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## NOTES

# SUSPICIONLESS DRUG TESTING BY PUBLIC ACTORS: HOW *CHANDLER V. MILLER* SHOULD CHANGE THE STANDARD

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*Necessity is the plea for every infringement of human freedom. It is the argument of tyrants, it is the creed of slaves.*

*-William Pitt*

### I. INTRODUCTION

The value of liberty extends beyond its utility. Even if free societies can boast the best living conditions known to humanity, freedom also has intrinsic value: it is the means by which individuals seek meaning in their lives. The “amount” of freedom society deems proper should not simply be the result of a cost-benefit analysis that weighs the joys of freedom against the harms that could potentially result.

Of course, society demands limits on liberty and to the extent that acts infringe on others’ freedom, liberty is cabined by agreed-upon standards. The local and national governments of the United States have decided that people are so likely to infringe on others’ freedom when certain chemical

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substances are used that those chemicals are banned.<sup>1</sup> In detecting the use of such chemicals, however, the government encounters limits: in the abstract, the social contract and, in the slightly less abstract, the Constitution. Specifically, the Fourth Amendment is the source of limits on the government's ability to invade the liberty of individuals. In non-law enforcement situations, these limits remain unclear. For instance, government actors, such as employers and school administrators, legally can search the bodies of employees and students for evidence of drug use more easily than the police can search individuals to detect a crime.

Drug testing, by either blood test or urinalysis, has been recognized consistently as a Fourth Amendment search or seizure.<sup>2</sup> When government-imposed testing is used for something other than a criminal prosecution, it falls into the category of "administrative searches."<sup>3</sup> Although not treated identically to criminal searches, administrative searches of homes and businesses are subject to the demands of the Constitution.<sup>4</sup>

The Fourth Amendment states that searches and seizures imposed on individuals by the government must be reasonable and that judges should issue warrants only upon a finding of probable cause.<sup>5</sup> If a warrant has not been issued, typically there must be at least a showing of probable cause for a search to be held reasonable.<sup>6</sup> There have, however, been instances where courts have found searches reasonable without probable cause. Yet,

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1. This infringement manifests itself in two situations: the potentially harmful actions of a drug-user when under the influence of illegal substances and the cost society bears subsidizing those whose drug use makes them unable to provide for themselves.

2. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); ROBERT P. DECRESCE, MARK S. LIFSHITZ, ADRIANNE C. MAZURA & JOSEPH E. TILSON, *DRUG TESTING IN THE WORKPLACE* 13 (1989). See also JOHN GILLIOM, *SURVEILLANCE, PRIVACY, AND THE LAW* 89-90 (1994); Corinne A. Carey, Comment, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs*, 46 *BUFF. L. REV.* 281, 317 (1998).

3. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (finding the use of vehicle checkpoints at borders for questioning without individualized suspicion to be constitutional). See also *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding search of female student's purse for cigarettes as reasonable in light of her age and sex); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 282 (4th ed. 1992).

4. See *Camara v. Mun. Court*, 387 U.S. 523, 530-34 (1967).

5. U.S. CONST. amend. IV.

6. *Cupp v. Murphy*, 412 U.S. 291 (1973); CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION: RIGHTS OF THE INDIVIDUAL* 748 (6th ed. 1996) (quoting *Florida v. Bostick*, 501 U.S. 429 (1991), which held that to determine if a particular encounter amounted to a seizure or whether a search was reasonable, a court should consider all of the circumstances); 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, 535-36 (1997).

even in these situations courts have often required some level of individualized suspicion.<sup>7</sup> The requirement of suspicion has faded, however, in the aftermath of the Supreme Court's declaration that "the Fourth Amendment imposes no irreducible requirement of . . . suspicion."<sup>8</sup> The result is that when the government can show that it has special needs for testing—defined as needs other than those of ordinary law enforcement—it can conduct searches to meet those needs without individualized suspicion.<sup>9</sup>

Courts have determined that after balancing government interests against the individual's expectation of privacy, drug testing of government employees is not an unreasonable search or seizure in several situations, including the following: where the testing is performed on applicants, where reasonable suspicion of job performance impairment exists, or where the employment position implicates safety-sensitivity.<sup>10</sup> The arguments for drug testing of applicants are, in these situations, strong, as the employer has not yet observed the employee's job performance to determine if it is hampered by drug use. On the other hand, one could argue that unless applicants will be thrust immediately into safety-sensitive positions, their privacy interests should obtain for them the benefit of proving their abilities.<sup>11</sup> Arguments regarding applicants to federal employment, however, are not considered in this Note. Likewise, the employee whose job performance has raised a reasonable suspicion of drug use is beyond the parameters of this piece. Rather, this Note addresses the public employee who has been employed already, has been subject to varying degrees of supervisory scrutiny, has not raised an individualized suspicion of drug use, and yet has been subjected to mandatory drug testing.

This Note challenges the special governmental needs doctrine—a doctrine that has allowed the government to bypass Fourth Amendment requirements and impose administrative drug testing. This doctrine has

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7. See Keleigh Biggins, Case Note, *Candidates for Public Office Exempt From Drug Testing—Supreme Court Rules There Is No Special Need Justifying a Departure from Fourth Amendment Requirements*, Chandler v. Miller, 23 S. ILL. U.L.J. 781, 781 (1999) (citing *Martinez-Fuerte*, 428 U.S. at 560). See also *T.L.O.*, 469 U.S. 325 (allowing warrantless search of student's purse where officials had reason to suspect student had cigarettes).

8. *Martinez-Fuerte*, 428 U.S. at 561.

9. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (allowing suspicionless urinalysis search of railroad employees).

10. June D. Coleman, *Review of Selected 1995 California Legislation*, 27 PAC. L.J. 1035, 1039 (1996). See also *Skinner*, 489 U.S. at 620; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670–72 (1989) (authorizing testing based on safety concerns).

11. Also, applicants' past records should provide evidence as to whether there is a significant risk that drugs will affect their job performance capabilities.

been exploited to undervalue privacy expectations while exaggerating the needs of the government, by focusing on worst-case scenarios rather than likely results. Part II of this Note outlines the state of the law in suspicionless drug testing, following the development of both the special needs exception and the balancing test that it employs. In Part III, the recent Supreme Court case *Chandler v. Miller*<sup>12</sup> is discussed pointing out its apparent discontinuity with previous cases. While to some, the *Chandler* decision of 1997 was taken as a signal for reform in the doctrine of public employee testing, it has yet to function as anything other than an anomaly. If the Court actually desires to reform the special needs doctrine, however, the values implied in *Chandler* can provide a guide for the new test that should be used in future cases.

Part IV argues that the best way to hold the government to a higher standard in proving the validity of its administrative searches is to use a test closer to that for assessing criminal searches. Safety-based exceptions to the suspicion requirement should meet the same standards, whether the test is administrative or criminal—there must be no non-invasive, practicable means of preventing the harm before the invasive search is permitted. This standard would usually require a high degree of imminence of the threat. Part IV also discusses the ramifications of allowing the government broad leeway to invade personal privacy. The government's efforts in the "war on drugs" amount to expanding social control and, ultimately, limiting freedom.

## II. STATE OF THE LAW IN SUSPICIONLESS PUBLIC EMPLOYEE DRUG TESTING

President Reagan signed Executive Order 12,564, or Drug-Free Federal Workplaces, in September of 1986.<sup>13</sup> The Order authorized testing in four specific circumstances: where reasonable suspicion exists, as part of an accident investigation, in conjunction with employee counseling programs, and in screening job applicants.<sup>14</sup> Accordingly, "both the Federal Railroad Administration . . . and the Customs Service instituted drug-testing plans for their employees."<sup>15</sup> Employees subsequently

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

13. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986), *codified in* 5 U.S.C. §7301. The first government use of drug testing on a wide scale was the program established by the military in 1981. *See* ROTHSTEIN & LIEBMAN, *supra* note 2, at 194. This program was performing more than three million tests annually at a cost of more than \$500 million by 1985. *See id.*

14. *See* 5 U.S.C. § 7301.

