BORROWING BALANCE, HOW TO KEEP THE SPECIAL-NEEDS EXCEPTION TRULY SPECIAL: WHY A COMPREHENSIVE APPROACH TO EVIDENCE ADMISSIBILITY IS NEEDED IN RESPONSE TO THE EXPANSION OF SUSPICIONLESS INTRUSIONS

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I. INTRODUCTION

Rejecting the false dichotomy between our security and our ideals, President Obama, in his first inaugural address, harkened back to our Founders' creation of a "charter to assure the rule of law and the rights of

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man."[1] In his speech, President Obama recognized that the protection of security and rights are not mutually exclusive. Instead, they are necessary predicates for the other.[2] The process of reconciling national security—the need to protect both the nation itself and the safety of its citizens—with the protection of civil liberties, remains a consistent challenge for Western governments, which are under increasing pressure as a result of the rise of domestic and international terrorism since the 1960s. But it is the rule of law itself that provides the best tool to achieve this balance and preserve both liberty and security.

Addressing similar challenges, the post-World War II American military justice system was designed to balance the rights of accused soldiers and the need to maintain good order and discipline within the armed forces.[3] As it developed over the past seventy-four years, the Uniform Code of Military Justice (UCMJ), and the justice system it fostered, increased protections for the rights of individuals within the strictures of maintaining discipline—developments not seen until decades later in significant Supreme Court civil-rights cases.[4] Although Groucho Marx famously quipped, "Military justice is to justice what military music is to music,"[5] the reality is that the effort to strike an effective balance

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1. President Barack Obama, Inaugural Address (Jan. 20, 2009).

2. *See id.*

3. *See* U.S. ARMY JUDGE ADVOCATE GENERAL'S SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 12–13 (1959).

4. Defense counsel F. Lee Bailey has said that if accused of a crime, "he would rather be tried in a military court than in any other system of justice because of the protections afforded the military accused." *Military Justice 101 - Part 5: Right to Remain Silent (Article 31 Rights)*, ABOUT.COM U.S. MIL., http://usmilitary.about.com/od/justicelawlegislation/l/aa31rights.htm (last visited Aug. 9, 2014). For example, in Article 31 of the UCMJ, the military required an accused to be warned of the right against self-incrimination sixteen years before the Supreme Court would recognize a less encompassing right in *Miranda v. Arizona*. *Compare* Miranda v. Arizona, 384 U.S. 436, 469, 472 (1966) ("Therefore, the right to have counsel present at that interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights."), *with* UCMJ art. 31(b) (2012) (requiring that servicemembers be warned of their right against self-incrimination). Article 38 of the UCMJ also guarantees an accused the right to defense counsel at no cost, while the Supreme Court only recognized such a right for defendants who can show they are unable to afford counsel. *Compare* Gideon v. Wainwright, 372 U.S. 335, 344 (1963), *abrogated in part by* Scott v. Illinois, 440 U.S. 367 (1979) ("[A]ny [criminal defendant] haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."), *with* UCMJ art. 38(b)(1) ("The accused has the right to be represented in his defense before a general or special court-martial or at an investigation . . . .").

5. *Quotation Details*, QUOTATIONS PAGE, http://www.quotationspage.com/quote/848.html (last visited Oct. 6, 2014).

between individual liberties, the interests of justice, and the complex needs of the unique military society has resulted in a highly credible and effective system for the investigation and adjudication of criminal offenses. Military law, therefore, provides a potentially useful source for broader civilian criminal justice system as the civilian counterpart struggles to strike a similar balance between protecting the security interests of society while preserving fundamental liberties.

Innovations found in the UCMJ—which was enacted by Congress and implemented by the Executive to achieve this balance in the military—may in some instances be logically extended to civilian society by providing tools for federal courts to use in reconciling civil liberties and national security. The UCMJ can be a focus and mechanism for judicial scrutiny of executive actions taken when faced with the increasing threats posed by international terrorism. One such innovation is especially compelling in this regard: Military Rule of Evidence 313 (Rule 313).[6] This rule of evidence was adopted to facilitate the legitimate use of suspicionless searches to protect the safety and security of military units while simultaneously exposing the improper use of such searches as subterfuge to avoid the normal individualized suspicion requirements of the Fourth Amendment.

Accordingly, this Article proposes using Rule 313 as the basis of an analogous Federal Rule of Evidence designed to identify when special-needs searches are impermissibly being used to subvert the protections of the Fourth Amendment. While others have touched on the importance of extending existing Fourth Amendment doctrines to the realm of counterterrorism-related suspicionless searches, and even analogizing Rule 313 as a template to better manage the inevitable expansion of such searches,[7] this Article provides a comprehensive foundation for such an extension. Indeed, it is the direct correlation between the jurisprudential foundations of the special-needs exception and the limitations imposed on its invocation by the courts that are necessary to justify intrusions into zones of individual privacy that demonstrates the wisdom of a rule of evidence-based mechanism to enforce those limitations. It is also essential,

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6. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313 (2012).

7. While other authors have examined Rule 313 for applicability in the civilian context, the premise of this Article will suggest that the military rule should be available to challenge all searches, not only searches based on individualized suspicion or those in the context of terrorism. The following authors have contributed substantially to the discussion over the usefulness of such a federal rule of evidence. Geoffrey S. Corn, *Terrorism, Tips, and the Touchstone of Reasonableness: Seeking a Balance Between Threat Response and Privacy Dilution*, 118 PENN ST. L. REV. 129, 162 (2013); Sharon Finegan, *Closing the Inventory Loophole: Developing a New Standard for Civilian Inventory Searches from the Military Rules of Evidence*, 20 GEO. MASON L. REV. 207, 235–36 (2012).

however, to recognize the almost inevitable expansion of government use of this doctrine in the realm of counterterrorism operations, and the associated risk to individual liberty that will result. Part II of this Article provides the context necessary to understand the value of a Rule 313-based approach to regulating the use of evidence derived from suspicionless searches. Part III offers an in-depth review of the jurisprudential foundation for such searches. Part IV provides an overview of the dangers to liberty inherent in the increasing use of such searches with the contemporary threat of domestic terrorism. Part V analyzes how creating a federal version (and ideally state versions) of Rule 313 will provide a more effective mechanism to balance the interests of security and liberty than the existing ad hoc approach. Placing the burden on the government to justify invocation of the suspicionless-search authority whenever objective evidence creates a reasonable basis to conclude that the use of this tool was a subterfuge to avoid the normal individualized suspicion requirements under the Fourth Amendment, makes two important contributions. First, such a rule contributes to the achievement of a long-term, constitutionally supportable balance between national security and liberty; and second, it recognizes that the personal autonomy and liberty protected by the Fourth Amendment are both an individual and societal good.[8]

II. CONTEXTUAL BACKGROUND

As international and domestic terrorism have become recognized realities after World War II, United States and Western European legal systems have struggled to balance protection of civil liberties with governments' legitimate efforts to protect the safety of their citizens. Increased threats to the safety of the nation and its citizens have led to increasing government security actions that impact freedom of speech, religion, and assembly, as well as the freedom from unreasonable search and seizure. These challenges are not unique to the United States with its constitutional protections of fundamental rights and commitment to civil liberties. Western European nations also struggle with achieving an effective protective balance through appropriate laws. One early example of this struggle resulted from the rise of international hijacking in the late 1960s and early 1970s.[9] This threat led to the imposition of security screening at U.S. and international airports.[10] After the attacks of September

8. Alexander A. Reinert, *Revisiting "Special Needs" Theory via Airport Searches*, 106 NW. U. L. REV. 1513, 1531–32 (2012).

