

An Army of Suspects:¹ The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes

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Introduction

The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991.² "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from members of the active duty and reserve forces."³ What was then called the "DOD DNA Registry,"⁴

a program within the Armed Forces Institute of pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment.⁵

As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains,"⁶ contained the DNA of approximately 3.2 million service members.⁷ According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory."⁸ The direction to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ).⁹ If convicted at court-martial for the offense of violating a lawful general order, the service member carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.¹⁰

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1. See Jean E. McEwen, *DNA Databanks*, in *GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC AGE* 231, 236 (Mark Rothstein ed., 1997) ("[A] population-wide DNA data bank could fundamentally alter the relationship between individuals and the state, essentially turning us into a nation of suspects."), cited in D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 *CORNELL J.L. & PUB. POL'Y* 455, 457 & n.8 (2001). This article was originally written to meet the requirements for a Master of Laws degree at George Washington University, specifically, a class entitled, "Anatomy of a Homicide."
 2. *Mayfield v. Dalton*, 901 F. Supp. 300, 302 (D. Haw. 1995), *vacated as moot*, 109 F.3d 1423 (9th Cir. 1997); see also Sarah Gill, *The Military's DNA Registry: An Analysis of Current Law and a Proposal for Safeguards*, 44 *NAVAL L. REV.* 175, 183-84 (1997). Ms. Gill's article contains excellent research on the early Department of Defense memoranda that established the DNA Registry.
 3. *Mayfield*, 901 F. Supp. at 302.
 4. Notices, Department of Defense (DOD) Department of the Army (DA), Privacy Act of 1974; Add a System of Records, 60 Fed. Reg. 31,287 (June 14, 1995).
 5. *Id.*; see Memorandum and Policy Statement, Deputy Secretary of Defense, subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (16 Dec. 1991) [hereinafter 1991 Registry Memo].
 6. Notices, Department of Defense (DOD) Department of the Army (DA), Privacy Act of 1974; System of Records, 62 Fed. Reg. 51,835 (Oct. 3, 1997).
 7. Tranette Ledford, *Law Expands Access to Military DNA*, *ARMY TIMES*, Dec. 16, 2002, available at <http://www.armytimes.com> [hereinafter Ledford, *Law Expands Access*].
 8. U.S. DEP'T OF DEFENSE, DIR. 5154.24, ARMED FORCES INSTITUTE OF PATHOLOGY para 3.4.3.2 (28 Oct. 1996) [hereinafter DOD DIR. 5154.24, 1996 version], *cancelled and superseded* by U.S. DEP'T OF DEFENSE, DIR. 5154.24, ARMED FORCES INSTITUTE OF PATHOLOGY (3 Oct. 2001) [hereinafter DOD DIR. 5154.24, 2001 version].
 9. UCMJ art. 92 (2002).
 10. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. IV, ¶ 92e(1) (2002) [hereinafter MCM]. The less serious offense of failing to follow a lawful order other than a general order carries a maximum punishment of a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id.* para. 92e(2).

As its name suggests, the DNA Repository was initially conceived solely to identify the remains of service members. However, a small entry in the huge 2003 National Defense Authorization Act, “signed by President Bush on December 2, 2002, overrides Pentagon policy that the DNA samples be used almost solely to identify troops killed in combat,”¹¹ and allows access to the Repository for law enforcement purposes.¹² The provision reads:

§ 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes

(a) Compliance with a court order.

(1) Subject to paragraph (2), if a valid order of a Federal court (or military judge) so requires, an element of the Department of Defense that maintains a repository of DNA samples for the purpose of identification of human remains *shall make available*, for the purpose specified in subsection (b), such DNA samples on such terms and conditions as such court (or military judge) directs.

(2) A DNA sample with respect to an individual shall be provided under paragraph (1) in a manner that does not compromise the ability of the Department of Defense to maintain a sample with respect to that individual for the purpose of identification of human remains.

(b) Covered purpose. *The purpose referred to in subsection (a) is the purpose of an investigation or prosecution of a felony, or any sexual offense, for which no other source of DNA information is reasonably available.*

(c) Definition. In this section, the term “DNA sample” has the meaning given such term in section 1565(c) of this title.¹³

The 2002 law, proposed by Rep. John Culberson, R-Texas, passed with no debate. It followed the January, 2002 rape of a soldier at Fort Hood, Texas by a fellow soldier, Specialist (SPC) Christopher Reyes.¹⁴ The law is in addition to the military’s statutory requirement, similar to that of every state and the District of Columbia,¹⁵ for collection of DNA samples from those soldiers who are convicted of certain offenses by military court-martial, which are furnished to the Director of the Federal Bureau of Investigation for inclusion in the Combined DNA Index System (CODIS).¹⁶ The collection of samples under this statute is not in issue in this article.¹⁷

Does the 2002 change pass constitutional muster? Does a commander violate the Fourth Amendment’s ban against unreasonable searches and seizures when he requires a service member to provide a DNA sample that can later be used as evidence against him in a criminal prosecution, absent a warrant, probable cause, or even individualized suspicion that he has committed a crime?

This article first describes *Reyes* and how it led to the 2002 law. Second, this article examines the permissible uses of DNA samples in the repository before the passage of the 2002 amendment—and whether the change represents a significant difference from the regulations that existed before the statute. A Pentagon spokesman recently claimed that the new bill was merely “a codification of a longstanding policy.”¹⁸ Third and finally, this article analyzes the constitutionality of the repository under the “special needs” exception to the warrant and probable cause requirements of the Fourth Amendment to the Constitution in light of the recent Supreme Court decisions in *City of Indianapolis v. Edmond*¹⁹ and *Ferguson v. City of Charleston*,²⁰ and lower court cases examining the constitution-

11. Ledford, *Law Expands Access*, *supra* note 7, at 1.

12. 10 U.S.C. § 1565a (LEXIS 2003).

13. *Id.* § 1565a (emphasis added). “DNA sample” is defined as “a tissue, fluid or other bodily sample of an individual on which a DNA analysis can be carried out.” *Id.* § 1565(c).

14. Ledford, *Law Expands Access*, *supra* note 7, at 1. The author was the Senior Defense Counsel at Fort Hood at the time of SPC Reyes’ case, and was involved in supervising SPC Reyes’ defense. The factual discussion of his offenses is compiled from contemporaneous news reports. None of the information resulted from the author’s professional involvement in the case.

15. See Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 771-72 (1999), cited in John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 132 & n.91 (2000).

16. 10 U.S.C. § 1565(a).

17. However, this collection regime is also subject to challenge under the Fourth Amendment. See *United States v. Miles*, 228 F. Supp. 2d 1130 (E.D. Cal. 2002); see also *infra* nn.187-95 and accompanying text.

18. Ledford, *Law Expands Access*, *supra* note 7, at 2.

19. 531 U.S. 32 (2000).

ality of other DNA databanks both before and after those critical decisions.

Expanding access to the repository for law enforcement purposes is troublesome. As one editorial writer stated, “America’s service members and convicted felons now have something in common—they’re the only U.S. citizens whose DNA data can be used without consent [or probable cause] in police investigations.”²¹ Nonetheless, this article concludes that because both the primary purpose of the repository and the actual purpose served by the Repository remains the identification of fallen service members, the expanded access in itself does not invalidate its constitutionality.

A cautionary note is in order, however. If the DOD Repository becomes routinely accessed for law enforcement purposes such that its law enforcement use overtakes its remains identification use, the repository slips into unconstitutional territory. Should this occur, the “special needs exception” to the warrant and probable cause requirements of the Fourth Amendment will no longer justify these mandatory, suspicionless searches, because the actual purpose served by the repository would then cease to be divorced from general, ordinary, or normal law enforcement.