15. *See* Carey, *supra* note 2, at 317.

challenged the drug-testing programs before the Supreme Court in *National Treasury Employees Union v. Von Raab* and *Skinner v. Railway Labor Executives' Association*, both decided in 1989.<sup>16</sup> The standards and factors the Court articulated in these cases established the framework for later challenges to governmentally-imposed drug-testing plans.<sup>17</sup>

In each of these cases, the Court held that the government's drug testing of its employees constituted a search; that search, however, was not unreasonable because of the "special need" exception to the Fourth Amendment.<sup>18</sup> Before these cases, federal judges generally rejected drug-testing programs without individualized suspicion.<sup>19</sup>

*Von Raab* challenged the United States Custom Service's imposition of a mandatory urinalysis test for employees seeking transfer or promotion to certain positions. The Court upheld drug testing of applicants for positions requiring the carrying of a firearm or involving direct contact with drugs,<sup>20</sup> while it remanded the issue of positions where employees were required to handle classified materials.<sup>21</sup> Holding that Custom Service employees enjoy a "diminished expectation of privacy," Justice Kennedy wrote for the Court that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees . . . ."<sup>22</sup> Justice Scalia, joined by Justice Stevens, wrote dissented, criticizing the Court's balancing of the employees' privacy interests and the government's interest in testing,

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16. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

17. *Carey*, *supra* note 2, at 317. See GILLIOM, *supra* note 2, at 90.

18. See *Von Raab*, 489 U.S. 656; *Skinner*, 489 U.S. 602.

19. See GILLIOM, *supra* note 2, at 99. The *Von Raab* trial judge followed the tradition of requiring suspicion in writing: "This dragnet approach, a large-scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution." 649 F. Supp. 380, 387 (1986).

20. See *Von Raab*, 489 U.S. at 679.

21. See *id.* The Court questioned whether the government defined the category too broadly. It was clear, however, that the Court would include positions where an employee must handle classified materials within the exception if the class were properly defined. "We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who . . . 'might compromise [such] information.' We also agree that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program." *Id.* at 677 (citations omitted). The government's argument that Customs agents who used drugs were vulnerable to blackmail or less trustworthy resonated with the Court. See the examination of *Chandler* in Section 3, which explains how a similar argument was less compelling to the Court in the case of politicians.

22. *Von Raab*, 489 U.S. at 668, 672.

emphasizing that drug testing in this situation failed to prevent any actual drug use.<sup>23</sup>

In *Skinner*, the Court upheld Federal Railroad Administration regulations requiring post-accident drug tests of railroad crews.<sup>24</sup> The accident itself gave rise to suspicion, according to the Court.<sup>25</sup> Justice Scalia joined the majority this time, apparently satisfied that the record of drug use among railroad employees involved in accidents bolstered the government's argument.<sup>26</sup> Justices Marshall and Brennan dissented in both *Skinner* and *Von Raab*, arguing that the Court was allowing the Government to use the "Draconian weapon"<sup>27</sup> of drug testing while being "swept away by society's obsession with stopping the scourge of illegal drugs . . . ."<sup>28</sup>

Sections A and B describe the development of the special needs exception to the Fourth Amendment and the balancing test that the exception employs. These sections also examine how, once initially applied to drug testing in *Skinner* and *Von Raab*, the special needs doctrine has been utilized liberally in drug-testing cases by the lower courts.

#### A. THE SPECIAL NEEDS EXCEPTION

The Fourth Amendment explicitly protects an individual's right to be free from "unreasonable searches and seizures."<sup>29</sup> The courts have uniformly recognized the taking of employee urine or blood for the purpose of drug or alcohol testing as a Fourth Amendment search.<sup>30</sup> Thus, government-instituted drug testing implicates the Fourth Amendment.<sup>31</sup> The Court has held, however, that traditional Fourth Amendment protections—such as warrants, probable cause, and even individualized

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23. *See id.* at 681. Justice Scalia emphasized the government's inability to provide even one example of on-the-job failure resulting from drug use. *Id.* at 683.

24. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

25. The Court also held that the privacy interests of the employees were diminished because they regularly underwent tests as part of physical exams and because they were employed in a highly regulated industry. *See id.* at 627–28.

26. *See id.* at 605.

27. *Id.* at 634.

28. *Id.* at 654.

29. U.S. CONST. amend. IV.

30. *See supra* note 2.

31. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616–17 (1989). *See also* DeCresce et al., *supra* note 2, at 14 (asserting that "drug screening by urinalysis infringes the employee's reasonable expectation of privacy and thus constitutes a search and seizure within the meaning of the Fourth Amendment").

suspicion—are not always required for a search to be deemed reasonable.<sup>32</sup> Upon finding a special need, rather than requiring probable cause, the Court engages in a balancing test, pitting the employee's expectation of privacy against the government's justification for the search.<sup>33</sup>

The special needs exception was first articulated in *New Jersey v. T.L.O.*<sup>34</sup> Originally, this doctrine made the warrant and probable cause requirements of the Fourth Amendment unnecessary "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement" make such requirements impracticable.<sup>35</sup> As case law has developed however, determining the impracticability of alternative methods has become little more than an afterthought, resulting in the special needs exception being used much more commonly than "exceptional circumstances." In *Skinner* and *Von Raab*, the Court determined that the government had met this lenient threshold requirement—now just a need beyond normal law enforcement, not necessarily an exceptional situation.

In *Vernonia Sch. Dist. 47J v. Acton*, the Supreme Court held that random, suspicionless drug testing of high school students who participated in extracurricular sports was not a violation of the Fourth Amendment.<sup>36</sup> The Court determined that the government had a special need for testing, noting the *in loco parentis* relationship that schools have with children.<sup>37</sup>

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32. See *Skinner*, 489 U.S. at 602 (holding that governmental "special need" justifies drug testing of railroad employees with neither a warrant nor individualized suspicion); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding that governmental security-related "special need" justifies drug testing of Customs Service Employees); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (holding that the Fourth Amendment can protect employees' reasonable privacy expectations in the workplace, but this expectation must be balanced against the reasonableness of the employer's search).

33. See *Skinner*, 489 U.S. at 619–20; *O'Connor*, 480 U.S. at 724–25; DECRESCHE ET AL., *supra* note 2, at 14 ("In cases involving searches of public employees, the determination of reasonableness usually involves a balancing of the individual's expectation of privacy against the government's right as an employer to investigate employee misconduct."). Before the special needs exception was applied broadly—following *Von Raab* and *Skinner*—"[t]esting of public employees absent cause or individualized suspicion of drug use had been closely scrutinized." *Id.* "[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable . . . [W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624.

34. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (requiring the program in question to serve a governmental need beyond law enforcement in order to qualify as having a "special need"). See *Recent Cases*, 112 HARV. L. REV. 713, 713 (1999).

35. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

36. 515 U.S. 646 (1995).

37. See *id.* at 653–56.

The Court engaged in a balancing test to determine the reasonableness of the search, considering the nature of the privacy interest, the "character of the intrusion," and the "nature and immediacy of the governmental concern."<sup>38</sup> Although the Court in *T.L.O.* and *Von Raab* asserted that the special needs doctrine would apply only in "exceptional circumstances," where a warrant or probable cause was impracticable,<sup>39</sup> in *Vernonia Sch. Dist. 47J* the Court changed the standard. The Court's focus shifted to the invasiveness of the test and the strength of the privacy expectation from the necessity of testing due to extreme circumstances. The Court did not conclude, however, that alternative, non-invasive methods of detection were impracticable.

*Vernonia Sch. Dist. 47J*, however, was not a groundbreaking decision. The Court did not set a standard narrow enough to limit its future holdings—and it was clear before *Vernonia Sch. Dist. 47J* that it did not effectively restrain the lower courts either. Thus, lower courts have found a wide range of special governmental needs, carving out a significant exception to Fourth Amendment protections.<sup>40</sup> Generally, a special need has been found "where there has been a history of drug abuse in the industry, when the employ[ment] involved work in safety-sensitive or high-risk positions, and where there is some showing that drug use has led to accidents or other dangers to the public welfare."<sup>41</sup> Notably missing from

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38. *Id.* at 658–60. In finding a special need, the Court evaluated evidence of an immediate crisis caused by the increase in drug use among student athletes. *See id.* at 662.

39. *See T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

40. *See Aubry v. Sch. Bd.*, 148 F.3d 559, 561–65 (5th Cir. 1998) (upholding suspicionless drug testing of public school custodians); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998) (upholding suspicionless drug testing of school teachers and administrators); *Commonwealth v. Cass*, 709 A.2d 350 (Pa. 1998) (upholding suspicionless dog-assisted locker searches); *Doe v. City & County of Honolulu*, 816 P.2d 306 (Haw. 1991) (ruling that suspicionless drug testing during firefighters' annual physical exams did not violate Fourth Amendment as city's interests outweighed reduced privacy expectations); *Am. Fed. of Labor v. Unemployment Ins. Appeals Bd.*, 23 Cal. App. 4th 51 (2nd Dist. 1994) (holding employee's refusal to submit to drug testing amounted to misconduct because the employee worked in a safety-sensitive environment); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 129–31 (1992).

