Mississippi College Law Review

Volume 19
Issue 2 *Vol. 19 Iss. 2*

Article 12

1999

# Chandler v. Miller: The Civil Liberties Sky is Not Falling

Mary Jacq Watson

# *Chandler v. Miller*: THE CIVIL LIBERTIES SKY IS NOT FALLING

*Chandler v. Miller*
520 U.S. 305 (1997)

*Mary Jacq Watson**

## I. INTRODUCTION

At the same time that the federal government declared war on drugs, the courts began taking a new look at the Fourth Amendment's requirements of probable cause and warrants for searches and seizures, especially those involving drug testing. The Supreme Court has determined that drug testing by urinalysis is a form of search and seizure governed by the Fourth Amendment and has developed an analysis to determine when such testing may be made mandatory. Until January 1997, the Court had decided three drug-testing cases, and upheld the constitutionality of each rationale for mandatory drug-testing based on what it determined to be a "special need" beyond the normal needs of law enforcement. Because of the lack of uniformity with which lower courts have applied the "special needs" exception, and because of rampant legal fear that the civil liberties sky was falling as a result of the "special needs" analysis, the Court needed to clarify how that analysis should be applied. In *Chandler v. Miller*,[1] a case dealing with mandatory urine-testing of candidates for public office in Georgia, the Court found an opportunity to do so. This Note examines the Court's holding in *Chandler* and its application of the "special needs" analysis to the case. Additionally, this Note examines how the "special needs" analysis was developed and how it will likely change in the future.

## II. FACTS

In 1990, the Georgia legislature enacted a statute requiring candidates for certain state offices to certify that they had taken, and passed, a urinalysis drug screening for the indicia of any of five illegal drugs[2] within thirty days of qualifying for nomination or election.[3] Under the statute, anyone who declined to take the test or tested positive was disqualified from running for, or being nominated to, public office.[4]

---

* B.A., M.A., University of Alabama; J.D., May 1999, Mississippi College School of Law. The author wishes to thank Professor Judy Johnson of Mississippi College School of Law for her encouragement, constructive criticism and inspiration during the preparation of this article.

1. 520 U.S. 305 (1997).

2. "Illegal drug" is defined in the statute as marijuana or any of the following controlled substances: cocaine, opiates, amphetamines or phencyclidines, except when used pursuant to a valid prescription or otherwise authorized by law. GA. CODE ANN. § 21-2-140 (1993), *repealed by* 1998 GA. LAWS 295, effective Jan. 1, 1999.

3. *Id.*

4. *Id.*

In May 1994, about one month before the deadline for submission of certification that they had tested negative, Libertarian Party candidates Walker Chandler, Sharon Harris, and James D. Walker challenged the statute in United States District Court for the Northern District of Georgia, raising First, Fourteenth, and Fourth Amendment challenges,[5] and naming as defendants Governor Zell Miller and two officials involved in the administration of the statute.[6]

The district court focused almost exclusively on the Fourth Amendment claim and found that the drug tests, although searches and seizures within the meaning of the Fourth Amendment, were not unreasonable.[7] The court denied the candidates' request for a preliminary injunction.[8]

Having failed in their attempt to avoid the requirements of the statute, the three candidates submitted to the urine testing which, by statute, could be performed in a private physician's office.[9] Each candidate tested negative, and was subsequently defeated in his or her respective race.[10]

On appeal, the Eleventh Circuit Court of Appeals affirmed,[11] relying on the Supreme Court's precedents sustaining drug-testing programs for student athletes,[12] Customs Service employees,[13] and railway employees.[14] The Eleventh Circuit decided, as the Supreme Court had found in those prior cases, that the drug testing served "special needs"—important interests beyond the ordinary needs of law enforcement.[15] The court balanced the state's interest in having its candidates for public office be certified drug-free against the candidates' interest in privacy, and decided the statute was consistent with the Fourth and Fourteenth Amendments.[16] A strongly worded dissent by Circuit Judge Rosemary Barkett foreshadowed the arguments that eventually would prevail before the United States Supreme Court.[17] Barkett raised questions about whether Fourth Amendment protections could constitutionally be suspended when there was no individual suspicion of wrongdoing, no threat to public safety, no institutional setting, and no time urgency that would preclude waiting for a warrant.[18]

---

5. The First Amendment challenge was based on the notion that refusal to submit to the government's drug-testing edict was itself a free speech right, reinforced by the Libertarian Party's position that drug laws are unnecessary and a waste of time and effort. One Fourteenth Amendment argument was that the Georgia election statute unconstitutionally restricted the rights of voters to choose their elected officials, since candidates who disagreed with the drug testing might not run for office, or might be eliminated from candidacy by a positive test result. The Fourteenth Amendment was also involved in the case because it is through the Fourteenth Amendment that the Fourth Amendment applies to state action. *Chandler*, 520 U.S. at 305.