The Reyes Case²²

On Easter Sunday, 31 March 2002, Specialist (SPC) Christopher Reyes was a twenty-one year-old soldier assigned to the Army’s 1st Cavalry Division at sprawling Fort Hood, Texas.²³ Located in Killeen, Texas, between Dallas and Austin,²⁴ Fort

Hood is home to more than 40,000 soldiers; including soldiers and family members living on and off post, it supports a population of over 100,000 people.²⁵

On that Easter Sunday, SPC Reyes and two friends from his unit, SPC Vance Rogers and Private First Class (PFC) Gregory Payton, spent the day drinking. Sometime that night, they decided to take a drive into the city of Killeen to look for drugs. The soldiers carried several handguns; SPC Rogers was so drunk he had passed out.²⁶

At about 2330., the men spotted twenty-year old Eric DeSean Davis, “an aspiring rap musician”²⁷ and father of three who had married a soldier just four days before. Specialist Reyes got out of the vehicle and asked Davis where he could get some drugs. According to PFC Payton, “I didn’t hear no one raise their voice. Then I heard a shot go off.”²⁸ Davis crumpled to the ground, and SPC Reyes said, “I just shot that guy.”²⁹

Private First-Class Payton, who was driving the vehicle, later admitted that he dropped the drunken SPC Rogers off, and that SPC Reyes then said that he “wanted to shoot someone else.”³⁰ By now it was about 0300 on the morning of 1 April. The two drove around Fort Hood, and apparently randomly stopped at the on-post quarters of Sergeant First Class (SFC) Nathan Moreau, his wife, Mary, a kindergarten teacher, and their three children. Both soldiers got out of the car and approached the front door of the dwelling.³¹

Mary Moreau heard the door bell, and she and her husband “went down the hallway. That’s when I noticed the front door was wide open. I yelled at my husband and ran into the kitchen.

20. 532 U.S. 67 (2001).

21. *Revisit Access to DNA*, ARMY TIMES, Dec. 16, 2002, available at <http://www.armytimes.com>.

22. This account is taken from various articles in the *Army Times*, a nationally distributed weekly newspaper, throughout 2002 and early 2003.

23. Tranette Ledford, *One Soldier Charged*, ARMY TIMES, Dec. 16, 2002, at 2, available at <http://www.armytimes.com> [hereinafter Ledford, *One Soldier*].

24. U.S. Dep’t of Army, Fort Hood, Tex. Directorate of Public Works Web Site, *Directorate of Public Works* (Jan. 2, 2003), at <http://www.dpw.hood.army.mil/HTML/TBO/MES/forthood.htm>.

25. U.S. Dep’t of Army, Fort Hood, Tex. Web Site, *III Corps & Fort Hood Statistical Data* (Sept. 30, 2001), at <http://www.hood.army.mil/PAO/Statistics.htm>.

26. Ledford, *One Soldier*, *supra* note 23.

27. *Id.*

28. *Id.*

29. *Id.* Private First Class Payton pled guilty to several offenses based on his involvement in these crimes. A military judge sentenced him to fifteen years of confinement. A pretrial agreement (the military’s version of a plea bargain) limited PFC Payton’s confinement to eight and one-half years. If PFC Payton fully complied with the terms of his pretrial agreement, including testifying truthfully against SPC Reyes, he will serve a maximum of only eight and one-half years, notwithstanding the judge’s sentence. This information about PFC Payton’s pretrial agreement was discussed in open court during his trial. The military also retains a system of parole, for which PFC Payton becomes eligible after serving one-third of his sentence. Specialist Rogers also pled guilty; he received a sentence of nine years of confinement. His pretrial agreement limits his confinement to four years. *Id.* at 4.

30. *Id.* at 2.

31. *Id.*

I saw a man stand up from behind the counter. He pulled two guns out and he shot me twice.”³² Mrs. Moreau “turned, and as she did, both bullets entered her left side [where they remain].” She recalls that she put her hand over the wounds and tried to run. “He chased me outside. As I ran, I fell on the steps and lay down. He shot at my husband but missed him.”³³

Later that morning, both PFC Payton and SPC Rogers turned themselves in and made statements. Specialist Reyes turned himself in on 2 April. As a newspaper account later reported, “Through the course of the investigation, it was discovered that [SPC] Reyes had a tattoo fitting the description” given by a soldier raped in the barracks in January—the letters “CMR” on his chest.³⁴

Three months before the shootings, on 9 January 2002, Private (PVT) Amy Brown was raped and sodomized in her barracks room. She had arrived at Fort Hood for her first assignment less than one week before the rape. Private Brown’s attacker broke into her room wearing a ski mask, gloves, and a cap, locked the door behind him, and told her, “Don’t scream or I’ll cut your throat.”³⁵ The assailant forced PVT Brown to undress while he videotaped her. “I remember him telling me to shut up,” PVT Brown testified. “He covered my mouth and kept telling me to breathe. I tried to fight him off and get to the door. But he grabbed me and threw me to the other side of the room. Then he choked me and kept telling me not to scream or he would slice my throat.”³⁶ He also told PVT Brown that she would see him again.³⁷

Based on SPC Reyes’ tattoo, which the military police (MP) most likely discovered while booking him after his arrest, investigators obtained a search warrant for his barracks room.

There, investigators found a video camera and a videotape labeled “No-no tape,” showing PVT Brown undressing before her rape.³⁸ Investigators also obtained a DNA sample from SPC Reyes, which matched DNA taken from PVT Brown after the rape.³⁹

From 13-16 January 2003, SPC Reyes pled guilty to some offenses and was convicted of others contrary to his pleas. Specialist Reyes stands convicted of the unpremeditated murder of Eric DeSean Davis, the attempted premeditated murders of Mary Moreau and SFC Nathan Moreau, and the rape and sodomy of PVT Brown. He was sentenced to life without parole.⁴⁰

The story does not end there, of course. Largely as a result of PVT Brown’s mother’s complaints to her congressman, Rep. John Culberson, R-Texas sponsored the new statutory provision allowing law enforcement access to the military’s DNA repository. “While police recovered genetic samples during [PVT Brown’s] rape investigation, they were barred by DOD policy from access to Reyes’ DNA data.”⁴¹ According to Rep. Culberson,

The Fort Hood horror story highlighted the need for uniformity and consistency in interpretation and enforcement of the Army’s procedures in providing access to DNA samples If law enforcement had been able to identify a suspect immediately after the rape, it is highly unlikely that this criminal would have been able to hurt anyone else.⁴²

32. Tranette Ledford, *Twice Wounded, Yet ‘Very Fortunate,’* ARMY TIMES, Dec. 16, 2002, available at <http://www.armytimes.com> [hereinafter Ledford, *Twice Wounded*].

33. *Id.*

34. Ledford, *One Soldier*, *supra* note 23, at 3.

35. *Id.*

36. Tranette Ledford, *Fort Hood Soldier Gets Life for Crime Spree*, ARMY TIMES, Jan. 27, 2003, at 2, available at <http://www.armytimes.com/archivepaper.php?f=0ARMYPAPER-1502441.php>.

37. Ledford, *One Soldier*, *supra* note 23, at 3.

38. Tranette Ledford, “*He Shot Me*,” ARMY TIMES, June 24, 2002, at 2, available at <http://www.armytimes.com>.

39. *Id.*

40. United States v. Reyes (Headquarters, Fort Hood, Texas 16 Jan. 2003) (U.S. Dep’t of Army, DA Form 4430-R, Department of the Army Report of Result of Trial (Oct. 1985)). The prosecution never sought the death penalty in SPC Reyes’s case; the list of death-qualifying aggravating factors in the Manual for Courts-Martial (MCM) suggests that it would not have been appropriate. See MCM, *supra* note 10, R.C.M. 1004(c).

41. Ledford, *Law Expands Access*, *supra* note 7, at 1. Specialist Reyes was not a suspect until after the Davis and Moreau shootings. In fact, it was not initially known whether any soldier was responsible for PVT Brown’s rape. Private Brown’s family also reportedly pushed for an examination of the tattoos of all Fort Hood soldiers, despite the lack of any evidence that a soldier was involved in the rape. The Office of the Staff Judge Advocate, III Corps, wisely advised investigators against conducting this search, which may well have been unconstitutional. *Id.*; see MCM, *supra* note 10, MIL. R. EVID. 315.