Even in cases where the Court determined that the privacy expectations outweighed the government's interest, the Court still found a special need in the government's favor. *See Rutherford v. City of Albuquerque*, 77 F.3d 1258 (10th Cir. 1996) (holding that positive drug-test results used in the dismissal of a bus driver upon return to work after an extended illness was unconstitutional); *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993), *cert. denied* 511 U.S. 1070 (holding that university's interest in drug-free athletic program was not superior to students' expectation of privacy in urinating and in personal information obtainable from bodily fluids).

41. *See Biggins*, *supra* note 7, at 791. "In short, when governmental needs beyond those of ordinary law enforcement are involved, the Court has not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the

this list are determining whether an individualized suspicion requirement is impracticable and whether non-invasive means of detection could be employed effectively. Additionally, a problem arises in situations where there is no history of drug use or drug-related accidents because the Court has held that the lack of evidence of a drug problem does not necessarily invalidate a test. The resulting doctrine's threshold question—whether there is a special need—is always answered in the affirmative, with the substantive analysis occurring in the balancing test that followed.

The Court's holding in *Chandler v. Miller*<sup>42</sup> might have reversed the trend of liberalizing application of the special needs exception because the Court shifted its emphasis to the threshold question, and in so doing, challenged whether the government had established a sufficiently "special" need.<sup>43</sup> Thus far, however, the lower courts have not retreated from their emphasis on the balancing test.<sup>44</sup>

#### B. BALANCING THE EMPLOYEE'S PRIVACY RIGHTS AGAINST THE EMPLOYER'S INTEREST IN PREVENTING DRUG USE

The courts consider several factors in balancing the privacy interests of employees against the governmental interest in testing for drug use. To weigh the employees' interests, courts look at the reasonableness of the employees' privacy expectations and the intrusiveness of the testing involved.<sup>45</sup> For example, with urinalysis, courts often consider whether an observer is present when the sample is provided.<sup>46</sup>

Courts have noted that drug tests are intrusive on two levels: one, the indignity of the testing itself, and two, the informational violation it represents. Regarding the second component, informational violation, courts consider whether information other than illegal drug use, such as the presence of legal chemicals or HIV infection, is divulged by testing.

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particular context.' . . . Thus, Fourth Amendment requirements have been relaxed several times if the need is considered great enough to justify a departure from Constitutional norms." *Id.* at 786–87 (quoting *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 619 (1989)).

42. 520 U.S. 305 (1997).

43. For a more thorough discussion of the impact of *Chandler*, see *infra* Part III.

44. See *infra*, Part III.D.

45. See *Skinner*, 489 U.S. 602; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); sources cited *supra* note 40.

46. The district court in *Von Raab* argued that urinalysis can be "even more intrusive than a search of a home." 649 F. Supp. 380, 386 (E.D. La. 1986). The court saw urinalysis as having a "massive intrusive effect." *Id.* at 387. Other courts have found in their analysis that the conditions of urinalysis make it far less invasive than body cavity and strip searches. See, e.g., *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987), *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3rd Cir. 1986), *cert denied*, 479 U.S. 986 (1986).

Beyond this concern, “[u]rine tests are unable to establish when a drug was taken; even if they correctly identify the drug, all that is known is that drug use occurred at some point in the past.”<sup>47</sup> Presumably, government employees can use, or simply be exposed to,<sup>48</sup> marijuana on the weekend or while on vacation, return to work long after any effects have worn off, and lose their jobs because of it. Therefore, government employers can arguably control employees both on and off the job. That the government can monitor what individuals do to their own bodies—regardless of whether job performance has been affected—makes drug testing more threatening than mere physical degradation. Courts have virtually ignored this aspect of the privacy invasion in deference to the employers’ interests component of the balancing test.

When a court finds that the interest of the employer outweighs an employee’s privacy interest, the court often finds a diminished expectation of privacy exists for employees in a particular field.<sup>49</sup> At first glance, the more closely inspected an industry is, the lower the employee’s expectation of privacy should be.<sup>50</sup> As discussed in the next section, however, courts have found reduced privacy expectations for markedly different reasons.<sup>51</sup>

In evaluating the employer’s interest in testing, courts consider the dangerousness of the job, the threat to the public posed by a failure to perform the job properly, the effectiveness of the testing program as a deterrent to drug use (including whether there is any known drug use to deter)<sup>52</sup>, and the drawbacks to requiring testing only upon reasonable, individualized suspicion.<sup>53</sup>

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47. GILLIOM, *supra* note 2, at 94.

48. The accuracy of drug testing is not considered in any detail here—it is a topic that warrants separate study. For a brief analysis, see Mark. A. Rothstein, 63 CHI.-KENT L. REV. 683, 695–99 (1987).

49. See, e.g., *Von Raab*, 489 U.S. at 671 (holding that “certain forms of public employment may diminish privacy expectations even with respect to such personal searches”).

50. See *Skinner*, 489 U.S. at 627 (finding that privacy expectations of railroad employees are diminished by the fact that the industry “is regulated pervasively to ensure safety”).

51. Compare *Von Raab*, 489 U.S. at 674 (holding that lack of supervision results in a lowered expectation of privacy), with *Skinner*, 489 U.S. at 627 (finding that heavy scrutiny or regulation reduces privacy expectations). But see *Chandler v. Miller*, 520 U.S. 305, 321 (1997) (holding that heavy scrutiny does not imply a lowered expectation of privacy for elected officials).

52. Although the courts often mention the testing program’s ability to deter drug use as one factor, a program actually does not need to deter any actual use to pass the test. See *Von Raab*, 489 U.S. at 676; *Aubrey v. Sch. Bd.*, 148 F.3d 559, 564 (5th Cir. 1998); *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361, 374 (6th Cir. 1998).

53. See *supra* note 51.

Courts often find the employer's interest in drug testing overwhelming, especially if the job is deemed "safety sensitive."<sup>54</sup> Examples of such jobs include bus and truck drivers;<sup>55</sup> flight crews, pilots, and air traffic controllers;<sup>56</sup> and nuclear plant engineers.<sup>57</sup> Less obvious positions considered safety-sensitive include teachers, school janitors, students (and their parents),<sup>58</sup> mechanics and bus attendants.<sup>59</sup> Whether drug testing actually ends a trend of drug-related problems or deters future abuse has not always been an important factor in the balancing test.<sup>60</sup> Courts are often willing to accept the government's straw man version of the individual's privacy expectations, while focusing on the worst harm imaginable that could result from drug use on a job as a measure of the government's interest in drug testing. Applying this analysis, one could justify Fourth Amendment violations in nearly any situation—by imagining the worst potential harms that *could* be prevented if drug tests and other searches were required. What harms could be prevented by requiring a drug test before allowing anyone to roam about freely in public? Given this unbalanced approach to the balancing test, inconsistency alone explains cases where the government has lost.<sup>61</sup>

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54. *E.g.*, *Von Raab*, 489 U.S. at 670 (holding that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment").

55. *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292, 1305–06 (9th Cir. 1991).

56. *Bluestein v. Dep't of Transportation*, 908 F.2d 451, 456 (9th Cir. 1990).

57. *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 564–65 (8th Cir. 1988).

58. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995); *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998); sources cited *supra* note 40.

59. *See Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (holding that it was not unreasonable to require drug testing where a school bus attendant's duties involved direct contact with young students); *English v. Talladega County Bd. of Educ.*, 938 F.Supp. 775, 783 (N.D. Ala. 1996) (holding that a county board of education did not violate the Fourth Amendment rights of a mechanic's helper who was required to undergo mandatory random drug testing).

60. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 648–49 (citing current problem as important); *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 629–30 (1989); *Todd*, 133 F.3d 984, 986. *But see Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989); *Aubrey v. Sch. Bd.*, 148 F.3d 559, 563–64 (5th Cir. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 374 (6th Cir. 1998).

61. *See Rutherford v. City of Albuquerque*, 77 F.3d 1258 (10th Cir. 1996) (holding that positive drug-test results used in the dismissal of a bus driver upon return to work after an extended illness was unconstitutional); *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993), *cert. denied* 511 U.S. 1070 (holding that university's interest in drug-free athletic program was not superior to students' expectation of privacy in urinating and in personal information obtainable from bodily fluids).

