THE CONSTITUTIONAL VALIDITY OF SUSPICIONLESS DRUG TESTING AFTER *CHANDLER v. MILLER*[*]

Walker Chandler[**]
Miranda Doming-Krush[***]

I. INTRODUCTION

The 1997 Supreme Court eight to one decision in *Chandler v. Miller*[1] seemed, at first blush, to be a major victory in the war against universal drug testing. However, a more careful consideration of what the Court did and did not say may leave the reader with a less sanguine view of the current status of suspicionless drug testing. Even after *Chandler*, suspicionless testing of the common populace appears to remain, for the most part, a constitutionally-viable intrusion into individual rights. In the end, the Court found that candidates for public office were among those favored few who may hope to escape unscathed, and fully zipped, from Georgia's law

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** Walker Chandler practices criminal law in Zebulon, Georgia. For 30 years, he has been an outspoken opponent of the so-called "War on Drugs," which he contends is nothing less than a war on non-conforming people. Twice the lieutenant gubernatorial candidate of the Libertarian Party of Georgia, in 1994, he challenged a state law that required candidates for public office to take a drug test as a prerequisite to being allowed placement on the general election ballot. Acting as his own, as well as the other plaintiffs' attorney, he took the matter up through the federal court system and ultimately argued the case before the U.S. Supreme Court in January 1997. On April 15, 1997, the Court ruled eight to one that the challenged law constituted an unconstitutional search under the Fourth Amendment. Mr. Chandler is currently the announced Libertarian candidate for Attorney General in Georgia's 1998 General Election. His web site is located at *www.walkerchandler.com*.

Mr. Chandler represented himself and two other Libertarian Party candidates before the United States District Court for the Northern District of Georgia and argued the case before the Eleventh Circuit Court of Appeals and the United States Supreme Court. For a summary of *Chandler v. Miller*, see Scott Sternberg, Recent Developments, 27 STETSON L. REV. 1023 (1998).

*** B.A., Tulane University, New Orleans, La. 1995; J.D. Candidate, June 1999, St. John's University School of Law, New York.

1. 117 S. Ct. 1295 (1997).

created by an apparent self-righteous state legislature.[2] The rest of us may not be so fortunate. As the reader is probably aware, Supreme Court jurisprudence applies only to state-mandated testing, and in previous cases, the Court has, at least, reluctantly approved governmental testing of customs officers, railroad employees, and school children involved in athletics.[3]

Due to the narrowness of the Court's decision, a standard of review in which the privacy interests of the individual are left to the mercy of yet another arbitrary test was created. It is a test, ostensibly to determine reasonableness, devoid of a substantial foundation in the Fourth Amendment. Beyond concerns of the constitutional validity of suspicionless searches, the issue on which such drug testing cases have thus far been decided, is the issue of the First Amendment violation that occurred when the state attempted to force candidates for governmental office to participate in a symbolic demonstration of acquiescence to the so-called "war on drugs."[4]

Although it is in keeping with the history of Supreme Court jurisprudence for the Court to narrowly construe cases,[5] it is nevertheless disappointing that the Court was not interested in addressing the First Amendment issues involved in a law requiring submission to drug testing as a prerequisite for candidacy for state office. The proposed test was only symbolic in nature, in that it constituted an attempt by the General Assembly of Georgia to require that only those who would tip their hats — or yield their urine — to this country's failed war on drugs should be allowed to run for public office.

There were many reasons the Court might have addressed the First Amendment issues in *Chandler*. One such reason was expressed by Judge Barkett of the Eleventh Circuit in her dissent from that court's consideration of the case, in which she wrote:

> [T]he majority's justification for suspending the requirements of

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2. *See id*. at 1305.

3. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (holding suspicionless drug testing of student athletes reasonable); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (holding suspicionless drug testing of customs agents reasonable); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633–34 (1989) (holding suspicionless drug testing of railroad employees reasonable).

4. *See Chandler*, 117 S. Ct. at 1305.

5. *See* Rescue Army v. Municipal Court of L.A., 331 U.S. 549, 568 (1947) (stating that the Supreme Court follows "a policy of strict necessity in disposing of constitutional issues").