9. *See* COMM. ON COMMERCIAL AVIATION SEC. ET AL., AIRLINE PASSENGER SECURITY SCREENING: NEW TECHNOLOGIES AND IMPLEMENTATION ISSUES 6, 9 (1996).

10. *Id.* at 6.

11, 2001, new security measures were implemented in response to public pressure calling for effective actions to prevent future terrorist attacks.[11] After the 2004 Madrid train bombings and the two London attacks in July 2005, the European Union and its member governments passed laws granting increased powers to the police in an attempt to battle terrorist attacks.[12]

Not surprisingly, citizens have challenged the impacts that these new security measures have had on their protected civil rights, usually through the courts.[13] As a result, the courts have become the arbiter of the balance drawn between security and civil liberties, a role both familiar to them and simultaneously one that is at the periphery of their institutional competence. Facing these challenges after the 9/11 attacks, U.S. courts have fallen back on familiar constitutional doctrines such as the special-needs exception to the Fourth Amendment, which at its core, balances the government interest in security against the privacy interest of the citizenry.[14]

Yet, recognizing their own institutional limitations in the face of the increasing terrorism threats, U.S. courts have remained hesitant to second-guess security decisions made by government experts, or delve into the subjective mindset of individual government agents. However, as the shock of the September 11th attacks began to wane, courts became increasingly more willing to examine government programs and security methods, particularly when government actions infringed on other constitutional freedoms, such as those protected by the First Amendment, or when motivated by racial or religious profiling.[15] Similar conflicts arose in Britain as stringent government security measures impacted individual liberties, specifically freedom of speech, assembly, and press following the July 2005 London bombings.[16] Despite several government inquiries recognizing significant racial disparities in the implementation of these laws, courts in the UK did not restrict the government's security activities, and it was only after the European Court of Human Rights held these laws violated fundamental rights that Parliament curtailed the previous unfettered security

11. *After 9/11: Global Effects on the 'War on Terror,'* BBC NEWS MAG., http://www.bbc.co.uk/news/world-14844727 (last updated Sept. 9, 2011, 17:00).

12. *See, e.g.*, *Fight Against Terrorism*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/index_en.htm (last visited Aug. 10, 2014); *Fight Against Terrorism: Prevention, Preparedness, and Response*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33219_en.htm (last updated Jan. 1, 2005).

13. *See* discussion *infra* Part IV.

14. *See* discussion *infra* Part IV.

15. *See* discussion *infra* Part IV.

16. *See* discussion *infra* Part IV.

powers exercised by the police.[17] Even after these changes, security laws in Britain remain robust. Despite some cases limiting government security actions, U.S. courts, recognizing the limits of their institutional competence, remained hesitant to substitute their judgment for that of the Executive in determining necessary security measures; and Congress has provided little guidance to the courts to assist them in balancing security needs against individual liberties.[18]

Ironically, Congress and the President, through the UCMJ, have provided such guidance to the military justice system in Rule 313, a provision specifically designed to balance the needs of security and military discipline against individual liberties.[19] This rule uses a system of shifting presumptions[20] to maintain the ability to conduct administrative inspections, "ensur[ing] the security, military fitness, or good order and discipline" in the military is confined to its proper role and does not become a subterfuge for government searches that would otherwise violate the Fourth Amendment or infringe other constitutional protections.[21] By focusing on objective evidence, Rule 313's use of shifting presumptions provides a meaningful judicial mechanism to test and, if appropriate, limit government security actions, while remaining well within the institutional and historical competencies of the Judicial Branch. Adopting a similar rule in the Federal Rules of Evidence would provide federal courts with a principled tool to examine government security actions, achieve the appropriate balance between security and liberty, and potentially provide a useful model for implementation of similar protective laws at the state level. Strengthening principled judicial oversight of executive security actions through such an evidentiary rule would reinforce the protections inherent in the Constitution's separation-of-powers principles, contribute to achieving long-term balance between security and liberty, and illustrate the central role of the rule of law in protecting the rights of society in our democratic system of government.

17. *See* discussion *infra* Part IV.

18. *See* discussion *infra* Part IV.

19. *See* MCM, *supra* note 6, MIL. R. EVID. 313.

20. A rebuttable presumption is defined as "[a] conclusion made as to the existence or nonexistence of a fact that must be drawn from other evidence that is admitted and proven to be true." *Presumption*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/presumption (last visited Aug. 9, 2014).

21. *See* MCM, *supra* note 6, MIL. R. EVID. 313.

A. Terry *and* Camara—*The Game Changers*

Contemporaneously with the rise of international terrorism and aircraft hijacking in the 1960s and early 1970s the Supreme Court decided *Terry v. Ohio*[22] and *Camara v. Municipal Court.*[23] Although having nothing to do with terrorism or national security, these two cases, seen as game changers in Fourth Amendment jurisprudence, set the foundation for the future recognition of a special-needs exception to the Fourth Amendment, which is the basis for a majority of the Fourth Amendment reasonableness determinations supporting national security searches.[24] Prior to these two cases, absent exigent circumstances, searches and seizures generally required both probable cause and a warrant to be considered reasonable under the Fourth Amendment.[25]

In *Camara*, the Supreme Court clarified that the warrant and probable-cause requirements of the Fourth Amendment were not obviated in the context of administrative housing inspections conducted to ensure compliance with health, safety, and housing code requirements.[26] Requiring both a warrant[27] and probable cause, the Court nevertheless calibrated the probable cause inquiry to one relevant to the context of the search, recognizing that the Fourth Amendment "test of 'probable cause' . . . can take into account the nature of the search that is being sought."[28] Challengingly, the program in *Camara* relied on a suspicionless, periodic area inspection, or what in the traditional criminal context would have been a complete lack of probable cause. Although requiring a warrant, the *Camara* Court recognized that "the unique character of the[] inspection programs" might require "some other accommodation between public need

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22. Terry v. Ohio, 392 U.S. 1 (1968).

23. Camara v. Mun. Court, 387 U.S. 523 (1967).

24. Reinert, *supra* note 8, at 1520–22.

25. *Id.*

26. *Camara*, 387 U.S. at 527–29. In *Camara*, the Court overruled *Frank v. Maryland*, 359 U.S. 360 (1959), which had allowed warrantless housing inspections. *Camera*, 387 U.S. at 527–28.

27. The warrant requirement served to limit the "discretion of the official in the field" in important ways. *Id.* at 532. The question for the *Camara* court was "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Id.* at 523. The Court concluded that the warrant requirement assured neutral review of whether enforcement of the regulatory scheme required inspection of the premises, whether the inspector was acting under lawful authority, and in determining the lawful limits of the inspection; the Court further noted that "broad statutory safeguards [were] no substitute for individualized review." *Id.* at 532–33.

