d Cir. 1988) (police officers); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (power plant employees); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Department of Corrections employees).

Several courts have focused on the hazards associated with a particular employment setting in order to uphold the constitutionality of a random drug-testing program. See, e.g., Jones
Unlike the traditional balancing approach utilized by courts to reach a particular standard of reasonableness, the administrative search exception requires no standard of individualized suspicion and only necessitates that the search should be reasonable. Courts considering the administrative search exception have emphasized several important factors. In each situation there existed highly regulated industries coupled with strong governmental interests in con-

v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987) (finding that the transportation of handicapped children raised serious safety concerns); Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976) (finding the hazards associated with transportation workers created safety concerns for the well-being of others).

120. See Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986). In Shoemaker, the Third Circuit set forth two requirements which were necessary to justify a random search: “First, there must be a strong state interest in conducting an unannounced search. Second, the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search.” Id. at 1142 (citing Donovan v. Dewey, 452 U.S. 594, 600 (1981)). The test in Shoemaker is in accordance with Supreme Court jurisprudence regarding the administrative search exception. See infra note 123.

However, the Shoemaker decision is not without criticism. See Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1545 (6th Cir. 1988); American Fed’n of Gov’t Employees v. Weinberger, 651 F. Supp. 726, 734-35 (S.D. Ga. 1986); 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. 201, 228-31 (1986).

121. See infra notes 208-10 and accompanying text (discussing the balancing approach). The standards courts commonly arrived at are probable cause and reasonable suspicion. Probable cause is the strictest standard, while mere suspicion (random selection) is the least stringent. See supra text accompanying note 100 (defining probable cause); supra note 104 (defining reasonable suspicion). Generally, some amount of individualized suspicion is necessary in order to find a search constitutional under the fourth amendment. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); see supra note 112. However, there is “no irreducible requirement of such suspicion.” Id. at 561; Almeida-Sanchez v. United States, 413 U.S. 266, 283-85 (1973) (Powell, J., concurring).

122. See infra text accompanying notes 207-10.

123. In New York v. Burger, 107 S. Ct. 2636 (1987), the Supreme Court set forth certain criteria necessary to find a warrantless inspection in a pervasively regulated area constitutionally reasonable. First, there must be a substantial government interest in the regulatory scheme in which the inspection is made. Id. at 2644; see infra notes 163-86 and accompanying text (discussing the NCAA’s substantial interest). Second, the searches must “‘further [the] regulatory scheme.’” 107 S. Ct. at 2644 (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)); see infra note 170 (asserting that random selection is the only effective method of furthering the NCAA’s regulatory purpose). Third, there must be procedural safeguards which inform the individual “that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” 107 S. Ct. at 2644 (citations omitted); see infra notes 232-57 and accompanying text (discussing the NCAA's procedural safeguards and limited scope).

ducting warrantless searches. The regulations involving the drug-testing programs were restricted in scope, and were instituted with the intention of improving the health or safety of the individual as well as the public's perception of the industry. Moreover, the

577 (1986)); see Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1418 (1989) (noting that "the expectations of privacy . . . are diminished by reason of . . . participation in an industry that is regulated pervasively . . ."); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1394 (1989) (noting that "customs employees who are directly involved in the interdiction of illegal drugs . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test."); Burger, 107 S. Ct. at 2642-43; Donovan 452 U.S. at 600; United States v. Biswell, 406 U.S. 311, 315 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 566 (8th Cir. 1988); Policeman's Benevolent Ass'n v. Township of Wash., 850 F.2d 133, 141 (3d Cir. 1988); Shoemaker, 795 F.2d at 1136. Compare Shoemaker, 795 F.2d at 1142 (applying the administrative search exception where pervasive regulation lowered the justifiable privacy expectations of individuals to be drug-tested) with Capua, 643 F. Supp. at 1518-19 (refusing to apply the administrative search exception to the challenged drug-testing program where no closely regulated industry existed) and Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D. 2d 35, 39, 505 N.Y.S.2d 888, 890-91 (1986) (holding that the profession of teaching is not a persuasively regulated industry) aff'd 70 N.Y. 2d 57, 510 N.E. 2d 325, 517 N.Y.S. 2d 456 (1987). In Capua, the court noted the Shoemaker exception, which applied the administrative search exception to individuals, was narrowly tailored to the "circumstances surrounding 'closely regulated industries'" Id. at 1518.

The pervasive regulation distinction does not limit itself solely to the length of time which the industry has been subject to the regulations. See Donovan, 452 U.S. at 605-06. Rather, the Supreme Court has stated "the doctrine is essentially defined by the 'pervasiveness and regularity of the regulation and the effect of such regulation upon an [individual's] expectation of privacy.'" Burger, 107 S. Ct. at 2643 (quoting Donovan, 452 U.S. at 600, 606)). Nonetheless, the duration of the regulatory scheme is still a relevant factor "in deciding whether a warrantless inspection pursuant to the scheme is permissible." Id. (quoting Donovan, 452 U.S. at 606).

125. See Burger, 107 S. Ct. at 2644 (1987); Donovan at 452 U.S. at 602; Biswell, 406 U.S. at 315; Colonnade Catering Corp., 397 U.S. at 75; Shoemaker, 795 F.2d at 1142. In Schail v. Tippecanoe County School Corp., 864 F.2d 1309, 1316-17 (7th Cir. 1988), the court noted several important factors influencing the Supreme Court's approval and application of the administrative search exception to commercial premises. The regulatory scheme authorizing the "search must further substantial governmental interest" and "warrantless, suspicionless inspections must be necessary to further the regulatory scheme . . . ." Id. Although the Supreme Court has traditionally applied the administrative search doctrine to searches of commercial enterprises, the court stated that the "Supreme Court has construed [sic] and applied the same constitutional provision" in the administrative search cases, and therefore the Seventh Circuit found these factors relevant to the constitutionality of the challenged drug-testing program. Id. at 21.

In Shoemaker, the Third Circuit went even further by literally applying the administrative search exception to individuals 795 F.2d at 1141-42. In accordance with the Supreme Court, the Third Circuit similarly required "a strong state interest in conducting an unannounced search." Id. at 1142 (citing Donovan, 452 U.S. at 600).

126. See Policeman's Benevolent Ass'n v. Township of Wash., 850 F.2d 133 (3d Cir. 1988); Schail v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986); see also infra notes 163-66 and accompanying text (discussing the NCAA's concern with safety and the public's perception).
searches were conducted for administrative rather than criminal purposes.\textsuperscript{127} Under the administrative search doctrine, these factors enable a court to find warrantless and random searches reasonable because the fundamental policies underlying the fourth amendment remain secured.\textsuperscript{128}

1. \textit{Shoemaker v. Handel}.—Areas of pervasive regulation are usually found where the searching party has utilized its rule-making authority to the extent of lowering the individual’s expectancy of privacy.\textsuperscript{129} In those circumstances, individuals are put on notice that they will continually be subjected to the intrusive rule-making authority of the regulating entity.\textsuperscript{130}

In \textit{Shoemaker v. Handel},\textsuperscript{131} the court was confronted with the issue of whether to apply the administrative search exception to the drug-testing of jockeys.\textsuperscript{132} Although the court noted that several distinctions existed between the traditional application of the administrative search exception to property rather than the application of the exception to individuals,\textsuperscript{133} the court did not find these differences significant since the jockeys were the primary concern of the

\begin{itemize}
\item \textsuperscript{127} See cases cited supra note 126; see also infra notes 171-75 and accompanying text (discussing the administrative nature of the NCAA drug-testing program).
\item \textsuperscript{128} See supra notes 79-81, 94 (discussing the fundamental purposes of the fourth amendment). The fundamental basis underlying the administrative search exception “is that searches not conducted as part of a typical police investigation to secure evidence of crime but as part of a general regulatory scheme, one applying standardized procedures negating the potential for arbitrariness, need not be based on individualized suspicion (nor, sometimes, be authorized by warrants).” Kamisar, supra note 96, at 44.
\item \textsuperscript{129} See supra note 124 and accompanying text.
\item \textsuperscript{130} See United States v. Biswell, 406 U.S. 311, 316 (1972) (holding that when a dealer chooses to engage in a pervasively regulated industry, the individual certainly expects the intrusive authority of the regulating entity to be exercised); \textit{Policeman’s Benevolent Ass’n}, 850 F.2d at 137 (finding police department’s regulations lowered police officers’ expectation of privacy); McDonell v. Hunter, 809 F.2d 1302, 1306 (8th Cir. 1987) (finding corrections officers’ subjective expectations of privacy diminished while in prison); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 180 (5th Cir. 1987), \textit{aff’d}, 109 S. Ct. 1384 (1989) (noting that individuals in the Customs Service know inquiries may be made concerning drug use); \textit{Shoemaker}, 795 F.2d at 1142 (finding the Racing Commission exercised its rule-making authority to reduce the jockeys’ expectations of privacy); Rushton v. Nebraska Pub. Power Dist., 653 F. Supp 1510, 1524 (D. Neb. 1987), \textit{aff’d}, 844 F.2d 562, 566 (8th Cir. 1988) (finding plaintiffs had a lowered expectation of privacy due to pervasive and comprehensive regulatory scheme).
\item \textsuperscript{131} But cf. Capua v. City of Plainfield, 643 F. Supp. 1507, 1519 (D.N.J. 1986) (finding no previous intrusive exercise of regulatory power and, therefore, no notice that plaintiffs would be subject to intrusive searches).
\item \textsuperscript{132} \textit{Id.} Traditionally, the administrative search exception has applied to the inspection of property and industries rather than individuals. See supra note 117 and accompanying text.
\item \textsuperscript{133} \textit{Shoemaker}, 795 F.2d at 1142.
\end{itemize}
Racing Commission’s extensive regulations governing licensing and ethical conduct. The purposes behind the regulations were crucial to the court’s reasoning. In particular, the court focused on the program’s goals of preserving the integrity in the racing industry and promoting fairness in competition as it related to the wagering public.