## C. DISSENTING TO THE GOVERNMENT'S SUCCESS

The Department of Health and Human Services establishes federal testing guidelines—including specimen collection, lab analysis, and interpretation of results. These guidelines, issued in 1987, detail which drugs are to be detected—specifically, marijuana, cocaine, and "any drug listed in Schedule I or II of the Controlled Substances Act."<sup>62</sup> As mentioned above, the testing process and its potential affront to an individual's privacy are factors courts consider when conducting the balancing test. Accordingly, the specimen collection process outlined in the guidelines is probably the most controversial aspect. Specifically, the employee may urinate in privacy only if there is no "reason to believe that . . . the particular individual may alter . . . the specimen."<sup>63</sup> Other precautions include the following: the use of blue dye in toilet water (to preclude its use in diluting a specimen), requiring photo identification, the removal of clothing that could hide tools for altering the sample, and inspection of the urine for color and temperature.<sup>64</sup> Even the *Von Raab* majority recognized that the "interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial . . ."<sup>65</sup> Scalia's dissent offers a more critical view: "I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity."<sup>66</sup>

While personal opinion varies as to which versions of drug testing are more or less invasive of an individual's privacy, the Court has admitted that specimen collection in urinalysis potentially can be a substantial interference with privacy, making the assertion that certain employees have a diminished expectation of privacy even more important in the Court's analysis. Justice Kennedy described the privacy expectations of Customs agents in *Von Raab*:

Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test . . . . [E]mployees involved in

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62. ROTHSTEIN & LIEBMAN, *supra* note 2, at 195. Interestingly, while the Guidelines also include information on drugs likely to be encountered such as opiates and PCP, they do not mention alcohol or other legal drugs. *See id.* If safety and productivity are the real purpose behind testing, one can only wonder why legal substances that obstruct these goals are not more of an issue.

63. ROTHSTEIN & LIEBMAN, *supra* note 2, at 195 (quoting the Federal Guidelines).

64. *See id.*

65. *Von Raab*, 489 U.S. at 671.

66. *Id.* at 680.

drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.<sup>67</sup>

According to the Court, public-sector employees who need good judgment, fitness, and dexterity to perform their jobs have lowered expectations of privacy. The Court did not argue that if a Customs agent exhibits a lack of dexterity or poor judgement, a warrantless test is justified. Rather, because fitness and probity are requirements of the job, the government may engage in admittedly privacy-invading searches without any suspicion—let alone evidence—of drug use.

The physical and mental demands of the job are not all the *Von Raab* Court cited as a basis for a lowered privacy expectation. The relationship a job has to the prevention of drug use is also a factor. The Court states:

[M]any [of these employees] may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service . . . . A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.<sup>68</sup>

This holding suggests that drug users are less likely to enforce anti-drug policy effectively; they are also more susceptible to bribes and blackmail. Thus, the compelling governmental interest in *Von Raab* should be the prevention of these particular problems that would result from drug use. This interest, however, may not be the compelling government interest on which the Court relied. Justice Scalia's dissent makes the crucial point that the government, in presenting its case, did not provide a single example of drug use causing one of the feared results: misuse of guns, bribery, or compromising revelations of classified information.<sup>69</sup>

Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the

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67. *Id.* at 672.

68. *Id.* at 669–70.

69. *See id.* at 683.

line of duty since 1974, there is no indication whatever that these incidents were related to drug use by Service employees.<sup>70</sup>

Justice Scalia notes that counsel for the government reported that of 3,600 employees tested, no more than five tested positive for illegal substances. In addition, there was no demonstrated connection between these five "users" and any failure to perform the job.<sup>71</sup>

Assuming the Court knew that drug testing was not rooting out a hidden drug problem and that there was no history of negative consequences from employee drug use in the Customs service, what, then, could be the compelling governmental purpose that outweighed the privacy rights of employees? Justice Scalia suggested symbolism as the government's motive:

What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? . . . [T]here is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is "clean," and . . . will demonstrate the determination of the Government to eliminate this scourge of our society . . . . [T]he impairment of individual liberties cannot be the means of making a point; . . . symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.<sup>72</sup>

Responding to this charge, the majority asserted that their opinion has more substance than symbolism, arguing that the prevention of a great harm—no matter how unlikely it may be—is sufficient justification for the drug testing in question.<sup>73</sup> Describing the worst imaginable consequences and arguing that the search is justified because of how horrible this extreme situation would be, no matter how unlikely, is not logically sound. The Fourth Amendment should not crumble before such an attack.

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70. *Id.*

71. *See id.* at 683–84.

72. *Id.* at 686–87.

73. *See id.* at 674–75. Kennedy also writes:

"The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity . . . . The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs."

*Id.* at 674. It is unclear, however, how preventing the promotion of drug users differs from detecting drug users in a way that discounts the fact that there is no drug problem.

The *Von Raab* Court set the standard for applying the special needs balancing test to public employee suspicionless drug testing. Its opinion, however, failed to craft a clear standard for determining when privacy expectations are diminished, resulting in a liberal understanding of diminished privacy expectations in the lower courts.<sup>74</sup> Perhaps more importantly, the Court held that drug testing can be an overwhelmingly important government interest—even without showing that the testing prevents any harms. In doing so, the Court rejected Scalia's claim that such testing has only symbolic value that cannot outweigh the individual's privacy interests. Accordingly, the lion's share of cases that followed *Von Raab* and *Skinner* tend to show little concern for the existence of an actual drug problem, but take very seriously the potential harms drug use could produce.<sup>75</sup>

### III. *CHANDLER V. MILLER*: A NEW STANDARD?

With its 1997 holding in *Chandler v. Miller*, the Supreme Court introduced the possibility of redefining its entire approach to suspicionless drug testing.<sup>76</sup> The Court held that Georgia had no special need that required drug testing of candidates for public office.<sup>77</sup> Only Chief Justice Rehnquist dissented.

The most important facet of the Court's holding is its lengthy treatment of the threshold question—whether there is a special need—rather than addressing this question quickly and focusing on the balancing of interests.<sup>78</sup> The determination of whether a special need actually exists, however, used similar criteria to the balancing test. Specifically, the Court held that the government had failed to show that there was a real threat of drug use by elected officials (weighing the government's interest), and that elected state officials do not perform sufficiently safety-sensitive jobs (weighing the candidates' privacy interests).<sup>79</sup> Focusing on the lack of evidence of a drug problem, the Court concluded that it was not a special need that Georgia sought to protect—but instead its image.<sup>80</sup> Symbolic

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74. See cases cited *supra* note 40.

75. See *id.*

76. 520 U.S. 305 (1997). See *Recent Cases*, *supra* note 34, at 713 n.4.

77. See *Chandler*, 520 U.S. at 318–19.

78. See *id.* at 318–21.

79. See *id.* at 319, 321–22.

80. See *id.* at 318–22.

need, Justice Ginsburg wrote, is not sufficient to overcome the protections of the Fourth Amendment.<sup>81</sup>

#### A. FACTS AND THE RESULTS FROM THE LOWER COURTS

Georgia instituted a drug-testing requirement for candidates to state office in 1990.<sup>82</sup> The statute required that any individual “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.”<sup>83</sup> The testing had to take place within thirty days of qualifying for the election.<sup>84</sup> In addition, the test was to be administered according to the Department of Health and Human Services Guidelines—revealing only the presence or absence of drug use and providing no information to law enforcement agencies or officials.<sup>85</sup>

Several 1994 nominees of the Libertarian Party took issue with the law.<sup>86</sup> The nominees filed suit for declaratory and injunctive relief that would prevent enforcement of the statute, asserting that the required drug test violated the First, Fourth, and Fourteenth Amendments of the United States Constitution.<sup>87</sup>

The district court denied relief and found for the defendants, citing both the importance of the state offices covered by the statute and the minimal intrusiveness of the required testing.<sup>88</sup> The plaintiffs appealed to the Eleventh Circuit. Judge Edmondson wrote the opinion affirming the district court, agreeing that no constitutional rights were violated.<sup>89</sup> The court’s holding emphasized the special trust placed in government officials, noting that these officials make public policy decisions dealing with drug interdiction.<sup>90</sup> Citing *Von Raab*, Edmondson also argued that public office demands honesty, physical fitness, and clear thinking.<sup>91</sup> The appeals court

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81. *See id.* at 322.

82. *See id.* at 309.

83. GA. CODE ANN. § 21-2-140 (1993)(b) (repealed Jan. 1, 1999).

84. *Id.* at (c).

85. *See Chandler*, 520 U.S. at 310.