28. *Id.* at 538 (quoting *Frank*, 359 U.S. at 383 (Douglas, J., dissenting)) ("Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.").

and individual rights," ultimately crafting probable cause as such an accommodation.[29] According to the Court, reasonableness "in determining whether there is probable cause to issue a warrant . . . must be weighed in terms of the[] reasonable goals of code enforcement."[30]

Recognizing that the standards would vary with the program being enforced,[31] the Court explained that even with a complete lack of particularized suspicion, probable cause would "exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[32] The Court further explained that such calibration, while differing from the traditional probable cause in the criminal context, was still reasonable under the Fourth Amendment.[33] The phrase "suitably restricted search warrant" buttressed the inherent cabining of government discretion reflected in the Court's reference to the "reasonable legislative or administrative standards" necessary for a finding of probable cause.[34] This calibration, requiring a nexus between the administrative inspection and search program and the scope of the search, served to limit government discretion. Thus, in *Camara*, the Court introduced "reasonableness balancing" as its test under the Fourth Amendment, which attempts to balance the need to search against the invasion that the search entails[35]—a concept seen one year later in *Terry*.

In *Terry*, the Court tested a police officer's "stop and frisk" against the Fourth Amendment's general reasonableness requirement.[36] In its evaluation, the *Terry* Court did three novel things. First, *Terry* recognized that a warrant and probable cause were not the irreducible minimum

29. *Id.* at 534–35.

30. *Id.* at 535; *see also* Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987) ("In the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness.").

31. *Camara*, 387 U.S. at 538. To conduct this balancing, the Court looked to three criteria. First, the "long history of judicial and public acceptance" of the inspection at issue; next, "the public interest demands that all dangerous conditions be prevented or abated" because it was unlikely any other technique would achieve acceptable results; and lastly, "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." *Id.* at 537.

32. *Id.* at 538.

33. *Id.* at 539 ("If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.").

34. *Id.* at 538–39.

35. *Id.* at 536–37 ("Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.").

36. Terry v. Ohio, 392 U.S. 1, 12 (1968).

requirements of reasonableness under the Fourth Amendment, allowing a limited warrantless search based on reasonable and articulable suspicion—a standard less than probable cause.[37] Second, it incorporated the concept of "reasonableness balancing" from *Camara*[38] to weigh the government's asserted interest in the search against the individual's constitutionally protected interest.[39] Finally, in order to be reasonable, *Terry* required a nexus between the scope of the search and its underlying justification, i.e., the articulated government need.[40]

In reaching its decision in *Terry*, the Court relied on *Camara* to refine and articulate these three concepts.[41] After *Camara* and *Terry*, searches based on a lesser degree of suspicion—or on no suspicion at all—could, in certain circumstances, be reasonable under the Fourth Amendment. Thus, *Camara* and *Terry* became the two cases courts would turn to as they faced the challenges posed by the rise of hijacking and terrorism in the late 1960s and early 1970s.

B. Air Piracy and the Early Security Searches

During the mid-1960s and early 1970s, hijacking became an increasingly common occurrence, with over fifty hijackings occurring in 1969 alone.[42] The dramatic rise in numbers and the media coverage of these dramatic events caused increased public concern about air safety. In response, the U.S. government began to place U.S. Marshals on some

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37. *Id.* at 20–21.

38. Professor Reinert uses three categories to discuss approaches taken in cases dealing with airport-security screenings: (1) reasonableness balancing, (2) consent, and (3) special needs. Reinert, *supra* note 8, at 1515. Few courts relied solely on consent, but extrapolations from *Terry*'s and *Camara*'s reasonableness balancing quickly became the dominant trend. *Id.* at 1524.

39. *Terry*, 392 U.S. at 20–21 ("[I]t is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" (alterations in original) (quoting *Camara*, 387 U.S. at 534–37)).

40. In *Terry*, the Court limited the scope of the search to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29.

41. *Id.* at 20–21 (citing *Camara*, 387 U.S. at 534–37). Although *Terry* is frequently cited for its balancing test, the test was first articulated in *Camara*. *See Camara*, 387 U.S. at 536–37.

42. *Hijacking: 1969 Year in Review*, UNITED PRESS INT'L, http://www.upi.com/Audio/Year_in_Review/Events-of-1969/Hijacking/12303189849225-11/ (last visited June 26, 2014); *see also* United States v. Epperson; 454 F.2d 769, 771 (4th Cir. 1972) ("Up to June 1970, there occurred 80 instances of air piracy of passenger aircraft."); United States v. Lopez, 328 F. Supp. 1077, 1082–84 (E.D.N.Y. 1971) (describing the federal government's response to pervasive hijacking).

commercial flights in 1971,[43] and in the following year, the Federal Aviation Administration's Anti-Hijacking Program mandated airline screenings of passengers by "behavioral profile, magnetometer [screening], identification check, [or] physical search."[44] Predictably, these government-mandated screenings faced Fourth Amendment challenges.[45]

While the details of the initial Anti-Hijacking Program were shrouded in secrecy, courts were nevertheless forced to evaluate their constitutionality.[46] The initial security procedures in 1972 and 1973 used behavioral profiles to identify passengers who would be subject to additional screening through identity checks, the screening of the passenger and her baggage through a magnetometer, and if a magnetometer was unavailable, a search of the passenger and her baggage.[47] As the program expanded and magnetometers became increasingly available, magnetometer screening of all passengers became increasingly common, and finally became required.[48] As these screenings expanded, so too did legal cases evaluating their reasonableness under the Fourth Amendment.

In response to these challenges to the Anti-Hijacking Program, courts universally concluded that the exigencies of time and the danger involved dispensed with the warrant requirement for airport-security searches under

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43. Annie Wu, *The History of Airport Security*, SAVVY TRAVELER, http://savvytraveler.publicradio.org/show/features/2000/20000915/security.shtml (last visited July 26, 2014).

44. *See* COMM. ON COMMERCIAL AVIATION SEC., *supra* note 9, at 6; *see also* United States v. Davis, 482 F.2d 893, 897 *passim* (9th Cir. 1973) (describing the federal government's response to the problem of hijacked airplanes), *overruled en banc by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

45. In addition to Fourth Amendment issues, courts routinely evaluated equal protection arguments, consent issues, and protection of the constitutional right to travel in these cases. *See, e.g.*, *Lopez*, 328 F. Supp. at 1101, 1092–93. To the extent that the screening profiles used indicators that "do not discriminate against any group on the basis of religion, origin, political views, or race . . . they violate none of the traditional equal protection standards." *Id.* at 1086–87. To the extent that the profile was altered to include any of these categories, courts were quick to police these differences. *Id.* at 1101–02.

46. Because the swift nature required of the anti-hijacking security procedures that conflicted with the warrant requirement, these systems required a thorough analysis under the Fourth Amendment. *See id.* at 1092. Differing from today's universal screening requirements, magnetometer screenings were initially not available at all airports or required of all passengers. *Id.* at 1082. "The [Anti-Hijacking Program P]rogram [was] designed to speed passengers who are unlikely to present danger and to isolate, with the least possible discomfort[] or delay, those presenting a substantial probability of danger." *Id.* at 1083. *Lopez* presents the best overview of the initial Anti-Hijacking Program security elements. *Id.* As the air security situation deteriorated, the Federal Aviation Administration increased security requirements mandating either magnetometer or physical search of all passengers and their luggage to ensure the absence of weapons or explosives, and the stationing of armed government agents to respond to emergencies at airports. *See Davis*, 482 F.2d at 900–02, 904.