Unlike the warrantless search situation where a search is unannounced, the jockeys received notice that they would be subjected to warrantless and random drug-testing. As a result, the extensive rules promulgated by the Racing Commission lowered the jockeys’ expectation of privacy, and thereby justified the application of the administrative search exception to persons engaged in the horse racing industry.

2. National Treasury Employees Union v. Von Raab.— In National Treasury Employees Union v. Von Raab, the court considered the constitutionality of a random drug-testing program directed at individuals within the United States Customs Service. The Fifth Circuit focused on the purposes underlying the administrative search exception rather than the doctrine’s literal requirements.

Although the employees did not participate in a highly regulated industry, the court analogized to the purposes underlying the regulated industry distinction. The search was administrative in nature and not conducted to gather evidence for a criminal investigation which might have resulted in punitive measures. Focusing on

134. Id.
135. Id.
136. Id. at 1141-42. The court noted that since the viability of the horse racing industry was dependent upon the public’s perception of the industry, the racing commission had a strong interest in assuring the fairness in competition. Id.
137. Id. at 1142.
138. Id.
139. 816 F.2d 170 (5th Cir. 1987), aff’d, 109 S. Ct. 1384 (1989).
140. Id.
141. Id. at 174-82.
142. Id. at 180.
143. Id.; supra note 124 (discussing the pervasively regulated distinction as it relates to the administrative search doctrine). But see Lovorn v. City of Chattanooga, 846 F.2d 1539, 1545-46 (6th Cir. 1988) (stating that “[t]o allow widespread mandatory drug testing of individuals by analogizing it to the relaxed standards governing . . . searches of places allowed under the administrative search warrant exception fundamentally misapprehends that doctrine.”).
144. National Treasury Employees Union, 816 F.2d at 179. The court reasoned that the need for protections against a particular intrusion is lessened where the purpose of the search
the individuals’ lowered expectation of privacy, individuals who sought these positions knew the Customs Service would utilize its regulatory power to investigate drug use by employees seeking certain high security positions. The employment positions were voluntary and an employee could refuse to be drug tested without an inference of guilt or the application of punitive measures. The only consequence of refusing to be tested would be the withdrawal of the application for the position requested. Similar to the Racing Commission in Shoemaker, the Customs Service has historically enacted rules and regulations, including the drug-testing program, in order to maintain the Custom Service’s integrity. As a result, the random drug-testing of employees seeking to be transferred to more sensitive positions was held not to be constitutionally unreasonable.

3. Capua v. City of Plainfield.— Despite providing an exception to the requirement of individualized suspicion, the administrative search exception should not be used as a blanket justification for all random drug-testing programs. In Capua v. City of Plainfield, the defendants unsuccessfully relied upon Shoemaker to justify the urinalysis testing of fire fighters without individualized suspicion. Although the court refused to apply the administrative search exception to carry out an administrative scheme. Id. Thus, the random drug-testing of Customs Service employees requesting transfers to certain sensitive positions did not require a warrant or probable cause. Id. at 179 n.49. In addition, the court noted the Supreme Court’s acceptance of searches pursuant to an administrative scheme without a warrant or individualized suspicion. Id. at 179 nn.52 & 53; see also Camara v. Municipal Court, 387 U.S. 523, 535 (distinguishing a search for the purposes of a criminal investigation from a purely administrative search).

145. National Treasury Employees Union, 816 F.2d at 178.
146. Id. The concept of voluntariness relates to the administrative nature of the search and indicates, to a certain extent, the existence of adequate notice. Since the positions were voluntary, those who chose to seek employment for these positions knew in advance they would be drug-tested. In addition, employees voluntarily seeking these employment positions would not be penalized if the individual withdrew his or her application. Id.; see supra note 110 (discussing the concept of voluntariness in the context of the warrant requirement).
147. National Treasury Employees Union, 816 F.2d at 178.
148. See supra notes 131-38 and accompanying text.
149. National Treasury Employees Union, 816 F.2d at 179.
150. Id. at 182.
151. Yale Kamisar, Professor of Law at the University of Michigan, exemplifies a growing concern surrounding the use of the administrative search exception: “The serviceability of the administrative search concept has gladdened government lawyers, but has alarmed others, including me. ‘Administrative search’ is swarming around the Fourth Amendment like bees. And the drone may soon be deafening.” Kamisar, supra note 97, at 45.
153. Id. at 1518-19.
NCAA DRUG-TESTING

154. Id. The court noted that the exception created in Shoemaker was applicable only to voluntary participants in a highly regulated industry. Id. (citing Shoemaker v. Handel, 795 F.2d 1136, 1142 n.5 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986)). But see supra notes 139-50 and accompanying text (applying the administrative search exception due to the individual's lowered expectation of privacy, as opposed to the highly regulated nature of the industry).


156. Id.

157. Id. The voluntary nature or ability to make an informed decision is crucial to a court's finding that the individual received adequate notice. See supra note 146 and accompanying text.

158. Id. at 1512.

159. Id. at 1519. The City of Plainfield was "not seeking to combat public perception of 'untoward influence' undermining its fire force." Id. As a result, the state's interest in departmentwide urinalysis was not compelling. Id. at 1519-20.

160. Id. at 1519. The procedures concerning the selection of fire fighters and the Plainfield Fire Department's satisfactory performance created the public's positive perception. Id. There was nothing to indicate the existence of a drug problem affecting the fire fighters' abilities and performances. Id.
V. THE FOURTH AMENDMENT AS APPLIED TO THE NCAA DRUG-TESTING PROGRAM

A. *The Administrative Search Exception*

1. The Warrant Requirement.— Similar to other drug-testing programs, the NCAA drug-testing program does not require a warrant as a prerequisite to conducting urinalysis. It is unlikely that the NCAA will be required to obtain a warrant due to the applicability of the administrative search exception, or because the burden of obtaining a warrant will frustrate the purposes of the search.\(^{161}\) While the latter exception will only permit a search to be conducted without a warrant, the administrative search exception eliminates the necessity of a warrant and the requirement of particularized suspicion.\(^{162}\) Consequently, the application of the administrative search exception will permit the NCAA to conduct not only warrantless searches, but searches not based on reasonable suspicion.

2. The NCAA’s Interest.—The NCAA has a substantial interest in the random drug-testing of student-athletes. The public’s perception of intercollegiate athletics is crucial to the viability and continued support of college sports.\(^{163}\) The primary purposes of the

161. Despite the lack of a warrant, “[w]here the purpose of the search is to detect illegal substances in the body, it is undisputed that the delay of obtaining a warrant could frustrate that purpose.” Guiney v. Roache, 686 F. Supp. 956, 959 (D. Mass. 1988); see Schmerber v. California, 384 U.S. 757, 770-71 (1966); Policeman’s Benevolent Ass’n v. Township of Wash., 672 F. Supp. 779, 785 (D.N.J. 1987), rev’d on other grounds, 850 F.2d 133 (3d Cir. 1988); *supra* notes 109-16 and accompanying text (discussing the exceptions to the warrant requirement); cf. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (discussing reasons why a warrant is both unnecessary and undesirable in a school setting).

162. In *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402 (1989), the Court recognized “that the Government’s interest in dispensing with the warrant requirement is at its strongest when . . . the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.” *Id.* at 1416 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967)).

163. Dr. Robert Dugal, member of the International Olympic Committee Medical Commission and director of the drug-testing programs at the 1976 Montreal Summer Olympic Games and the 1980 Lake Placid Winter Olympic Games, comments on the importance of the public’s perception of intercollegiate competition and the influence of drugs upon this perception:

[T]he profile and popularity of collegiate sport is such that revelations of drug misuse by athletes at the higher levels of competition have an immediate adverse effect on the entire sport community and society at large. The health of athletes is threatened; public perception about sport[s] excellence is endangered; younger athletes aspiring to high achievement in sport come to believe (and sometimes are lead to believe) that they too must use such drugs if they are to succeed; and a great many athletes come to regard their fellow competitors not as colleagues engaged in
NCAA's drug-testing program are to protect the health of the athlete and the integrity of intercollegiate competition.\textsuperscript{164} In order to achieve these ends, the NCAA is committed to both drug-testing\textsuperscript{165}

fair competition, but rather as objects of suspicion about whom allegations and counter-allegations of drug use are made.

