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# Chandler v. Miller: Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment

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## **CHANDLER V. MILLER: REDEFINING "SPECIAL NEEDS" FOR SUSPICIONLESS DRUG TESTING UNDER THE**

### **FOURTH AMENDMENT**

"I'm looking forward to the Government's next attempt to restrict the people and test them like hogs."<sup>1</sup>

#### I. INTRODUCTION

In *Chandler v. Miller*,<sup>2</sup> the Supreme Court of the United States "finally [found] a drug testing program it didn't like. . . ."<sup>3</sup> In the 1980s the country became embroiled in a "war on drugs."<sup>4</sup> Drug testing in the workplace and elsewhere grew to be commonplace, while individual rights dwindled.<sup>5</sup> Critics<sup>6</sup> who feared that the Court's line of cases upholding suspicionless drug testing was eroding Americans' Fourth Amendment<sup>7</sup> rights should be happy with the Court's about-face in *Chandler*, or should they? Symbolically, the Court has made a bold move to halt further extension of exceptions to the warrant requirement,<sup>8</sup> but practically, the direction of Fourth Amendment doctrine may still be anyone's guess.<sup>9</sup>

This Note will discuss the three Supreme Court cases that, up to now, have defined Fourth Amendment doctrine regarding suspicionless drug testing in the public sector: *National Treasury Employees Union v. Von Raab*,<sup>10</sup> *Skinner v. Railway Labor Executives' Association*,<sup>11</sup> and *Vernonia School District v. Acton*.<sup>12</sup> Specifically, this Note will focus on the "special needs"<sup>13</sup> analysis as it was articulated in these cases, as well as how that analysis was altered in *Chandler*. This Note will then thoroughly analyze the *Chandler* decision, pointing out its strengths in eliminating some of the subjectivity of Fourth Amendment doctrine.<sup>14</sup> It will also explain the opinion's weakness in failing to articulate its holding as a new statement of the law.<sup>15</sup>

#### II. BACKGROUND

The Supreme Court has not always been in agreement about the correct interpretation of the two parts of the Fourth Amendment,<sup>16</sup> but up until the late 1960s the Court firmly interpreted the Fourth Amendment as requiring "probable cause"<sup>17</sup> for the issuance of warrants for criminal searches.<sup>18</sup> The Court, however, allows a less stringent standard for the issuance of warrants for administrative searches, and in some cases, an administrative search<sup>19</sup> may not require a warrant at all.<sup>20</sup>

The Supreme Court upheld a warrantless governmental search for the first time<sup>21</sup> in *Frank v. Maryland*,<sup>22</sup> holding that a search conducted at a reasonable time by housing inspectors to enforce health regulations was outside the purview of the Fourth Amendment.<sup>23</sup> Since *Frank*, the Court has extended this administrative exception to numerous circumstances, including: a social worker's warrantless search of a welfare recipient's home;<sup>24</sup> a customs official's warrantless search of mail for narcotics;<sup>25</sup> a

school principal's search of a student's purse;<sup>26</sup> and mandatory drug and alcohol testing for railway workers involved in accidents.<sup>27</sup> When determining whether a warrant, or individual suspicion, is needed for an administrative search, the Court applies a balancing test to weigh the individuals' privacy interests against the particular government interest involved.<sup>28</sup>

The Supreme Court held in *Skinner* that the testing of bodily fluids to obtain physical evidence about a person is a search within the meaning of the Fourth Amendment.<sup>29</sup> The issue in *Skinner* and its progeny therefore became under what circumstances such searches violate the Fourth Amendment if they are conducted without a warrant or probable cause.<sup>30</sup> In order to fully understand the holding in *Chandler*, it is necessary to visit the line of cases dealing with suspicionless drug testing.

#### A. *Skinner v. Railway Labor Executives' Association* (1989)

In 1985, the Federal Railroad Administration ("FRA") promulgated regulations requiring railroads to perform blood and urine testing on their employees following a "major train accident"<sup>31</sup> in order to determine the presence of drugs or alcohol.<sup>32</sup> The impetus for administrative action was an FRA study of accident investigation reports that revealed a disturbing number of serious train accidents caused by employees' use of drugs or alcohol on the job.<sup>33</sup> The Railway Labor Executives' Association sued Samuel K. Skinner, Secretary of Transportation, to enjoin the FRA's regulations on the grounds that the testing was violative of the employees' Fourth Amendment rights.<sup>34</sup>

The Supreme Court found that exceptions to the Fourth Amendment's warrant requirement for searches and seizures may be made "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."<sup>35</sup> Where such a "special need" is found, the Court stated, the proper standard is to balance governmental interests against the individuals' privacy interests "to assess the practicality of the warrant and probable-cause requirements in the particular context."<sup>36</sup> The Court went on to find that the governmental interest in ensuring public safety in a highly regulated industry is a "special need" justifying an exception to the warrant and probable cause requirements.<sup>37</sup> After applying the interest-balancing test, the Court concluded that the governmental interest in preventing train accidents<sup>38</sup> outweighed the railroad employees' privacy interests, and that no warrant or individualized suspicion was required.<sup>39</sup>

#### B. *National Treasury Employees Union v. Von Raab* (1989)

In a case decided the same day as *Skinner*, the Court faced the issue of whether a drug testing program<sup>40</sup> for Customs Service employees was constitutional.<sup>41</sup> Again, as in *Skinner*, the Court found that the drug testing program was not designed to serve the ordinary needs of law enforcement, and proceeded on a "special needs" analysis.<sup>42</sup> The Court was convinced that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."<sup>43</sup> As for the employees' privacy interests, the Court was equally convinced of

the diminished privacy expectations of those front-line customs personnel.<sup>44</sup> The Court concluded that the compelling governmental interest outweighed the privacy interests, and held that the testing program involved reasonable searches.<sup>45</sup>

### *C. Vernonia School District 47J v. Acton (1995)*

Six years passed before the Supreme Court was faced with determining the reasonableness of another drug testing scheme. In *Acton*,<sup>46</sup> the Vernonia School District adopted a policy authorizing random urinalysis testing of students participating in the District's school athletic programs.<sup>47</sup> James Acton, a seventh grader who wanted to play football, was denied participation when he and his parents refused to sign the drug testing consent form.<sup>48</sup> The Actons sued the District, seeking declaratory and injunctive relief from enforcement of the policy on Fourth and Fourteenth Amendment grounds.<sup>49</sup>

The Court quickly found that the *Acton* scenario implicated the "special needs" analysis,<sup>50</sup> and that no warrant or individualized suspicion would be required if the search was found to be reasonable.<sup>51</sup> Looking to the privacy interests of the students, the Court noted that "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'"<sup>52</sup> The Court discussed several cases involving the privacy expectations of unemancipated minors,<sup>53</sup> and concluded that the students, especially student athletes, have a lesser expectation of privacy than the adult public.<sup>54</sup>