6. Phyllis T. Bookspan, *In the U.S. Supreme Court: Can States Require Drug Tests for Office-Seekers?*, WEST'S LEGAL NEWS, Jan. 13, 1997, WLN 14362, 1997 WL 8494.

7. *Id.*

8. *Id.*

9. GA. CODE ANN. § 21-2-140 (1993), *repealed by* 1998 GA. LAWS 295, effective Jan. 1, 1999.

10. Bookspan, *supra* note 6.

11. Chandler v. Miller, 73 F.3d 1543 (11th Cir. 1996).

12. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

13. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

14. Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989).

15. *Chandler*, 73 F.3d at 1546.

16. *Id.* at 1547.

17. *Id.* at 1549.

18. *Id.* at 1550.

On April 15, 1997, in an eight-to-one opinion written by Justice Ginsburg, the Supreme Court reversed the Eleventh Circuit.[19] The Court found that "Georgia's requirement that candidates for state office pass a drug test [did] not fit within the closely guarded category of constitutionally permissible suspicionless searches."[20] In its analysis, the Supreme Court first acknowledged that Georgia's drug-testing requirement effected a search within the meaning of the Fourth and Fourteenth Amendments.[21] The Court then focused on the question of reasonableness, stating that to be reasonable a search must ordinarily be based on individualized suspicion of wrongdoing.[22]

The Court reviewed *Skinner v. Railway Labor Executives Ass'n*,[23] *National Treasury Employees Union v. Von Raab*,[24] and *Vernonia School District 47J v. Acton*.[25] Referring to these cases as "our precedents most immediately in point,"[26] the Court found that "[n]otably lacking in [the State of Georgia's] presentation is any indication of a concrete danger demanding a departure from the Fourth Amendment's main rule [requiring a warrant and probable cause for searches and seizures]."[27] The Court found that "Georgia assert[ed] no evidence of a drug problem among the State's elected officials, those officials typically [did] not perform high-risk, safety-sensitive tasks, and the required certification immediately aid[ed] no interdiction effort," and thus concluded that the need for the statute was merely "symbolic," not "special."[28]

## III. BACKGROUND AND HISTORY OF THE LAW

### *A. The Fourth Amendment*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[29]

In the years immediately preceding the American Revolution, the British Parliament adopted legislation that allowed broad, suspicionless searches in the colonies in an attempt to combat smuggling and exercise more stringent control over the wayward colonists.[30] The new laws allowed Writs of Assistance to be ordered that permitted British officers to search any home for contraband.[31] No

19. Chandler v. Miller, 520 U.S. 305 (1997).
20. *Id.*
21. *Id.* at 312.
22. *Id.*
23. 489 U.S. 602.
24. 489 U.S. 656.
25. 515 U.S. 646.
26. *Chandler*, 520 U.S. at 314.
27. *Id.* at 318-19.
28. *Id.* at 321-22.
29. U.S. CONST. amend. IV.
30. *See* Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 558 (1997).
31. *Id.*

probable cause nor identification of locations to be searched was required.[32] These general warrants allowed a search without specifying the items to be seized.[33] Historians agree that the Fourth Amendment was a reaction to the hated Writs of Assistance that were designed to insure that random searches of that nature could never happen again in a free America.[34]

The Fourth Amendment traditionally has been interpreted as being composed of two clauses.[35] The first clause, known as the "Reasonableness Clause," makes up the first part of the amendment and states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[36] The second clause, termed the "Warrant Clause," states, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[37] The Supreme Court has taken two different approaches when interpreting the words of the Fourth Amendment. Under the traditional approach, the meaning of the Reasonableness Clause has been held as defined by the Warrant Clause.[38] In other words, the two main requirements of the Fourth Amendment, with regard to reasonable searches and seizures, are a warrant and probable cause.[39] The alternative approach sometimes employed by the Court is called the "general reasonableness" interpretation that rests on the idea that the two clauses are distinct.[40] In other words, a warrant based on probable cause is only one factor to consider in determining whether a search and/or seizure is constitutional; a balancing test is also employed to decide between competing interests, tempered by reasonableness.[41]

One of the first cases in which the Court applied the "general reasonableness" approach using a balancing test was *Camara v. Municipal Court of San Francisco.*[42] In *Camara*, the Court balanced "the need to search against the invasion which the search entails," and held that warrants for housing inspections could be issued without strict probable cause if certain standards were met.[43] The next year, the *Camara* balancing test was quoted and relied upon in *Terry v. Ohio*,[44] the first case in which the Supreme Court confronted the issue of whether police have the right to stop and question a suspect without a warrant and probable cause or consent.[45] *Terry* established that a search and seizure which is limit-