**Permissible Uses of the DNA Repository Before
10 U.S.C. § 1565a**

Is the 2002 law really new? Or is it really, as the Pentagon claimed, the codification of a long-standing policy? The answer lies somewhere between these two positions. Before the enactment of § 1565a, no statutory provision defined the permissible limits of access to the DNA Repository. Instead, various entries in the Federal Register, memoranda from the Deputy Secretary of Defense and the Assistant Secretary of Defense (Health Affairs),⁴³ and DOD directives defined the limits. As one law review article stated,

In 1991 the Deputy Secretary of Defense authorized the Assistant Secretary of Defense for Health Affairs to facilitate the creation of a DNA registry. In 1993, the Assistant Secretary of Defense for Health Affairs issued a detailed policy for the implementation, organization, and administration for the DOD Registry.⁴⁴

Both of the documents referred to above were memoranda—documents not generally distributed to the public.⁴⁵

The first entry in the Federal Register was published in 1993. It gave notice that the Department of the Army was adding a system of records, namely “a blood smear that can be used for DNA typing to identify human remains.”⁴⁶ This entry said nothing more about the permissible uses of the Repository.⁴⁷

In 1995, the Army gave notice that the “DOD DNA Registry” was established.⁴⁸ The only listed purpose for the Registry was “the identification of human remains.”⁴⁹ This entry also gave notice that the DOD would maintain the samples for seventy-five years and then destroy them.⁵⁰ Although not mentioned in the Federal Register notice, the January 1993 memorandum referred to above that set forth the policy for administration of the Repository stated that, “in extraordinary cases, when no reasonable alternative means of obtaining a specimen for DNA profile analysis is available, a request for access to the DOD Registry . . . shall be routed through the appropriate Secretary of the Military Department or his designee, for approval by the Assistant Secretary of Defense for Health Affairs.”⁵¹

A lawsuit by two service members challenged the 1993-1995 version of the DOD Repository and its attendant policies in court. In *Mayfield v. Dalton*, two marines refused an order to provide specimens for the DNA repository, and both were charged with violating an order from a superior commissioned officer.⁵² In their federal court challenge, the marines alleged that the taking of their DNA without their consent violated the Fourth Amendment.⁵³

The court in *Mayfield* first noted that, although a request for a specimen for purposes other than the identification of remains was possible, “no such request from this program has ever been approved, though it is unclear how many, if any, such requests have been made.”⁵⁴ Further, the plaintiffs conceded “that the military’s stated purpose for the DNA Repository—remains identification—is a benign one. But they argue that the military

42. Ledford, *Law Expands Access*, *supra* note 7, at 1-2. Even though it was PVT Brown’s family who pushed for the expanded DNA access, such access would not have prevented their daughter’s rape—it could only conceivably have helped to prevent the subsequent shootings. The family members of those victims apparently did not complain to Rep. Culberson. *Id.*

43. See Gill, *supra* note 2, at 184 and accompanying notes.

44. *Id.*

45. See 1991 Repository Memo, *supra* note 5; Memorandum and Policy Statement, Assistant Secretary of Defense (Health Affairs), to Secretaries of the Military Departments, subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (5 Jan. 1993) [hereinafter 1993 Repository Memo].

46. 58 Fed. Reg. 29,207, 29,208 (May 19, 1993).

47. See generally Privacy Act of 1974, 5 U.S.C. § 552a (2000).

48. Notices, Department of Defense (DOD) Department of the Army (DA), Privacy Act of 1974; Add a System of Records, 60 Fed. Reg. 31,287 (June 14, 1995).

49. *Id.* at 31,288.

50. *Id.*

51. Gill, *supra* note 2, at 185 (quoting 1993 Repository Memo, *supra* note 45).

52. *Mayfield v. Dalton*, 901 F. Supp. 300, 302 (D. Haw. 1995), *vacated as moot*, 109 F.3d 1423 (9th Cir. 1997). The military trial judge initially dismissed the charges, holding that the regulations underlying the DNA repository were not punitive and thus could not serve as the basis for a violation of an order charge. The Marine Corps appealed that decision. The intermediate military appellate court, however, reversed the trial judge’s decision. See *United States v. Vlacovsky*, No. 9500919, 1995 CCA LEXIS 471, at *2 (N-M. Ct. Crim. App. Oct. 25, 1995) (unpublished), *cited in* Gill, *supra* note 2, at 191 & nn.101-02.

53. *Mayfield*, 901 F. Supp. at 303.

could, at some point in the future, use the DNA samples for some less innocuous purpose”⁵⁵ As prescient as the plaintiffs’ claims now appear, the *Mayfield* court found that, at the time of their suit,

the blood and tissue samples at issue are not to be used as evidence against Plaintiffs, but only as a means of identifying their remains should they be killed in action with the Marine Corps. . . . Plaintiffs have presented no evidence that the military has used or disclosed or has any plans to use or disclose, information gleaned from the DNA samples for any purpose other than remains identification. A challenge to such hypothetical future use, or misuse, as the case may be, of the samples in the DNA registry does not present a justiciable cause or controversy.⁵⁶

The court’s analysis of the plaintiffs’ Fourth Amendment claim is muddy. Although the court cited two of the Supreme Court’s leading cases on the special needs doctrine,⁵⁷ discussed further in part III of this article, the court does not squarely rest its decision on that doctrine, and never mentions the term “special need.”⁵⁸ The court instead performs a straight Fourth Amendment balancing test to conclude that the mandatory provision of DNA samples is a reasonable search.⁵⁹ The court balanced the government’s interest against the intrusion into the plaintiff’s privacy interests and held:

The military has demonstrated a compelling interest in both its need to account internally for the fate of its service members and in

ensuring the peace of mind of their next of kin and dependents in time of war. The court further finds that when measured against this interest, the minimal intrusion presented by the taking of blood samples and oral swabs for the military’s DNA registry, though undoubtedly a “seizure,” is not an unreasonable seizure and thus not prohibited by the Constitution.⁶⁰

While plaintiffs’ appeal to the Ninth Circuit was pending, a court-martial convicted them of failing to obey a lawful order.⁶¹ Subsequently, both plaintiffs were “honorably separated from active duty without ever having given any blood or tissue samples.”⁶² As a result, the court determined that the plaintiffs’ challenge was moot, vacated the lower court’s decision, and remanded the case to the district court with instructions to dismiss the case as moot.⁶³

In its decision, however, the Ninth Circuit noted that “in the intervening time between the district court judgment and oral argument . . . the military changed the repository in ways that appear to respond to some of plaintiffs-appellants’ main concerns.”⁶⁴ The changes included shortening the length of time samples were retained from seventy-five to fifty years, and permitting the destruction of samples upon the donor’s request after separation from the military.⁶⁵

Most important for purposes of this article, the military clarified the “permissible uses” of the samples. This particular clarification read as follows:

54. *Id.* at 302.

55. *Id.* at 304.

56. *Id.* at 303-04 (citation omitted).

57. *Id.* at 303 (discussing *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602 (1989); *Nat’l Treas. Employees Union v. Von Raab*, 489 U.S. 656 (1989)).

58. *Id.*

59. See *infra* notes 166-195 and accompanying text (concerning more recent court decisions concluding that the constitutionality of DNA databanks must be analyzed under the “special needs” test, and not by a simple balancing test). The *Mayfield* court’s opinion could have (and perhaps should have) more clearly rested on a “special need.” See *id.*

60. *Mayfield*, 901 F. Supp. at 304.

61. Gill, *supra* note 2, at 192 and accompanying notes. Both were sentenced to minimal punishments, a reprimand, and restriction to the marine base for one week. *Id.*

62. *Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997).

63. *Id.* at 1427.

64. *Id.* at 1425.

65. *Id.* at 1425-26 & n.1 (quoting Memorandum and Policy Statement, Assistant Secretary of Defense for Health Affairs, subject: Policy Refinements for the Armed Forces Repository of Specimen Samples for the Identification of Remains (2 Apr. 1996)); see also DOD DIR. 5154.24, 1996 version, *supra* note 8, para 3.5.1 (setting forth the same uses), cancelled and superceded by DOD DIR. 5154.24, 2001 version, *supra* note 8 (which does not set forth any uses for the Repository other than remains identification).

3. Permissible uses. Authority to permit the use of any specimen sample in the repository for any purpose other than remains identification is further clarified. [The prior policy] limited use of specimen samples to remains identification (exclusive of internal, quality assurance purposes), but did not prohibit the use under other circumstances in “extraordinary cases” when “no reasonable alternative means of obtaining a specimen for DNA profile analysis is available: and when the request is approved by the [Assistant Secretary of Defense for Health Affairs]. To date no consensual exception request has been approved. This policy limits “extraordinary cases” to cases in which a use other than remains identification is compelled by other applicable law. Consequently, permissible uses of specimen samples are limited to the following purposes:

- a. identification of human remains;
- b. internal quality assurance activities to validate processes for collection, maintenance and analysis of samples;
- c. a purpose for which the donor of the sample (or surviving next-of-kin) provides consent; or
- d. as compelled by other applicable law in a case in which all of the following conditions are present:
 - (1) the responsible DOD official has received a proper judicial order or judicial authorization;
 - (2) the specimen is needed for the investigation or prosecution of a

crime punishable by one year or more of confinement;

(3) no reasonable alternative means for obtaining a specimen for DNA profile analysis is available; and

(4) the use is approved by the [Assistant Secretary of Defense, Health Affairs] after consultation with the DOD General Counsel.⁶⁶

This and the other “refinements” adopted in 1996 were “designed to reaffirm DOD’s longstanding commitment to, and strengthen procedures for, privacy protections concerning the specimens and any DNA analysis that may be performed” on them.⁶⁷ The law enforcement use “refined” in 1996 remains unchanged, despite the passage of 10 U.S.C. § 1565a in 2002, as of the latest Federal Register posting on 23 March 2003.⁶⁸