Turning to the "nature and immediacy of the governmental concern . . . and the efficacy of [the] means for meeting it,"<sup>55</sup> the Court referred to the "compelling need" requirements of *Skinner* and *Von Raab*.<sup>56</sup> The Court made a direct comparison of the governmental needs of these cases with the District's articulated needs in *Acton*, finding that "the nature of the concern is important--indeed, perhaps compelling . . . ." <sup>57</sup> As for the immediacy of the District's concerns, the Court agreed that there was an immediate need for the policy because of the evidence of a serious existing drug problem in the District's schools.<sup>58</sup> Finally, the Court analyzed the efficacy of the testing policy for addressing the District's drug problem.<sup>59</sup> The Court was persuaded that random drug testing or testing based on individualized suspicion would be ineffective in solving the problem.<sup>60</sup>

Having considered all of these factors, the Court held Vernonia's policy to be reasonable and, therefore, constitutional.<sup>61</sup> For the third time, the Supreme Court had upheld a drug testing program that required neither a warrant nor individualized suspicion. As critics were up at arms about the ever-expanding Fourth Amendment doctrine,<sup>62</sup> the Court itself seemed ill-at-ease, stating, "[w]e caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."<sup>63</sup> Even as Justice Scalia wrote these words, a case that would test their integrity was already pending.

## III. STATEMENT OF THE CASE

### *A. Statement of Facts*

In 1990, the Georgia General Assembly enacted O.C.G.A. § 21-2-140,<sup>64</sup> which required candidates for certain state public offices to take a urine drug test each time they sought qualification to run for such office.<sup>65</sup> In 1994, the Libertarian Party<sup>66</sup> nominated several candidates for various state offices covered by the legislation.<sup>67</sup> The candidates sought to stop the further extension of suspicionless searches by challenging the constitutionality of O.C.G.A. § 21-2-140.<sup>68</sup>

### *B. Procedural History*

In May 1994, approximately one month before the deadline for submission of the certificates required by § 21-2-140, petitioners Chandler, Harris, and Walker filed suit<sup>69</sup> against Zell D. Miller, Governor of Georgia, and two officers responsible for the statute's administration, in the United States District Court for the Northern District of Georgia.<sup>70</sup> The nominees complained that the drug tests violated their First, Fourth, and Fourteenth Amendment rights under the United States Constitution.<sup>71</sup> Specifically, the plaintiffs argued that the drug testing statute constituted an unreasonable search under the Fourth Amendment.<sup>72</sup> The district court denied the plaintiffs' motion for a preliminary injunction and later entered judgment for the defendants.<sup>73</sup>

The Eleventh Circuit affirmed,<sup>74</sup> holding that O.C.G.A. § 21-2-140 did not violate the candidates' First, Fourth, or Fourteenth Amendment rights.<sup>75</sup> The court determined that because the purpose of the statute involved "special needs" rather than criminal prosecution, the proper Fourth Amendment analysis was to "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."<sup>76</sup> Using what it called the "Skinner-Von Raab framework," the court stated that the state's interest is measured by "the level of documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position."<sup>77</sup> The Eleventh Circuit noted that Georgia did not argue it had past problems with high ranking officers abusing drugs.<sup>78</sup> The court, however, pointed to *Von Raab*,<sup>79</sup> in which the Customs office was also unable to demonstrate a past history of drug abuse by the agents to be tested.<sup>80</sup> The court pointed out that, despite this fact, the drug testing regulation in *Von Raab* was upheld because of evidence that the physical and ethical demands of customs agents were so great as to make drug abuse completely incompatible with the nature of the job.<sup>81</sup> The court compared the public interest involved in *Von Raab* to Georgia's interest in having drug-free government leaders, and found that "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use."<sup>82</sup>

Turning to the issue of the candidates' privacy interests, the court conceded that a drug test can be "particularly destructive of privacy and offensive to personal dignity."<sup>83</sup> The court was satisfied, however, that such privacy interests were protected by the fact that the testing methods prescribed in O.C.G.A. § 21-4-140<sup>84</sup> were relatively non-intrusive, especially when compared with the ones upheld in *Von Raab*.<sup>85</sup> The Eleventh Circuit concluded, therefore, that Georgia's governmental interest outweighed the privacy

intrusions of the challenged statute.<sup>86</sup> The plaintiffs appealed the decision to the United States Supreme Court, which granted certiorari.<sup>87</sup>

### *C. U.S. Supreme Court Decision*

The Supreme Court, in an 8-1 decision, reversed the decision of the Eleventh Circuit.<sup>88</sup> In the opinion, written by Justice Ginsburg, the Court first reviewed the previous holdings of *Skinner*, *Von Raab*, and *Acton*, to determine the proper standard for a "special needs" exception under the Fourth Amendment.<sup>89</sup> The Court articulated a slightly different standard than the one stated by the appellate court-- "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."<sup>90</sup> The Court agreed the statute's testing procedures were not excessively intrusive, and the "core issue" was whether the drug testing requirement was warranted by a special need.<sup>91</sup> Georgia, the Court ruled, failed to demonstrate such a need.<sup>92</sup>

In a strong dissent, Chief Justice Rehnquist expressed his fear that, "the novelty of this Georgia law has led the Court to distort Fourth Amendment doctrine in order to strike it down."<sup>93</sup> The Chief Justice explained that "special needs", as applied in prior Fourth Amendment cases, were not ones of especially great importance, rather the term referred to any proper governmental purpose other than law enforcement.<sup>94</sup> Accordingly, Georgia's governmental interest in ensuring that its high-ranking public officials continue to be drug-free is a sufficient "special need," even though Georgia was unable to provide evidence of past problems of drug abuse by such officers.<sup>95</sup> The Chief Justice found no reason to distinguish the policy concerns upheld in *Von Raab* from those deemed insufficient by the majority in *Chandler*.<sup>96</sup>

## IV. ANALYSIS

The *Chandler* decision painstakingly articulates the "special needs" balancing test according to the *Skinner-Von Raab-Acton* framework,<sup>97</sup> but, miraculously, the test is never applied. Instead of balancing the governmental interest against the individuals' privacy interests, the Court determined that unless the governmental interest meets a certain threshold of significance, the testing procedure is unreasonable and unconstitutional.<sup>98</sup> In other words, "special needs" is no longer just a label for a category of searches conducted for purposes other than criminal prosecution--it is a judicial standard.