32. *Id.*
33. *Id.*
34. *Id.*
35. *See* Laura M. Bergamini, *Random Drug Testing of High School Athletes in New Jersey After* Vernonia School District 47J v. Acton—*Will Acton Make the Cut?*, 49 Rutgers L. Rev. 551, 555 (1997).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. 387 U.S. 523 (1967).
43. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 203 (2d ed., 1992).
44. 392 U.S. 1 (1968).
45. LAFAVE, *supra* note 43, at 202-03.

ed in intrusiveness (in this case a "stop and frisk") may be considered reasonable under the Fourth Amendment even in the absence of probable cause.[46] In *Terry*, the Supreme Court reduced the required level of suspicion from probable cause to reasonable suspicion for a constitutional search and seizure.[47]

### *B. Exceptions to Fourth Amendment Requirements*

#### 1. Administrative Searches

*Camara* was the first case to allow a departure from individualized suspicion.[48] *Camara* also introduced a new category of Fourth Amendment searches called "administrative searches." The administrative search is intended to serve some governmental regulatory purpose other than the capture of criminals, or the discovery and seizure of evidence for use in a criminal trial.[49] In *Camara*, the Supreme Court took a careful look at the interrelationship of the Reasonableness Clause and the Warrant Clause.[50] The Court asserted that in administrative searches, "reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[51] The cases involving administrative searches that followed over the next twenty years served to further broaden the Court's view of the requirements of the Fourth Amendment relative to searches and seizures.

In *See v. City of Seattle*,[52] decided the same day as *Camara*, the Court reaffirmed the balancing test for administrative searches and directed that it should be applied on a "case-by-case basis under the general Fourth Amendment standard of reasonableness."[53] The Court found that an administrative entry pursuant to a fire code inspection could be made "within the framework of a warrant procedure" without the consent of the owner and without probable cause.[54]

A few years after *See*, in *Colonnade Catering v. United States*,[55] the Supreme Court cited the long history of regulation of the liquor industry as a reason for dispensing with the warrant requirement when conducting an inspection of a liquor store. Since *Colonnade*, the Court has upheld warrantless administrative searches of other regulated businesses, generally holding that warrants are required for nonconsensual fire, health, or safety inspections of residential or private commercial property, unless the business is one that is otherwise government regulated, in which case a warrant may not be needed.[56] Among the busi-

---

46. *Id.*
47. *See* Denise E. Joubert, Note, *Message In A Bottle: The United States Supreme Court Decision in* Vernonia School District 47J v. Acton, 56 LA. L. REV. 959, 964 (1996).
48. *Id.*
49. JAMES B. HADDAD ET AL., CASES AND COMMENTS ON CRIMINAL PROCEDURE 461 (1992).
50. *Id.*
51. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 539 (1967).
52. 387 U.S. 541 (1967).
53. *Id.* at 546.
54. *Id.* at 545.
55. 397 U.S. 72 (1970).
56. Buffaloe, *supra* note 30, at 535.

nesses for which the Court has upheld warrantless administrative searches are mines,[57] a junkyard subject to state regulation,[58] and a gun shop.[59]

Administrative searches veered into the realm of personal privacy in the 1987 case of *O'Connor v. Ortega*.[60] The Supreme Court divided four-four-one on the case, in which a government employer searched an employee psychiatrist's desk and file cabinet as part of an investigation into workplace misconduct.[61] Four justices said employees may have reasonable expectations of privacy against employer inspections, while four justices asserted that such inspections were reasonable only when the search was authorized by a magistrate based on probable cause.[62] The plurality opinion, written by Justice O'Connor, concluded that under most circumstances a warrantless, work-related search will be justified by a reasonable belief that the search will yield evidence of work-related misconduct.[63] *Ortega* demonstrated a further development of the balancing test, with the Court finding it necessary to "balance the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."[64] The Court found "an interest in ensuring that . . . agencies operate in an effective and efficient manner," and concluded that because the hospital had a reasonable suspicion of Dr. Ortega's wrongdoing, the warrantless search was reasonable.[65]

2. "Special Needs" Cases

Following *Ortega*, the new category of administrative searches based on "special needs" developed exceptions to the Fourth Amendment's protection of the privacy expectations of an assortment of people, including high school students, student athletes, railroad employees, and drug interdiction agents.[66] "Special needs" has been used to refer to a need that purportedly is beyond the normal needs of law enforcement, thus bypassing the warrant and probable cause requirements for searches and seizures.[67] This development during the 1980s and 1990s paved the way for consideration of the instant case in 1997.