Comparing the permissible law enforcement use of DNA samples before and after the passage of the 2002 law reveals that much of the new statute is indeed codification of longstanding policy, with two exceptions. First, while the old policy limits access for “investigation or prosecution of crimes punishable by one year or more in confinement,” (changed to “a felony” in the statute), the statute also permits access for “any sexual offense.”⁶⁹

This is new, but does it actually broaden permissible access to the DNA Repository? The answer is that it does not. Access is not limited to nonconsensual sexual offenses. The military continues to criminalize (and prosecute, although normally not as the primary offense) many consensual sexual offenses including adultery,⁷⁰ consensual oral and anal sodomy,⁷¹ and indecent acts,⁷² which include sex involving more than two people or sex in places where the participants are “reasonably likely” to be viewed by those other than the participants—even if no third party actually views the acts.⁷³ In addition, the military routinely prosecutes consensual sexual offenses involving trainees and drill sergeants—usually as a violation of a lawful general regulation⁷⁴ and fraternization.⁷⁵ Finally, conspiracy to

66. DOD DIR. 5154.24, 2001 version, *supra* note 8 (emphasis added); *see also* 62 Fed. Reg. 51,835, 51,836 (Oct. 3, 1997) (publishing notice of the new law enforcement use of the DNA samples maintained in the repository). This use was also published twice without change in the Federal Register. Notices, Department of Defense (DOD), Department of the Army (DA), Privacy Act of 1974; System of Records, 63 Fed. Reg. 10,205, 10,207 (Mar. 2, 1998); Notices, Department of Defense (DOD), Department of the Army (DA), Privacy Act of 1974; System of Records, 68 Fed. Reg. 14,954, 14,955 (Mar. 27, 2003) (publishing the same regulation again without change, despite passage of the new law).

67. *Mayfield*, 109 F.3d at 1426 n.1.

68. 68 Fed. Reg. at 14,955.

69. *See id.*; *cf.* 10 U.S.C.S. § 1565a (LEXIS 2003).

70. MCM, *supra* note 10, pt. IV, ¶ 62.

71. *Id.* ¶ 51.

72. *Id.* ¶ 90.

commit any consensual offense,⁷⁶ aiding and abetting any consensual sexual offense,⁷⁷ attempting to commit any consensual sexual offense,⁷⁸ and solicitation of any consensual sexual offense⁷⁹ are also prohibited by military law.

The previous policies, however, already covered all of these offenses. Of the consensual sexual offenses listed above, only adultery limited the maximum punishment to no more than one year of confinement.⁸⁰ As such, it was covered by the previous policies, which permitted access for investigation and prosecution of crimes punishable by one year or more of confinement. Section 1565a continues to cover this offense, albeit in a different manner. While adultery may not be a “felony,” usually defined as any offense with a maximum punishment of more than one year of confinement,⁸¹ it is a “sexual offense.”⁸²

The second and more significant difference between the old policy and the new statute is that the statute makes access to the DNA Repository *mandatory* upon receipt of a “valid order” of a federal court or military judge.⁸³ The previous policies (and the latest policy published in the Federal Register on 23 March 2003) still required approval by the Assistant Secretary of Defense for Health Affairs as one of four required conditions for access, suggesting that access was permissive even after the receipt of a “proper judicial order.”⁸⁴ This leads to the conclusion that the statute was intended to eliminate any discretion on the part of military officials, so long as the request for disclosure meets the basic requirements for access.

What other reasons are there to codify what was already substantially DOD policy? A cynical answer points to the publicity that surrounded Rep. Culberson’s amendment. Legally, however, there is at least one obvious reason to codify the policy. Now, instead of allowing DOD officials to change what had been mere “policy” by memorandum or notice in the Federal Register, now only Congress can effect change. Not only

does the statute wrest both the responsibility and authority for changes and “refinements” away from the DOD, but congressional action is probably less likely than change by policy memorandum or notice. As already stated, the amendment also clarifies to military officials that access to the Repository is mandatory and not discretionary if a request meets the statutory prerequisites.

Is the DNA Repository Constitutional in Light of Its Access for Law Enforcement Purposes?

Is the mandatory suspicionless provision of samples for the DNA Repository—including for access for certain law enforcement purposes mandated by the 2002 statute—a violation of the Fourth Amendment? The answer to this question lies in the “special needs” exception to the warrant and probable cause requirements. This section is divided into four parts: (1) an overview of the special needs exception up to the Supreme Court’s decisions in *Edmond* and *Ferguson*; (2) a discussion of the impact of *Edmond* and *Ferguson* on special needs analysis; (3) an analysis of other DNA databank cases both before and after *Edmond* and *Ferguson*; and (4) an application of these principles to the military’s DNA Repository.

Overview of the Special Needs Exception

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

73. *United States v. Izquierdo*, 51 M.J. 421 (1999) (sexual acts are indecent when they are committed openly and notoriously, including acts performed in such a place and under such circumstances that they are reasonably likely to be seen by others).

74. MCM, *supra* note 10, ¶ 16.

75. *Id.* ¶ 83.

76. *Id.* ¶ 5.

77. *Id.* ¶ 77.

78. *Id.* ¶ 80.

79. *Id.* ¶ 105.

80. *Id.* ¶ 62(e) (limiting maximum confinement for adultery to one year).

81. BLACK’S LAW DICTIONARY 633 (7th ed. 1999).

82. 10 U.S.C.S. § 1565a (LEXIS 2003).

83. *Id.*

84. DOD DIR. 5154.24, 1996 version, *supra* note 8, para. 3.5.1.4.1.

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸⁵

The collection of blood or other tissue samples by the federal government is a search under the Fourth Amendment.⁸⁶ Accordingly, these searches must be reasonable to avoid the warrant requirement. As the Supreme Court stated,

What is reasonable, of course, “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” Thus, the permissibility of a particular practice “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”⁸⁷

In most criminal cases, courts strike the balance in favor of the warrant and probable cause requirements, the satisfaction of which make a search “reasonable.”⁸⁸ There are exceptions to these requirements, however, “when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’”⁸⁹ Put another way, “[I]f there [is] a proper governmental purpose other than law enforcement, there [is] a ‘special need,’ and the Fourth Amendment then require[s] the familiar balancing between that interest and the individual’s privacy interest.”⁹⁰

The special needs doctrine originated in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.*,⁹¹ a school search case. “T.L.O. was a student at a New Jersey public school when she was caught smoking in the restroom. A teacher at the school brought T.L.O. to the school principal who searched her purse without a warrant. The search uncovered cigarettes, marijuana, rolling paper, and other drug paraphernalia.”⁹² The Supreme Court upheld the search, even in the absence of a warrant, based on the reasonableness of the search under all of the circumstances.⁹³ Justice Blackmun concurred, explaining, “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”⁹⁴

Following *T.L.O.*, the Supreme Court adopted Justice Blackmun’s “special needs” terminology in *O’Connor v. Ortega*,⁹⁵ which authorized a public employer’s warrantless search of a public employee’s workplace when there was some individualized suspicion of work-related misconduct, and in *Griffin v. Wisconsin*,⁹⁶ which authorized the warrantless search of a probationer’s home, also based on individualized suspicion. The Supreme Court subsequently expanded the special needs exception to include suspicionless searches in *Skinner v. Railway Labor Executives Association*⁹⁷ and *National Treasury Employees Union v. Von Raab*,⁹⁸ both decided on the same day.

Skinner upheld regulations of the Federal Railway Administration that mandated the warrantless, suspicionless, mandatory

85. U. S. CONST. amend. IV.

86. *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (holding that the compelled intrusion into the body for blood to analyze for alcohol content is a Fourth Amendment search; *see also* *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 616-17 (1989) (holding that a breathalyzer test is also a Fourth Amendment search) (citing *California v. Trombetta*, 467 U.S. 479, 481 (1984)).

87. *Skinner*, 489 U.S. at 619 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

88. *Id.*

89. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

90. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.17 (2001).

91. 469 U.S. 325 (1985).

92. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 262 (2000) (footnotes omitted). Mr. Dodson’s article provides an excellent overview of the special needs cases up to the time of the article’s publication.

93. *T.L.O.*, 469 U.S. at 343.

94. *Id.* at 351 (Blackmun, J., concurring).

95. 480 U.S. 709 (1987).

96. 483 U.S. 868 (1987).

97. 489 U.S. 602 (1989).