### *A. The Meaning of "Special Needs" Before Chandler*

Prior to *Chandler*, "special needs" was a phrase referring to an exception to the Warrant Clause of the Fourth Amendment -- a term to distinguish searches not related to the "normal needs" of law enforcement.<sup>99</sup> Chief Justice Rehnquist states in his dissent that "special needs" was used in a much different sense in *Skinner* and *Von Raab* than the majority uses it in *Chandler*.<sup>100</sup> Before *Chandler*, the prerequisite of finding a "special

need" was a meaningless step in the analysis--just another name for the governmental interest side of the balancing test.<sup>101</sup> The government's interest did not have to be compelling, rather it had to be sufficiently important for the search to be justified.<sup>102</sup>

The *Skinner-Von Raab-Acton* decisions were met with overwhelming criticism by the legal community.<sup>103</sup> At the heart of this criticism was the idea that although some types of suspicionless government searches, such as metal detection at airports,<sup>104</sup> should be permitted, the government's burden of demonstrating a compelling interest should be made heavier.<sup>105</sup> Some scholars proposed a standard that would require the government to prove that its interest could not be effected by a constitutionally less restrictive policy.<sup>106</sup>

### B. "Special Needs" After Chandler

Drawing support from the holding in *Von Raab*, Georgia claimed that there was a substantial need for the drug testing policy because "[s]tate officials who must submit to the drug testing requirement each have some power or influence which could be affected by the use of illegal drugs or could make such individual more susceptible to influence by those from whom such illegal drugs are obtained or who traffic in illegal drugs."<sup>107</sup> The unpersuaded majority recognized no "special need" for the drug testing, and noted four principal weaknesses in Georgia's argument. First, the Court noted the feared threat was merely hypothetical because Georgia had demonstrated no actual problems of drug abuse by the state's top officials.<sup>108</sup> Second, the Court attacked the efficacy of the statute in preventing the use of illegal drugs by high-ranking officials.<sup>109</sup> Third, the officials covered by O.C.G.A. § 21-2-140 were not in safety-sensitive positions.<sup>110</sup> Fourth, the Court reasoned that because political candidates are usually "subject to relentless scrutiny-- by their peers, the public, and the press," drug testing is not necessary.<sup>111</sup>

### C. The Consequences of Chandler

#### 1. A More Objective Test . . .

The varied circumstances surrounding the drug testing schemes upheld in *Skinner*, *Von Raab*, and *Acton* suggest that the "special needs" balancing test is too broad to provide a consistent standard of reasonableness.<sup>112</sup> The hazard of such a subjective test became clear after the Eleventh Circuit's liberal evaluation of governmental need in *Chandler*.<sup>113</sup> The Supreme Court decision deserves praise for bolstering the objectivity of the "special needs" doctrine by setting out more precise requirements. Although the Court failed to adopt a strict scrutiny standard<sup>114</sup> for Fourth Amendment analysis, it does articulate more definitely than ever the factors to be considered in assessing the substantiality of the governmental need for drug testing.

First, the danger precipitating the need for testing must be real, and not symbolic or hypothetical.<sup>115</sup> The Court falls short of requiring a demonstrated history of drug problems, but notes that such evidence "would shore up an assertion of special need for a suspicionless general search program."<sup>116</sup> Because Georgia was unable to show any

problem of drug abuse by its high-ranking officials, the Court did not need to address the question of what constitutes a history of a problem.<sup>117</sup> Here, there remains some ambiguity: If Georgia had produced evidence that one official, ten years ago, had a drug problem, would this have fulfilled Georgia's burden?<sup>118</sup>

Second, if a drug testing scheme's sole purpose is to deter drug use, or to symbolize a tough stance against drugs,<sup>119</sup> the testing is unreasonable.<sup>120</sup> The testing procedures must be aimed at actually detecting illegal drug use.<sup>121</sup> The Court suggests that a policy of random drug testing would be more acceptable than the 30-day certification policy because it would be less likely for officeholders to avoid detection.<sup>122</sup>

Third, the Court states that public safety must genuinely be at risk.<sup>123</sup> Although the Court does not state it as such, it suggests that this must be an imminent physical threat.<sup>124</sup> Georgia argued that an imminent physical harm was not necessary, as evidenced by *Von Raab*, since one of the justifications in that case was that customs officials who abused drugs would be more open to blackmail and bribery.<sup>125</sup> The Court distinguished this from the issue in *Chandler*, because customs officials actually deal with the interdiction of drugs or carry firearms.<sup>126</sup>

## 2. . . . *But Confusion Remains*

The effects of *Chandler* remain to be seen, but the decision is bound to cause further confusion of Fourth Amendment doctrine.<sup>127</sup> The Court claimed to follow the *Skinner-Von Raab-Acton* framework, when actually, the Court created a new "special needs" analysis by adopting a minimum threshold of substantial need.<sup>128</sup> The Court should have stated that *Chandler* was overruling or modifying its earlier opinions.<sup>129</sup> Its failure to do so suggests that *Chandler* was distinguished on the facts, when in reality, *Chandler* may well have been upheld if the candidates' privacy interests had been weighed against the governmental interests.<sup>130</sup>

The Court treads carefully in the morass of the Fourth Amendment, cautioning that *Chandler* should not be read to address physicals for general health, mandatory financial disclosures, or private sector drug testing.<sup>131</sup> However, as Chief Justice Rehnquist points out, it is difficult to imagine how, under the Court's analysis in *Chandler*, a different result would be reached if the urine test was used to determine the general health of a candidate.<sup>132</sup>

## V. CONCLUSION

With *Chandler*, the Supreme Court has taken a step backward<sup>133</sup> in the right direction. The Court seems to have realized that, despite its warnings against misapplication of its decisions, the "special needs" doctrine begged for modification to prevent unwarranted expansion of exceptions to the warrant requirement.<sup>134</sup> Lower courts, as well as lawmakers, should now be put on notice of the Fourth Amendment's limitations on suspicionless drug testing. For the time being, however, *Chandler* has left enough



unanswered questions to keep the Walker Chandlers<sup>135</sup> of the world on their guard against would-be violators of the Fourth Amendment.

**Joy L. Ames**

1 Linda Greenhouse, *Supreme Court Strikes Down Drug Testing of Candidates*, N.Y. TIMES, April 16, 1997, at A-12 (quoting Libertarian Party member Walker L. Chandler, plaintiff-petitioner in the case above, reacting to his victory).

2 *Chandler v. Miller*, 117 S. Ct. 1295 (1997). In *Chandler*, the Supreme Court of the United States struck down as unconstitutional a Georgia statute that required candidates for certain high level state offices to certify that they submitted to and passed a drug test in order to qualify to run in an election. *Id.* The Court held that Georgia failed to demonstrate "special needs" for the policy as required for a suspicionless search under the Fourth Amendment. *Id.* at 1303.