*New Jersey v. T.L.O.*[68] was the first of these cases, marking the first time the Court applied the reasonableness standard and balancing test to searches of high school students. The case involved the warrantless search of a fourteen-year-old student's purse that yielded marijuana, rolling papers, money, and notes appar-

57. Donovan v. Dewey, 452 U.S. 594 (1981).
58. New York v. Burger, 482 U.S. 691 (1987).
59. United States v. Biswell, 406 U.S. 311, 317 (1972).
60. 480 U.S. 709 (1987).
61. *Id.*
62. *Id.*
63. *Id.* at 728.
64. *Id.* at 719-20.
65. *Id.* at 724.
66. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
67. *See* Buffaloe, *supra* note 30, at 548.
68. 469 U.S. 325 (1985).

ently documenting drug deals.[69] The Court recognized that the student had an expectation of privacy in the contents of her purse, but decided that the student's privacy interest was outweighed by the school's need to maintain order and discipline.[70] The Court's opinion, written by Justice White, stated that the normal warrant and probable cause requirements would frustrate "the swift and informal disciplinary procedures needed in the schools," and that the "legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[71] In his concurrence in *T.L.O.*, Justice Blackmun wrote: "Only in those exceptional circumstances in which special needs, beyond the normal needs 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."[72]

Two cases decided by the Supreme Court on the same day in 1989 went even further by doing away with individualized suspicion as an element of the reasonableness analysis employed in "special needs" cases. In *Skinner*,[73] the Railway Labor Executives' Association challenged the constitutionality of Federal Railroad Administration rules that required employees to submit to blood, breath, and urine tests for drugs following major rail accidents.[74] In *Von Raab*,[75] the union sued the United States Customs Service to prevent implementation of a mandatory urine testing program for drugs that applied to employees seeking transfer or promotion to jobs involving drug interdiction or requiring them to carry firearms.[76]

In *Skinner*, the Court recognized that a person's excretory functions are "traditionally shielded by great privacy," but found that the privacy expectations of the railway employees were diminished "by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal substantially dependent on the health and fitness of covered employees."[77] In *Von Raab*, the Court found the Customs Service had no need for individualized suspicion before testing urine for drugs because the employees who were subjected to the tests were in positions that were exposed to drugs and firearms, thus implicating a public safety concern.[78] The Court reasoned that, like railroad workers, Customs Service employees had a diminished expectation of privacy.[79]

Together, *Skinner* and *Von Raab* established a framework for analyzing "special needs" cases.[80] Using this framework, the Court first decided whether the Fourth Amendment was implicated by determining whether government action invaded

69. *Id.* at 338.
70. *Id.* at 341.
71. *Id.* at 340.
72. *Id.* at 341.
73. 489 U.S. 602.
74. *Id.*
75. 489 U.S. 656.
76. *Id.*
77. *Skinner*, 489 U.S. at 626-27.
78. *Von Raab*, 489 U.S. at 672.
79. *Id.*
80. *See* Mark A. Stanislawczyk, Note, *An Evenhanded Approach to Diminishing Student Privacy Rights Under the Fourth Amendment:* Vernonia School District v. Acton, 45 CATH. U. L. REV. 1041, 1063-64 (1996).

an individual's reasonable expectation of privacy.[81] Next, the "special needs" test was employed, with the Court determining whether requiring a warrant, probable cause, or individualized suspicion would in any way interfere with the government's objectives—even if impractical, or only minimally protecting the individual's privacy interest.[82] The Court then weighed the two competing interests to determine which was greater, and found that the search was reasonable.[83]

In *Vernonia,*[84] the Court addressed the Fourth Amendment analysis of suspicionless drug testing by urinalysis of middle and high school student athletes.[85] The school district alleged it had experienced an increase in disciplinary problems that it believed was drug-related, with student athletes being seen as possible leaders in the developing drug subculture.[86] James Acton, a seventh-grader, had not been allowed to participate in student athletics because he refused to take part in the drug testing, a decision that was supported by his parents.[87] His parents brought an action for declaratory and injunctive relief.[88] The Supreme Court, agreeing with the district court but overruling the Ninth Circuit Court of Appeals, found that the immediacy and severity of the school district's interest in stopping the drug problem, combined with the minimal intrusiveness of the testing and the reduced privacy expectations of student athletes, overruled those privacy interests.[89] The Court held that "[t]aking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's policy is reasonable and hence constitutional."[90]

The *Vernonia* decision left a number of questions unanswered. It was unclear whether the holding should be read narrowly to apply only to cases specifically like *Vernonia*, or whether it could be applied to the drug testing of all student athletes, participants in other extracurricular activities, or even to all students.[91] Furthermore, it was unclear whether the decision should be applied to other "special needs" situations as well. The majority wrote, perhaps anticipating these questions, and perhaps foreshadowing the present case: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."[92]

## IV. INSTANT CASE

*Chandler v. Miller* forced the United States Supreme Court to clarify the "special needs" category of administrative searches and to finally decide whether the

81. *Id.*
82. *Id.*
83. *Id.* at 1065.
84. 515 U.S. 646 (1995).
85. *Id.*
86. *Id.* at 649.
87. *Id.* at 649-50.
88. *Id.* at 651.
89. *Id.* at 664-65.
90. *Id.*
91. *See* Joubert, *supra* note 47, at 977.
92. *Vernonia Sch. Dist.*, 515 U.S. at 665.