98. 489 U.S. 656 (1989).

blood and urine testing of a defined category of railroad employees “engaged in safety sensitive tasks.”⁹⁹ The regulations concerned mandatory testing of employees involved in certain serious train accidents, as well as the discretionary breath and urine testing of railroad employees who violated certain safety rules, such as “noncompliance with a signal and excessive speeding.”¹⁰⁰ In *Skinner*, the compelling government interest that rose to a legitimate special need was regulating the conduct of railroad employees “engaged in safety-sensitive tasks.”¹⁰¹ Applying the balancing test—that is, the nature of the intrusion on the employees’ Fourth Amendment interests against the government’s legitimate interests—the Court found that the regulations in question “suppl[ied] an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol.”¹⁰²

Rejecting a requirement of individualized suspicion, the Court found that

a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.¹⁰³

Significantly, the employer used results of the suspicionless tests for administrative sanctions against the employee, including dismissal, but did not use them “to assist in the prosecution of employees.”¹⁰⁴ In fact, the Court reserved the question of

whether “routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext or otherwise impugn the administrative nature of the . . . program.”¹⁰⁵

Von Raab also approved warrantless, suspicionless drug screening urinalyses of certain federal employees who applied for or occupied specific positions in the U.S. Customs Service. The approved testing positions were: (1) those positions with “direct involvement in drug interdiction or enforcement of related laws;” and (2) those positions which required employees to carry firearms.¹⁰⁶ *Von Raab* reiterated that “the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer.”¹⁰⁷ The Court recognized, nonetheless, that the government had a “compelling interest in ensuring the front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment,”¹⁰⁸ and also a substantial interest in “deter[ring] drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions.”¹⁰⁹ These interests, apart from normal law enforcement, rose to a legitimate “special need” that justified “departure from the ordinary warrant and probable cause requirements”¹¹⁰ and led to the Court’s conclusion that the searches were reasonable. The fact that the test results were not “turned over to any other agency, including criminal prosecutors, without the employee’s written consent” was crucial to the Court’s decision that the searches were reasonable.¹¹¹

The Supreme Court also approved suspicionless urinalysis testing of schoolchildren, an issue T.L.O. left open, under the special needs exception in two cases, *Vernonia School District 47J v. Acton*, which concerned student athletes,¹¹² and *Board of*

99. *Skinner*, 489 U.S. at 620.

100. *Id.* at 611.

101. *Id.* at 620.

102. *Id.* at 629.

103. *Id.* at 624.

104. *Id.* at 621.

105. *Id.* at 621 n.5.

106. *Nat’l Treas. Employees Union v. Von Raab*, 489 U.S. 656, 660 (1989).

107. *Id.* at 665.

108. *Id.* at 670.

109. *Id.* at 666.

110. *Id.*

111. *Id.* at 663.

112. 515 U.S. 646 (1995).

Education of Independent School District No. 92 v. Earls, which concerned students engaged in extracurricular activities.¹¹³ The special need justifying these searches was deterring drug use by schoolchildren, and in particular, deterring drug use in the categories of students subjected to the testing.¹¹⁴ In both cases, the Court emphasized the limited uses of positive urinalysis results; neither school district intended to disclose the test results to law enforcement officials.¹¹⁵

Limiting Special Needs—Edmond and Ferguson

Against what seemed to be an ever-expanding exception to the Fourth Amendment under the rubric of “special needs” came the Supreme Court’s two decisions in *City of Indianapolis v. Edmond*¹¹⁶ and *Ferguson v. City of Charleston*,¹¹⁷ both of which significantly limited the doctrine. After these cases, suspicionless searches violate the Fourth Amendment when the primary or immediate purpose of the search is not divorced from normal, ordinary, or general law enforcement purposes, even though the ultimate purpose of the searches may be benign.

In *Edmond*, the Court considered “the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.”¹¹⁸ The Court distinguished prior constitutional suspicionless searches, including special needs searches: “In none of these cases . . . did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal

wrongdoing.”¹¹⁹ Passing constitutional muster before *Edmond* were “brief, suspicionless seizures of motorists at fixed Border Patrol checkpoints designed to intercept illegal aliens,”¹²⁰ “a sobriety checkpoint aimed at removing drunk drivers from the road,”¹²¹ and hypothetically, “a similar type of roadblock with the purpose of verifying drivers’ licenses and vehicle registrations.”¹²² “[W]hat principally distinguishes these checkpoints from those we have previously approved is their primary purpose.”¹²³

In *Edmond*, all parties agreed that the primary purpose of the checkpoint was interdicting narcotics, but the city argued that other checkpoints also had the “ultimate purpose of arresting those suspected of committing crimes.”¹²⁴ The Court squarely rejected this argument. “Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”¹²⁵

The City also argued that the checkpoint program was “justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations.”¹²⁶ The Court also rejected this argument. “If this were the case . . . , law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose”¹²⁷ This “purpose inquiry . . . is to be conducted only at the programmatic level and is not an invita-

113. 536 U.S. 822 (2002).

114. *Vernonia*, 515 U.S. at 661; *Earls*, 536 U.S. at 836.

115. In *Vernonia*, “the results of the tests [were] disclosed only to a limited class of school personnel who have a need to know; and they [were] not turned over to law enforcement authorities or used for any internal disciplinary function.” *Vernonia*, 515 U.S. at 658. In *Earls*, the “test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences.” *Earls*, 536 U.S. at 833.

116. 531 U.S. 32 (2000).

117. 532 U.S. 67 (2001).

118. *Edmond*, 531 U.S. at 34.

119. *Id.* at 38.

120. *Id.* at 37 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

121. *Id.* (citing *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990)).

122. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)).

123. *Id.* at 40.

124. *Edmond*, 531 U.S. at 42.

125. *Id.*

126. *Id.* at 46.

127. *Id.*

tion to probe the minds of individual officers acting at the scene.”¹²⁸

As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.¹²⁹

Ferguson followed *Edmond*, and further refined the “primary purpose” rule. In addition, *Ferguson* faced the issue of a true “mixed motive” purpose, distinguishing the ultimate purpose, which may be a legitimate special need, from the “immediate purpose, which, if designed to obtain evidence . . . that would be turned over to police and that could be admissible in subsequent criminal prosecutions,” violates the Fourth Amendment.¹³⁰

At issue in *Ferguson* was the “constitutionality of a state hospital’s performance of a diagnostic test to obtain evidence of a patient’s criminal conduct for law enforcement purposes”¹³¹ Concerned about cocaine use by pregnant patients, a public hospital in Charleston, South Carolina “began to order drug screens to be performed on urine samples from maternity patients who were suspected of using cocaine.”¹³² Although at first, the hospital merely used positive results for counseling and treatment, the hospital soon offered its “cooperation in prosecuting mothers whose children tested positive for drugs at birth.”¹³³ The county solicitor took the lead in developing the

hospital policy. If a woman in labor tested positive for drugs, “the police were to be notified without delay and the patient promptly arrested.”¹³⁴ If a pregnant woman not yet in labor tested positive, “the police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor.”¹³⁵

A jury ruled in favor of the city. On appeal, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed under the special needs exception. According to the Fourth Circuit, the drug screens were for “medical purposes wholly independent of an intent to aid law enforcement efforts . . . and [thus] the interest in curtailing the pregnancy complications and medical costs associated with maternal cocaine use outweighed . . . a minimal intrusion on the patients.”¹³⁶

The Supreme Court reversed. This case was unlike the Court’s prior special needs cases approving drug testing, because in those cases, the “nature of the ‘special need’ . . . advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement.”¹³⁷ In contrast, “the central and indispensable feature of [Charleston’s] policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”¹³⁸

The City argued that its “ultimate purpose[,] . . . protecting the health of both the mother and child[,] is a beneficent one.”¹³⁹ This did not assuage the Court, which would “not simply accept the State’s invocation of a ‘special need.’ Instead, we [carry] out a ‘close review’ of the scheme at issue before concluding” whether the need at issue is special.¹⁴⁰ In carrying out this “close review,” the Court looks to the “programmatic purpose,” and considers “all the available evidence to deter-

128. *Id.* at 48 (citation omitted).

129. *Id.* at 47.

130. *Ferguson v. City of Charleston*, 532 U.S. 67, 69, 86 (2001).

131. *Id.* at 69.

132. *Id.* at 70.

133. *Id.*

134. *Id.* at 72.

135. *Id.*

136. *Id.* at 75.

137. *Id.* at 79.

138. *Id.* at 80.

139. *Id.* at 81.