47. *Davis*, 482 F.2d at 900–02, 904.

48. *Id.* at 906 n.32.

both *Terry* and *Camara*.[49] But it was the legality of the searches themselves that posed more conceptual difficulties. Courts struggled to justify the initial magnetometer screens under existing Fourth Amendment doctrine as they were often used when no individualized suspicion existed, or at best when the behavioral profile flagged an individual for heightened scrutiny. Facing these conceptual difficulties, courts often looked to a combination of the behavioral profile, suspicious passenger behavior, positive unexplained magnetometer readings, or a combination of circumstances to justify the magnetometer screens, frisks, or hand searches of the passenger and the passenger's baggage.[50]

For those cases where suspicious passenger behavior provided reasonable and articulable suspicion under *Terry*, courts were able to uphold the searches as reasonable under a routine application of *Terry*.[51] As magnetometer use became increasingly more common, courts, relying on *Terry* as authority, balanced the minimal intrusion of a magnetometer screen against the substantial dangers posed by air piracy to find the magnetometer screen as per se reasonable under the Fourth Amendment, even though no particularized suspicion existed to justify them.[52] In this

49. *E.g.*, *Lopez*, 328 F. Supp. at 1092.

50. Blanket airport-security searches were not supported by any particular suspicion at their inception. However, courts did accept the behavioral profile of the Anti-Hijacking Program to provide the required reasonable, articulable individualized suspicion under *Terry* for the subsequent use of the magnetometer, a request for identification, or both. *Lopez*, 328 F. Supp. at 1098. Often the profile identification would lead to an interview with airline personnel or a U.S. Marshal, which would produce suspicious behavior to justify a magnetometer screen, which would in turn produce a positive result, which could then justify a *Terry* frisk or search of baggage. *Id.* at 1083. The Court's concern over the Orwellian implications of blanket electronic surveillance is exemplified in *Lopez*; nevertheless, courts allowed the use of the profile when combined with other indicators giving rise to reasonable suspicion, however slight, given the substantial danger of air piracy. *Id.* at 1100 (allowing 100% magnetometer screen when coupled with a behavioral profile to trigger additional inquiry). However, if applicable, courts in particular cases did rely on the *Terry* stop-and-frisk authorization if supported by the facts. *See id.* at 1098; *see also* United States v. Ruiz-Estrella, 481 F.2d 723, 730 (2d Cir. 1973) (holding that failure to produce reasonable articulable facts failed to support *Terry* search at an airport); United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972) (upholding *Terry* search supported by specific articulable facts); United States v. Lindsey, 451 F.2d 701, 704 (3d Cir. 1971) (finding an appropriate *Terry* stop at an airport).

51. *See, e.g.*, *Lindsey*, 451 F.2d at 704 (upholding a normal *Terry* pat-down after observing nervous demeanor and bulges in jacket).

52. United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); *see also* United States v. Albarado, 495 F.2d 799, 806, 810 (2d Cir. 1974) (finding magnetometer search reasonable); *Bell*, 464 F.2d at 675 (allowing *Terry* search of passenger who was a "selectee" under the hijacker profile used at the time, had no identification, admitted being on bail for attempted murder and narcotics charges, and activated the magnetometer). *But see* United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972) (holding that potential denial of boarding based on hijacker profile and inadequate explanation of ticket and identification in another person's name did not support warrantless search of baggage).

conceptual shift, courts dispensed with the discussion of the reasonable suspicion necessary to justify the magnetometer screens at their inception, a discussion required under a strict application of *Terry*. Instead, courts directly balanced the privacy intrusion of the magnetometer screen against the governmental interest in searching to determine the reasonableness of the search,[53] thus using the suspicion-based standard from *Terry* to justify a suspicionless search.[54] In some cases, courts further reduced the degree of suspicion required under *Terry* in the context of airport-security searches, creating a "*Terry*-lite" rule, or expanding the scope of the search allowed under *Terry* to automatically include all baggage because of the danger inherent in the air piracy context.[55]

This shift occurred in several steps. First, the exigencies of screening for weapons and explosives at an airport were analogized to that of the street-side frisk for weapons in *Terry* in both scope and purpose, thus excusing the warrant requirement.[56] Next, both *Camara* and *Terry* were used to support a general reasonableness-balancing test, one where the government interest in searching was balanced "against the invasion of privacy involved,"[57] a test now undertaken with no prerequisite of probable cause or reasonable suspicion. The government interest in searching was

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53. United States v. Epperson, 454 F.2d 769, 771–72 (4th Cir. 1972) ("The danger is so well known, the governmental interest so overwhelming, and the invasion to privacy so minimal, that the warrant requirement is excused by exigent national circumstances. . . . Such a search is more than reasonable; it is a compelling necessity to protect air commerce and the lives of passengers."); *see also* United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) ("The reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion.").

54. *See supra* note 36 and accompanying text. Although courts grappling with the airport-security cases routinely did so from a *Terry* standpoint, the court in *Davis* explicitly found its solution in *Camara*'s administrative search provisions. *Davis*, 482 F.2d at 909–10.

55. *See* United States v. Fern, 484 F.2d 666, 667, 669 (7th Cir. 1973) (finding reasonable suspicion to justify search under *Terry* when passenger met profile and acted nervous, even without magnetometer); United States v. Legato, 480 F.2d 408, 410, 414 (5th Cir. 1973) (upholding search in the parking structure of the airport); United States v. Moreno, 475 F.2d 44, 50 (5th Cir. 1973) (rejecting view that airport-security personnel must always restrict themselves to a pat-down search when there is a proper basis for an air piracy investigation).

56. *Epperson*, 454 F.2d at 771.

57. *Albarado*, 495 F.2d at 804–05 ("[W]e note our guideline for decision lies in the language—through [sic] not the specific holding—of *Terry v. Ohio* . . . [in] that the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures, since an airport search as a practical matter could not be subjected to the warrant procedure. The ultimate standard of the [F]ourth [A]mendment on which we must base our opinion, therefore, is one of reasonableness. . . . [T]he reasonableness of a search depends upon the facts and circumstances and the total atmosphere of each case. . . . Our inquiry here must be directed to the basic issue whether in the totality of circumstances such a search is reasonable." (internal quotation marks omitted)); *see Slocum*, 464 F.2d at 1182; *Epperson*, 454 F.2d at 771.

then conceptualized as "the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and pre-criminal events,"[58] a very thinly sliced differentiation from "general law enforcement." The Fifth Circuit described the air piracy situation as "an exceptional and exigent situation under the Fourth Amendment."[59] Finally, like *Terry*, the primary purpose of the airport searches was viewed as protecting the safety of the officer and those around her, with the scope of the search limited to the government's purpose.[60]

Rather than rely on *Terry*—with its inherent difficulties with individualized suspicion in blanket airport-security screening—some courts concluded that *Camara*'s administrative-search exception was a more appropriate approach.[61] Under this approach, searches "conducted as part of a general regulatory scheme in furtherance of an administrative purpose" can be reasonable under the Fourth Amendment even absent "a showing of probable cause directed to a particular place or person to be searched."[62] Under *Camara*, the reasonableness of a search is evaluated "by balancing the need to search against the invasion which the search entails."[63] For the Ninth Circuit in *Davis*, the inquiry was clear:

> As we have seen, screening searches of airline passengers are conducted as part of a general regulatory scheme in

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58. *Epperson*, 454 F.2d at 771. This language is reminiscent of the parsing of probable cause in *Camara*, and will be seen in the special-needs jurisprudence and its warning against general law enforcement purpose; this Article will go on to describe the similarity as outlined in Rule 313(b). *See* discussion *infra* Part V. Rule 313 allows inspections for weapons or contraband as long as the primary purpose of the inspection is to determine and ensure military fitness. *See* MCM, *supra* note 6, MIL. R. EVID. 313(b).