Constitution would permit completely suspicionless searches and seizures in the form of drug testing by government entities.[93] The answer was a resounding one —an eight-to-one decision—that was unexpected by many legal scholars who thought the Court would continue down the "special needs" row plowed by *Skinner*, *Von Raab*, and *Vernonia*.[94]

In their arguments before the Court, petitioners Chandler, Harris, and Walker asked the Court to find that the Georgia statute's drug-testing requirement was an unreasonable invasion of privacy and a violation of the search and seizure provisions of the Fourth Amendment.[95] They further argued that the drug-testing requirement violated the First Amendment by restricting free expression, and the Fourteenth Amendment by constraining the rights of voters to choose their elected officials from a field unnarrowed by the testing requirement.[96]

Respondents, Governor Zell Miller and the State of Georgia, asserted that the drug-testing statute was a legitimate exercise of state power under the Tenth Amendment, and that the search and seizure represented by the urine testing was reasonable under the Fourth Amendment.[97] Further, they argued that the state's interest in regulating its own elections outweighed any restriction of an individual's fundamental rights.[98]

The Court first addressed the Fourth Amendment question of whether the drug-test requirement "rank[ed] among the limited circumstances in which suspicionless searches are warranted."[99] The Court determined that the drug tests "[were] searches under the Fourth Amendment," and, citing *Vernonia*, stated that to be reasonable under the Fourth Amendment they should be based on an individualized suspicion of wrongdoing.[100] However, Justice Ginsburg, citing *Skinner*, recognized that "particularized exceptions to the main rule are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.'"[101] She went on to discuss the special needs relied upon in *Skinner* (safety), *Von Raab* (drug interdiction), and *Vernonia* (sharp increase in drug use among student athletes).[102]

The Court examined the testing method prescribed by the Georgia statute. The testing method allowed candidates to give a urine specimen and have it screened

---

93. *See* Bookspan, *supra* note 6.

94. *See generally Id.*; Buffaloe, *supra*, note 30.

95. Brief for the Petitioners, Chandler v. Miller, 520 U.S. 305 (1997) (No. 96-126), *available in* 1996 WL 656352.

96. *Id.*

97. Brief of Respondents, Chandler v. Miller, 520 U.S. 305 (1997) (No. 96-126), *available in* 1996 WL 708930.

98. *Id.*

99. Chandler v. Miller, 520 U.S. 305, 308 (1997).

100. *Id.* at 313 (citation omitted).

101. *Id.*

102. *Id.* at 316 (citations omitted). Next, taking up Georgia's Tenth Amendment argument that states should enjoy wide latitude to establish conditions of candidacy for state office, Ginsburg wrote:

> We are aware of no precedent suggesting that a State's power to establish qualifications for state offices—any more than its sovereign power to prosecute crime—diminishes the constraints on state action imposed by the Fourth Amendment. We therefore reject respondents' invitation to apply in this case a framework extraordinarily deferential to state measures setting conditions of candidacy for state office. Our guides remain Skinner, Von Raab, and Vernonia.

*Id.* at 317-18.

in the candidates' own physician's office.[103] The Court found the method was "relatively noninvasive," and stated that, had the state made a sufficient "special need" showing, the state "could not be faulted for excessive intrusion."[104] However, Justice Ginsburg criticized the certification requirement, stating that in contrast to the testing regimes the Court upheld in *Skinner, Von Raab,* and *Vernonia*, the plan was not well-designed to identify candidates who violate anti-drug laws, nor was it a credible means to deter drug-users from seeking public office.[105]

Ginsburg's examination of the "core issue"—the "special need" that might warrant the drug testing—relied upon the Court's precedents which established "that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[106] The Court flatly concluded that "Georgia has failed to show, in justification of § 21-2-140, a special need of that kind."[107]