140. *Id.*

mine the relevant primary purpose,” as well as whether the “purpose actually served” by the searches is “ultimately indistinguishable from the general interest in crime control.”¹⁴¹

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of [the hospital’s] policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose. Such an approach is inconsistent with the Fourth Amendment.¹⁴²

A recent law review article highlights an important question that both *Edmond* and *Ferguson* fail to answer:

[N]either *Edmond* nor *Ferguson* reaches the more vexing question of what evidence can be used to infer purpose when the government contends that its immediate purpose in instituting an investigative practice is something other than (or in addition to) pure crime control. The validity of mixed motive programs will be more difficult to ascertain.¹⁴³

DNA Databank Decisions Before and After *Edmond* and *Ferguson*

Courts had decided numerous cases that concerned DNA databanks before *Edmond* and *Ferguson*.¹⁴⁴ Some courts employed the special needs exception to the uphold mandatory extraction of blood or other samples for inclusion in DNA databanks, and others simply performed a traditional Fourth Amendment balancing test to assess the searches’ reasonableness.¹⁴⁵ For example, in the earliest case upholding a state DNA databank, *Jones v. Murray*,¹⁴⁶ the Fourth Circuit, discussed the special needs exception, but did not rely on that exception for its decision to uphold the DNA data bank at issue. Rather, the court performed a straight Fourth Amendment balancing test to determine the reasonableness of the searches at issue.¹⁴⁷

Jones concerned the constitutionality of a Virginia statute that required all convicted felons to submit blood samples for DNA analysis “for the purpose of criminal law enforcement. . . . Six inmates . . . challenged the statute’s constitutionality, contending that it authorizes the involuntary extraction of blood in violation of the Fourth Amendment.”¹⁴⁸ Virginia argued that the testing was justified by the special needs exception, as set forth in *Skinner* and *Von Raab*.¹⁴⁹ While the district court relied on the exception for its decision, the Fourth Circuit declined to apply the special needs exception, instead resting its decision on a “separate category” of cases involving the “Fourth Amendment rights of prison inmates . . . to which the usual per se requirement of probable cause does not apply.”¹⁵⁰ Balancing the “minor intrusion” of the blood sampling process against “the government’s interest in preserving a permanent identification record of convicted felons for resolving past and future crimes,” the court found that the government’s interest outweighed the intrusion of the blood sample.¹⁵¹

141. *Id.* at 81.

142. *Id.* at 83-84 (footnotes omitted).

143. Kaye, *supra* note 1, at 495-96 (footnotes omitted).

144. See Cronan, *supra* note 15, at 142-44; Susan M. Dadio, *Maryland’s DNA Data Base System and Repository: Does It Pass Constitutional Muster?*, 25 U. BALT. L. REV. 47, 53-71 (1995) (discussing pre-*Edmond* cases concerning DNA databanks).

145. See Kaye, *supra* note 1, at n.162 and accompanying text (listing decisions both accepting and rejecting the special needs exception as the appropriate analysis to determine the constitutionality of various DNA databanks).

146. 962 F.2d 302 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992).

147. *Id.* at 304-08.

148. *Id.* at 304.

149. *Id.* at 305-06 (citations omitted).

150. *Id.* at 307 n.2.

151. *Id.* at 307.

Similarly, in *Rise v. Oregon*,¹⁵² the Ninth Circuit upheld a typical scheme requiring those convicted of certain offenses (murder, sexual offenses, or conspiracies or attempts to commit sexual offenses) to provide blood samples to the state Department of Corrections for the state DNA databank.¹⁵³ The plaintiffs argued that the statute violated the Fourth Amendment. The district court upheld the statute, holding that it served a special need other than law enforcement, and was related to penal administration.¹⁵⁴ The Ninth Circuit held that the statute was constitutional “even if its only objective is law enforcement.”¹⁵⁵ The court considered a number of factors, including

the reduced expectations of privacy held by persons convicted of one of the felonies to which [the statute] applies, the blood extractions’ relatively minimal intrusion into these persons’ privacy interests, the public’s incontestable interest in preventing recidivism and identifying and prosecuting murderers and sexual offenders, and the likelihood that the DNA data bank will advance this interest¹⁵⁶

The Ninth Circuit ultimately held that the statute was both reasonable and constitutional under the Fourth Amendment.¹⁵⁷

In contrast to the straight balancing tests performed by the Fourth and Ninth Circuits in *Jones* and *Rise*, respectively, the Second Circuit upheld Connecticut’s DNA collection program (requiring those convicted of specific felonies to provide samples) with a straight application of the special needs exception. In *Roe v. Marcotte*,¹⁵⁸ the court held that the DNA collection program advanced the government’s significant interests in deterring future crimes, as well as in solving past crimes, because of the high rate of recidivism among sexual

offenders.¹⁵⁹ The court held that this significant government interest rose to a special need and outweighed the “minimal intrusion involved.”¹⁶⁰ *Marcotte* found the special needs analysis “more compelling” than the Fourth Circuit’s analysis in *Jones*, which both *Marcotte* and the concurring opinion in *Jones* concluded had a “strikingly truncated view of the Fourth Amendment protections afforded to a convicted felon.”¹⁶¹

Edmond and *Ferguson* significantly changed the landscape surrounding the analysis of the constitutionality of DNA databanks. Of the subsequent cases discussing the impact of *Edmond* and *Ferguson* on the issue of the constitutionality of DNA databanks, all but one upheld the Repository and found it constitutional. Nearly all agree, however, that after *Edmond* and *Ferguson*, the special needs exception, rather than a traditional Fourth Amendment balancing test, controls analysis of the issue.¹⁶²

Many post-*Edmond* and *Ferguson* DNA databank cases faced the issue of the constitutionality of the federally mandated DNA Analysis Backlog Elimination Act of 2000 (DNA Act),¹⁶³ “which requires U.S. probation officers to collect a DNA sample from each individual on supervised release ‘who is, or has been, convicted of a qualifying federal offense.’”¹⁶⁴ The database established by the Act is known by the acronym CODIS. The first three cases to test the constitutionality of the DNA Act after *Edmond* and *Ferguson* continued to perform a straight Fourth Amendment balancing test and did not analyze the impact, if any, of *Edmond* and *Ferguson* on their analysis. All three determined that, under the straight balancing test, the DNA Act was constitutional.¹⁶⁵ The first case to discuss the impact of *Edmond* and *Ferguson* on the analysis of the constitutionality of the DNA Act was *United States v. Reynard*.¹⁶⁶ The parties in *Reynard* agreed that the “sole Fourth Amendment issue in this case [was] whether the ‘special needs exception’ .

152. 59 F.3d 1556 (1995), *cert. denied*, 517 U.S. 1160 (1996).

153. *Id.* at 1558.

154. *Id.* at 1559 (citations omitted).

155. *Id.* (citation omitted).

156. *Id.* at 1562; *see also* *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (adopting the rationale of *Rise* and *Jones* to uphold Colorado’s DNA databank statute).

157. *Id.*

158. 193 F.3d 72 (2d Cir. 1999).

159. *Id.* at 79, 82.

160. *Id.* at 80.

161. *Id.* at 81 (citing *Jones*, 962 F.2d at 311 (Murnaghan, J., concurring in part and dissenting in part)).

162. *See infra* notes 166-195 and accompanying text.

163. 42 U.S.C.S. § 14135 (LEXIS 2003).

164. *United States v. Reynard*, 220 F. Supp. 2d 1142, 1145 (S.D. Cal. 2002) (quoting 42 U.S.C. § 14135a(a)(2) (2000)).