59. *Moreno*, 475 F.2d at 48.

60. *See Epperson*, 454 F.2d at 771–72 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

61. *See* United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973), *overruled en banc by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007). The Ninth Circuit explicitly relied on *United States v. Biswell*, *Wyman v. James*, and *Camara* in coming to its conclusion. *See id.* at 908 & n.40. Even the short passage of time from *Lopez* in 1971 to *Davis* in 1973 resulted in dramatic changes to the Anti-Hijacking Program. *See id.* By 1973, when the Ninth Circuit evaluated the screening procedures in *Davis*, all passengers were required to pass through magnetometers as part of the security screening procedures mandated by the government, thus lacking the individualized suspicion required under *Terry*. *See id.* For the Ninth Circuit, reliance on *Terry* also suffered from scope problems as *Terry* justified only a quick pat-down to ensure that the person did not have a weapon immediately available to use against the officer. *Id.* at 907.

62. *Id.* at 908.

63. *Id.* at 910 (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)). In its balancing of the government need, the court concluded:

> The need to prevent airline hijacking is unquestionably grave and urgent. The potential damage to person and property from such acts is enormous. . . .
>
> A pre-boarding screen of all passengers and carry-on articles sufficient in scope to detect the presence of weapons or explosives is reasonably necessary to meet the need.

Id. (footnote omitted).

> furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.[64]

Thus, *Camara* provided a valuable approach for the airport-security cases: It avoided the problem of the lack of traditional, individualized probable cause or reasonable suspicion inherent in cases relying upon *Terry* to justify airport-security searches, yet used the same reasonableness-balancing test. Sufficient regulations existed in the Anti-Hijacking Program to allow the courts to evaluate its regulatory and administrative standards as justification for the need for both the search and its scope.[65] Outlining the permissible scope of such a search, the Ninth Circuit chose to borrow from *Terry* to narrow the scope, explaining that "an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it."[66] Finally, under this administrative-search exception, a warrant was not required if "the burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search."[67] Again, with the exigencies of time and danger of the airport-security screening, no warrant was required.[68]

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64. *Id.* at 908. The Ninth Circuit initially predicated its conclusion on passengers' ability to avoid the search by electing not to board the aircraft. *Id.* at 910–11. However, by tying this caveat to the limitation of permissible scope authorized by *Terry*, the court also recognized the caveat as protecting the passengers' constitutional right to travel. *Id.* at 912. The Ninth Circuit later overruled this caveat in *United States v. Aukai*, recognizing that the administrative-search exception did not rely on consent. United States v. Aukai, 497 F.3d. 955, 959 (9th Cir. 2007) (en banc). *But see* Ferguson v. City of Charleston, 532 U.S. 67, 90–91 (2001) (Kennedy, J., concurring) (discussing the concept of consent as relevant to the reasonableness of the intrusion under the special-needs exception).

65. *See generally Davis*, 482 F.2d at 897–904 (providing an excellent discussion of the evolution of the Anti-Hijacking Program in the U.S.).

66. *Id.* at 910 & n.49 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968))); *see also* United States v. Hartwell, 436 F.3d 174, 181 (3d Cir. 2006) (adopting an administrative-search exception to uphold magnetometer and other airport-security searches).

67. *Camara*, 387 U.S. at 533 ("In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.").

68. *Id.*; *see also* Downing v. Kunzig, 454 F.2d 1230, 1232–33 (6th Cir. 1972) (upholding limited searches of briefcases and packages for weapons or explosives in federal courthouse where special circumstances of danger and balancing of competing interests were clearly on the side of upholding a limited search).

A common issue threaded throughout the early airport-security cases was that of consent. First were contentions by the government that airport searches were justified by implied consent either because the Anti-Hijacking Program regulations required passengers identified under the air carrier's security program to consent to a search or be denied boarding, or alternatively because prominent notices informed passengers that they and their baggage were subject to search.[69] The government argued that these facts led to the conclusion that passengers had impliedly consented to search by purchasing an airline ticket and attempting to board an aircraft.[70] Courts, however, applying the high standard required to waive a constitutional right, rejected that theory,[71] finding that posted notices or acquiescence to authority were insufficient to waive passengers' Fourth Amendment rights.[72] In addition to holding the government to its burden of showing that any consent was freely and voluntarily given, courts did not permit the government to condition the exercise of the constitutionally protected right to travel on the relinquishment of Fourth Amendment rights[73]—an early application of the unconstitutional conditions doctrine.

Secondly, courts evaluated what became the "right to leave" argument. The Anti-Hijacking Program regulations, while not mandating a search, did

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69. *See Davis*, 482 F.2d at 913–15 (analyzing the role of "voluntariness" necessary to find that passengers impliedly consented to preboarding searches); United States v. Lopez, 328 F. Supp. 1077, 1092–93 (E.D.N.Y. 1971).

70. *Id.*; *see Davis*, 482 F.2d at 913–15; *Lopez*, 328 F. Supp. at 1092–93.

71. United States v. Albarado, 495 F.2d 799, 806–07 (2d Cir. 1974) ("While a search which would otherwise be unlawful may through the consent of the person searched become lawful, such consent entailing as it does the waiver of a constitutional right, must be freely and voluntarily given; it must not be directly or indirectly the result of coercion. To make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, in many situations a form of coercion, however subtle." (citations omitted)).

72. *See, e.g.*, United States v. Edwards, 498 F.2d 496, 501 (2d Cir. 1974) (holding consent goes to reasonableness, not necessarily waiver); *Albarado*, 495 F.2d at 806–07; United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973); *Davis*, 482 F.2d at 913–14; United States v. Ruiz-Estrella, 481 F.2d 723, 727–28 (2d Cir. 1973); United States v. Meulener, 351 F. Supp. 1284, 1287–88 (C.D. Cal. 1972); *Lopez*, 328 F. Supp. at 1092–93. *But see, e.g.*, United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973) (finding signs and public address announcements that all passengers were subject to search supports inference of consent, akin to individuals participating in a closely regulated business); United States v. Skipwith, 482 F.2d 1272, 1277, 1281 (5th Cir. 1973) ("[The right to leave] greatly damages the prophylactic purpose of the search procedure. Such an option would constitute a one-way street for the benefit of a party planning airplane mischief, since there is no guarantee that if he were allowed to leave he might not return and be more successful. Of greater importance, the very fact that a safe exit is available if apprehension is threatened, would, by diminishing the risk, encourage attempts."); United States v. Edwards, 359 F. Supp. 764, 768 (E.D.N.Y. 1973), *aff'd*, 498 F.2d 496 (2d Cir. 1974) (finding no requirement for explicit warning of right not to consent so long as the passenger did not board the aircraft).