The Court saw no "concrete danger demanding departure from the Fourth Amendment's main rule" in the facts surrounding the adoption of the Georgia drug-testing requirement.[108] Ginsburg went on to distinguish the instant case from the three cases upon which the Court relied for the definition of "special needs," but focused primarily on *Von Raab*, which she said respondents and the United States as amicus curiae had relied upon most heavily.[109] She wrote that *Von Raab* should be read narrowly and in its "unique context."[110] She pointed out a "telling difference" between *Von Raab* and Georgia's drug-testing program, stating that "[i]n *Von Raab*, it was 'not feasible to subject employees [required to carry firearms or concerned with interdiction of controlled substances] and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments'"—in contrast, holders of public office are subjected to daily, relentless scrutiny from peers, the public, and the press.[111] Ginsburg further stated that Georgia asserted no evidence of a drug problem among the state's elected officials, and the nature of their jobs was not high-risk or safety-sensitive —if such were the case, it might support a "special need" argument.[112] In conclusion, Ginsburg made it clear that the Court was not expressing an opinion on drug-testing in the private sector, since the Fourth Amendment applied only to the public sector; nor did the Court speak to financial disclosure requirements for public officials, which remain in most states.[113]

---

103. GA. CODE ANN. § 21-2-140 (1993), *repealed by* 1998 GA. LAWS 295, effective Jan. 1, 1999.
104. *Chandler*, 520 U.S. at 318.
105. *Id.* at 320.
106. *Id.* at 318.
107. *Id.*
108. *Id.* at 319.
109. *Id.*
110. *Id.* at 321.
111. *Id.* (citations omitted).
112. *Id.* at 322.
113. *Id.*

In his dissent, Chief Justice Rehnquist commended Georgia for being the first to condition candidacy for state office on a drug test and quoted the familiar words of Justice Brandeis' dissent in *New State Ice Co. v. Liebmann:*[114] "[it is] one of the happy incidents of the federal system that a single courageous State, may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[115]

Turning to *Skinner* and *Von Raab*, Rehnquist defined a "special need" as "a proper governmental purpose other than law enforcement" and found such a purpose in the instant case, even when balanced against the individual's right to privacy.[116] Calling the majority's opinion a "strange holding, indeed," Rehnquist wrote, "if in fact preventing persons who use illegal drugs from concealing that fact from the public is a legitimate government interest, these cases indicate that the government may require a drug test."[117]

Comparing the legitimate government interests in *Skinner* and *Von Raab* with that in the instant case, Rehnquist wrote, "[i]n short, when measured through the correct lens of our precedents in this area, the Georgia urinalysis test is a 'reasonable' search; it is only by distorting these precedents that the Court is able to reach the result it does."[118]

## V. ANALYSIS

The decision in *Vernonia*, using the "special needs" analysis and the balancing test to approve a public school district's suspicionless urinalysis drug testing of middle school and high school student athletes, caused significant alarm in the legal and civil liberties communities. It resulted in an abundance of law review articles condemning the "special needs" test and predicting the harm that an unfettered Supreme Court could do to the Fourth Amendment by using this nebulous exception.[119]

One author described the balancing test as "a paper clip that was continuously bent and manipulated," and stated that it was predestined to break.[120] He argued that the test was inherently manipulatable and illusory, and that it had already been extended too far in the *Vernonia* case.[121] He urged a substitution of the balancing analysis used in substantive due process and equal protection cases for the "special needs" test to determine the constitutionality of Fourth Amendment administrative searches.[122] Using this analysis, the courts apply strict scrutiny when a fundamental right is infringed by government action.[123] Under this test,

114. 285 U.S. 262 (1932).
115. *Chandler*, 520 U.S. at 324 (citations omitted).
116. *Id.* at 325 (citations omitted).
117. *Id.* at 326.
118. *Id.* at 327.
119. *See, e.g.*, Stanislawczyk, *supra* note 80; Buffaloe, *supra* note 30; Bergamini, *supra* note 35; Joubert, *supra* note 47.
120. *See* Stanislawczyk, *supra* note 80, at 1080.
121. *Id.*
122. *Id.* at 1089.
123. *Id.* at 1090.

the government bears the burden of showing that its action furthers a compelling state interest by a means that is the least restrictive possible.[124] In short, the court balances the fundamental interest against the importance of the government's legislative goal, with the scale heavily weighted toward the individual right.