> the Fourth Amendment is the state's interest in officeholders who are "drug free," "honest[ ], clear-sighted[ ], and clear thinking," as well as [insuring that elected officials are persons] "appreciative of the perils of drug use" and "[ ]sympathetic to drug interdiction efforts."
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> . . . By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry. [Georgia Statute § 21-2-140] is neither neutral nor procedural, but, in the majority's own characterization, attempts to ensure that only candidates with a certain point of view qualify for public office.[6]

However, the Court recognized in petitioner's briefs, the use of Judge Brandeis's opinion in *Olmstead v. United States*[7] — used by Justice Scalia in his stinging dissent in the famous drug testing case of *National Treasury Employees Union v. Von Raab*.[8] In *Olmstead*, Brandeis states: "Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[9]

II. THE FOURTH AMENDMENT AND SPECIAL NEEDS

The Court's analysis in *Chandler* began with the "uncontested point" that Georgia Statute § 21-2-140,[10] which required candidates for state office to submit to and pass a drug test, "effects a search within the meaning of the Fourth and Fourteenth Amendments."[11] The only point of contention was whether the test, in the absence of individualized suspicion, was reasonable under a Fourth Amendment analysis.[12] To this end, the Court turned to the "special needs"

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6. Chandler v. Miller, 73 F.3d 1543, 1550, 1552 (11th Cir. 1996) (Barkett, J., dissenting) (second, third and fifth alteration in original).

7. 277 U.S. 438 (1928).

8. 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).

9. 277 U.S. at 479.

10. GA. CODE ANN. § 21-2-140 (1993).

11. Chandler v. Miller, 117 S. Ct. 1295, 1300 (1997).

12. *See id*.

balancing test, constructed in a line of previous cases, as a means of validating searches without the usual Fourth Amendment requirements of a warrant, probable cause, or individualized suspicion.[13]

In *Skinner v. Railway Labor Executives' Ass'n*,[14] the Court identified "`special needs,' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[15] "When such `special needs' . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."[16] By definition, this analysis calls for a subjective weighing of factors. It has been suggested that the balancing test is not a legal analysis at all, but rather, "[i]t merely demonstrates whether or not as few as five members of the Court value a particular government action."[17]

Since § 21-2-140 could not pass "special needs" analysis, the remaining claims were not addressed in *Chandler*. One claim of special importance to both those sympathetic to individual liberty and advocates of drug decriminalization is the State's violation of the First Amendment right of the individual. Although it was in keeping with Supreme Court jurisprudence to halt the inquiry once the narrow Fourth Amendment violation had been identified,[18] it is disappointing that the First Amendment issue was not examined by the Court.

III. THE FIRST AMENDMENT CLAIM

Although the Court refrained from discussing the First Amendment claim, its decision provided a basis for First Amendment analysis. In *Chandler*, after applying the facts to the "special needs" balancing test, the Court concluded that "[t]he need revealed, in short, is symbolic, not `special,' as that term draws meaning from our case law."[19] This conclusion was premised on three factors, dis-

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13. *See supra* note 3.
14. 489 U.S. 602 (1989).
15. *Id*. at 620.
16. *Chandler*, 117 S. Ct. at 1301.
17. George M. Dery, III, *Are Politicians More Deserving of Privacy than Schoolchildren? How* Chandler v. Miller *Exposed the Absurdities of the Fourth Amendment "Special Needs" Balancing,* 40 ARIZ. L. REV. 73, 88 (1998).
18. *See* Rescue Army v. Municipal Court of L.A., 331 U.S. 549, 567 (1947).
19. *Chandler*, 117 S. Ct. at 1305.

tinguishing *Chandler* from prior "special needs" cases.[20] First, Georgia never presented evidence of a drug problem among its elected officials.[21] Second, the officials in question did not perform "high risk safety-sensitive tasks."[22] Finally, Georgia failed to demonstrate how the certification aided interdiction efforts.[23]

The Court recognized counsel for respondent's argument that the test date could be scheduled anytime within thirty days prior to qualifying for a place on the ballot.[24] Thus, the Court recognized that recreational users could plan their drug use around pre-set test dates.[25] As a result, the Court held that the statute would not "ferret out lawbreakers," as all but the most inept drug enthusiast could have avoided a positive test result.[26]

Further, when asked by the Court if Georgia could point to a particular problem with state officials and drug abuse, the State responded "[n]o, there is no such evidence . . . and to be frank, there is no such problem as we sit here today."[27] Finally, the Court noted that the position of candidate for public office was one under relentless scrutiny by public and peers,[28] in direct contrast to other positions found to be particularly unique in terms of the feasibility of scrutiny by superiors, as in *Von Raab*.[29]

Unlike *Von Raab*, candidates for state office are not required to carry firearms or engage in activities concerned with the interdiction of controlled substances.[30] Thus, since the State could not present any evidence of "high risk" activity, the suspicionless drug test could not be justified on grounds of "special needs."[31]