Dugal Affidavit, \textit{supra} note 32, ¶ 6, at 3. The effects of drug use in sports does not only hurt the public perception of only the athlete, but extends to the overall perception of athletics:

When a major sports figure is found to be drug dependent, even though he may be an involuntary role model, he disappoints and hurts many more people than just himself. It can be devastating not only for the athlete, who throws away the precious gifts of supreme athletic ability and achievement, but also for the young person who idolizes and often emulates him.

\textit{Sports and Drug Abuse: Senate Hearing 98-1220 Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources,} 98th Cong., 2d Sess. 2 (1984) (opening statement of Senator Hawkins). The existence of "[h]uge salaries, illegalities on college campuses and the seemingly endless reports of drug and alcohol abuse have moved fans to the point where they wait, and in some cases root, for the athletes to fail." Cassidy, \textit{Heading Off Substance Abuse at the Pass,} \textit{Newsday,} Feb. 28, 1989, at col. 1. Ben Johnson's positive test results, \textit{see infra} note 215, are illustrative of the effect that even one athlete can have upon a sport. Canadian track officials have experienced many problems obtaining sponsors for events within Canada and several track meets have been cancelled. Jeansonne, \textit{Johnson and His Sport Hurt by Divorce,} \textit{Newsday,} Jan. 30, 1989, at 95, col. 1, col. 3. Mazda Corp., which sponsored a track team consisting of the best Canadian athletes, including Ben Johnson, has decided that it will no longer sponsor the team. \textit{Id.} at 95, col. 3.

164. The preface to the 1987-88 NCAA Drug-Testing Program exemplifies the NCAA's interest in conducting random drug-testing. The preface provides the following:

With their approval of Proposal No. 30 at the January 1986 Convention and Proposal No. 80 at the January 1988 Convention, NCAA member institutions reaffirmed their dedication to the ideal of fair and equitable competition at their championships and postseason certified events. At the same time, they took another step in the protection of the health and safety of the student-athletes therein competing. So that no one participant might have an artificially induced advantage, so that no one participant might be pressured to use chemical substances in order to remain competitive and to safeguard the health and safety of participants, this NCAA drug-testing program has been created.

\textit{NCAA Pamphlet, supra note 8, at 2. Article 2 of the NCAA's constitution sets forth the purposes and fundamental policy of the NCAA. Quoted in relevant part, the purposes of the NCAA are:}

\begin{itemize}
  \item[(a)] To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence . . .
  \item[(c)] To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism . . .
  \item[(i)] To study in general all phases of competitive intercollegiate athletics and establish standards whereby colleges and universities of the United States can maintain their athletics activities on a high level.
\end{itemize}

\textit{NCAA Const., supra note 2, art. 2 § 1 (a), (c), (i).}

165. \textit{See supra} note 164 (discussing the NCAA's motivations for conducting drug-testing). In addition to conducting its own drug-testing program, the NCAA encourages its member institutions to establish their own testing programs. \textit{See NCAA Pamphlet, supra note 8, at 19-20. Towards that end, the NCAA has provided guidelines which inform member institu-
The banned substance list is indicative of these concerns. Each substance on the NCAA banned substance list enables athletes to create a competitive advantage, whether perceived or actual. Despite the uncertainty of whether banned substances enable an athlete to obtain a tangible advantage, there is incontrovertible evidence that the use of banned substances by student-athletes creates serious health-related dangers to themselves and others. In addition, the NCAA drug-testing program selects

sections of the necessary prerequisites to a legally permissible program. Id. For a discussion of the similarities and differences between the NCAA drug-testing program and a university's drug-testing program, see Scanlan, supra note 47, at 882-92, and Brock & McKenna, Drug Testing in Sports, 92 Dick. L. Rev. 505, 533-42 (1988).

NCAA publications clearly illustrate the NCAA’s concern with the athlete’s health and the community’s perception of college athletics. The NCAA firmly believes that education, along with drug-testing, is an effective means of prevention. Towards that end, the NCAA encourages its member institutions to engage in extensive drug rehabilitation and drug education:

The NCAA commitment is to the overall development of the student-athlete. A major portion of that responsibility entails providing authoritative, comprehensive information to coaches, athletics administrators and student-athletes about the dangers and realities of drug abuse.


167. See NCAA EXEC. REG., supra note 5, art. 1, § 7(b), (c) (reprinting the banned drug classes for 1988-89 with common examples); Dugal Affidavit, supra note 32, ¶¶ 13-20, at 7-11 (providing an exhaustive description of the dangerous effects associated with the banned substances on the NCAA list); DRUGS AND THE ATHLETE, supra note 166, at 2-6 (listing NCAA banned substances and their impact on athletic performance). The NCAA provides the following comments concerning the banned substance list: “[t]his list is comprised of substances generally purported to be performance enhancing and/or potentially harmful to the health and safety of the student-athlete. The drug classes specifically include stimulants (such as amphetamines and cocaine) and anabolic steroids as well as other drugs.” NCAA PAMPHLET, supra note 8, at 2. In addition, the NCAA has instituted anabolic steroid testing in the off-season for the sport of football and other sports on a voluntary basis. NCAA BYLAWS, supra note 24, art. 5, § 2(d); see NCAA PAMPHLET, supra note 8, at 18-19 (reprinting the guidelines for NCAA off-season steroid testing in football). Twenty-five institutions, involving 546 student-athletes, have agreed to participate in the NCAA’s off-season steroid testing program. NCAA, 1987-88 ANNUAL REPORTS 38 (1989) (reprinting report of Executive Committee) [hereinafter ANNUAL REPORTS].

168. See Chaiikin, The Nightmare of Steroids, SPORTS ILLUSTRATED, Oct. 24, 1988, at 82. Tommy Chaiikin, a long-term steroid user and varsity football player at the University of South Carolina, describes how continual steroid use almost led him to suicide:

I was sitting in my room at the root, the athletic dorm at the University of South Carolina, with the barrel of a loaded .357 Magnum pressed under my chin. A .357 is a man’s gun, and I knew what it would do to me. My finger twitched on the trigger.

I was in bad shape, very bad shape. From the steroids. It had all come down from the steroids, the crap I’d taken to get big and strong and aggressive so I could play this game that I love.

Id. at 84. The experience of Tommy Chaiikin is not an isolated event. In a Harvard Medical
student-athletes based on position of finish or suspicion. If random selection is not permitted, the NCAA’s purposes for conducting drug-testing will be significantly impaired. The NCAA drug-testing program is also administrative in nature. Pursuant to its rule-making authority, the NCAA established a program which does not subject the student-athlete to any form of criminal prosecution.

School study of approximately 41 steroid users, five of the study subjects (12.2%) showed signs of psychoses. These included paranoid and grandiose delusions, auditory hallucinations, and paranoid jealousy. Five of the study subjects (12.2%) had manic episodes and symptoms, and five other subjects (12.2%) developed major depression. Pope & Katz, Affective and Psychotic Symptoms Associated with Anabolic Steroid Use, 145 Am. J. Psychiatry 487, 488-89 (1988); see also Menamay & Robins, The Insanity of Steroid Abuse, Newsweek, May 23, 1988, at 75; Altman, Concern Grows Over Steroids, N.Y. Times, Sept. 28, 1988, at D32, col. 1. Drugs such as cocaine, amphetamines and steroids cause increased aggressiveness, lessen awareness to pain, and are dangerous to both the user and players. See Schail v. Tippecanoe County School Corp., 679 F. Supp. 833, 842 (N.D. Ind.), aff’d 864 F.2d 1309 (7th Cir. 1988); Altman, New ‘Breakfast of Champions’: A Recipe for Victory or Disaster?, N.Y. Times, Nov. 20, 1988, at A1, col. 3. Steroid use has been linked to increased cholesterol level and blood pressure which may lead to an increased risk of heart disease. See Bishop, Study of Athletes Shows Steroid Pills Harm Cholesterol, Wall St. J., Feb. 24, 1989, at B4, col. 4; Altman, supra, at A22, col. 4.

169. See supra notes 24-26 and accompanying text.

170. See NCAA Pamphlet, supra note 8, at 2; Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.) (concluding frequent and random alcohol and drug-testing is an effective means of demonstrating the sport’s integrity), cert. denied, 476 U.S. 577 (1986), But see Capua v. City of Plainfield, 63 F. Supp. 1507, 1518 (D.N.J. 1986) (concluding the state’s interest will not be significantly impaired by individualized suspicion). Dr. Robert Dugal, see supra note 163, states the following concerning the NCAA’s necessity of selecting student-athletes based upon random selection:

The NCAA does not recommend testing only on probable cause or individual suspicion. This is reasonable as it is practically impossible to detect by observation alone the use of anabolic steroids, depressants and even stimulants in most cases. Additionally, mere testing would stigmatize student-athletes . . . . [T]esting all competitors would be logistically impossible and financially prohibitive. Thus, a selection process based upon randomization is the fairest way to conduct the choice of athletes for testing and is consistent with the deterrent effect which is sought.