3 Marcia Coyle, *Was This Term Historic? Maybe, Say Some, But None of its Big Rulings was Seen as a True Landmark*, NAT'L L. J., Aug. 11, 1997, at B5 (citation omitted).

The Court has previously upheld mandatory suspicionless drug testing in three cases; *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (holding that a public school district's student athlete drug policy did not violate a student's rights against unreasonable searches); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (holding that suspicionless drug testing of Customs Service employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms was a reasonable search under the Fourth Amendment); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (holding that federal regulations mandating drug testing of railway workers were reasonable even though no warrant or reasonable suspicion existed).

4 JOHN GILLIOM, *SURVEILLANCE, PRIVACY, AND THE LAW: EMPLOYEE DRUG TESTING AND THE POLITICS OF SOCIAL CONTROL* 1 (1994). For a colorful yet cynical discussion of the so-called "war on drugs" that does not necessarily reflect the views of the author, see ABBIE HOFFMAN, *STEAL THIS URINE TEST: FIGHTING DRUG HYSTERIA IN AMERICA* 9-20 (1987).

5 GILLIOM, *supra* note 4, at 1 ("One key strategy of the war was to demand that American workers prove their abstinence from illegal drugs by urinating into small plastic bottles. This procedure came to be known as employee drug testing.").

6 See, e.g., *Recent Case, Fourth Amendment - Mandatory Drug Testing - Eleventh Circuit Upholds Suspicionless Drug Testing for Political Candidates*, 110 HARV. L. REV. 547, 552 (1996) ("The Eleventh Circuit [in *Chandler*] should not have stretched the *Skinner-Von Raab* exception to the warrant and individualized suspicion requirements beyond the narrow circumstances specifically approved by the Supreme Court.").

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

U.S. CONST. amend. IV.

8 The Supreme Court has interpreted the Fourth Amendment as requiring a warrant for searches and seizures. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994). In the criminal context, police are required to obtain a warrant before conducting a search if a citizen has a reasonable expectation of privacy with respect to his or her body or the area to be searched. John J. Bursch, Note, *The 4 R's of Drug Testing in Public Schools: Random is Reasonable and Rights are Reduced*, 80 MINN. L. REV. 1221, 1226 (1996). In order for a warrant to issue, the police must demonstrate to a neutral, detached magistrate that they have probable cause to carry out the search. *Id.*

9 The Supreme Court's line of cases on this issue have been attacked for being imprecise and for creating uncertainty. See, e.g., David J. Gottlieb, *Drug Testing, Collective Suspicion, and a Fourth Amendment Out*

of Balance: A Reply to Professor Howard, 6 KAN. J.L. & PUB. POL'Y 27, 27-28 (1997) (arguing that Acton demonstrates the Court's failure to give a fair reading of Fourth Amendment tradition and represents a "poverty of analysis"); Harlin Ray Dean, Jr., Note, National Treasury Employees Union v. Von Raab: The Fourth Amendment Hangs in the Balance, 68 N.C. L. REV. 389, 407 (1990) (describing the decisions as having "only limited precedential value" and as creating "an inherent amount of uncertainty"). But see, Daniel J. Fritze, Comment, Drug Testing of Government Employees and Government-regulated Industries: Expounding the Fourth Amendment, 25 WAKE FOREST L. REV. 831, 859 (1990) (agreeing that the Fourth Amendment is unclear as to employee drug testing, but finding that "[t]he Supreme Court's decisions upholding the drug testing of government employees are logical extensions of existing law that reasonably expound the fourth amendment").

10 489 U.S. 656 (1989). See *infra* notes 40-45 and accompanying text.

11 489 U.S. 602 (1989). See *infra* notes 31-39 and accompanying text.

12 515 U.S. 646 (1995). See *infra* notes 46-63 and accompanying text.

13 "Special needs," discussed throughout the remainder of this Note, refers to an exception to the warrant and probable cause requirements of the Fourth Amendment. 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, 530 (1997). "When such a special need exists, the Court excuses the state actor from the warrant and probable cause requirements, and instead assesses the reasonableness of a search by conducting an *ex post* balancing test of the government and individual privacy interests at stake." *Id.* at 531.

14 See *infra* notes 64-111 and accompanying text.

15 See *infra* notes 112-35 and accompanying text.

16 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 787 (2d ed. 1995). In the past, the Court has been divided over whether the first standard, which bars unreasonable searches and seizures, is an independent standard, or whether it must be read together with the second standard, which requires a warrant issued upon probable cause. *Id.* Time and time again, the Court has been faced with the question of whether a warrantless search or seizure is necessarily unreasonable if not based on probable cause. *Id.* at 789. See also Keith Shotzberger, Overview of the Fourth Amendment, 85 GEO. L.J. 821, 821 (1997) ("Interpreted literally, the Amendment requires neither a warrant for each search or seizure, nor probable cause to support a search or seizure. Nevertheless, the Supreme Court imposes a presumptive warrant requirement for searches and seizures, and generally requires probable cause for a warrantless search or seizure to be 'reasonable.'"). Subsequently, the Court has developed various exceptions to these requirements. *Id.*; Amar, *supra* note 8, at 758 ("The result [of this confusion] is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse.").

17 "Probable cause" means "[r]easonable grounds for belief that a person should be arrested or searched. The evidentiary criterion necessary to sustain an arrest or the issuance of an arrest or search warrant." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990).

18 Buffaloe, *supra* note 13, at 530 ("[I]n order for a search to be 'reasonable,' law enforcement officials desiring to conduct a search must first obtain a warrant from a neutral and detached magistrate by establishing probable cause that a law had been violated.").

19 O'BRIEN, *supra* note 16, at 858. Administrative searches are those conducted by public officials other than police. *Id.*

20 *Id.*

21 *Id.*

22 359 U.S. 360 (1959), overruled by *Camara v. San Francisco Mun. Ct.*, 387 U.S. 523 (1967).

23 *Frank*, 359 U.S. at 373.

24 *Wyman v. James*, 400 U.S. 309 (1971).

25 *United States v. Ramsey*, 431 U.S. 606 (1977).

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

27 *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989). For a survey of cases involving warrantless administrative searches, see O'BRIEN, *supra* note 16, at 861-63.

28 O'BRIEN, *supra* note 16, at 858. The first case in which the Court balanced a governmental regulatory interest against an individual's privacy interest was in *Camara v. San Francisco Mun. Ct.*, 387 U.S. 523, 523 (1967) (holding that although an administrative search by city health inspectors is a significant intrusion on Fourth Amendment rights, probable cause exists where reasonable legislative or administrative standards for the inspection are satisfied with respect to the particular dwelling). See Andrew P. Massman, Note, *Drug Testing High School and Junior High School Students After Vernonia School District 47J v. Acton: Proposed Guidelines for School Districts*, 31 VAL. U. L. REV. 721, 740 (1997).