73. *See Albarado*, 495 F.2d at 806–07; *Davis*, 482 F.2d at 913–14; *Meulener*, 351 F. Supp. at 1288; *Lopez*, 328 F. Supp. at 1092–93.

require that the airline deny boarding to anyone refusing to consent to a search after meeting the profile or activating the magnetometer.[74] Several courts considered whether passengers' actual knowledge that they could choose to leave and not board the aircraft, and therefore avoid a search, was relevant to the assessment of either the validity of any consent gained, or the reasonableness of the scope of the search.[75] Other than the Ninth Circuit, few courts followed this theory, which initially considered that a passenger's consent was relevant to the permissible scope of the search.[76]

However, the Ninth Circuit disavowed this theory in 2007, clarifying that administrative searches, upon which their analysis was based, were not dependent on consent.[77] Instead, all that was required in an otherwise reasonable airport search conducted pursuant to statutory authority was a "passenger's election to attempt entry into [a] secured area."[78] Nevertheless,

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74. *Davis*, 482 F.2d at 911 n.51.

75. *See, e.g.*, *Meulener*, 351 F. Supp. at 1289–91. For these courts, the purpose of the search was to preclude weapons and explosives from being taken on-board the aircraft. *Id.* at 1288–89. Therefore, to be truly voluntary, any consent gained had to be based on the passenger's actual knowledge of the right to choose to not board the aircraft and avoid the search. *Id.* at 1289–90. Additionally, if a passenger chose not to board, a search was no longer reasonably related to the purpose of the search. *Id.*; *see also Davis*, 482 F.2d at 910–912 (discussing consent under circumstances of airport-security check). *Contra* United States v. Cyzewski, 484 F.2d 509, 513 n.4. (5th Cir. 1973); *Skipwith*, 482 F.2d at 1277 (rejecting right-to-leave argument).

76. *Davis*, 482 F.2d at 910–12 (discussing consent in the context of purposes of airline-security search). *But see* United States v. Aukai, 497 F.3d. 955, 960–61 (9th Cir. 2007) (en banc) (overruling *Davis*'s conclusion that consent to search may be revoked and search cannot be forced at that point after 9/11). The *Aukai* court further held that "where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, all that is required is the passenger's election to attempt entry into the secured area of an airport." *Aukai*, 497 F.3d at 961 (footnote omitted) (citation omitted) (citing United States v. Biswell, 406 U.S. 311, 315 (1972)).

77. In *Aukai*, the Ninth Circuit returned back to the basis of the decision in *Davis*—the administrative-search inspection. *Aukai*, 497 F.3d at 960–61. *Davis* held that the passenger could revoke his consent to search at any time because the government's need for the search had been satisfied by the deterrence established by the airport-security search program, and continuing the search when the passenger decided not to board the aircraft would go beyond the necessary nexus between the government need justifying the search and the scope of the search. *Davis*, 482 F.2d at 910–13. However, in *Aukai*, relying on *Biswell*, an administrative-inspection case, the focus was on the government's need, not on consent, just as the administrative inspection of a licensed firearms dealer was the justification of the inspection, not the consent of the firearms dealer. *Aukai*, 497 F.3d at 960–61. The Ninth Circuit returned the focus of the reasonableness of the airport-security administrative inspection to a person's initial decision to subject herself to the security regime, similar to the initial decision to enter into a closely regulated industry like a federal firearms dealer or federally licensed alcoholic beverage dealers. *See id.*; *see also Biswell*, 406 U.S. at 315–16 (discussing federal firearms dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72, 73–74 (1970) (discussing federally licensed alcoholic beverage dealers). Thus, as no consent was required in *Camara* for the homeowner to submit to administrative housing inspections, the decision to submit to airport-security inspections was made at the point of entry into the security screening line. *See Aukai*, 497 F.3d at 960–61.

78. *Aukai*, 497 F.3d at 961.

the public's knowledge and acceptance that searches were an integral part of the flying experience was, and continues to be, relevant to *Camara*'s reasonableness balancing by affecting the perception of the "invasion [that] the search entails."[79] Even if not seen as requirements in and of themselves—because they affect the objective and subjective invasion of privacy—consent, notice, or the opportunity to avoid the search continued to be relevant considerations in the general reasonableness-balancing test.

As discussed above, a key difference between these approaches, all reasonable under the Fourth Amendment, is that the *Terry* stop-and-frisk approach requires at its inception some degree of individualized suspicion based on reasonable and articulable facts, while the *Camara* approach accepts that no particularized suspicion exists and relies upon other safeguards to control government behavior. As it developed in the early airport-screening cases, the reasonableness-balancing approach, while originally premised on *Terry* in many cases, became unmoored from *Terry*'s requirement of individualized suspicion, perhaps reflecting (sometimes explicitly) the incorporation of *Camara*'s reasonableness balancing with its calibration of probable cause to the administrative and legislative standards authorizing the search. Both approaches relied on the required nexus between the government purpose authorizing the search and the scope of the search to restrict the government official's discretion. These early airport-screening cases took place against the backdrop of the escalation of air piracy with its extreme danger to lives and property—with at least one circuit court of appeals describing airport-security searches as "an exceptional and exigent situation under the Fourth Amendment."[80]

Moving forward, the Supreme Court would use *Terry*, *Camara*, and the experiences of the lower federal courts in the early airport-security cases as it developed the Fourth Amendment's special-needs exception. These earlier airport-screening cases were the quintessential special-needs cases, occurring a decade before that term appeared. Ironically, a general reasonableness-balancing test was used in these early cases to extend *Terry* searches where no individualized suspicion existed, an extension of *Terry* initially rejected by the Supreme Court in *Brown v. Texas* and *Delaware v. Prouse*.[81] Nonetheless, in more narrow contexts "in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," the Supreme Court would come

79. Camara v. Mun. Court, 387 U.S. 523, 537 (1967).

80. United States v. Moreno, 475 F.2d 44, 48 (5th Cir. 1973); *see also* United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974).

81. Brown v. Texas, 443 U.S. 47, 51–52 (1979); Delaware v. Prouse, 440 U.S. 648, 662–63 (1979).

to accept that suspicionless searches could indeed be reasonable under the Fourth Amendment.[82]

III. SPECIAL NEEDS—BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT

Although the Supreme Court had recognized a limited exception to the warrant and probable-cause requirements in *Terry*, it did so sparingly. Rejecting a similar argument in its companion case, *Sibron v. New York*, the Court reiterated that only a reasonable, articulable suspicion that a person is armed and poses a threat to a police officer or others justifies a *Terry* stop and frisk.[83] Even faced with the Court's cautionary language in *Terry* and *Sibron*, the lower courts dealing with the significant air security threat discussed above attempted to articulate when such security searches were reasonable under the Fourth Amendment, grappling with *Terry* as authority for blanket suspicionless airport searches.[84] In many cases, these courts extended *Terry* beyond its original limited circumstances. Faced with the same air piracy threat, other courts, relying on *Camara* and later administrative-inspection cases,[85] attempted to articulate when warrants were not required, and how government discretion could be limited with their absence. Under both approaches, reasonableness under the Fourth Amendment for these hard cases became a balance between "the need to search [or seize] against the invasion which the search [or seizure] entails."[86]

The doctrinal developments compelled by the early airport-security cases became the genesis for the Supreme Court's special-needs jurisprudence, as it too was forced to grapple with situations where significant government needs for searches outside of the traditional criminal-law context became more critical.[87] Although decided nearly a

82. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985).