. . . permits the collection of DNA samples from individuals” covered by the DNA Act.¹⁶⁷ After examining *Ferguson*, the court concluded that the Ninth Circuit’s decision in *Rise* was not controlling.¹⁶⁸ The court analyzed the issue by distinguishing the law’s immediate and ultimate purposes,¹⁶⁹ determining that the “immediate purpose” for the DNA Act was “to permit probation officers to fill the CODIS database with the DNA fingerprints of all qualifying” subjects.¹⁷⁰ Beyond this immediate purpose, the court found

at least two purposes that go beyond the normal need for law enforcement. First, the searches contribute to the creation of a more accurate criminal justice system. Second, the searches allow for a more complete DNA database, which will assist law enforcement agencies to solve future crimes that have not yet been committed.¹⁷¹

These purposes, concluded the court, established a special need that outweighed the diminished privacy expectations of the subjects, and made the DNA Act constitutional.¹⁷²

Three other courts analyzing the constitutionality of the DNA Act also found it constitutional under a special needs analysis.¹⁷³ One additional case, *Nicholas v. Goord*,¹⁷⁴ while discussing the constitutionality of a state DNA database instead of the federal DNA Act, nonetheless contains an excellent anal-

ysis of the impact of *Edmond* and *Ferguson* on the analysis of DNA data bank issues, as well as a complete discussion of DNA databank cases that preceded *Edmond* and *Ferguson*. The court first determined that *Edmond* and *Ferguson* “cast doubt on at least one aspect of *Marcotte*’s [the Second Circuit’s pre-*Ferguson* decision on DNA databanks] application of the ‘special needs doctrine’”¹⁷⁵ because it did not undertake a “‘close review’ to determine the primary purpose of the statute This principle represents a departure from *Marcotte*, which engaged in no such review.”¹⁷⁶

Moreover, the court found at least two issues raised by the decisions . . . that significantly affect the analysis of DNA indexing statutes: (1) whether traditional Fourth Amendment balancing is available in the absence of “special needs[;]” and (2) what purposes of a DNA indexing statute are relevant for determining “special needs.”¹⁷⁷

Answering the first question, the court found that *Edmond* and *Ferguson* “allow no room for a classic Fourth Amendment ‘balancing’ analysis except in those cases meeting the ‘special needs’ threshold.”¹⁷⁸ This conclusion “casts doubt on the majority of the cases upholding DNA databanks” before the recent Supreme Court decisions, although the court allowed that it would not necessarily change the outcome of those cases.¹⁷⁹ Answering the second question, the court engaged in the “close review” mandated by *Ferguson* and concluded that “it is beyond question that the primary purpose of the statute is

165. The first case to face the question of the constitutionality of the DNA Act was *Groceman v. Dep’t of Justice*, Civil Action No. 3:01-CV-1619-G, 2002 U.S. Dist. LEXIS 11491, at *10 n.2 (N.D. Tex. June 27, 2002) (considering the special needs doctrine, but finding that “in determining the reasonableness of the search under the [DNA] Act, the balancing approach [of *Jones*, *Rise*, and other courts] . . . is more appropriate because the [DNA] Act more closely resembles the procedures in those states”). *Groceman* did not discuss the impact, if any, of *Edmond* and *Ferguson* on its analysis. The second and third cases, both from Oregon, found *Rise* to be controlling, and also did not discuss the impact of the *Edmond* and *Ferguson* on their analysis. *United States v. Meier*, CR No. 97-72 HA, 2002 U.S. Dist. LEXIS 25755, *11-13 (D. Or. Aug. 6, 2002); *United States v. Lujan*, No. CR No. 98-480-02 HA, 2002 U.S. Dist. LEXIS 25754, *1-13 (D. Or. July 8, 2002).

166. *Reynard*, 220 F. Supp. 2d at 1145.

167. *Id.* at 1165.

168. *Id.* at 1166 n.29.

169. *Id.* at 1167.

170. *Id.*

171. *Id.* at 1168.

172. *Id.*

173. *United States v. Kimler*, No. 02-3097, 2003 U.S. App. LEXIS 13586 (10th Cir. July 7, 2003); *Miller v. United States Parole Comm’n*, 259 F. Supp. 2d 1166 (D. Kan. 2003); *United States v. Sczubelek*, 255 F. Supp. 2d 315 (D. Del. 2003).

174. No. 01 Civ. 7891, 2003 U.S. Dist. LEXIS 1621 (S.D.N.Y. Feb. 6, 2003). *Nicholas* discussed a constitutional challenge to a New York state DNA databank law that is “substantially similar to the federal statute on DNA collection.” *Miller*, 259 F. Supp. 2d at 23 n.38.

175. *Nicholas*, 2003 U.S. Dist. LEXIS 1621, at *30 (criticizing *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999)).

176. *Id.* at *36 (citations omitted).

177. *Id.* at *35.

178. *Id.*

to solve crimes”¹⁸⁰ Whether this reflected a “need beyond the normal need for law enforcement” and thus qualified as a special need was a trickier question. The court reasoned that because the databank would not be used “to investigate past crimes,” but instead was “to maintain information available to solve future crimes,”¹⁸¹ this purpose was not a “‘normal’ or ‘ordinary’ purpose of law enforcement.”¹⁸²

Nicholas did not explain how solving future crimes was not a general purpose of law enforcement as the Supreme Court described in *Ferguson*, *Edmond*, or *Delaware v. Prouse*.¹⁸³ After all, preventing and solving *all* crimes, no matter when committed, is the essential essence of law enforcement, whether normal, ordinary, general, or otherwise. Nor did the court address the many instances police use DNA databanks to solve past crimes (as opposed to future crimes), including both “cold” cases and those for which an innocent person is imprisoned. Finally, the court did not address the fact, apparent to anyone who reads a daily newspaper, that solving crimes using DNA databanks is becoming more and more common every day.¹⁸⁴

Nonetheless, once it determined that solving future crimes was not a normal or ordinary purpose of law enforcement, *Nicholas* had no problem concluding that the governmental interest at issue and the efficacy of the program in meeting that interest outweighed the intrusion into the subject’s privacy interests.¹⁸⁵ Accordingly, the court concluded that, “taking into account all of the factors considered above—the decreased expectation of privacy to be accorded convicted felons who are incarcerated, the minimal intrusiveness of the sampling, and the

extremely strong governmental interest in solving crimes—New York State’s DNA indexing program does not violate the Fourth Amendment.”¹⁸⁶

*United States v. Miles*¹⁸⁷ is the only case to hold that the DNA Act was unconstitutional after *Edmond* and *Ferguson*. Although *Miles* was decided before *Nicholas*, it completely rejects *Nicholas*’s conclusions. The import of *Edmonds* and *Ferguson*, according to *Miles*, is that “the Supreme Court has gone to great lengths to require something more than the assertion of a general law enforcement need to justify a regime of suspicionless searches.”¹⁸⁸ As the Supreme Court mandated in *Ferguson*, *Miles* next examined “all the available evidence,” rather than the “government’s retrospective justifications” for the DNA Act to determine its primary purpose.¹⁸⁹ “Thus, the court examine[d] each of the asserted governmental interests to determine whether such interest is in fact an actual primary purpose of the [DNA Act] and, if so, whether that interest can be distinguished from law enforcement.”¹⁹⁰

First, examining the purported primary purpose of expanding the CODIS database, the court found it “intellectually dishonest to decouple the collection of information for use in CODIS from the law enforcement purpose for which CODIS was created.”¹⁹¹ Second, in response to the government’s asserted interest in advancing the accurate prosecution of crimes, the court found that “[i]f a convicted felon wants to be exonerated of a crime for which he is wrongly accused, he will presumably submit voluntarily to a DNA test It is disingenuous for the government to state that it needs to exonerate people who do not want to be exonerated.”¹⁹²

179. *Id.* at *35-36.

180. *Id.* at *39.

181. *Id.* at *43.

182. *Id.* at *46.

183. 440 U.S. 648 (1979).

184. See generally The Innocence Project, *DNA News* (Aug. 12, 2003), at www.innocenceproject.org. This Web site states that, as of 5 August 2003, DNA analysis has exonerated 131 people of crimes for which they had been convicted. In each case, DNA analysis conclusively established that the convicted person could not have been the perpetrator of the offense. Thirty-three of the first 123 people exonerated had confessed to the crimes. *Id.*

185. *Nicholas*, 2003 U.S. Dist. LEXIS 1621, at *64. *Nicholas* noted that the privacy interest of a convicted felon “is entitled to much less weight than the privacy interest of an individual who has not [been convicted].” *Id.* at *56.

186. *Id.* at *63-64.

187. 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

188. *Id.* at 1137 (footnote omitted).

189. *Id.* at 1138.

190. *Id.*

191. *Id.* at 1139 n.6.

192. *Id.* at 1139.