86. *See id.* The nominees were Walker L. Chandler for Lieutenant Governor, Sharon T. Harris for Commissioner of Agriculture, and James D. Walker for member of General Assembly. *Id.*

87. *See id.*

88. *See Chandler v. Miller*, 952 F. Supp. 804, 806–07 (N.D. Ga. 1994).

89. *See Chandler v. Miller*, 73 F.3d 1543, 1544, 1549 (11th Cir. 1996).

90. *See id.* at 1546–47.

91. *See id.* at 1546. Judge Edmondson wrote, “much like the Customs agents whose privacy expectations are diminished because physical conditioning and ethical behavior are central to job performance, candidates for high office must expect the voters to demand some disclosures about their

reasoned that because public officials expect voters to evaluate their fitness for the position, they have a reduced expectation of privacy.<sup>92</sup> Following precedent, the Eleventh Circuit determined that the government had a special need for performing the test:

Like the test at issue in *National Treasury Employees Union v. Von Raab*, this test “is not designed to serve the ordinary needs of law enforcement.” That is, the test is not designed to prosecute crime: no party before us contends otherwise. Special needs are involved. In this circumstance the courts must “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>93</sup>

The Supreme Court granted the plaintiffs’ petition for certiorari and had a dramatically different take on how *Von Raab* should be applied to the candidates’ claim.

#### B. THE MAJORITY OPINION

Justice Ginsburg, writing for the Court, noted that the Georgia statute was “a measure plainly not tied to individualized suspicion” and announced that the Court would determine whether a special need existed based on the precedent set by *Skinner*, *Von Raab*, and *Vernonia Sch. Dist. 47J*.<sup>94</sup> Before moving to its analysis of precedent, the Court dismissed Georgia’s argument that its Tenth Amendment sovereign power to set qualifications for state office candidates should be a factor in determining whether a special need existed.<sup>95</sup>

According to the Court, *Skinner* held that documented drug abuse problems, obvious safety hazards raised by drug use, and the diminished expectation of privacy of employees (such as those who work in a highly

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physical, emotional, and mental fitness for the position.” *Id.* at 1547 (citations omitted). *See also* Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).

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

93. *Id.* at 1545 (citing *Von Raab*, 489 U.S. at 666).

94. *See Chandler v. Miller*, 520 U.S. 305, 314 (1997).

95. *See id.* at 317–18. Respondents cited *Gregory v. Ashcroft* in support of their argument. 501 U.S. 452 (1991) (upholding mandatory retirement for state judges at age seventy as a reasonable age classification). The *Chandler* Court found that, although *Gregory* reaffirmed the principle that states have the power to set qualifications for state offices, states may not infringe upon constitutional protections. *Chandler*, 520 U.S. at 317. The Court concluded that states may not infringe on candidates’ Fourth Amendment rights under the auspices of the sovereign power to establish qualifications for state offices. *See id.* The result was that the Court would not give deference to Georgia’s qualification-setting prerogatives in deciding this case. *See id.*

regulated industry) are all key components to finding a special need.<sup>96</sup> The Court also reasoned that the important factors in finding a special need in *Von Raab* included the role Customs agents played in working to prevent drug smuggling, the danger of Customs agents being blackmailed or bribed, the agents' lowered privacy expectations, and the physical dangers of the job.<sup>97</sup> Finally, the Court asserted that the key components in finding a special need in *Vernonia Sch. Dist. 47J* were the school's special role as a guardian for children, the lesser expectation of privacy students have, and the necessity of preventing injuries to children engaged in sports.<sup>98</sup>

The Court did not argue that *Skinner* presented a special need because the government has a strong interest in preventing drug-related accidents, nor did the court suggest that the government had a special, non-law enforcement need for testing because of an important interest in preventing drug use among Customs agents in *Von Raab*. Instead, the Court defined the factors examined in the balancing test and used these factors to determine whether the government met the special need requirement.<sup>99</sup> Given the Court's recharacterization of *Skinner*, *Von Raab*, and *Vernonia Sch. Dist. 47J* and its analysis of the special need Georgia sought, the *Chandler* Court seems to have defined a special need as one that survives the balancing test. Therefore, the Court's analysis in the foregoing discussion—although it involves the factors used in the balancing of interests test—is actually the calculation of whether a special need exists.

The Court determined that candidates for state offices do not have a lowered expectation of privacy,<sup>100</sup> as it found Customs agents in *Von Raab* had. Justice Ginsburg noted that unlike agents who are not subject to daily scrutiny, "[c]andidates for public office . . . are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention . . . beyond the norm in ordinary work environments."<sup>101</sup> The *Skinner* Court determined that an important factor in finding a lowered expectation of privacy for railway workers was the heavy regulation of the railroad industry.<sup>102</sup> The *Vernonia Sch. Dist. 47J*

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96. See *Chandler*, 520 U.S. at 314–15.

97. See *id.* at 315–16.

98. See *id.* at 316–17.

99. See *id.* at 318–26. Originally, the only specified hurdle in identifying a special need was whether the program in question served a need beyond law enforcement. See *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 289, 294 (1997).

100. See *Chandler*, 520 U.S. at 321.

101. *Id.*

102. See *id.* at 315.

Court held that the students had a similarly lowered expectation of privacy based on the scrutiny they typically endured.<sup>103</sup> In *Chandler*, however, the Court used heavy scrutiny to hold the other way—finding that the circumstances supported *not* finding a special need. Looking at the close scrutiny of employees as a viable alternative to testing—rather than as a reason for lowering privacy expectations—places a higher burden on the government to establish the reasonableness of drug testing its employees.

Georgia emphasized the “incompatibility of unlawful drug use with holding high state office” in defending the statute, particularly given elected officials’ duty to carry out anti-drug law-enforcement efforts.<sup>104</sup> The state also pointed to the desire to maintain confidence in elected representatives and the potential effect of illegal drug use on an official’s honesty, judgment, and integrity.<sup>105</sup> Georgia relied on the reasoning in *Von Raab*, where the effects that drug use could have on honesty and judgment—not to mention the resulting threat of bribery or blackmail—were taken quite seriously.<sup>106</sup>

The Court first responded that no evidence supported a drug problem among elected officials in Georgia. Thus, the statute was not preventing any real threat.<sup>107</sup> While the Court admitted that no demonstration of drug abuse was evident in *Von Raab*,<sup>108</sup> it held that such evidence was one factor to be considered in the analysis of whether testing is necessary rather than a prerequisite to finding a special need.<sup>109</sup> The lack of evidence of an actual drug problem is one strike against a testing program, according to the Court, but one that can be overcome if the Court deems the program to be of sufficient value.

The Court concluded that the government’s reasons for testing were not compelling enough to overcome the lack of evidence of drug use. Specifically, it held that the interest Georgia valued most was its image of commitment to the struggle against drug use.<sup>110</sup> This interest was symbolic

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103. *See id.* at 316. It seems impossible that teenagers who are subject to teacher observation most of the day and observation by athletic coaches after school have a reduced privacy expectation because of any *lack* of “the kind of day-to-day scrutiny that is the norm in more traditional office environments,” which was the reason for the finding in *Von Raab*. 489 U.S. 656, 674 (1989).

104. *See Chandler*, 520 U.S. at 318.

105. *See id.*

106. *See Von Raab*, 489 U.S. at 670–71.

107. *See Chandler*, 520 U.S. at 318–19.

108. *See Von Raab*, 489 U.S. at 676.

109. *See Chandler*, 520 U.S. at 319.

110. *See id.* at 321–22.

only and not a sufficient special need.<sup>111</sup> The lack of evidence of actual drug use among elected officials and the fact that they do not participate in the “immediate interdiction effort” were central to this determination.<sup>112</sup>

A final, key factor was the ineffectiveness of Georgia’s testing to actually deter drug use, since the testing deadline was commonly known and candidates could abstain from drug use during the necessary time period to pass the test.<sup>113</sup> When Scalia raised this point in *Von Raab*, the majority responded that the worst drug users—those unable to abstain—would still be detected.<sup>114</sup> In *Chandler*, however, the majority determined that drug addicts were unlikely to be candidates for state office and that ordinary public scrutiny should detect such individuals.<sup>115</sup>

The Court essentially agreed with Georgia that the testing methods employed were relatively noninvasive, as they followed the drug-testing guidelines applicable to federal programs.<sup>116</sup> Given that candidates could provide urine samples through a personal physician and that they were not required to disclose the results of the test if they chose not to run for office,<sup>117</sup> the privacy invasion was not as great as the invasions in *Skinner* and *Von Raab*.<sup>118</sup> This conclusion suggests that if the Court had found a special need, the plaintiffs would have lost on the balancing test.