Other authors have seen the Bill of Rights as a casualty of the War on Drugs and predicted the continued erosion of civil liberties under the "semimartial state" of the nation.[125] This argument can be (and has been) carried to an extreme. Assuredly, the civil liberties sky is not falling, and *Chandler's* final adjudication in the Supreme Court demonstrates that. The Court's disposition of the case also shows that it is capable of applying a test that weighs "an individual's legitimate expectations of privacy and personal security" against the "government's need for effective methods to deal with breaches of public order" without annihilating civil liberties.[126]

However, the district courts and the circuit courts admittedly have applied the "special needs" framework of *Skinner, Von Raab,* and *Vernonia* in a way that has given some cause for alarm. The words "special needs," along with the analysis used by the Court in the above decisions, have turned up as justification for suspicionless searches in recent decisions dealing with drug-testing of emergency medical technicians,[127] Department of Education employees,[128] Detroit police officers,[129] correctional officers,[130] airline employees,[131] Army civilian employees,[132] military personnel,[133] and Department of Justice employees.[134]

It has been noted that these circuit and district court decisions not only apply the Supreme Court's "special needs" framework to a range of new administrative contexts, but that they apply it in a somewhat sloppy manner.[135] For example, some of the lower courts evoke the balancing test without first identifying the specific "special need."[136] The appropriate use of the analysis would be to first identify the "special need" as a justification for departing from the warrant and

---

124. *Id.* at 1093.

125. Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1389-91 (1993) (quoting Jerome H. Skolnick, *A Critical Look at the National Drug Control Strategy,* 8 YALE L. & POL'Y REV. 75 (1990)). *See also* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

126. Stanislawczyk, *supra* note 80, at 1064-65 (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)).

127. Piroglu v. Coleman, 25 F.3d 1098, 1102-03 (D.C. Cir. 1994) (holding that suspicionless drug testing of EMT trainees served a special need by protecting public health and safety).

128. American Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361, 1372-74 (D.C. Cir. 1989) (holding that personal guard and motor vehicle operators may be subjected to the Department of Education's drug testing program).

129. Brown v. City of Detroit, 715 F. Supp. 832, 834-35 (E.D. Mich. 1989) (holding that the Police Department's drug testing policy was justified by public interest).

130. American Fed'n of Gov't Employees v. Roberts, 9 F.3d 1464 (9th Cir. 1993) (holding that suspicionless drug testing of federal correctional employees is justified by public interest in preventing drug use and smuggling in the prisons).

131. *See* Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (holding that random drug testing served special need of securing safe travel).

132. *See* National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989).

133. *See* United States v. Bickel, 30 M.J. 277 (C.M.A. 1990).

134. *See* Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989).

135. *See* Buffaloe, *supra* note 30, at 542.

136. *Id.*

probable cause requirements, and then apply the balancing test. Instead, many of the courts skip the first step and apply a balancing test to determine whether the need is special or not.[137]

This is a strong indication that clarity and leadership have been needed in the form of a Supreme Court decision that would limit the application of "special needs" analysis, and show the lower courts exactly how far that analysis should or should not stretch the limits of the Fourth Amendment. *Chandler* provided that opportunity, and the Court rose to the occasion for clarity that the case presented, by carefully distinguishing it from *Skinner, Von Raab,* and *Vernonia.*[138]

In the majority opinion, Justice Ginsburg first pointed out that Georgia's requirement that candidates for state office pass a drug test did not fit within the closely guarded category of constitutionally permitted suspicionless searches.[139] Then, she reiterated the correct application of the "special needs" test, stating that when "special needs" beyond the normal need for law enforcement are alleged, the courts "must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."[140]

Ginsburg quoted with approval from Judge Rosemary Barkett's dissent in the Eleventh Circuit decision: "There is nothing so special or immediate about the generalized governmental interests involved here."[141] Clearly, the *Chandler* case should never even have made it past the first step of the analysis: determining whether a "special need" existed. Ginsburg wrote that there was no showing that the statute was enacted "in response to any fear or suspicion of drug use by state officials," and stated that the need alleged was "symbolic, not 'special.'"[142]

In distinguishing the instant case from *Von Raab*, Ginsburg pointed out that while there was no documented evidence of drug use among customs officials, drug interdiction was the agency's primary mission—"an 'almost unique mission.'"[143] Further, the agents affected by the drug testing were required to carry firearms, thus implicating public safety concerns, and were exposed to "large amounts of illegal narcotics and to persons engaged in crime."[144] A generalized suspicion that some of the agents had succumbed to bribery from drug traffickers, along with the presence and ready availability of contraband, easily placed *Von Raab* within the "special needs" category.[145] An inability to observe the Customs Service employees on a day-to-day basis ruled out the application of individualized suspicion and particularly demanded an across-the-board drug test, Ginsburg wrote.[146]

---

137. *Id.* at 543.
138. Chandler v. Miller, 73 F.3d 1543 (11th Cir. 1996).
139. Chandler v. Miller, 520 U.S. 305, 307-08 (1997).
140. *Id.* at 314.
141. *Id.* at 312 (citations omitted).
142. *Id.* at 319, 322.
143. *Id.* at 316 (citation omitted).
144. *Id.*
145. *Id.*
146. *Id.*