83. Sibron v. New York, 392 U.S. 40, 64–66 (1968).

84. *See* discussion *supra* Part II.B.

85. *See* New York v. Burger, 482 U.S. 691 (1987) (concerning an automobile junkyard); O'Connor v. Ortega, 480 U.S. 709 (1987) (evaluating a government office); Donovan v. Dewey, 452 U.S. 594 (1981) (dealing with underground and surface mines); Michigan v. Tyler, 436 U.S. 499 (1978) (relating to an arson investigation).

86. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (alterations in original) (quoting Camara v. Mun. Court, 387 U.S. 523, 534–35 (1967)).

87. In *National Treasury Employees Union v. Von Raab*, the Supreme Court quoted Judge Friendly's opinion in *United States v. Edwards*:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the

decade after many of the airport-security cases, the Supreme Court in 1985 followed a familiar path blazed by those cases when it decided *New Jersey v. T.L.O.*, a case involving a school administrator's search of a student's purse.[88] Recognizing the special needs in the case—both the unique relationship between students and school officials, and the school's need to maintain discipline and protect the educational environment—the Court dispensed with the traditional warrant and probable-cause requirement as being inconsistent with those needs.[89] After balancing the need to search against the intrusion the search entailed under *Camara*, the Court, using *Terry* as both authority and a benchmark, concluded that reasonable suspicion was the appropriate standard to satisfy the Fourth Amendment's reasonableness standard in that case.[90] *Terry* also served as a benchmark for the appropriate scope of such a search.[91]

Agreeing that there were limited exceptions to the probable-cause requirement, the Court in *Ferguson* cited Justice Blackmun's concurrence in *T.L.O.* in which reasonableness could be determined by "a careful balancing of governmental and private interests," ultimately "conclud[ing] that such a test should only be applied 'in those special circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[92] Thus, *Terry* and *Camara* provided the basis for the Court—as they did for the lower federal courts dealing with the airport-security cases—to dispense with the

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passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)).

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

89. *Id.* at 340.

90. *Id.* at 337–42 (quoting *Camara*, 387 U.S. at 536–37).

91. *Id.* at 341–42 ("Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." (citation omitted) (internal quotation marks omitted)).

92. Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7, 75 (2001) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)). In *Ferguson*, the Supreme Court traced the history of the special-needs exception by focusing on Justice Blackmun's concurrence in *T.L.O.* as the origin of the term, and explained that the "Court subsequently adopted the 'special needs' terminology in *O'Connor v. Ortega* . . . and *Griffin v. Wisconsin*, . . . concluding that, in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification." *Id.* In 1987, the Court recognized such special needs in the context of work-related searches of an employee's desks and offices in *O'Connor*, and in the search of a probationer's home in *Griffin*, weighing the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements. *See* O'Connor v. Ortega, 480 U.S. 709, 709–10 (1987); Griffin v. Wisconsin, 483 U.S. 868, 870–72 (1987).

warrant requirement if the "burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search,"[93] and to endorse "balancing the need to search against the invasion which the search entails" as the ultimate test of reasonableness under the Fourth Amendment where these special needs existed.[94]

While *T.L.O.* involved "some quantum of individualized suspicion,"[95] the Court was soon called upon to address whether its special-needs doctrine extended to situations where no particularized suspicion existed—a question reserved in *T.L.O.*[96] Two cases would test this proposition in 1989, and both addressed drug-testing programs established or mandated by the government.

Prior to these cases, only in 1976's *United States v. Martinez-Fuerte* had the Court sanctioned a brief, investigatory suspicionless stop near the border.[97] Deciding in that case that the government's need to control the flow of illegal aliens into the country outweighed the limited intrusion on Fourth Amendment interests in the brief stop and questioning at an established highway border checkpoint, the Court analogized the brief checkpoint stop to *Camara*'s use of an "area warrant" to inspect for housing violations.[98] Because "[t]he Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of

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93. *T.L.O.*, 469 U.S. at 340.

94. *Id.* at 337.

95. *Id.* at 342 n.8.

96. *Id.* (reserving the issue of the reasonableness of the search if there is no individualized suspicion). In *T.L.O.*, there was reasonable suspicion that evidence of smoking would be found in T.L.O.'s purse. *Id.* at 329. In *Griffin*, the Court upheld warrantless searches of a probationer's house based on "reasonable grounds" under a regulatory program and the special need of the probation system. *Griffin*, 483 U.S. at 875–76. Reasonable grounds, however, still required an articulation of particularized suspicion. *See id.* at 878 (discussing the reasonableness requirement as less than probable cause). In *O'Connor*, the Court allowed a government employer to conduct warrantless searches of an employee's desks and offices without probable cause, deviating from the traditional standard because of the substantial government interests in the efficient and proper operation of the workplace. *O'Connor*, 480 U.S. at 725 ("[S]pecial needs, beyond the normal need for law enforcement, make the . . . probable-cause requirement impracticable." (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment))). *O'Connor* also involved individualized suspicion. *Id.* at 726. In later special-needs cases, the Court would cite both *Griffin* and *O'Connor* as authority for the development of this exception, and its exploration of what it meant to have a need apart from the normal need for law enforcement. Both cases, while discussing *T.L.O.*, also went back to *Camara*.

97. United States v. Martinez-Fuerte, 428 U.S. 543, 545, 560–61 (1976) ("The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion. This is clear from *Camara v. Municipal Court*." (footnote omitted) (citation omitted)).

98. *Id.* at 561–62 (internal quotation marks omitted).

individuals,"[99] two major factors leading to approval of *Martinez-Fuerte*'s routine highway checkpoint were that they were less likely than roving checkpoints to lead to fear or concern from motorists and, by being set up by higher level administrators, were less subject to the discretion of officials in the field.[100] Although not discussed in terms of a government special need, and instead using *Camara* and administrative inspections as authority, *Martinez-Fuerte* would serve in future special-needs and traffic-checkpoint jurisprudence as authority for suspicionless searches. Nevertheless, in other contexts in 1979, the Court in *Delaware v. Prouse* and *Brown v. Texas* rejected two attempts to expand *Terry* to allow seizures of vehicles or persons, absent reasonable, articulable suspicion.[101] Only in the administrative-inspection context had the Court allowed what could be termed suspicionless administrative searches, and then only when the discretion of officials in the field was constrained by an administrative warrant or by a specific statutory or regulatory scheme.[102] It was against this backdrop that the Court considered *Skinner v. Railway Labor*

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99. *Id.* at 554.