171. Cf. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 179 (5th Cir. 1987) (reasoning that the need for protections against a particular intrusion is lessened where the search is conducted pursuant to an administrative scheme), aff’d, 109 S. Ct. 1384 (1989); see supra notes 117-28 and accompanying text (discussing the administrative search doctrine, and suggesting that warrantless and random searches will be permitted so long as the policies underlying the fourth amendment are shielded).

172. This distinction has influenced several courts to hold particular drug-testing programs constitutionally reasonable. See, e.g., Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (finding no evidence that urinalysis tests were conducted for criminal investigatory purposes); Schail v. Tippecanoe County School Corp., 679 F. Supp. 833, 858 (N.D. Ind.) (concluding that the drug-testing program was non-punitive in nature and students would be denied participation only in extracurricular sports), aff’d, 864 F.2d 1309 (7th Cir. 1988). But see, e.g., McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (stating that

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a student athlete tests positive, the student-athlete remains eligible for participation in all intercollegiate competitions except for NCAA championships and certified postseason football contests. Participation in intercollegiate athletics is voluntary to the extent that competition in athletics, and more specifically postseason competition, is merely a privilege and not a right guaranteed by the Constitution. Thus, the student-athlete is put on notice that the privilege of intercollegiate participation may be withdrawn if certain violations occur.

The rules and regulations continually promulgated by the NCAA pursuant to its rule-making authority are illustrative of the NCAA’s concern with the health of the athlete and integrity of athletics. In almost every instance, the NCAA has enacted regula-

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individuals are protected by the fourth amendment all of the time, not only when criminal suspicion exists), aff’d as modified, 809 F.2d 1302 (8th Cir. 1987); Capua v. City of Plainfield, 643 F. Supp. 1507, 1520 (D.N.J. 1986) (holding drug-testing program unconstitutional where defendants were legally compelled to criminally charge those who tested positive).

In O’Halloran v. University of Wash., 679 F. Supp. 997 (W.D. Wash.), rev’d on other grounds, 856 F.2d 1375 (9th Cir. 1988), the court determined the likelihood of success on the merits of a constitutional claim challenging the NCAA drug-testing program. In finding the program constitutional, the court reasoned:

In providing the urine sample, the student-athlete is not threatened with the consequences of a criminal investigation. The only consequence facing a student-athlete who tests positive (after subsequent testing confirming positive results) is denial of intercollegiate eligibility, which is not protected by either the State or Federal constitution.

679 F. Supp. at 1005.

173. Refusal to sign the consent form, however, results in ineligibility for all intercollegiate competition. See supra note 20 and accompanying text; infra note 195 (reprinting and discussing NCAA drug consent form).

174. It is unlikely a student-athlete will successfully allege that a student-athlete possesses a constitutional right to engage in intercollegiate postseason competition. See Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975); Hawkins v. NCAA, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987); Howard Univ. v. NCAA, 510 F.2d 213, 222 n.16 (D.C. Cir. 1975); Schain, 679 F. Supp. at 854-55; Note, supra note 52, at 220-29; supra text accompanying note 147. As the Supreme Court noted in Board of Regents v. Roth, 408 U.S. 564 (1972), “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Id. at 577.

175. See infra notes 192-99 and accompanying text.

176. The NCAA constitution states the following as one of its fundamental purposes: “To legislate, through bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics...” NCAA Const., supra note 2, art. 2, § 1(h). The subject matter of the NCAA legislation concerns the conduct of athletic program in areas such as admissions, financial aid, eligibility and recruiting. Member institutions are obligated to apply and enforce NCAA legislation. NCAA Const., supra note 2, art. 2, § 2(b); see also infra notes 183-85 (discussing NCAA’s requirements concerning eligibility, recruitment, membership, and academic standards).
tions which enhance the integrity of intercollegiate athletics and ensure fairness in competition. The NCAA has enacted various regulations governing the ethical conduct of student-athletes as well as staff members of member institutions. The NCAA's code of ethics governs activities such as gambling, compensation, and contracts. In addition, the NCAA constitution provides principles of ethical conduct governing staff members who have knowledge of a student-athlete's use of a banned substance, or a staff member's failure to follow certain procedures concerning drug abuse.

The NCAA's concern for the integrity of intercollegiate athletics goes beyond rules and regulations directed at the ethical conduct of member institutions. Regulations prohibit the advertising of products or activities which are detrimental to the welfare of student-athletes and are not in the best interest of higher education. In addition, extensive regulations have been enacted governing recruitment, membership, minimum academic standards, and eligibility.

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177. See NCAA Const., supra note 2, art. 3, § 1 (listing NCAA's principles of ethical conduct); cf. Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.) (finding a drug-testing program constitutional where the Racing Commission was concerned with the health of the jockeys and fairness in competition), cert. denied, 107 S. Ct. 577 (1986).

178. Id. art. 3, § 6(c).

179. Id. art. 3, § 6(d), (g), (i), (j).

180. Id. art. 3, § 6(h).

181. Id. art. 3, § 6(b).

182. NCAA Bylaws, supra note 24, art. 2, § 2(j); NCAA Exec. Reg., supra note 5, art 1, § 19(a). The general "[a]dvertising policies of the NCAA are designed to exclude those advertisements that do not appear to be in the best interests of higher education . . . . [T]he following expressly are prohibited: alcoholic beverages that exceed six percent alcohol by volume, cigarettes, smokeless tobacco and other tobacco products, professional sports organizations or personnel . . . . and organizations or individuals promoting gambling." Id. (parenthetical omitted). In addition, the NCAA expressly recommends that member institutions prohibit the consumption of alcoholic beverages at the site of athletic competition. NCAA Recommended Policy, policy 13. NCAA executive director Dick Schultz has stated that after the 1990 NCAA basketball tournament, there will no longer be any beer advertising despite the fact that beer advertising generated over $36 million in network revenues. Topol, Schultz Brings Human Touch to Stuffy NCAA, Newsday, Jan. 5, 1989, at 106, col. 3.

183. NCAA Const., supra note 2, art. 3, § 5; NCAA Bylaws, supra note 24, art. 1. The NCAA promulgates recruiting rules "to prevent member institutions athletic departments from influencing high school athletes, in the throws of making secondary education decisions, to the exclusion of other educational considerations and values." Hawkins v. NCAA, 652 F. Supp. 602, 615 (C.D. Ill. 1987).

184. NCAA Const., supra note 2, art 4; NCAA Bylaws, supra note 24, art. 9, §§ 1-4.

185. NCAA Const., supra note 2, art. 3, § 3; NCAA Bylaws, supra note 24, art. 5, § 1(j) (including "Note" provisions). In January, 1989, the NCAA reinforced the bylaws, commonly known as "Proposition 48," by adopting Proposal 42. Under Proposition 48, student-athletes would still receive their scholarships if they met the minimum grade point average or the minimum standardized test scores. Under Proposal 42, however, partial qualifiers will not
bility. These rules prevent a member institution from engaging in unfair competition to the detriment of other member institutions, the athlete, and the overall perception of intercollegiate athletics.

3. Pervasive Regulation.— In addition to illustrating the NCAA’s compelling interest in random testing, the NCAA’s extensive regulations serve another equally important purpose. Combined with the circumstances surrounding intercollegiate athletics, the NCAA should be characterized as a pervasively regulated industry. The NCAA’s regulations cover almost every aspect of intercollegiate athletics and are extremely comprehensive and detailed. Student-athletes who become participating members are put on notice that they will be subject to the intrusive authority of the NCAA. In essence, student-athletes are voluntary participants in


186. NCAA CONST., supra note 2, art 3, § 9; NCAA BYLAWS, supra note 24, arts. 4, § 1, 5, §§ 1, 5-7.

187. See supra note 124 (discussing the pervasive regulation distinction).

188. Illustrative of the detail common throughout the NCAA regulations are the rules governing contacts and visits of prospective recruits. With regard to contacts, the NCAA regulates the information permitted to be given to prospective student-athletes as follows:

(iii) One annual athletics recruiting brochure (with only one color of printing inside the covers) per sport...

(v) One wallet-size playing schedule per sport...

(x) Newspaper clippings, which may not be assembled in any form of scrapbook...

NCAA BYLAWS, supra note 24, art. 1, § 1(b)(3)(ii), (v), (x). The NCAA has even promulgated regulations governing the types of air fare and amount of hours a recruit may remain on a member institution’s campus:

(a) A member institution may finance one and only one visit to its campus for a given prospective student-athlete. Such visit shall not exceed 48 hours. If commercial air transportation is used, the fare may not exceed tourist (or comparable) class.

NCAA BYLAWS, supra note 24, art. 1, § 9(a).

189. See supra notes 18-20 and accompanying text.
a highly regulated area. This is especially true since the NCAA's constitution explicitly provides the NCAA with legislative and regulatory power concerning matters relevant to intercollegiate athletics.