29 *Skinner*, 489 U.S. at 616. See also, *Winston v. Lee*, 470 U.S. 753, 760 (1985) (holding that a compelled surgical intrusion into a person's body in search of evidence constitutes a search within the meaning of the Fourth Amendment); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (holding that a blood test is a search of a person within the meaning of the Fourth Amendment).

There are two dimensions to the privacy interests involved in drug testing. GILLIOM, *supra* note 4, at 90. Gilliom refers to the first dimension as "dignity and visual privacy", or the idea that "[e]xcreting body fluids and body wastes is one of the most personal and private human functions". *Id.* at 91 (quoting *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd* as modified by, 809 F.2d 1302 (8th Cir. 1987)). This was certainly a concern of the appellate court in *Von Raab*:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemism if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

*Id.* at 92 (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (1987)). The second dimension is what Gilliom calls "informational privacy," or the problem that the fluids obtained for a drug test can reveal confidential medical information. *Id.* This information may disclose, for example, the presence of certain prescription medication, or that a person is pregnant. *Id.* at 93.

30 *Skinner*, 489 U.S. at 619.

31 49 C.F.R. § 219.201(a)(2) (1988) defines a "major train accident" as an accident involving "(I) a fatality, (ii) release of hazardous material lading from railroad equipment accompanied by; (A) an evacuation; or (B) a reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or (iii) damage to railroad property of \$1,000,000 or more."

32 *Skinner*, 489 U.S. at 608-09.

33 *Id.* at 607. The FRA found that during this period, the nation's railroads experienced at least 21 accidents in which drugs or alcohol played a role. *Id.* In these accidents, 25 persons died, 61 were injured, and \$19 million dollars in property was damaged. *Id.* (citing 48 FED. REG. 30726 (1983)).

34 *Skinner*, 489 U.S. at 612. The District Court upheld the regulations because the compelling government interest of ensuring safety of the employees and the general public outweighed the railroad employees' privacy interests. *Id.* The Ninth Circuit Court of Appeals reversed. *Railway Labor Executives' Ass'n. v. Burnley*, 839 F.2d 575, 588 (1988), *rev'd*, *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (holding that although a finding of probable cause is not necessary in such a situation, toxicological testing of railroad employees would be unreasonable without individualized suspicion).

35 *Skinner*, 489 U.S. at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

36 *Id.*

37 *Id.* at 620.

38 Steven P. Bann, *Drug Testing*, N.J.L.J. 68 (May 8, 1995) (noting that, according to *Skinner*, ". . . the safety-sensitive nature of an employee's position should be a very significant factor in the balancing test. . .").

39 *Skinner*, 489 U.S. at 634. The Court's conclusion has been criticized for not giving proper weight to the individuals' privacy interests in the balancing test. See, e.g., Heidi P. Mallory, Note, Fourth Amendment -- The "Reasonableness" of Suspicionless Drug Testing of Railroad Employees, 80 J. CRIM. L. & CRIMINOLOGY 1052, 1080 (1990). Mallory opines that the testing is "unnecessarily intrusive" because it requires testing of both blood and urine, when blood alone would suffice. *Id.* at 1081. The testing procedure is also overly intrusive because the employee must be observed directly, and the results may be turned over to criminal prosecutors. *Id.* at 1081-82.

40 In 1986, the United States Customs Service announced a new drug testing program that required certain employees to submit a urine sample for analysis to determine the presence of illegal drugs. *Von Raab*, 489 U.S. at 656. The regulation was limited to three classes of employees: (1) those directly involved in drug interdiction or enforcement of related laws; (2) those carrying firearms; and (3) those handling classified materials. *Id.* at 660-61.

41 *Id.* at 663.

42 *Id.* at 666.

43 *Id.* at 670.

44 *Id.* at 671-72. The Court stated:

[T]hose who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions. . . . We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test.

*Id.*

45 Id. at 679. The Court only addressed the reasonableness of testing employees applying for promotion to positions directly involving the interdiction of drugs or those requiring the employee to carry a firearm. Id. The Court did not rule on the testing of employees handling classified materials, because it felt the record was insufficient on the subject. Id.

46 *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

47 Id. at 650. Teachers and administrators in the School District began to complain about the increase in student drug use in the mid-to-late 1980's. Id. at 649. It appeared that student athletes were drug users, and in fact, were "leaders of the drug culture." Id. The District implemented the drug testing policy after hearing numerous complaints, including those of high school athletic coaches who were able to give specific examples of student athletes they believed were injured because of the effects of drug use. Id.

48 Id. at 651.

49 Id.

50 Id. at 653. The Court does not explain why the "special needs" analysis is proper, rather it skips to the point that "special needs" have previously been found in the public school context. Id. Relying on its finding in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court stresses that a warrant requirement would be impracticable because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed." *Acton*, 515 U.S. at 653.

51 *Acton*, 515 U.S. at 653.

52 Id. at 654 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985)).

53 *Acton*, 515 U.S. at 655-56. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 346-47 (1985) (approving the search of a schoolgirl's purse when there was individualized suspicion of wrongdoing but no probable cause for the search); *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (recognizing that a student's due process rights for challenging a disciplinary suspension were satisfied by a teacher's informal discussion with the student just after the event occurred); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (upholding censorship of school publications by public school officials if the censorship is "reasonably related to legitimate pedagogical concerns").

54 *Acton*, 515 U.S. at 656-57. The Court also considered the relative intrusiveness of the testing involved. Id. at 658. The Court found the testing procedure to be relatively unintrusive when compared with the usual level of privacy found in a public restroom. Id.

55 Id. at 660.

56 Id. at 660-61.

57 Id. at 661 ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab* . . . or deterring use by engineers and trainmen, which was the governmental concern in *Skinner* . . . "). But see, Jonathan M. Ettman, Comment, *Vernonia Case Comment: High School Students Lose Their Rights When They Don Their Uniforms*, 13 N.Y.L. SCH. J. HUM. RTS. 625 (1997). Ettman questions the validity of Vernonia's argument that it is concerned about the safety of its student athletes. Id. at 656. If the school district is truly concerned about the health and safety of its athletes, Ettman ponders, why does the drug test not search for the presence of steroids--"one of the most prevalent and dangerous drugs abused by adolescents and athletes." Id.