*Chandler* appeared to mark a shift in the Supreme Court’s drug-testing jurisprudence—with the discovery of a scenario in which the government’s interests outweigh the individual’s privacy interests, the Court still determined that the government failed to show a special need. This result illustrates the unpredictable nature of a supposedly formulaic test, as the Court arguably evaluated the same factors in making its threshold decision as it would have in employing the balancing test.

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111. *Id.* at 322. *See also* Carey, *supra* note 2, at 327 (“Instead of concrete danger . . . what the Court found at stake was Georgia’s image.”). Justice Ginsburg wrote that “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’ . . . [but] where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.” *Chandler*, 520 U.S. at 323.

112. *Chandler*, 520 U.S. at 321–22.

113. *See id.* at 319–20.

114. *See* Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 (1989).

115. *See Chandler*, 520 U.S. at 320.

116. *See id.* at 318.

117. *See id.*

118. *See id.*

## C. CHIEF JUSTICE REHNQUIST'S DISSENT

Chief Justice Rehnquist's dissent closely paralleled the Court's logic in *Von Raab*. Citing both *Skinner* and *Von Raab*, Rehnquist argued that "[u]nder our precedents, if there was a proper governmental purpose other than law enforcement, there was a "'special need.'"<sup>119</sup> Only then does the Fourth Amendment require the balancing between the governmental purpose and the individual's privacy interest.<sup>120</sup>

The Chief Justice argued that Georgia clearly met the precedential standard for showing a special need.<sup>121</sup> He then applied the balancing test and, like the majority, determined that the plaintiffs lost this test.<sup>122</sup> In evaluating the individual's privacy interests, he argued that the continual public scrutiny under which politicians live creates a diminished expectation of privacy. This lowered expectation, combined with a relatively non-invasive testing procedure, produces a low value for the candidates' privacy interests.<sup>123</sup>

The Chief Justice then asserted that Georgia's interest in keeping its elected officials drug free, because of the risk of bribery and blackmail associated with drug use, is essentially the same interest asserted in *Von Raab*.<sup>124</sup> The dissent links this case to *Von Raab* based on the threat to credibility and risk of bribery associated with drug use, rather than by comparing the law-enforcement responsibilities of Customs agents to those of elected officials. Rehnquist's dissent raises the following question: do threats to the image of credibility, sound judgement, and legality weigh more heavily than threats to actual enforcement of the law? The Chief Justice's point seems clear—the *Chandler* majority did not act consistently with precedent when it raised the bar for showing a special need. Justice Rehnquist's criticism of this discrepancy was well put when he argued that the Fourth Amendment does not prevent a state from enacting a statute simply because the Supreme Court finds it "misguided or even silly."<sup>125</sup> Yet, the special needs doctrine seems to empower the courts to step in

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119. *Id.* at 325.

120. *See id.*

121. *See id.*

122. *See id.* at 325–27.

123. *Id.* at 325.

124. *See id.* at 326 (citing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989)). "[The] risks of bribery and blackmail for high-level officials of state government using illegal drugs would seem to be at least as significant as those for off-duty Customs officials." *Id.*

125. *Id.* at 328.

where they detect a lapse of judgment in state legislatures. Thus, the doctrine's only clear result may be the empowerment of judicial activism.

#### D. IMPACT OF *CHANDLER* ON THE SPECIAL NEEDS DOCTRINE

Some argue that *Chandler* limited the special needs exception, thwarting symbolic justifications that might have excused states from the Fourth Amendment.<sup>126</sup> The case also gave rise to hopes that it would render "'mere allegations' of danger to the public . . . insufficient to justify a blanket drug-testing scheme."<sup>127</sup> *Chandler*'s application by lower courts, however, does not offer evidence of this result.

In *New Hampshire v. Zeta Chi Fraternity*,<sup>128</sup> the New Hampshire Supreme Court considered a college fraternity's challenge to random, warrantless searches of their residence.<sup>129</sup> The fraternity was on probation for providing alcohol to minors.<sup>130</sup> In finding for the state, the Court pointed to the reduced privacy expectations that people on probation can expect as well as the state's interest in protecting the public from such individuals.<sup>131</sup> While the majority did not discuss the influence of *Chandler*, the dissent argued that, in light of *Chandler*, "the case can not [*sic*] fairly be read to support the proposition that such a regime would 'fit within the closely guarded category of constitutionally permissible suspicionless searches.'"<sup>132</sup>

In *Pierce v. Smith*, a doctor claimed that a state medical residency program's drug-testing requirement was unconstitutional.<sup>133</sup> The Fifth Circuit mentioned that *Chandler* required more than symbolism to outweigh an individual's privacy interests. Nonetheless, the court found a special need because the doctor was studying emergency medicine and providing professional healthcare services to the public.<sup>134</sup> As before *Chandler*, the emphasis was on potential harms, rather than the actual necessity for the test. The dissent argued that "the governmentally proffered special need for suspicionless drug testing has not been

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126. See Biggins, *supra* note 7, at 797.

127. *Id.* at 798 (quoting Kelly M. Brown, *Search and Seizure—State Law Requiring That Candidates for Public Office Pass a Drug Test Violates the Fourth and Fourteenth Amendments—Chandler v. Miller*, 7 SETON HALL CONST. L.J. 1085, 1092 (1997)).

128. 696 A.2d 530 (N.H. 1997).

129. See *id.* at 539.

130. *Id.* at 537–38.

131. See *id.* at 539–40.

132. *Id.* at 544 (quoting *Chandler v. Miller*, 520 U.S. 305, 309 (1997)).

133. 117 F.3d 866 (5th Cir. 1997).

134. See *id.* at 874.

demonstrated to be real, substantial or sufficiently vital to suppress 'the Fourth Amendment's normal requirement of individualized suspicion.'"<sup>135</sup> The dissent continued by asserting that *Chandler* bolstered the need to narrow special needs exceptions and required the showing of a real threat—not just an allegation of danger.<sup>136</sup>

The Seventh Circuit removed any doubt that *Chandler* failed to tighten the exception in *Todd v. Rush County Schools*.<sup>137</sup> The court upheld random suspicionless drug testing of high school students participating in any extracurricular activity.<sup>138</sup> What made this finding a particularly egregious and troublesome expansion of the special needs doctrine was the requirement that not only the student, but also the student's parents to participate in random urinalysis testing for drugs, tobacco, and alcohol before the student could participate in extracurricular activities or drive to and from school.<sup>139</sup> The suit commenced when parents refused to consent to the testing.<sup>140</sup>

The district court held that the program was sufficiently similar to the one in *Vernonia Sch. Dist. 47J*, and so it withstood the Fourth Amendment challenge.<sup>141</sup> In affirming, the Seventh Circuit cited three justifications for the suspicionless testing: first, "successful extracurricular activities require healthy students;" second, the program was only applicable to students (and the parents of students) who voluntarily participate in extracurricular activities; and third, participants in extracurricular activities serve as role models for other students, and it "is not unreasonable to couple [this status] with an obligation to undergo drug testing."<sup>142</sup> The court did not emphasize whether non-invasive methods of detection were impracticable options and concluded that the tests were constitutional without individualized suspicion.<sup>143</sup>

The last post-*Chandler* case considered is *Knox County Education Ass'n. v. Knox County Board of Education*.<sup>144</sup> The Sixth Circuit upheld drug testing of employees in safety sensitive positions, including teachers,

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135. *Id.* at 888 (Dennis, J., dissenting; quoting *Chandler*, 520 U.S. at 318).

136. *See id.*

137. *Todd v. Rush County Sch.* 133 F.3d 984 (7th Cir. 1988), *cert. denied*, 525 U.S. 824 (1998).

138. *See id.* at 986–87.

139. *Id.* at 984–85.

140. *Id.* at 985.

141. *See id.*

142. *Id.* at 986.

143. *See id.* at 986–87.