The student-athlete is additionally put on notice of the NCAA's intrusive authority when the NCAA consent form is signed by the student-athlete prior to participation in intercollegiate competition each year. Arranged in three parts, the consent form contains a statement concerning eligibility, the release of information, and drug-testing. While a search may be constitutionally reasonable


191. See supra note 176.

192. The introduction to the consent form provides, in relevant part: "Before you sign this form, you should read the Summary of NCAA Regulations provided by your director of athletics or read the sections of the NCAA Manual that deal with your eligibility." NCAA PAMPHLET, supra note 8, at 5 (reprinting student-athlete consent form).

193. The statement concerning eligibility states, in relevant part:

   By signing this part of the form, you affirm that, to the best of your knowledge, you are eligible to compete in intercollegiate competition.

   You affirm that you have read the Summary of NCAA Regulations or the relevant sections of the NCAA Manual, and that your director of athletics gave you the opportunity to ask questions about them.

   You affirm that you meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, amateur status and involvement in organized gambling . . . .

   You affirm that you understand that if you sign this statement falsely or erroneously, you violate NCAA legislation on ethical conduct and you will further jeopardize your eligibility.

NCAA PAMPHLET, supra note 8, at 5-6.

194. NCAA PAMPHLET, supra note 8, at 6 (reprinting the Buckley Amendment Consent). Pursuant to the Buckley Amendment Consent, student-athletes give their consent only to disclose the following information to authorized NCAA representatives: the Buckley Amendment Consent form, results of NCAA drug tests, academic transcripts, financial aid records, and information obtained pertaining to NCAA eligibility. Id.

195. See NCAA CONST., supra note 2, art. 3, § 9(g). The student-athlete consent form, subject to annual review by the NCAA, provides the following:

   Drug-Testing Consent

   By signing this part of the form, you certify that you agree to be tested for drugs. You agree to allow the NCAA, during the academic year, before, during or after you participate in any NCAA championship or in any postseason football game certified by the NCAA, to test you for the banned drug listed in Executive Regulation 1-7-(b) in the NCAA Manual.

   You reviewed the procedures for NCAA drug-testing that are described in the NCAA Drug-Testing Program brochure.

   You understand that if you test positive (consistent with NCAA drug-testing protocol), you will be ineligible to participate in postseason competition for at least 90
pursuant to voluntary consent, it is unlikely the NCAA consent form will serve as a blanket waiver of the student-athlete's fourth amendment rights. However, in addition to the NCAA's extensive regulations, the consent form is another factor lowering the student-athlete's expectation of privacy. Pursuant to the consent form, the student-athlete has advance knowledge of the breadth and scope of the NCAA's regulations. Student-athletes who choose to participate in intercollegiate athletics undoubtedly know the NCAA will exercise its regulatory authority in order to ensure the fairness of competition and integrity in intercollegiate athletics and higher education.

If you test positive and lose eligibility for 90 days, and then test positive again after your eligibility is restored, you will lose postseason eligibility in all sports for the current and the next academic year.

You understand that this consent and the results of your drug tests, if any, will only be disclosed in accordance with the Buckley Amendment consent.

Date Signature of student-athlete

Date Signature of parent if the student-athlete is a minor

NCAA PAMPHLET, supra note 8, at 6-7; see also supra note 194 (discussing the Buckley Amendment Consent).

196. See supra note 110 and accompanying text.

197. See National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833, 857 (N.D. Ind.), aff'd 864 F.2d 1309 (7th Cir. 1988); Lock & Jennings, supra note 22, at 606-08; Note, supra note 110, at 822-30. While a consent form provides the student-athlete with "notice of the program, . . . it will not operate as a waiver of constitutional rights at the operational level." Schaill, 679 F. Supp. at 857.

198. The traditional application of the administrative search exception involved unannounced searches of property. See cases cited supra note 117. However, where notice exists, the constitutional reasonableness of an administrative search is enhanced. See, e.g., Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.) (noting that unlike traditional warrantless searches, the contested searches were announced), cert. denied, 107 S. Ct. 577 (1986); Schaill, 679 F. Supp. at 857 (finding urinalysis testing reasonable where consent forms provided advanced notice of drug-testing program); Mulholland v. Department of Army, 660 F. Supp. 1565, 1569 (E.D. Va. 1987) (finding employees had advance knowledge of urinalysis testing). But cf. Capua v. City of Plainfield, 643 F. Supp. 1507, 1519 (D.N.J. 1987) (finding urinalysis testing unreasonable where plaintiffs had no warning or notice whatsoever). An individual can consent only to reasonable searches, and advance consent to future unreasonable searches is not constitutional. McDonell v. Hunter, 612 F. Supp. 1122, 1131 (S.D. Iowa 1985), aff'd as modified, 809 F.2d 1302 (8th Cir. 1987).

199. In Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986), the Third Circuit made a similar observation: "When jockeys chose to become involved in this perversely-regulated business . . . they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry." Id. at 1142; see also supra notes 176-86 and accompanying text (discussing the NCAA's regulatory purpose).
Factors and circumstances unique to athletics, although not determinative, also emphasize the student-athlete's lowered expectation of privacy. The popularity and size of intercollegiate competition places the athlete in a position of public prominence. Consequently, athletes are considered to be public figures for purposes of libel and slander actions. The media regularly publishes articles and reports concerning college athletics, and the NCAA annually generates significant proceeds from national television contracts.

200. During the 1987-88 year, the NCAA reported that “[r]ecord gross receipts again were recorded, paid attendance increased and individual participation increased.” ANNUAL REPORTS, supra note 8, at 23. Men's championships and meets involved 12,482 student-athletes, and 1,584 teams. “[g]ross receipts were a record $76,700,636 and paid attendance was 1,608,227.” Id. In women's championships and events, “[t]here were 7,344 women student-athletes and 1,073 teams participating in the 33 championships for women. Record gross receipts of $2,599,824 and paid attendance of 312,892 were recorded.” Id. Yearly attendance at college football games increased from 20,403,000 in 1960 to 35,541,000 in 1980. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 235 (102d ed. 1981). Similarly, yearly attendance of college basketball games increased from 29,041,000 in 1977 to 30,692,000 in 1980. Id.

Television coverage of NCAA championships and events has enhanced the popularity of college athletics. It is estimated that the Division I Men's Basketball Championships were viewed in 16.7 million homes. ANNUAL REPORTS, supra note 8, at 127 (reprinting report of NCAA Division I Men's Basketball Committee); see also infra note 203 (discussing the amount of funds generated from NCAA television contracts). In conjunction with CBS Sports and ESPN, NCAA Productions “coordinated coverage of 30 first-round games televised by 166 Stations.” ANNUAL REPORTS, supra note 8, at 127. At the 1988 College World Series, all games were televised by ESPN and the “[s]ingle-game National Championship . . . was televised live by CBS Sports.” Id. at 123 (reprinting report of NCAA Baseball Committee).

201. See supra note 163 and accompanying text.

202. Since 1967, in defamation actions brought by professional athletes and sports figures, courts have reached the conclusion that the plaintiff was a public figure or that the subject of the publication was a matter of legitimate public interest thereby requiring the plaintiff to prove the higher standard of malice. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (football coach); Cepeda v. Cowles Magazine and Broadcasting, Inc., 392 F.2d 417 (9th Cir.) (baseball player Orlando Cepeda), cert. denied, 393 U.S. 840 (1968); Time Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (basketball player Neil Johnston); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (football player Don Chuy); Bell v. Associated Press, 584 F. Supp. 128 (D.D.C. 1984) (football player Theo Bell); Fazekas v. Crain Consumer Group Div. of Crain Comms., Inc., 583 F. Supp. 110 (S.D. Ind. 1984) (auto racer Dale Fazekas); Gomez v. Murdoch, 193 N.J. Super. 595, 475 A.2d 622 (N.J. Super. Ct. App. Div. 1984) (jockey Michael Gomez). The general reasoning is that an athlete, professional or otherwise, becomes a public figure when that athlete “chooses to perform publicly in a sport which commands widespread interest, and regarding which the communications media regularly report.” Id. at 600, 475 A.2d at 625.