58 Acton, 515 U.S. at 662-63. The Court relied on its holdings in Skinner and Von Raab to support this argument. *Id.* The Court noted that the School District's drug problem appeared to be of a much greater proportion than that demonstrated in Skinner, and that the Court upheld the drug testing scheme in Von Raab, where there was no documented history of drug abuse by Customs officials. *Id.* See also, Roscoe C. Howard, Jr., *Vernonia School District 47J v. Acton: The Right Response for Drug Testing of Student Athletes*, 6 KAN. J.L. & PUB. POL'Y 17 (1997). "The drug culture has become an integral part of the American youth experience. . . . Users become dependent on the drugs at a time when they are least able to resist its addictive effects . . ." *Id.* Howard applauds the Court's conclusion in Acton because, "[i]n a school situation the government must take responsibility for their visible, but vulnerable, youth." *Id.* at 24.

59 Acton, 515 U.S. at 663-64.

60 *Id.*

61 *Id.* at 664-65.

62 See, e.g., Gottlieb, *supra* note 9, at 28. Gottlieb finds fault with the balancing test because he feels the Supreme Court tends to give only scant consideration of the intrusions upon privacy while inflating government interests. *Id.* This inflation of government interest results because the Court discusses the general social problem behind the search, rather than the specific need for the search scheme. *Id.*; Kevin C. Newsom, *Recent Development, Suspicionless Drug Testing and the Fourth Amendment: Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995), 19 HARV. J.L. PUB. POL'Y 209, 214 (1995) (advocating the replacement of the reasonableness balancing test with a strict scrutiny standard). Newsom criticizes the balancing test for being too vague and inherently subjective. *Id.* at 215. Because of this vagueness, the test "has become so subject to the political and social passions of the moment' that it consistently undervalues the fundamental nature of the privacy safeguarded by the Fourth Amendment." *Id.* (quoting Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 512 (1991)); Lois Yurow, *Note, Alternative Challenges to Drug Testing of Government Employees: Options after Von Raab and Skinner*, GEO. WASH. L. REV. 148, 149 (1989) (commenting that the holdings of Von Raab and Skinner have "susceptibility to broad reading"). Yurow hints at the subjectivity of the balancing test when she notes that the way in which the Court framed the issues in Von Raab and Skinner "made it easy to conclude that the government interests should prevail." *Id.*

63 Acton, 515 U.S. at 665.

64 GA. CODE ANN. § 21-2-140 (1993):

21-2-140. Mandatory drug testing for candidates.

(a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53, Fed. Reg. 11979, et seq., as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine; opiates; amphetamines; or phencyclidine, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate with the officer with whom such candidate qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. . . .

Id.

65 Respondent's Brief, Chandler v. Miller, 1996 WL 708930, at \*1.

66 Libertarianism is a political philosophy that emphasizes individual rights. Libertarianism, in MICROSOFT ENCARTA 96 ENCYCLOPEDIA. The Libertarian Party, founded in 1972, resists the intrusion of growing government involvement in the lives of American citizens. Id.

67 Chandler v. Miller, 117 S. Ct. 1295, 1299 (1997). Specifically, the Party nominated Walker L. Chandler for Lieutenant Governor, Sharon T. Harris for Commissioner of Agriculture, and James D. Walker for the office of member of the General Assembly, who were all parties to this suit.

68 Georgia Drug Law Debated in Supreme Court (CNN Morning News broadcast, Jan. 14, 1997, No. 97011409V09). In a television interview, Walker Chandler said, "[i]f they can carry out suspicionless tests of a category of people -- politicians, people who are going to drive the ship of state -- well, then they can test you if you're going to drive a car down the highway." Id.

69 Chandler v. Miller, 952 F.Supp. 804 (N.D. Ga. 1994) (No. Civ. 1:94-CV-1298-ODE), aff'd, 73 F.3d 1543 (11th Cir. 1996), rev'd, 117 S. Ct. 1295 (1997).

70 Chandler, 117 S. Ct. at 1299.

71 Id. The complaint also contained claims under the Georgia Constitution, however, the District Court properly exercised its discretion not to employ supplemental jurisdiction over the state claims, and decided only the federal issues. Chandler v. Miller, 73 F.3d 1543, 1546 (11th Cir. 1996), rev'd, 117 S. Ct. 1295 (1997).

72 Petitioner's Brief, Chandler v. Miller, 1996 WL 656352, at \*4. The other constitutional claims, which will not be dealt with in this Note, were that a candidate's refusal to take a drug test is protected free speech under the First Amendment, and that Georgia violated the Fourteenth Amendment by excluding a defined group of persons from the ballot. Chandler, 73 F.3d at 1547-48.

73 Chandler, 117 S. Ct. at 1299. Mr. Chandler and the other nominees submitted to the drug tests after the restraining order was denied, and the candidates names appeared on the ballot. Id.

In its amicus curiae brief in support of the respondents, the United States suggested that the case had become moot. Brief for the United States as Amicus Curiae, Chandler v. Miller, 1996 WL 711200, at \*3-4. The United States alluded that because (1) the 1994 election was completed and the candidates had not run again, (2) the candidates failed to sue on behalf of a class, and (3) the candidates did not testify in the courts



below that they planned to run again in the future, the petitioners had failed to show a continuing controversy. *Id.*

74 *Chandler*, 73 F.3d at 1543.

75 *Chandler*, 73 F.3d at 1543.

76 *Id.* at 1545 (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989)).

77 *Chandler*, 73 F.3d at 1545.

78 *Id.*

79 489 U.S. 656 (1989).

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

81 *Id.*

82 *Id.*

83 *Id.* at 1547 (quoting Justice Scalia's dissent in *Von Raab*, 489 U.S. at 680).

84 See *supra* note 64, sub-sections (b) and (c) of O.C.G.A. § 21-2-140. Under this scheme, the urine specimen may be produced in the office of the candidate's own private physician. Respondent's Brief, *Chandler v. Miller*, 1996 WL 70893, at \*2. A positive result would be released only to the candidate, and not to law enforcement agencies. *Id.* at \*3.

85 *Chandler*, 73 F.3d at 1547.

86 *Id.*

87 *Chandler v. Miller*, 117 S. Ct. 38 (1996), *rev'd*, 117 S. Ct. 1295 (1997).

88 *Chandler v. Miller*, 117 S. Ct. 1295 (1997).

89 *Id.* at 1301-02. The respondents argued that these were not the only decisions relevant to their case. Respondent's Brief, *Chandler v. Miller*, 1996 WL 708930, at \*5-6. Because an individual state has the power to regulate its own elections under the Tenth Amendment, the respondents maintained that the Court's review of the drug testing statute should be conducted under a lower level of scrutiny. *Id.* at \*5.

90 *Chandler*, 117 S. Ct. at 1303.

91 *Id.*

92 *Id.*

93 *Id.* at 1305 (Rehnquist, C.J., dissenting).