In any case, the asserted interest in prosecuting crimes accurately is indistinguishable from the government's basic interest in enforcing the law. Any time the government attempts to solve or prosecute crime, the presumption is that the government's objective is to do so accurately. The accurate prosecution of crime is an inherent and implicit goal of the government's ordinary law enforcement objective.¹⁹³

Finally, as to the government's third asserted interest, reducing recidivism, the court determined that this was "collateral to the law enforcement purpose of the Act Under *Ferguson*, a program of suspicionless searches cannot be justified by its ultimate purpose . . . if its immediate purpose is to gather evidence for use in investigating and prosecuting crimes."¹⁹⁴ Finding no primary purpose "other than its use as a general law enforcement tool," *Miles* held that the DNA Act violated the Fourth Amendment when it required *Miles* "without any individualized suspicion to submit a blood sample."¹⁹⁵

Applying Edmond, Ferguson, and Other DNA Databank Decisions to the DOD Repository

How do *Edmond*, *Ferguson*, and other subsequent decisions discussing the constitutionality of DNA databanks affect the constitutionality of the DOD Repository? A careful reading of these cases suggests that they have fundamentally shifted the ground beneath any pre-*Edmond* analysis. First, *Reynard*, *Nicholas*, and *Miles*, as well as other post-*Edmond* and *Ferguson* cases, establish that one must examine the constitutionality of the Repository using the special needs exception, rather than a traditional Fourth Amendment balancing test. Second, under the special needs exception, allowing access to the Repository for law enforcement purposes clearly makes obtaining samples for the DOD Repository a mixed motive search, most analogous to the search at issue in *Ferguson*, and complicates the question of the Repository's constitutionality.¹⁹⁶

The government's interest in identifying the remains of fallen service members is unquestionably a proper government purpose apart from normal or general law enforcement, and thus qualifies as a special need.¹⁹⁷ The mandatory provision of samples for the express purpose of investigating or prosecuting felonies or any sexual offense is not such a special need, unless one accepts the special need propounded in *Nicholas*—the investigation of future crimes. It is questionable, however, whether the distinction between investigating past and future crimes applies to samples in the DOD Repository when: (1) the samples are not used to expand the CODIS database; (2) there is no issue of recidivism, because the service members must provide samples notwithstanding the lack of any conviction for or suspicion of any crime; (3) there is no need to deter convicted persons from committing further crimes because few if any of the DNA sample donors will have committed any crimes; and (4) although service members may have a diminished expectation of privacy for some purposes,¹⁹⁸ that expectation is not as diminished as it is for the convicted felons against which the government's interests were balanced in *Nicholas* and other cases. If service members who provide samples to the DOD Repository have any diminished expectation of privacy, it will not be the result of a conviction for any offense—the rationale for the diminished expectation of privacy of the subjects of the usual DNA databank.

If *Nicholas*'s rationale does not apply to the DOD Repository because of the differences set forth above, then the constitutionality of the Repository depends on the primary or immediate purpose of the Repository—remains identification or law enforcement. Undertaking the close review of the programmatic purposes of the DOD Repository that *Ferguson* demands leads easily to the conclusion that the Repository was established for—and remains established for—the primary purpose of identifying remains. Moreover, because the DOD has reportedly granted access only once thus far for any purpose other than remains identification,¹⁹⁹ the "purpose actually served" by the Repository is also divorced from general, normal, or ordinary law enforcement. Accordingly, as of this writ-

193. *Id.*

194. *Id.* (citation omitted).

195. *Id.* at 1141.

196. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 79-81 (2001).

197. *But see* Robert Craig Scherer, *Mandatory Genetic Dogtags and the Fourth Amendment: The Need for a New Post-Skinner Test*, 85 GEO L. J. 2007 (1997); *see also* Elizabeth Reiter, *The Department of Defense DNA Repository: Practical Analysis of the Government's Interest and the Potential for Genetic Discrimination*, 47 BUFF. L. REV. 975 (1999). Reiter argues that *Mayfield* addressed the wrong issue. The issue was not "whether the government had a compelling interest in the identification of remains in general," but "whether the DOD has a compelling interest in the identification of remains by DNA analysis when the DNA is obtained through a mandatory collection policy." *Id.* at 1032. The answer to that question, she argues, is "no." *Id.*

198. *See, e.g., MCM, supra* note 10, MIL. R. EVID. 313 (permitting suspicionless inspections of service members, although not for the "primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings").

199. As of July 2003, the Repository has evidently only granted one request for access other than for remains identification. That request was for law enforcement purposes. Jane McHugh, *Military DNA Released to Police for the First Time*, ARMY TIMES, Aug. 4, 2003, at 19 [hereinafter *McHugh*].

ing, the DOD Repository is constitutional, even though access for straightforward law enforcement purposes is permitted.

All of this could change, however. Other than the need to perform a “close review” to determine the “actual purpose served,” the Supreme Court has not provided much guidance in the “mixed motive” area. What happens if a mandatory, suspicionless search regime is set up for a genuine lawful *primary purpose*, but over time, the purpose *actually served* gradually shifts away from the primary purpose and moves toward more general, ordinary, and normal needs of law enforcement? To further complicate matters, what if the “actual purpose served” changes, but the “programmatic purpose” remains benign?

These complications arise because the DOD makes scant use of the Repository for remains identification, particularly for service members killed in combat. For example, “of the 388 deaths which resulted from Operations Desert Shield and Storm, only two cases required DNA analysis in order to complete remains identification—approximately 0.52%. In the other 386 cases, conventional methods of remains identification were sufficient.”²⁰⁰ To be fair, the lack of DNA for remains identification during the Gulf War was one of the reasons for establishing the DNA Repository in the first place.²⁰¹ Further, in times of relative peace, the chance of a service member dying in hostilities “is approximately 1 in 50,000, or 0.002%.”²⁰² Finally, “the chance of a service member dying by accident or homicide during peacetime is 0.05%, one-half of one percent.”²⁰³

With the statutory change, including its mandatory disclosure provision and the publicity surrounding the change, it is possible that the DOD could receive a growing number of federal court orders to access the databank for pure law enforcement purposes. Compared to the relative unlikelihood that DNA in the Repository will actually be used for identification purposes, “the actual necessity for the government to collect and store [a] DNA sample of every service member [for remains identification] may be even more speculative than the possibility” that the sample will be used for investigative or prosecutorial purposes.²⁰⁴

Many (if not most) of these requests could conceivably come from outside the military and could involve non-military

offenses. Other federal and state law enforcement agencies must certainly be aware of the accessibility of the Repository and will almost certainly attempt to use it for their investigative and prosecutorial purposes, for both past and future crimes.²⁰⁵

Should this occur, the “purpose actually served” by the Repository could shift from primarily remains identification to primarily law enforcement, despite the beneficent purpose behind the Repository’s creation, which would still remain the Repository’s “ultimate” purpose. If the actual purpose served by the Repository becomes “ultimately indistinguishable from the general interest in crime control,” there is no longer a legitimate “special need” supporting the mandatory, suspicionless taking of samples from service members for inclusion in the Repository. Any search and seizure of service members’ DNA for the Repository without individualized suspicion—most commonly signaled by both a warrant and probable cause—will violate the Fourth Amendment’s prohibition against unreasonable searches and seizures.

Conclusion

The DOD Repository continues to have a special need apart from general, ordinary, or normal law enforcement as its *primary and immediate purpose*—the identification of remains of fallen service members. As long as that is the case, the mandatory collection of samples for the Repository does not violate the Fourth Amendment. This is true despite the fact that the Repository is accessible for investigative or prosecutorial purposes (and has been accessible for those purposes since shortly after its inception) and, as such, has an *ultimate purpose* that is not separate from general, ordinary, or normal law enforcement.

If the Repository is accessed for law enforcement purposes so often that the *purpose actually served* by the Repository becomes primarily and immediately law enforcement rather than remains identification, it will lose its constitutional legitimacy regardless of the beneficent purpose for which it was founded. The special need justifying the DOD Repository’s establishment in the first place will evaporate, leaving only an unconstitutional search and seizure in its place.

200. Reiter, *supra* note 197, at 992 and accompanying notes (arguing that these numbers do not demonstrate that mandatory DNA collection is a compelling government interest). In fact, argues Reiter, because there is a greater likelihood in times of relative peace that a service member will die in an accident or homicide than in combat, “how would the military’s interest differ from the interests of the population as a whole . . . ? Should the government be allowed to seize DNA of all citizens based on the fact that any citizen might, at some time, die in an accident or at the hands of a murderer?” *Id.* at 990.

201. *See supra* note 3 and accompanying text.

202. Reiter, *supra* note 197, at 989 and accompanying notes.

203. *Id.* at 990.

204. *Id.* at 1033.

205. *See* McHugh, *supra* note 199.

Any Fourth Amendment issues concerning the DOD Repository are vitiated if providing samples ceases to be mandatory. If service members are fully informed of all of the permissible uses of their DNA and give prior consent to the samples' collection, there is no constitutional issue—assuming, of course, that the consent is truly voluntary. If a service member is unwilling to give his informed consent, the DOD could obtain the service member's affirmative waiver of the option to maintain a sample in the Repository.

After all, remains belong to the service member. Why should the decision to provide the DOD with the means to identify those remains through DNA analysis belong to anyone else, particularly when other means such as dental records, fingerprints, and mitochondrial DNA are also available? This is especially true now that the DOD Repository is statutorily open for investigative and prosecutorial purposes. A discussion of the contours and ramifications of an informed consent policy, however, are left for another day.