In comparing this factual situation with *Chandler*, the Court observed that there was no evidence of a drug problem among Georgia's elected officials, and plenty of opportunity to observe them on a day-to-day basis since they are constantly in the spotlight, "a telling difference between *Von Raab* and Georgia's candidate drug-testing program."[147] Furthermore, the Court said that these officials do not perform high risk jobs, and the drug testing aids no particular drug interdiction effort, as in *Von Raab*.[148] Ginsburg asserted that the *Von Raab* decision was "hardly a decision opening broad vistas for suspicionless searches."[149]

The Court also distinguished *Chandler* from *Skinner*, in which "surpassing safety interests" warranted drug-testing of railroad workers after train accidents, and from *Vernonia*, in which the "importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field" constituted "special needs."[150]

Justice Ginsburg pointed out that nothing in the *Chandler* record even hinted that "the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity."[151] She went on to state that, "[a] demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime . . . would shore up an assertion of special need for a suspicionless general search program."[152]

The point of the Court's analysis is that *Chandler* simply failed the "special needs" test. Therefore, there was no reason to even employ the balancing analysis demonstrated in *Von Raab, Skinner,* and *Vernonia*. In *Chandler,* the Supreme Court made it clear that the "special needs" hurdle would not be an easy one to surmount, and in doing so, the Court preserved an important safeguard to civil liberties under the Fourth Amendment.

Applying *Chandler,* it is clear that district and circuit courts simply misread the "special needs" test after *Von Raab, Skinner,* and *Vernonia,* and either employed it too loosely or skipped it altogether, thus causing general alarm about Fourth Amendment freedoms from searches and seizures without individualized suspicion. They should not be able to do so in the future.

For example, in the previously mentioned case involving Department of Justice employees,[153] the District of Columbia Circuit Court of Appeals relied heavily upon *Von Raab* and *Skinner* to evaluate the constitutionality, under the Fourth Amendment, of random drug-testing of thirty-eight attorneys, three paralegals, and one economist.[154] The court bypassed the determination of whether a "special need" existed for the testing and focused immediately on the balancing test by which the *Von Raab* Court "weighed individual privacy interests against the

147. *Id.* at 321.
148. *Id.*
149. *Id.*
150. *Id.* at 315, 317.
151. *Id.* at 319.
152. *Id.*
153. Harmon v. Thornburgh, 878 F.2d 484, 486-87 (D.C. Cir. 1989).
154. *Id.*

government's policy objectives, enumerating several factors that it deemed relevant in performing this balancing process."[155] The court proceeded to discuss the government's interests versus the employees' interests.[156] Using this analysis, the court permitted the random testing of those employees with a top secret clearance, but not other employees.[157]

If the circuit court had *Chandler* as its guide, it would have first employed a "special needs" analysis to determine, without going through the balancing test, that there was no special and immediate law enforcement interest in drug-testing federal prosecutors, paralegals, and secretaries. Chances are, the court would have excused the employees with top secret clearance from the random drug-testing along with the other employees, because the "special needs" that the Supreme Court failed to find in *Chandler* also were absent in *Harmon v. Thornburgh.* Under the *Chandler* analysis, there was no need beyond normal law enforcement procedures to subject the federal employees in *Harmon* to random drug-testing—no public safety concern, no problem with day-to-day supervision, no demonstrated problem of drug abuse.[158]

In *Chandler,* the Court rose to the occasion to draw a bright line for the lower courts and future Supreme Court cases to heed—that is without demonstrated and significant "special needs," there will be no need to proceed to a balancing analysis, and therefore no waiving of the Fourth Amendment's requirements for individualized suspicion in the form of probable cause and a warrant before search and seizure. In other words—beyond this point, the courts may not go.

## VI. CONCLUSION

While the government's War on Drugs presents special problems that the writers of the Fourth Amendment could not have anticipated, the amendment is still a mandate that can and must be followed with regard to searches and seizures. After *Chandler,* courts should have little doubt about what is and is not a "special need" justifying the consideration of exceptions to the Fourth Amendment requirements of a warrant and probable cause. The Supreme Court's analysis of the "special needs" exception in *Chandler* should serve as an exceptionally clear road map that even the most liberal court cannot fail to heed and follow.

The paper clip that one writer feared was becoming weakened from too much bending under the "special needs" analysis has been bent back into its constitutional form.[159] Unless future Supreme Court decisions find new routes around the Fourth Amendment's prohibition of unreasonable searches and seizures, random drug-testing by urinalysis will not be allowed to cause the civil liberties sky to fall.

---

155. *Id.* at 488.
156. *Id.* at 489.
157. *Id.* at 496.
158. *Id.*
159. *See* Stanislawczyk, *supra* note 80, at 1080.