203. See infra notes 213-17 (listing many published stories concerning athletic drug use in professional, amateur, collegiate and high school athletics). In 1975, the NCAA generated $13 million annually from the negotiation of television contracts. Howard Univ. v. NCAA, 510 F.2d 213, 220 (D.C. Cir. 1975). More recently, the NCAA has negotiated a contract with CBS for the rights to the NCAA Basketball Tournament. The NCAA convinced CBS to spend $166 million over three years. Topol, Schultz Brings Human Touch To Stuffy NCAA,
Athletes expect the presence of the media and other individuals in areas considered to be as private as locker rooms or showers.204 The nature of athletic participation also lowers the athlete's expectation of privacy. Physical contact is more likely to occur in athletic competition.205 Similarly, the student athlete is more accustomed to communal undress as well as periodic physical examinations.206

B. The Reasonableness Requirement

Application of the administrative search exception will permit the NCAA to conduct warrantless and random searches. However, even if a search is constitutionally permissible without a warrant or particularized suspicion, the fourth amendment still requires the search to be reasonable. As a result, the NCAA will be required to conduct its drug-testing program in a constitutionally reasonable manner.207 The test of reasonableness cannot be precisely defined or mechanically applied.208 “[I]t requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”209 In order to balance these interests, the Supreme Court has applied a twofold inquiry to determine if a search without a warrant or probable cause is reasonable: first, was the search justified at its inception; second, “one must determine whether the search


205. See Schail v. Tippecanoe County School Corp., 679 F. Supp. 833, 856 (N.D. Ind.), aff'd, 864 F.2d 1309 (7th Cir. 1988). While the court in Schail did not view physical contact as determinative of negating privacy expectations, it does illustrate the student-athlete's lowered expectation of freedom from physical intrusion. Id. Thus, student-athletes may view urinalysis testing to be less intrusive than would the general student body. In addition, urinalysis is not as intrusive as an invasion of bodily integrity or of an individual's home. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1987) (footnotes omitted), aff'd, 109 S. Ct. 1384 (1989).

206. See O'Halloran v. University of Wash., 679 F. Supp. 997, 1005 (W.D. Wash.), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988). Communal undress and periodic physical examinations are present in athletics unlike other university contexts. Id. In O'Halloran, the court further observed that “in the context of health examinations, viewing and touching is tolerated among relative strangers that would be firmly rejected, to say the least, in other contexts.” Id.


209. Id.
as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’” 210

1. Justified At Its Inception.— A search will be justified at its inception where there is “a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought.” 211 In the context of intercollegiate drug-testing, a search will be considered to be justified at its inception where there are reasonable grounds the search will reveal student-athlete drug use. 212

The NCAA’s suspicion “is not directed at a particular individual but at an activity that has experienced a drug-abuse problem.” 213 There is more than a slight reason for the NCAA to believe that the high incidence of drug use which exists among professional 214 and


211. Railway Labor Executives’ Ass’n v. Burnley, 839 F.2d 575, 587 (9th Cir. 1988), rev’d sub nom. Skinner v. Railway Labor Executives’ Ass’n, 109 S. Ct. 1402 (1989); cf. O’Connor v. Ortega 107 S. Ct. 1492, 1503 (1987) (holding a search is justified at its inception when there are reasonable grounds to suspect the search will reveal work-related misconduct); T.L.O., 469 U.S. at 341-42 (holding a search will be justified at its inception where reasonable grounds exist that the search will result in evidence of student violations).

212. O’Halloran v. University of Wash., 679 F. Supp. 997, 1004 (W.D. Wash), rev’d on other grounds, 856 F.2d 1375 (9th Cir. 1988). The court in O’Halloran, confronted with a constitutional challenge to the NCAA drug-testing program, expressed the inquiry in the following language: “First, was the action justified at its inception, that is, are there reasonable grounds for believing that urine tests of student-athletes will turn up evidence of misconduct inappropiate [sic] drug use?” Id.; cf. National Fed’n of Fed. Employees v. Weinberger, 818 F.2d 935, 942-43 (D.C. Cir. 1987) (holding a search is justified at its inception when reasonable grounds exist for suspecting the search will turn up evidence of work-related drug use). But see Capua v. City of Plainfield, 643 F. Supp. 1507, 1516-20 (D.N.J. 1986) (finding search not justified where there was no indication of any drug problem among fire fighters).

213. O’Halloran, 679 F. Supp. at 1004. The most publicized athlete who tested positive was Oklahoma’s Brian Bosworth. See Neff, Bosworth Faces the Music, SPORTS ILLUSTRATED, Jan. 5, 1987, at 21; Axthelm, A Star Flunks His Test, NEWSWEEK, Jan. 5, 1987, at 48. The drug deaths of Boston Celtic first round draft choice Len Bias and All-American football player and NFL Rookie of the Year Don Rogers, have publicized the seriousness and dangers of drug use among college athletes. See McCallum, The Cruelest Thing Ever, SPORTS ILLUSTRATED, June 30, 1986, at 20; Ketyjian & Selcraig, A Killer Drug Strikes Again, SPORTS ILLUSTRATED, July 7, 1986, at 18. In light of the Vanderbilt University incident, see infra note 220, “[r]ecent events indicate that steroid use on campuses is prevalent indeed, in spite of denials by many college coaches in football and other sports.” Johnson, Steroids: A Problem of Huge Dimensions, SPORTS ILLUSTRATED, May 13, 1985, at 42. Before Charles Radler’s arrest in 1984, law enforcement officials considered Radler to have the largest and wealthiest steroid operation in the country. Id. at 56. Radler’s operation covered 38 states and the District of Columbia. Id. at 61. His start, however, began with college athletic programs: “I started getting calls from college football teams. That surprised me at first. Now it would surprise me if there was a college football team out there that isn’t using steroids.” Id. (quoting Charles Radler).

214. There exists a continuous flow of media stories concerning professional athletes’
amateur athletes also occurs on an intercollegiate level. The use


In 1985, both Pete Rozelle, National Football League Commissioner, and Gene Upshaw, executive director of the National Football League Players Association, denied the existence of any black market for steroids or any widespread problem. Johnson, supra note 213, at 41-42, 44. The National Football League's position, however, was entirely reversed in 1988. Rozelle warned that players found using steroids and other banned substances in 1989 will be banned from the league for one year. King, Rozelle Targets Steroids, Newsday, Oct. 26, 1988, at 133, col. 3. Estimates of steroid use in the National Football League (NFL) vary from 40% to 90% of all professional football players. Steve Courson, offensive guard of the Tampa Bay Buccaneers and admitted steroid user, believes 75% of the linemen in the NFL are on steroids and 95% have tried them. Johnson, supra note 213, at 50; see also Willis, Parcells Claims Giants Are Not Using Steroids, Newsday, Oct. 27, 1988, at 167.


215. The 1988 Summer Olympic Games in Seoul emphasized the drug problem among amateur athletes. "At least half of the 9,000 athletes who competed at the Olympics in Seoul used anabolic steroids or other performance-enhancing drugs in training according to estimates by medical and legal experts as well as traffickers in these drugs." Janofsky & Alfano, Drug Use By Athletes Runs Free Despite Tests, N.Y. Times, Nov. 17, 1988, at A1, col. 1.

216. The most infamous positive test result was Canada's Ben Johnson who lost his gold medal, a world record, and the ability to compete for two years after testing positive for drug use. See Johnson & Moore, The Loser, SPORTS ILLUSTRATED, Oct. 3, 1988, at 20; More Evidence Against Johnson, Newsday, Sept. 29, 1988, at 176, col. 1; Litisky, U.S. Stars Welcome the Ban on Johnson, N.Y. Times, Sept. 28, 1988, at D32, col. 1; Janofsky, Johnson Loses Gold To Lewis After Drug Test, N.Y. Times, Sept. 27, 1988, at A1, col. 4.

217. Charlie Francis, Ben Johnson's coach for 12 years, testified before a Canadian government inquiry that Johnson and 10 other Canadian athletes coached by Francis were involved with steroids. Janofsky, Johnson's Coach Casts Doubt On Sprinter's World Record, N.Y. Times, Mar. 3, 1989, at A29, col. 4; Coach: Ben Started Using Steroids in '81, Newsday, Mar. 2, 1989, at 155, col. 1; see also Doctor Admits Johnson Used Steroids, Wash. Post, Feb. 17, 1989, at F3, col. 4 (noting that Ben Johnson's personal physician, Jame Astaphan, admitted Johnson took steroids). Despite consistent denials, on June 13, 1989, Ben Johnson admitted lying when he released an official statement which asserted that he had never knowingly taken steroids or had them given to him by his trainer. Janofsky, Johnson Admits Lying About
of drugs among athletes is so pervasive, it extends as far down as the high school level. Pressure associated with athletics make the student-athlete more susceptible to drug use in order to enhance performance or alleviate the physical and mental pressures associated with competition. While it is widely known that street drugs are...
easily obtained through clandestine markets, an enormous distribution network and black market permits athletes to easily purchase performance-enhancing drugs.219 The supply of performance-enhancing drugs to athletes is so problematic that the Food and Drug Administration and the Justice Department have begun a joint investigation220 in an effort to stop the extensive drug distribution networks directed solely at athletes.221

The results of the NCAA’s initial drug-testing in 1987, although limited, gives substantial credibility to the NCAA’s grounds...
for believing urine testing will turn up evidence of improper drug use. NCAA officials tested student-athletes at ten postseason bowl games.\textsuperscript{222} No fewer than twenty-one athletes tested positive for anabolic steroids and were thus suspended from competition for ninety days.\textsuperscript{223} Although significant, the numbers are likely to have been even higher since member institutions were not compelled to release any information concerning test results and athletes were given ample notice of exactly when prebowl testing would take place.\textsuperscript{224} In addition, the NCAA's advance announcement of its intention to drug test is likely to have deterrent effect on student-athlete drug use.\textsuperscript{225} Consequently, neither the deterrent value connected with drug-testing athletes nor the NCAA's success should be used to demonstrate a lack of a reasonable suspicion that testing will reveal drug use.\textsuperscript{226} Lastly, the NCAA's compelling interest in the health of the athlete and integrity of competition further support the notion that the NCAA's drug-testing program was justified at its inception.\textsuperscript{227}

\textsuperscript{222} Neff, supra note 213 at 21, 22.