94 *Id.* at 1306.

95 Id.

96 Id. at 1307. The Chief Justice placed especial emphasis on the concern that government officials who abuse drugs, even off-duty, are at a higher risk of being bribed or blackmailed. Id. Rehnquist could find no reason to distinguish this concern-- which was voiced in the Von Raab decision regarding drug testing of customs agents, from that of a high level state official who handles sensitive information. Id.

97 Id. at 1301-02.

98 Id. at 1305. For a blanket suspicionless search to be reasonable, the risk to public safety must be "substantial and real." Id. The Court found no such risk, so no consideration of the privacy interests of the candidates was made. Id. The Court states that if "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." Id.

99 See supra note 35 and accompanying text.

100 Chandler, 117 S. Ct. at 1306 (Rehnquist, C.J., dissenting) ("The 'special needs' inquiry as delineated [in Skinner and Von Raab] has not required especially great 'importan[ce],' unless one considers the 'supervision of probationers' or the 'operation of a government office' to be especially 'important.'") (citations omitted). See also, Wayne R. LaFave, Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint, 94 MICH. L. REV. 2553, 2573 (1996) (pointing out that "the Acton majority began with the cogent observation that [the] government interest did not have to meet some 'fixed, minimum quantum of governmental concern,' but merely had to be 'important enough to justify the particular search at hand.'" (citing Acton, 115 S. Ct. at 2394-95)).

101 Mallory, supra note 39, at 1075. This problem is particularly evident in the Acton majority opinion. In Acton, the Court concludes that "special needs" existed because a warrant or probable cause requirement in a public school context would be impracticable. 515 U.S. at 653. However, the impracticality of a suspicion requirement is analyzed several

pages later under the governmental need part of the balancing test. Id. at 663.

102 Bursch, supra note 8, at 1237 (citing Acton, 115 S. Ct. at 659-63).

103 See, e.g., Dean, supra note 9, at 409 ("In unprecedented fashion, Von Raab eliminated, for the convenience of government, the safeguards surrounding the fourth amendment that were meant to limit the government and to protect individual privacy and freedom . . ."); Mallory, supra note 39, at 1084 ("The Skinner decision adopted a fourth amendment analysis that is, in the words of the dissent, 'unprincipled and dangerous.'") (citing Skinner, 489 U.S. at 641)).

104 See Amar, supra note 8, at 769. Amar lists metal detectors at airports as one of several "real-life, unintrusive, non-discriminatory searches and seizures to which modern day Americans are routinely subjected." Id. Some other warrantless, yet constitutional, searches include auto emissions tests and border searches. Id. Amar suggests that these searches are readily accepted by society, but that the Supreme Court has been unable to articulate how these warrantless searches are consistent with the "so-called warrant requirement." Id. at 769-70.

105 Newsom, supra note 62, at 213. Newsom advocates the adoption of a modified "strict scrutiny" standard for determining the constitutionality of searches under the Fourth Amendment. Id. Under a strict scrutiny standard, the Court's analysis "should involve genuine judicial inquiry into whether the challenged search constituted the least intrusive means for effecting a compelling government interest." Id. at 213 n.35. This means that the government must show that its challenged action is "'necessary, and narrowly drawn, to a compelling state interest' and that there exist no less restrictive means of accomplishing its purpose." Id.

at 214. See also, Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531 (1997). Holly notes that under the current Fourth Amendment balancing test, the government interests and individual constitutional rights start out at "even tilt." *Id.* at 558. This suggests that an "interest" has more value than a "right," which is contrary to the very concept of a written Constitution. *Id.* Certainly, a right guaranteed by the Constitution should be given more weight than an interest contained nowhere in the document. *Id.*

106 See *supra* note 104. See also Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U.L. REV. 1173, 1177 (1988) (recommending that the Court incorporate the least intrusive alternative analysis into its Fourth Amendment balancing test). Strossen believes that such a component would better protect civil liberties than the current test which lacks an objective methodology. *Id.* at 1184.

107 Respondent's Brief, *Chandler v. Miller*, 1996 WL 708930, at \*13.

108 *Chandler v. Miller*, 117 S. Ct. 1295, 1303 (1997).

109 *Id.* at 1304. The Court found that Georgia's law was "not well designed to identify candidates who violate antidrug laws." *Id.* Most candidates could simply abstain from using illegal drugs for a sufficient period before submitting the urine sample, the Court reasoned, and thereby avoid detection. *Id.*

110 *Id.*

111 *Id.* Interestingly, if the Court had reached a consideration of the candidates' privacy interests, the same statement might have been used in support of the statute. One of the justifications for the decision to uphold the drug testing policy in *Acton* was that schoolchildren, particularly athletes, have lower expectations of privacy. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) ("School sports are not for the bashful. They require 'suing up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.").

112 *Mallory*, *supra* note 39, at 1080. *Mallory* complains that the balancing test is "broad" and "manipulable." *Id.* Specifically, *Mallory* finds fault with the *Skinner* majority for not giving the proper weight to the privacy side of the test. *Id.* *Mallory* predicts that "[t]he holding in *Skinner* clears the way for extensions of suspicionless drug testing programs to all segments of society . . ." *Id.* at 1084. For a discussion of the faults of constitutional balancing tests in general, see Strossen, *infra* note 130.

113 *Fourth Amendment Mandatory Drug Testing--Eleventh Circuit Upholds Suspicionless Drug Testing for Political Candidates*, *supra* note 6, at 552 ("The Eleventh Circuit should not have stretched the *Skinner-Von Raab* exception to the warrant and individualized suspicion requirements beyond the narrow circumstances specifically approved by the Supreme Court."). The article concedes that Georgia's interest in having drug-free officials is legitimate. *Id.* at 551. However, the author espouses the view that the Eleventh Circuit misapplied the balancing test by giving too much weight to the governmental interest and not enough to the candidates' privacy interests. *Id.* at 552.

114 See *supra* note 105.

115 *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997). The much-quoted language of Ginsburg's opinion states that "[h]owever well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake." *Id.*

116 *Id.* at 1303. The Court recognized that evidence of a history of drug abuse was not required in *Von Raab*, but that such evidence would help to "clarify" and "substantiate" the precise danger the government seeks to avoid. *Id.*

117 Id. The Court asked counsel for respondents if the record indicated that Georgia had a problem with State officeholders abusing drugs. Transcript of Oral Argument before the Supreme Court, Chandler v. Miller, 1997 WL 19002, at \*31. Counsel responded that "there is no such evidence. . . and there is no such problem as we sit here today." Id. at 32.