"What is left," said the court, "is the image the State seeks to project. By requiring candidates . . . to submit to drug testing, Georgia displays its commitment to the struggle against drug

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20. *See id*.
21. *See id*.
22. *Id*.
23. *See id*.
24. *See id*. at 1304.
25. *See Chandler*, 117 S. Ct. at 1304.
26. *Id.*
27. *Id*. at 1303 (quoting Tr. of Oral Arg. 32) (alteration in original).
28. *See id*. at 1304.
29. *See id*.
30. *See id*.
31. *See Chandler*, 117 S. Ct. at 1305.

abuse."[32]

Georgia's lack of evidence supporting its policy could have justified a First Amendment analysis. If the test provided no other function than to allow Georgia to make a statement that only "displays its commitment to the struggle against drug abuse,"[33] then the execution of the test is expressive conduct. As such, one's refusal to submit to the test should also be expressive conduct.

IV. THE ELEVENTH CIRCUIT

The Eleventh Circuit did take pause to address the First Amendment issue, though the majority found it insubstantial.[34] Finding that the appellants based their claim on the idea that the "refusal tamely to submit to the government's drug testing edict is itself a protected free speech act similar in nature to refusing to salute a flag or the king's hat set upon a post in the village square,"[35] the court said:

> We read this argument as an appeal to the rationale of cases like *Communist Party of Indiana v. Whitecomb*, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974), which invalidated a state statute conditioning ballot access on the filing of an affidavit disavowing the overthrow of state and national government, and *Bond v. Floyd*, 385 U.S. 116, 87 S. Ct. 339, 17 L.Ed. 2d 235 (1966), which held that exclusion of a member of the Georgia House of Representatives based on his stated opposition to the Vietnam War violated the First Amendment. We think these cases are distinguishable in that they involve pure speech acts, divorced from unlawful conduct.[36]

The Circuit Court further held that the facts at issue were closer to the case of *United States v. O'Brien*,[37] in which the prohibition of draft card burning was upheld since the government's interest was not simply to suppress the expressive aspects of the conduct, but to facilitate success of the draft system.[38]

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32. *Id.* at 1304.
33. *Id.*
34. *See* Chandler v. Miller, 73 F.3d 1543, 1548 (11th Cir. 1996).
35. *Id.*
36. *Id.*
37. 391 U.S. 367 (1968).
38. *See id.* at 376.

The *O'Brien* court held that,

> government regulation of conduct containing "speech and non-speech" elements is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[39]

The Eleventh Circuit found that Georgia's drug testing scheme satisfied the *O'Brien* test.[40] In its decision, the majority opined that the government was not trying to limit speech, but was furthering, in the least restrictive way, the substantial governmental interest of "ensuring that high public officials to whom immense responsibilities are entrusted possess the judgment, probity, and alertness required of them."[41] The Court was also ambivalent about whether the refusal to submit to a drug test was conduct that would qualify as expression.[42]

Thus, the First Amendment argument was rejected by the Eleventh Circuit based on findings of fact[43] while the Supreme Court did not even address the issue.[44] The Eleventh Circuit found that the drug test served a substantial governmental interest to satisfy the *O'Brien* test,[45] while the Supreme Court recognized no tangible governmental interest.[46] On a different note, while the district court was unsure about the expressive value for refusing to submit to the test,[47] the Supreme Court found the test's only function symbolic.[48] Accordingly, the Court's finding places the "refusal to submit" squarely within the facts of *O'Brien.* Thus, the refusal to participate in the conveyance of a message or symbol is an expressive act.

Furthermore, the Eleventh Circuit's rejection of the comparison

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39. *Chandler*, 73 F.3d at 1548 (quoting *O'Brien*, 391 U.S. at 377).
40. *See id*.
41. *Id*. at 1549.
42. *See id.*
43. *See id*. at 1549.
44. *See* Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997).
45. *See Chandler*, 73 F.3d at 1548.
46. *See Chandler*, 117 S. Ct. at 1305.
47. *See id*. at 1299.
48. *See id*. at 1305.

drawn between *Chandler* and *Communist Party* deserves a second look.[49] The court distinguished the cases as involving "pure speech acts, divorced from unlawful conduct."[50] However, this is a misunderstanding of the appellant's argument. To consume an illegal drug is unlawful conduct.[51] However, to refuse to take a test, which the government concedes is symbolic,[52] does not amount to unlawful conduct.[53] Rather, it is a protected expression to both reject the aforementioned statement or express a contrary view.