\textsuperscript{223} Id. at 21. In addition, the Executive Committee stated in its annual report for 1987-88 that "[d]uring the fall 1987 championships and certified postseason football games, [and] the winter 1988 and spring 1988 championships, a total of 99 student-athletes (three percent) tested positive . . . ." \textit{ANNUAL REPORTS}, supra note 167, at 38. In thirty-one of the ninety-nine positive-test cases, there was a resultant loss of eligibility. \textit{Id}.

\textsuperscript{224} Neff, supra note 213, at 21. The NCAA gave more than enough warning when it began its initial drug-testing in January 1987. An announcement of the program was made one year prior to the drug-testing, which gave athletes who have used drugs sufficient time to clean their systems. \textit{Id}. Moreover, the athletes were given a week's notice of the exact date of the prebowl testing. \textit{Id}. at 24.

\textsuperscript{225} In 1988, the second year of the NCAA's drug-testing program, the amount of positive results have decreased another 2-3%. Uryasz Interview, supra note 26. The NCAA attributes this decrease to the deterrent value of the NCAA's testing results in 1987, and the increase in the amount of drug-testing programs conducted by member institutions themselves. \textit{Id}.

\textsuperscript{226} In O'Halloran v. University of Wash., 679 F. Supp. 997, 1004 (W.D. Wash.), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988), the court warned that the "evidence of the [NCAA] program's success should not be used to demonstrate lack of need for the program or that the program has no reasonable basis." Dr. Robert Dugal, see supra note 163, strongly believes that drug-testing programs significantly decrease drug misuse in sports: Frequency of detected use in controlled competitions can fall drastically. The occurrence of established usage of amphetamine-like compounds in the early sixties fell, for example, from about 30 to a few percent (2-3\%) in European competitions over a few years after implementation of a testing program. More recently, when the sport of [powerlifting began testing in Canada about 3 years ago, the rate of positives was about 30-35\% and with continued testing and suitable penalties imposed on athletes found positive, has decreased to about 3\%. Dugal Affidavit, supra note 32, ¶ 12, at 6.

\textsuperscript{227} See supra notes 163-86 and accompanying text (discussing the NCAA's compelling
2. Reasonably Related To Original Justification.— In determining whether the search was reasonably related to the justification initiating the intrusion, "[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." The existence of procedural protections and standards is crucial to a judicial determination of reasonableness. Random searches which have not provided any definitive standards and procedural guidelines limiting the scope of the search have been found to be excessively intrusive and therefore unreasonable under the fourth amendment. Conversely, random drug-testing programs which have been found constitutional have provided individuals with sufficient notice, confidentiality, and definitive standards regarding selection and testing methods.

The NCAA's procedural safeguards and selection methods are carefully designed to be no more intrusive than necessary in order to deal with the drug problem among athletes. It is limited in both scope and manner. Although based upon random selection, the NCAA program is not an arbitrary or unannounced search since the tests will only be conducted at pre-determined times and places.

229. See Capua v. City of Plainfield, 643 F. Supp. 1507, 1520 (D.N.J. 1986). The most critical distinction influencing the court's decision in Capua not to apply the Shoemaker administrative search exception was the procedural protections provided in the drug-testing program in Shoemaker and the complete lack of any procedural safeguards in the drug-testing program challenged in Capua. Id.
231. Compare Shoemaker, 795 F.2d at 1143 (holding random drug-testing reasonable where State Steward has no discretion in conducting test) and Mullholland v. Department of Army, 660 F. Supp. 1565, 1569 (E.D. Va. 1987) (holding random drug-testing reasonable where tests did not leave any discretion to supervisor) and Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833, 857 (N.D. Ind.) (holding random drug-testing reasonable where program provided for a system for protecting confidentiality), aff'd, 864 F.2d 1309 (7th Cir. 1988) with Capua, 643 F. Supp. at 1520 (holding random search unreasonable where program did not contain any procedural safeguards whatsoever) and Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 881 (E.D. Tenn. 1986) (holding random drug-testing unreasonable where no standards for frequency, purpose, or methods of conducting test established), aff'd, 846 F.2d 1539 (6th Cir. 1988) and McDonell v. Hunter, 612 F. Supp. 1122, 1128 n.4 (S.D. Iowa 1985) (finding random drug-testing unreasonable where program lacked any standards for implementation), aff'd as modified, 809 F.2d 1302 (8th Cir. 1987).
232. See supra notes 27-28, 222 and accompanying text.
Student-athletes are tested only at postseason athletic events, and the student-athlete consent forms and NCAA publications provide student-athletes advance notice of the method, time, and place drug-testing will occur. Rather than testing all postseason participants, random drug-testing at postseason events avoids the implication of guilt or the inference that all student-athletes use banned substances.

Moreover, the manner of testing is not within the unfettered discretion of the official in the field. Only the NCAA committee responsible for drug testing is empowered to decide the method of testing athletes. Detailed procedures which ensure confidentiality and accuracy are set forth in writing concerning chain of custody, notification, and specimen collection. The reliability of testing methods is enhanced by the use of gas chromatography/mass spectrometry. These procedures are recognized by both the courts and medical experts to be virtually 100 % accurate. Specific false positive stan-

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233. See supra notes 5, 24-25 and accompanying text.
234. NCAA Exec. Reg., supra note 5, art 1, § 7(a); see supra notes 222-25 and accompanying text (discussing the NCAA's initial drug-testing in 1987).
235. Dugal Affidavit, supra note 32, ¶ 23, at 13. In Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986), the challenged drug-testing program involved the mass testing and “roundup” of all fire fighters. Id. at 1517. The court found this method of selection to be unconstitutional since it shifted the burden of proving innocence to the fire fighters rather than requiring the defendants to prove the fire fighters’ misconduct. Id. Consequently, the court noted that “[s]uch an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the Constitution.” Id.
236. NCAA Pamphlet, supra note 8, at 11 (reprinting §§ 2.1, 2.2, 2.3, 2.3.1 “Organization”); see United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (finding search constitutional where the authority to conduct searches was given to high ranking officials rather than field officers); Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir.) (finding search reasonable where State Steward had no discretion and targets were selected by Racing Commission), cert. denied, 479 U.S. 986 (1986).
237. See supra notes 36-38 and accompanying text (discussing the NCAA drug-testing program’s procedural safeguards); cf. Capua v. City of Plainfield, 643 F. Supp. 1507, 1516 (D.N.J. 1986) (finding search unconstitutional where no procedural guidelines regarding collection, testing, and utilization of information existed); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 877 (E.D. Tenn. 1986) (finding search unconstitutional where none of the methods for testing, standards for analyzing, or procedures for implementation were put in writing), aff’d, 846 F.2d 1539 (6th Cir. 1988).
239. See, e.g., Lovvorn 647 F. Supp. at 878 & n.4; Carlucci, 680 F. Supp. at 428.
240. See, e.g., Dugal Affidavit, supra note 32, ¶ 26, at 14. Dr. Robert Dugal, see supra note 163, states that the testing procedures are 100% accurate and cannot cause a false posi-
ards have also been established in order to eliminate false positive errors, and all positive results are required to be reconfirmed by another laboratory technician. Student-athletes are notified of any positive results and detailed notification procedures are provided which assure student-athletes that the information revealed by the urine test will be kept confidential. If a student-athlete tests positive, an extremely limited group of NCAA officials will receive the student-athlete's name. Only after the results have been reconfirmed and all appeals have been exhausted, will the NCAA notify the member institution's chief executive officer and director of athletics concerning the findings and results of any appeal. Member institutions are not compelled to publicly release test results and the NCAA recommends that member institutions answer all inquiries by only stating that the student-athlete was found to be in violation of

241. Testing results accurately determine the presence of banned substances since "urinalysis results are either positive or negative, leaving no room for official discretion in interpreting the tests." National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1987), aff'd, 109 S. Ct. 1384 (1989) (footnote omitted). Nonetheless, the NCAA has assured testing accuracy by making quantitative distinctions for certain substances which may cause a positive result even though the substance entered the individual's system for medical purposes or by passive inhalation (e.g. marijuana). NCAA Exec. Reg., supra note 5, art. 1, § 7(c); see Dugal Affidavit, supra note 32, ¶ 19, at 10. In addition, quantitative distinctions are made for caffeine and nicotine. NCAA Pamphlet, supra note 8, at 9-10; see Dugal Affidavit, supra note 32, ¶ 15, at 9. Because certain medications may cause positive results, NCAA regulations provide a listing of certain classes of substances which are given special consideration and student-athletes are instructed to inform testing officials if they are using medication. See NCAA Exec. Reg., supra note 5, art. 1, § 7(c); Dugal Affidavit, supra note 32, ¶ 28, at 15. For a description of how similar detailed procedures function in a real setting, see Johnson & Moore, The Loser, SPORTS ILLUSTRATED, Oct. 3, 1988, at 20 (chronicling the International Olympic Committee's testing and retesting of Ben Johnson's urine specimen).