Georgia claimed that even if it could not point to a past drug problem, it had the right to enact legislation that would prevent drug abusers from obtaining State office. Respondent's Brief, Chandler v. Miller, 1996 WL 708930, at \*16. Georgia pointed to the example of Washington, D.C. Mayor Marion Barry, who was indicted on charges of possession of cocaine and other drug-related crimes: "Mayor Barry's arrest and the publicity which accompanied that arrest serve as an example of the importance of avoiding, to the extent possible, the dangers posed to the public by the use of illegal drugs by Georgia elected officials." Id. at 14-15.

118 In light of Acton, it would seem that the burden of proving that a hazard exists is fairly light. The Vernonia School District produced only one example of a student athlete it felt was injured because of the effects of drug use. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 649 (1995). The District brought in an expert to explain the ill-effects of drug use on human behavior, but this would not demonstrate a problem specific to Vernonia. Id. The only other basis for the District's safety argument was the high school football coach's testimony that he believed certain omissions of safety procedures and misexecutions by football players were a result of drug abuse. Id.

119 Opponents of drug testing argue that it actually has a detrimental effect on politics. DANIEL JUSSIM, DRUG TESTS AND POLYGRAPHS 16 (1987) (" . . . [D]emagogues use the issue to get votes, avoiding intelligent debate over the drug problem.").

120 Chandler, 117 S. Ct. at 1305.

121 Id. at 1304. The Court was not persuaded that Georgia's drug testing scheme would actually serve the alleged purpose of preventing drug abusers from making it onto the ballot. Id. Under § 21-2-140, a candidate simply could abstain from using drugs for a period of time before submitting to the test and, thereby, avoid detection. Id. At oral argument, Ms. Guilday, counsel for respondent, all but admitted the inefficacy of the testing policy to "catch" drug abusers:

QUESTION: Is that an important purpose, a purpose that we find those people in society who are not able to stay off drugs for 22 days and therefore--is that the basic idea?

MS. GUILDAY: That is not the primary reason, no. It is a reason that this Court in Von Raab found to be significant. In our case, the primary purpose we would offer this Court for this statute is that the information that a negative drug test gives to the public about the individual candidate is significant.

Transcript of Oral Argument, Chandler v. Miller, 1997 WL 19002, at \*46-47.

122 See Transcript of Oral Argument, Chandler v. Miller, 1997 WL 19002, at \*47-49. The Court said to counsel for respondent, "[b]ut you could--as a matter of constitutional law, Georgia could say, annually, or even randomly, everyone in office in this State has to have a drug test." Id. at \*49. Dissenter Chief Justice Rehnquist finds the majority's reasoning on the issues of efficacy and intrusion paradoxical. Chandler v. Miller, 117 S. Ct. at 1307 (Rehnquist, C.J., dissenting). Rehnquist notes that the majority concedes that the testing method employed by Georgia, which allows so much flexibility as to the time and place of testing, makes the drug test quite unintrusive. Id. The majority, however, turns this fact against Georgia, by saying the test is merely symbolic because candidates may abstain for a short period of time to avoid detection. Id. Rehnquist cynically concludes that "one may be sure that if the test were random--and therefore apt to ensnare more users--the Court would then fault it for its intrusiveness." Id.

123 Chandler, 117 S. Ct. at 1305. ("[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.").

124 The Court emphasizes that the drug test subjects of the policies upheld in Von Raab and Skinner were employees in high-risk, safety-sensitive positions. *Id.* at 1303-04. The phrase "safety-sensitive" was first used by the Court in Skinner to describe persons whose job duties are "'fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences' and who 'can cause great human loss before any signs of impairment become noticeable to supervisors or others.'" D. Garrison "Gary" Hill, Feature, *The Needle and the Damage Done: The Fourth Amendment, Substance Abuse and Drug Testing in the Public Sector*, 8-JUN S.C. LAW. 19, 20-21 (1997) (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 623-25 (1989)). U.S. courts have categorized as "safety-sensitive" employees "policemen, fire fighters, sewer operators, civilian employees who have access to chemical weapons at a U.S. Army base, registered nurses at public hospitals, elevator maintenance workers," among others. *Id.* at 21. Positions that have been held not to be "safety-sensitive" include "corrections employees who have no direct regular contact with the inmate population, carpenters who work in teams and file clerks." *Id.* Drivers may be considered "safety-sensitive" if they carry passengers and if driving is not just an 'incidental' duty to the position. *Id.*

125 Respondent's Brief, *Chandler v. Miller*, 1996 WL 708930, at \*13-14.

126 Chandler, 117 S. Ct. at 1304.

127 For a discussion of recent criticisms of the Supreme Court's Fourth Amendment interpretation, see *supra* note 9.

128 The Court directly contradicts its previous statement of the law by holding that the governmental need must first be considered independently of the individuals' privacy interests. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 659-63 (1995). In *Acton*, the Court specifically stated that the question of compelling need can be answered only in light of the factors of intrusiveness and privacy. *Id.*

129 In the author's opinion, the Court reinforces the holdings of *Skinner*, *Von Raab*, and *Acton* by making such great efforts to distinguish *Chandler* on the facts.

130 Professor Strossen points out that constitutional balancing tests in general lead to the abrogation of civil liberties. Strossen, *supra* note 106, at 1185. When the judiciary lacks an objective standard for determining whether the government has violated constitutional freedoms, it tends to look toward the position of the legislative and executive branches. *Id.* Often, the result is that the courts presume the governmental action is constitutional. *Id.* One only needs to review the outcomes of *Acton*, *Skinner*, and *Von Raab* to find support for Strossen's proposition.

131 Chandler, 117 S. Ct. at 1305.

132 *Id.* at 1307 ("It is all but inconceivable that a case involving that sort of requirement could be decided differently than the present case; the same sort of urinalysis would be involved.").

133 The Fourth Amendment standard for suspicionless searches was greatly loosened by the Supreme Court since the 1980s. GILLIOM, *supra* note 4, at 106. A threshold requirement, as created by Chandler, is not a completely new idea. The old standard for administrative searches, as developed in *Camara v. San Francisco Mun. Ct.*, 387 U.S. 523, 523 (1967), had the following threshold requirements:

- (1) A long history of judicial and public acceptance of the program.
- (2) A strong public interest in the search due to the lack of alternatives, and

(3) The search must be nonpersonal and noncriminal.

Id. Chandler, of course, did not go this far, since such a standard would prohibit all drug testing programs.  
Id.

134 See supra note 62 (criticisms of the balancing tests).

135 Chandler announced in July 1997 that he will run for state attorney general in 1998. Libertarian  
Chandler to Run for Attorney General, FULTON COUNTY DAILY REP., July 16, 1997, available in  
LEXIS, News Library, CURNWS File. Chandler was quoted as saying, "There are too many laws in this  
state." Id.