It was Judge Barkett's dissent that identified the contradiction:

> The majority maintains that the government's purpose is not suppression of free expression. Yet, it supports its holding by citing the importance of ensuring that elected officials are "persons appreciative of the perils of drug use" and "[ ]sympathetic to drug interdiction efforts." Establishing a certain ideology as a "qualification" for holding public office appears to be a content-based restriction on free expression.[54]

As Judge Barkett implies, it is the ideology and not the conduct that is restricted by the test.[55]

Chandler is distinguished from subsequent cases because *Chandler* dealt entirely with the method of testing, not the idea of testing.[56] However, subsequent cases also recognize that the holding in *Chandler* turned solely on the absence of a "special" need.[57] In fact, testing was an extremely important issue to the plaintiffs, since it trumped their First Amendment right to refuse acceptance of Georgia's alleged commitment to the "war on drugs."

V. AFTER CHANDLER

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49. *See Chandler*, 73 F.3d at 1548.
50. *Id*.
51. *See* GA. CODE ANN. § 16-13-30 (1998).
52. *See* Wilcher v. City of Wilmington, 139 F.3d 366, 374 (3d Cir. 1998).
53. *See Chandler*, 73 F.3d at 1548.
54. *Id*. at 1552.
55. *See id.*
56. *Cf.* Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998); Reames v. Department of Public Works, City of Patterson, 707 A.2d 1377 (N.J. Super. Ct. App. Div. 1998).
57. *See* Pierce v. Smith, 117 F.3d 866, 867 (5th Cir. 1997).

The majority of cases dealing with the constitutionality of drug test urinalysis since *Chandler* rely without hesitation on the precarious guidelines of the "special needs" test to determine Fourth Amendment viability.[58] Most often, the issue is the reasonableness of the testing method itself.[59] In at least one case, *Todd v. Rush County Schools*,[60] the Seventh Circuit prevented a broad reading of the prior "special needs" cases, such as *Vernonia School District 47J v. Acton*.[61] In *Todd*, petitioners opposed a school policy requiring the successful taking of a drug test by any high school student wishing to participate in harmless extracurricular activities such as the Future Farmers of America or the Library Club.[62] Those edgy students wishing to join the French Club were saved from the privacy intrusion by the court's reference to *Chandler*, reiterating the need to "define with particularity the group for which testing is justified."[63]

The First Amendment issue has also been raised without success in *Desroches v. Caprio*,[64] involving a search of student backpacks.[65] Desroches argued he was suspended for voicing his objection to a search.[66] However, the court found that he was punished for his refusal to act rather than his statement.[67] Unfortunately, no precedent as of yet has come forth with a successful claim of a First Amendment violation via mandatory submission to a suspicionless drug test.

VI. CONCLUSION

Since the *Chandler* decision, there have undoubtedly been many instances in which local and state governments have been deterred from adopting measures similar to those struck down by the Supreme Court. However, at the same time we have seen the institution of "voluntary drug testing" in Congress and a continuation of political posturing on the part of those who, for the sake of reelec-

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58. *See supra* notes 58–59 and accompanying text.
59. *See Wilcher*, 139 F.3d at 374.
60. 139 F.3d 571 (7th Cir. 1998).
61. *See id.* at 572.
62. *See id*. at 571.
63. *Id*. at 573.
64. 974 F. Supp. 542 (E.D. Va. 1997).
65. *See id*. at 543.
66. *See id*. at 545.
67. *See id*. at 552.

tion, would gladly continue to forge chains with which to bind the disobedient populace. The *Chandler* victory, although significant in that it was the first time the Supreme Court has struck down a drug testing scheme, was nevertheless a minor one.

What *should* disqualify men and woman from running for public office are those things for which adequate tests cannot be formulated, such as tests for ethics, morality and integrity. It is the electoral system, at least in theory, that should provide the test for such qualities. It is ultimately the fault of a poorly informed electorate that allows people, such as those currently holding high office who hypocritically advocate a "war on drugs," while knowing that such an effort is nothing less than a war on the right of the individual to choose his own way of life, to end up in office.

Little can be done to prevent an ignorant public from giving away wholesale the liberties for which their forefathers fought. It is difficult for the authors to imagine that the men and women of 1790 would have submitted willingly to urine testing. The lesson seems clear: liberty is not a thing which can be passed down. It must be maintained through vigilance and struggle. *Chandler v. Miller* was but a minor battle in this ongoing struggle.