144. 158 F.3d 361 (6th Cir. 1998).

without suspicion.<sup>145</sup> Although the court noted that, like *Von Raab* and *Chandler*, no evidence that a drug abuse problem existed, it held that the interest in ensuring the safety of children within the school system outweighed the privacy interests of teachers.<sup>146</sup> More importantly, the court considered the daily scrutiny teachers faced as a reason for finding a lowered privacy expectation.<sup>147</sup> This treatment of scrutiny seems a clear departure from *Chandler*, where the Supreme Court found that the daily scrutiny to which politicians are subjected lessens the governmental need to test.<sup>148</sup>

Decisions like *Knox County* and *Pierce* suggest that *Chandler* has not reined in the special needs doctrine. While lack of evidence of an actual problem may be cited as evidence that a test is unconstitutional, it is not dispositive. More troubling, while close scrutiny might be evidence that drug testing is unnecessary and overly intrusive, it can also be used as evidence of a lowered privacy expectation. *Chandler's* ultimate effect on the special needs doctrine will be understood fully only when the Supreme Court hears another drug-testing case. The optimistic hope of some—that “the Supreme Court has started a trend towards reserve when applying the ‘special needs’ exception to various testing regimes,”<sup>149</sup> however—is premature.

#### IV. CHANDLER'S POTENTIAL: A MORE JUST EXCEPTION

It is not yet clear whether the *Chandler* Court intended to reinvigorate Fourth Amendment protections by raising the bar for the government, or whether it just took exception to testing in a particular case. If the Supreme Court's drug-testing jurisprudence needs change, the first idea to examine is the Court's re-emphasis on the threshold question—whether the government has a special need to perform a search. In answering this query, the *Chandler* Court focused on the lack of a current drug problem and emphasized the scrutiny of political leaders—scrutiny that should detect drug use without the use of drug testing. This second item involves the same query made when the special needs exception was first developed—are practicable alternatives to performing the search available? One potential alternative that must be considered is individualized suspicion.

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145. *See id.* at 363, 386.

146. *Id.* at 374.

147. *See id.* at 375.

148. *See Chandler v. Miller*, 520 U.S. 305, 321 (1997).

149. Biggins, *supra* note 7, at 800.

## A. WHITHER SUSPICION?

The Supreme Court has acknowledged the problems with the special needs doctrine as it has developed. In fact, Justice O'Connor pinpointed the lack of individualized suspicion as the key weakness of the doctrine in her *Vernonia Sch. Dist. 47J* dissent. Detailing the development of Fourth Amendment law, she wrote:

[T]he individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.<sup>150</sup>

In most Fourth Amendment cases, the Court has held suspicionless searches to be unreasonable.<sup>151</sup> Given this tradition, and not considering the “war on drugs,” this regime should not pass Constitutional muster. As Justice O'Connor pointed out, the “testing of urine is . . . a search of the person, one of only four categories of suspect searches the Constitution mentions by name.”<sup>152</sup> She then criticized the Court for discounting the constitutional arguments too easily. “[A] suspicion-based scheme . . . may not be as effective as a mass, suspicionless testing regime . . . . But there is nothing new in the realization that Fourth Amendment protections come with a price.”<sup>153</sup>

How is it that the government can more freely infringe Constitutional protections when its purposes are other than crime prevention? As Justice O'Connor argued, suspicionless testing should be permitted only where a suspicion-based regime would clearly fail. The Court has dismissed too

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150. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995).

151. *See id.* at 671–72 (citing *Ybarra v. Illinois*, 444 U.S. 85 (1979)).

152. *Vernonia Sch. Dist. 47J*, 515 U.S. at 672–73.

153. *Id.* at 680 (citing *Arizona v. Hicks*, 480 U.S. 321, 329 (1987)). Justice O'Connor distinguished *Vernonia Sch. Dist. 47J* from *Skinner* and *Von Raab*. She argued that “even one undetected instance of wrongdoing could have injurious consequences for a great number of people.” *Id.* at 675. It is curious that she did not apply this same logic in *Chandler*, where clearly the consequences that could result from a drug addict being bribed or blackmailed in office would be at least as disastrous to society as the same happening to a Customs agent. As argued above, evaluating the most extreme potential evil that may result is not a logical means of comparing options. If it were, the employees in *Von Raab* could argue that all people must pass a drug test before leaving their homes and going out in public for safety purposes—after all, think of the harms that could be prevented.

Justice Ginsburg's opinion in *Chandler*, discussed in Part III., and her concurrence in *Vernonia Sch. Dist. 47J* indicate a reluctance to allow suspicionless testing at the expense of Fourth Amendment protections. Carey, *supra* note 2, at 329. O'Connor, on the other hand, attributed her approval of the suspicionless schemes in *Skinner* and *Von Raab* to the societal threat of just one employee working under the influence of drugs. *Id.*

quickly the possibility of alternative, non-invasive means to prevent drug use. The shift of the special needs doctrine away from traditional understandings of the Fourth Amendment makes clear just how expansive the government's surveillance powers have become. Accordingly, traditional ideas relating to criminal searches and seizures should inform a redefinition what special needs are permissible.

Justice Kennedy, writing for the Court in *Skinner* reminds us, as Justice O'Connor did in *Vernonia Sch. Dist. 47J*, that individualized suspicion is not "an indispensable component of reasonableness in every circumstance."<sup>154</sup> As Justice O'Connor also noted,<sup>155</sup> however, a search as intrusive as bodily fluid drug testing had never been allowed in the absence of suspicion before *Skinner* and *Von Raab*.<sup>156</sup>

#### B. THE FOURTH AMENDMENT IN LAW-ENFORCEMENT

The criminal law doctrine of "stop and frisk" developed for similar reasons to the special needs exception. The "frisk" is a search that is neither based on probable cause nor incidental to a lawful arrest but on reasonable suspicion.<sup>157</sup> The Court first defined this doctrine in *Terry v. Ohio*.<sup>158</sup> The Court wrote:

[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.<sup>159</sup>

*Terry* set the standard that an officer is not allowed to act on "his inchoate and unparticularized suspicion or 'hunch,'" but only on "the

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154. *Vernonia Sch. Dist. 47J*, 515 U.S. at 678; *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 665 (1989).

155. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 668–69, 673–74.

156. This fact was widely discussed in scholarship before 1989. *See, e.g.*, GILLIOM, *supra* note 2, at 105. At least one commentator argued that allowing urinalysis in the absence of suspicion was "not a logical outgrowth of American jurisprudence." Jeannette C. James, Comment, *The Constitutionality of Federal Employee Drug Testing: National Treasury Employees Union v. Von Raab*, 38 AM. U. L. REV. 109, 137 (1988). As discussed above, the majority of lower courts have held suspicionless testing unconstitutional; the district court in *Von Raab* went so far as to label such programs "dragnet" searches and decried them as "repugnant" to the Constitution. 649 F. Supp. 380, 387 (1986).

157. *See DUCAT, supra* note 6, at 772.

158. 392 U.S. 1 (1968).

159. *Id.* at 20.

specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”<sup>160</sup> In other words, the “frisk” is allowed in situations where alternative methods—a warrant or establishing probable cause—are impracticable. Even the officer’s “necessarily swift action” must be individualized and based on experience. This doctrine was not established to protect the public from workers who might pose a threat through their incompetence. Rather, it dealt with police officers making decisions in the field, in situations where a mistake could be fatal. If police officers dealing with such “safety-sensitive” situations are so limited by reasonable suspicion, why are employers—dealing with much more controlled situations—not held to the same, if not a higher, standard?

Although the Court admits that drug testing is a search that implicates the Fourth Amendment, its treatment is not the same as other searches. With other searches, the procedure is to determine the following: 1) Did a search take place? 2) Was it certified by a warrant? and 3) If it was not empowered by a warrant, did the offending government agent—based on his or her experience and reason—have no practicable alternative to conducting the search. Administrative searches do not include an inquiry into warrants, and the standard of reasonableness is the balancing test between privacy expectations and the government’s need for testing. As shown, the test is whether a great harm could *possibly* occur if the test is not conducted. While Justice O’Connor admirably argues that this reasonableness standard should require that non-intrusive methods first be found impracticable, focusing on potential harms, rather than potential remedies, has been the actual method.

Even if administrative testing were held to the same standard as law enforcement, clearly not every case discussed here would lead to a different result. *Skinner*, for example, would likely stand since the employers could reasonably base their suspicion on the prerequisite of an accident. *Von Raab*, however, might be overturned. Without specific suspicion, the employer would have to show that an imminent safety threat could result without testing. If a Customs agent were about to go into the field and loss of life could easily result if that agent were under the influence of illegal drugs, for example, the imminence of the threat might justify drug testing. Invasions of privacy conducted on a random basis, however, would probably be unreasonable. It may be possible, on the other hand, that

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160. *Id.* at 27. “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.*

agents are in the field for such extended periods of time that supervision or other methods of detection truly are impracticable. The Court should fully develop this analysis, however, instead of disregarding these issues in light of the government's claimed needs. After all, constitutional rights are at stake.