242. See supra note 32 (discussing the influence of human factors upon the reliability of drug testing procedures).

243. See supra notes 38-40 and accompanying text (discussing the NCAA's notification procedures); cf. Shoemaker v. Handel, 795 F.2d 1136, 1140 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (finding search reasonable where results were kept confidential even from enforcement agencies); Capua v. City of Plainfield, 643 F. Supp. 1507, 1515 (D.N.J. 1986) (finding search constitutionally unreasonable where results were publicized thereby subjecting fire fighters to public suspicion and degradation).

244. See NCAA Pamphlet, supra note 8, at 15-17 (reprinting §§ 6.0-7.5 "Chain of Custody" and "Notification of Results").

245. See NCAA Pamphlet, supra note 8, at 17 (reprinting § 7.3 discussing NCAA notification of a member institution).
NCAA eligibility rules.\textsuperscript{246} The existence of alternative procedures has also influenced some courts' finding that a drug-testing program is more intrusive than necessary and therefore not reasonably related to the original justification for the intrusion.\textsuperscript{247} Urine testing, however, is the most effective method which does not considerably frustrate the NCAA's purposes for initiating drug-testing.\textsuperscript{248} Observation is not a wholly accurate indicator of drug use.\textsuperscript{249} It is extremely difficult, if not impossible, to detect a student-athlete's use of a particular banned substance without urine testing since many of the commonly used substances by athletes do not produce recognizable symptoms.\textsuperscript{250} The only intrusive aspect of the NCAA program is the fact that student-athletes may be required to submit a specimen in front of an NCAA official in order to verify the specimen's accuracy.\textsuperscript{251} How-

\textsuperscript{246} See supra note 34.

\textsuperscript{247} See, e.g., Lovorn v. City of Chattanooga, 647 F. Supp. 875, 883 (E.D. Tenn. 1986) (concluding drug use should be detectable by procedures detecting symptoms such as absenteeism, aberrant conduct, and financial difficulties rather than urine testing), aff'd, 846 F. 2d 1539 (6th Cir. 1988); National Fed'n of Fed. Employees v. Carlucci, 680 F. Supp. 416, 430 (D.D.C. 1988) (finding urine testing intrusive where observation by trained supervisors and neurobehavioral testing was not attempted). But see, e.g., National Treasury Employees Union v. Von Raab, 816 F.2d 170, 180 (5th Cir. 1987) (finding the availability of alternative sources of information did not eliminate the need for urine testing), aff'd, 109 S. Ct. 1384 (1989).

\textsuperscript{248} See supra note 170 and accompanying text; see also supra notes 163-66, 176-86 and accompanying text (discussing the NCAA's regulatory purposes).

\textsuperscript{249} See National Fed'n of Fed. Employees, 680 F. Supp. at 430 (noting that observation can only detect chronic drug use and some on-duty drug use). New testing methods are constantly being developed. For example, nuclear chemist Werner A. Baumgartner has developed a drug-testing method which detects drug use by analysis of human hair. Cox, Analysis of Hair Traces Drug Use, Nat'l. L.J., July 27, 1987, at 3, col. 1. Unlike the submission of urine, hair removal is less intrusive and therefore less likely to be considered a search under the fourth amendment. Id.; cf. United States v. Mara, 410 U.S. 19, 21 (1973) (finding that compelled voice and handwriting samples are physical characteristics which are constantly exposed to the public). But cf. Bouse v. Bussey, 573 F.2d 548, 550 (9th Cir. 1977) (finding compelled removal of pubic hair to be a search).

Unlike gas chromatography/mass spectrometry detection procedures, see supra notes 22, 237-38 and accompanying text, hair analysis has been subject to a great deal of criticism. Naresh Jain, chief toxicologist for Los Angeles County, declared that "Mr. Baumgartner's work is not worth the paper it is written on . . . ." Cox, supra, at 8, col. 3. Jain's opinion is based upon the fact that "the test has not been substantiated either in scholarly journals or through independent research." Id.

\textsuperscript{250} See Dugal Affidavit, supra note 32, ¶ 22, at 12-13 (discussing the difficulties in detecting student-athlete drug use).

\textsuperscript{251} See NCAA PAMPHLET, supra note 8, at 14 (reprinting § 5.1.4 "Specimen-Collection" procedures); cf. Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986) (finding the submission of urine under close surveillance intrusive); Mullholland v. Department of Army, 660 F. Supp. 1565, 1568 (E.D. Va. 1987) (finding search less intrusive where an
ever, new methods for specimen verification are continually being developed and since the NCAA has not hesitated to use the most advanced and modern techniques to ensure accuracy and confidentiality, the NCAA is likely to eliminate the necessity of observing the student-athlete.

The unique position of athletes as compared with employees also supports the notion that drug-testing conducted without particularized suspicion is not excessively intrusive. Random testing of employees has been found to be more intrusive than necessary because urine testing may provide information, including drug use, which may not be relevant to whether the employee’s job performance is impaired. Within intercollegiate athletics, however, the concern is not only with the impairment of performance on the field. There is a concern with performance in the classroom, fairness in competition, and the integrity and continued viability of student athletics. Employees’ relationships with their employers are limited and confined to established working hours and, in most instances, employees do not represent their employers when they are off-duty. Unlike employees, student-athletes are likely to be subject to greater public

official listens rather than observes submission of specimen). But cf. Lowvorn v. City of Chattanooga, 647 F. Supp. 875, 880 n.5 (E.D. Tenn. 1986), aff’d, 846 F.2d 1539 (6th Cir. 1988). In Lowvorn, the court noted that although observation of an individual submitting urine contributed to the intrusiveness of the test, because there existed a lack of a less intrusive method, the urine test was not unconstitutional. Id.

Dr. Dugal believes that observation is not only justified, but “has been current practice in olympic sports for nearly twenty years . . . .” Dugal Affidavit, supra note 32, ¶ 25, at 13-14. Observation was necessary “because there had previously been several deliberate attempts at specimen substitution.” Id; see, e.g., Lifer: Used Urine Transplants, Newsday, Feb. 3, 1989, at 143 (describing urine substitution by the Canadian National weight lifting team in 1984, using a catheter).

252. See, e.g., Andrews, Preventing Drug Test Cheating, N.Y. Times, Sept. 10, 1988, at 34, col. 1. In order to prevent individuals from substituting samples, Dr. Joel Ehrenkranz has developed a tamper-proof urine collection kit. Id. The invention prevents the removal of the urine specimen from its container, gives a single temperature reading to additionally prevent substitution, and even includes an enzyme to detect contaminants which may affect test results. Id. Although the NCAA is aware of several products which may enhance the integrity of the specimen, the NCAA does not believe these products are sufficiently accurate. Uryasz Interview, supra note 26.

253. See supra notes 5, 22, 238-41 and accompanying text.


255. See supra notes 163-66, 176-86 and accompanying text (discussing the NCAA’s regulatory purposes).
VI. Conclusion

The NCAA's decision to drug-test student-athletes based upon a random selection process raises important fourth amendment issues. Despite the general requirement of individualized suspicion, the NCAA program is likely to survive a constitutional challenge under the fourth amendment because the administrative search exception, which permits warrantless and random searches, should be applied or analogized to the NCAA drug-testing program. Courts which have applied or analogized the administrative search exception look to the purpose of the intrusion and the privacy expectations of the individual. The NCAA has a compelling interest in the health of the student-athlete, the integrity of both higher education and college sports, and fairness in competition. Similar to participants in a highly regulated industry, student-athletes who participate in intercollegiate competition have a diminished expectation of privacy because they are put on notice that they will be subject to rules and regulations furthering the interests of intercollegiate athletics.

The NCAA drug-testing program also fulfills the independent constitutional requirement of reasonableness. The NCAA has a reasonable basis to believe random drug-testing will reveal student-athlete drug use, and the program contains procedural safeguards which eliminate arbitrary discretion and intrusions.

Although the administrative search exception should be applied to the NCAA drug-testing program, courts should not utilize the exception as a justification for all random drug-testing programs. However, where the purposes behind the fourth amendment are not sacrificed and the necessary safeguards and criteria exist, the

256. See supra notes 163, 202-03 and accompanying text.
258. See supra note 14 and accompanying text.
259. See supra notes 161-206 and accompanying text.
260. See supra notes 117-60 and accompanying text.
261. See supra notes 161-86 and accompanying text.
262. See supra notes 187-206 and accompanying text.
263. See supra notes 207-57 and accompanying text.
administrative search exception is a valuable weapon in the war against drugs.

Craig H. Thaler