While the students in *Vernonia Sch. Dist. 47J* belonged to a class known to have a high rate of drug use, which strengthened the government's case, a sufficiently imminent safety threat seems absent without individualized suspicion. Testing just before a student leaps off of the high-dive or steps onto the football field is significantly different from blanket testing before even letting students participate in an extracurricular organization such as the speech team. Additionally, those students whose behavior causes coaches or teachers to suspect drug use could still undergo drug testing. The fine lines are for the courts to set, but requiring suspicion unless there is a significant, imminent threat would make the special needs exception more consistent with the Fourth Amendment in its criminal application.

Perhaps the greatest benefit of instituting a "suspicion unless imminent serious threat" requirement would be consistency, by standardizing expectations. Individuals who have not given rise to criminal suspicion could expect the same security at work. Individuals whose work performance suffers from suspected drug use, or those who act suspiciously or who are imminently engaging in a duty that has serious safety ramifications, could still be subject to testing.

### C. SPECIAL NEEDS AND SYMBOLISM

Although this Note does not outline federal drug policies, the importance of anti-drug efforts warrants discussion. The war on drugs, like other heightened safety-related crime-control policies, functions as a heavy weight in any balancing test against individuals' rights. It has even been charged that, whether consciously or not, "hidden . . . in these [anti-drug] efforts at so-called prevention there is . . . the attempt to achieve a kind of social, legal, and moral dominance over U.S. citizens."<sup>161</sup>

The courts have applied the special needs doctrine broadly in conjunction with the government-wide effort to curb (or appear to curb) drug use at any cost—including the lessening of privacy protections and the

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161. Norman E. Zinberg, *Mandatory Testing for Drug Use and AIDS*, in *TOWARD A NATIONAL POLICY ON DRUG AND AIDS TESTING* 60 (Mathea Falco & Warren I. Cikins eds., 1989).

implementation of broad surveillance programs.<sup>162</sup> Exceptions to individuals' privacy expectations, such as suspicionless drug-testing programs, are a means of attempting to achieve social control. When the government tries to control behavior, rather than to prevent harm, alarm bells go off in the heads of many citizens. Some would prefer a society "marked by a limited state in a contractual relation with citizens . . . [with] systems of surveillance and control . . . limited by a network of legal rights claims."<sup>163</sup> When the government can invade privacy, while showing neither an impending threat of harm nor individualized suspicion however, the protection of this "network of legal rights" is practically worthless.

While one might argue that the direction taken in *Skinner* and *Von Raab* "reaffirms the longstanding principle that neither a warrant nor probable cause . . . is an indispensable component of reasonableness in every circumstance,"<sup>164</sup> a search as invasive as body fluid testing was never permitted without suspicion before these cases.<sup>165</sup> Such invasive actions had been permitted only for law enforcement purposes in circumstances with highly individualized suspicion<sup>166</sup> until the Court allowed drug testing for special need purposes. Some recognized the threat that this exception posed to privacy before the doctrine was applied to drug testing in *Skinner* and *Von Raab*:

In effect, the courts have carved out an exception to traditional Fourth Amendment constraints that would allow what have been variously described as "regulatory searches," "administrative searches," or "inspections" . . . The essence of this exception is that searches not conducted as part of a typical police investigation to secure criminal evidence but as part of a "general regulatory scheme"—one applying standardized procedures to minimize the potential for arbitrariness—need not be based on individualized suspicion.<sup>167</sup>

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162. See GILLIOM, *supra* note 2, at 86.

163. *Id.* at 101.

164. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).

165. See GILLIOM, *supra* note 2, at 105; *supra* text accompanying note 153. One critic commented that allowing urinalysis in the absence of suspicion was "not a logical outgrowth of American jurisprudence." James, *supra* note 156, at 137.

166. See *Schmerber v. California*, 384 U.S. 757 (1966) (allowing blood testing to determine if suspect was driving under the influence). *But see* *Winston v. Lee*, 470 U.S. 753 (1985) (rejecting surgery to remove a bullet, to be used as evidence, from a suspect's body); *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that stomach-pumping to extract evidence swallowed by a suspect "shocks the conscience" and violates the Fourth Amendment).

167. Yale Kamisar, *Searches and Seizures: Drugs, AIDS and the Threat to Privacy*, N.Y. TIMES, Sept. 13 1987, § 6 at 109.

Originally, this exceptional category included several prerequisites, but these standards were loosened to the point where the search need only serve "special needs, beyond the normal need for law enforcement."<sup>168</sup> As the war on drugs grew in intensity, a broader exception became more compelling.

Perhaps *Chandler* could signal the Court's awareness of the infringements on liberty resulting from *Skinner* and *Von Raab*. If this is the case, it makes sense that the *Chandler* Court adopted language and logic from Justice Scalia's dissent in *Von Raab*. What is somewhat troubling, however, is that the *Chandler* Court did not clearly distinguish *Von Raab*.<sup>169</sup> The Court criticized the Georgia statute as serving only a symbolic purpose, but the best explanation for its past inconsistencies is just that—deference to symbolism.

The decisions in *Von Raab*, *Chandler*, and *Vernonia Sch. Dist. 47J* all kowtow to symbolism in one way or another. As Scalia argued, the *Von Raab* majority downplayed the fact that no drug use was being prevented and protected testing which served no functional purpose—except as a symbol of the government's commitment to the war on drugs.<sup>170</sup> In *Vernonia Sch. Dist. 47J*, the Court held that students had a reduced privacy expectation—not because it is difficult to monitor their behavior, as in *Von Raab*; rather, they had reduced privacy expectations because they *were* so heavily monitored. When the Court simultaneously told school children that they should not expect privacy because they are too closely scrutinized and customs agents that they should not expect privacy because they are not watched closely enough, a symbolic message was sent. The message was the same as that of the war on drugs—the government is serious about at least appearing to fight drug use, especially on such symbolically important fronts as high schools. Finally, "mere symbolism" influenced the *Chandler* Court when it decided to take a stand against empty political statements. The Court dismissed the similarities of Georgia's testing

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168. GILLIOM, *supra* note 2, at 106. The former standards included several themes: a long history of judicial and public deference to the enforcement program, strong public interest in the search due to a lack of alternatives, and the need for the search to be a limited invasion of privacy as a nonpersonal, noncriminal search. See *Skinner*, 489 U.S. 602 (1989); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Ry. Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 586 (9th Cir. 1988).

169. The *Chandler* Court held that the close scrutiny to which politicians are subject was evidence of a practicable alternative to drug testing, while in *Skinner* the close government regulation of the industry meant lower privacy interests. In *Von Raab*, the physical examinations Customs agents were required to undergo reduced their privacy expectations, while working in the field with little scrutiny also lowered their expectations of privacy.

170. See discussion *supra* Part II.

program to other programs it approved, focusing on the two factors just discussed—close scrutiny of the individuals and the lack of past drug problems. If the Court actually realized an error in its previous logic, it should have overturned or clearly distinguished its past decisions. Subjecting politicians to a meaningless drug test, to somehow prove something to their constituents, did not sit right with the Justices—indeed, it was a “drug-testing case the Supreme Court didn’t like.”<sup>171</sup>

“Reduced privacy expectations,” “merely symbolic tests,” and even the balancing test itself are tools. They are tools that allow courts to act as lawmakers—setting their own often inconsistent standards for exceptions to constitutional requirements. It is the special needs exception and its balancing test, however, and not a capricious Court that have driven the creation of this unclear field of law. In short, the special needs exception has led jurisprudence astray. A test can be crafted, however, that has more consistency if the Court reconsiders traditional Fourth Amendment tenets.

## V. CONCLUSION

For more than ten years, federal and state government actors have functioned—with the Supreme Court’s approval—outside the boundaries of the Fourth Amendment. It is the employer’s right to acquire information that will help to assess employee performance. The Fourth Amendment does not limit private employers in seeking this information. When the employer is the government, however, the individual has the right to expect more. People must not be made to surrender their privacy, dignity, or liberty allegedly for the “greater good”—unless it is absolutely necessary.

To show the necessity of its search, the government should be required to meet the standards of the Fourth Amendment—meaning its test must be reasonable. The Fourth Amendment should not be subject to a balancing test that uses a government-issue scale.

Government actors outside of law enforcement must at least meet the standards set for law enforcement officers. Suspicion should be required, unless the most imminent of harm looms. Such harm must be real and not symbolic. Finally, alternative, non-intrusive methods must be seriously considered. The individual in a free society should expect no less.

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171. See sources cited *supra* note 2.