100. *Id.* at 558–59; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (discussing roving patrols). After a series of cases in the '70s that challenged searches and seizures conducted as part of the Border Patrol's traffic-checking operations, the Supreme Court maintained the requirement for individualized suspicion in all cases except *Martinez-Fuerte*, which provides an excellent discussion of the prior cases and their distinctions. Because of these concerns expressed in *Martinez-Fuerte*, the Court did not approve suspicionless searches or seizures at roving checkpoints in *Brignoni-Ponce*. *Brignoni-Ponce*, 422 U.S. at 884. The Court determined that these fixed checkpoints were constitutionally reasonable because:

> [t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources . . . [who] will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.

Martinez-Fuerte, 428 U.S. at 559. Additionally, the "visible manifestations of the field officers' authority at a checkpoint provide substantially the same assurances" as the warrant serves in *Camara*. *Id.* at 565. Finally, the Court characterized the stop as a brief stop during which all that is required are answers to one or two questions and possible production of a document showing the right to be in the U.S.—with neither the vehicles nor occupants being subject to a search, and the visual inspection of the vehicle limited to what can be seen without a search. *Id.* at 558.

101. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979); Brown v. Texas, 443 U.S. 47, 48–49, 52–53 (1979). Law enforcement also pushed the boundaries of *Terry*, seeking to expand either the scope of *Terry* or its basis. In *Prouse* and *Brown*, the Court rejected attempts to expand *Terry* to allow suspicionless vehicle stops and seizures without reasonable and articulable suspicion.

102. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 599–600 (1981); Michigan v. Tyler, 436 U.S. at 506 n.5, 506–07 (1978); United States v. Biswell, 406 U.S. 311, 316 (1972); Camara v. Mun. Court, 387 U.S. 523, 538–39 (1967).

Executives' Association and *National Treasury Employees Union v. Von Raab*.[103]

Decided on the same day in 1989, both *Skinner* and *Von Raab* involved what would be considered "blanket" drug-testing programs—in *Skinner*, for railway employees involved in accidents or other incidents, and in *Von Raab*, for U.S. Customs Service employees whose duties involved drug interdiction, carrying firearms, or handling classified information.[104] As in the airport-screening cases, the government regulations mandating the breath, urine, and blood tests at issue in *Skinner* made them cognizable under the Fourth Amendment. And as in those early cases, which far predated the special-needs jurisprudence, "the permissibility of a particular practice '[was] judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[105]

While acknowledging that the Fourth Amendment normally requires both a warrant and probable cause in criminal cases, the *Skinner* Court explicitly harkened back to *T.L.O.*, adopting Justice Blackmun's special-needs language: "[W]hen 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" the Court will "balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context."[106] This contextual reasonableness balancing required an examination of both government and individual interests.[107] Complicating the reasonableness balancing in *Skinner*, however, was the lack of individualized suspicion. Acknowledging the difficulty, the Court stated:

> When the balance of interests precludes insistence on a showing of probable cause, we have usually required "some quantum of individualized suspicion" before concluding that a search is reasonable. We made it clear, however, that a showing of

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

104. *Skinner*, 489 U.S. at 606; *Von Raab*, 489 U.S. at 660–61.

105. *Skinner*, 489 U.S. at 619 (quoting *Prouse*, 440 U.S. at 654).

106. *Id.* (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

107. Even after recognizing the special need in *Skinner*, which the Court acknowledged was "[t]he [g]overnment's interest in regulating the conduct of railroad employees to ensure . . . the safety of the traveling public and of the employees themselves," the Court exhaustively examined the nature of the employment relationship of the affected employees, the pervasive regulation of the industry, its history of alcohol and drug abuse, the long history of regulatory concern, as well as the detailed nature of the regulations in question, which provided minimal discretion for the official in the field in order to assess the intrusiveness of the search on the employees' privacy interests. *Id.* at 620–21.

> individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.[108]

In *Skinner*, the Court concluded as it had in *Martinez-Fuerte* that the government's interest outweighed the intrusion on the individual's privacy interest, even accounting for the lack of individualized suspicion.[109] However, the Court's choice of wording at least implied that suspicionless searches were limited to situations where the government's interest is important and the privacy intrusion minimal.[110] This distinction is similar to that made by the Court between the roving and fixed highway checkpoints in *Brignoni-Ponce*[111] and *Martinez-Fuerte*,[112] respectively. In *Martinez-Fuerte*, the Court upheld the fixed checkpoints as reasonable because they were less intrusive—they engendered less fear and concern in the motorists and involved far less discretion in officials in the field than the roving checkpoints disapproved of in *Brignoni-Ponce*.[113]

Building on this basis in *Von Raab*, the Court described *Skinner* as "reaffirm[ing] the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[114] In

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108. *Id.* at 624 (citations omitted).

109. *Id.* In *Skinner*, the Court concluded that the detailed regulations provided guidance both as to the circumstances justifying the tests and the permissible limits of their intrusiveness, thereby limiting discretion that was similar to the protection provided by a warrant. *Id.* at 622. The Court relied on the administrative-inspection cases such as *Camara* and *Burger*, substituting detailed guidance for the oversight provided by a magistrate. *Id.* The Court further discounted the employees' privacy interests as they were subject, in addition to the normal restrictions of the employment relationship, to restrictions inherent in working in a pervasively regulated industry—one which had a long history of regulation to ensure safety, a goal dependent on their "health and fitness." *Id.* at 627.

110. In making this determination in *Skinner*, the Court examined the employees' privacy interests, concluding that the intrusion caused by the search was minimal. *Id.* at 624. Similarly, the Court evaluated the privacy intrusion of the brief traffic stop in *Martinez-Fuerte* and held it as minimal as well. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); *see also* Dunaway v. New York, 442 U.S. 200, 212 (1979) (explaining that *Brignoni-Ponce* refused to extend *Terry* in such a way, and that anything beyond the brief stop for limited questions must be supported by probable cause).

111. United States v. Brignoni-Ponce, 422 U.S. 873, 881–83 (1975).

112. *Martinez-Fuerte*, 428 U.S. at 563–64.

113. *Id.* at 555–59 (explaining the *Brignoni-Ponce* holding).

114. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989) (relying on *T.L.O.* and *Martinez-Fuerte*).

the context of special needs, the reasonableness-balancing test now was articulated as follows: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the [g]overnment's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[115]

Von Raab, similar to *Skinner*, involved a workplace drug-testing program, but in a government workplace, and one in which the articulated special need was the government's need to have its frontline drug interdiction personnel be "physically fit, and have unimpeachable integrity and judgment."[116] Key to the Court's contextual balancing was its evaluation of the diminished expectation of privacy held by the U.S. Customs Service employees, as government employees generally, but specifically as those engaged in sensitive duties or required to carry firearms, who "reasonably should expect effective inquiry into their fitness and probity."[117] Equally reassuring to the Court was that the program's procedures minimized the potential intrusion on privacy interests, with the scope and dates of testing being determined in advance, and that those in covered positions knew that they were subject to drug testing when they applied for the positions.[118]

In *Skinner* and *Von Raab*, the Court did four things. First, the Court re-emphasized the distinction between criminal cases, which ordinarily required a warrant and probable cause, and special-needs cases, which do not.[119] Second, the Court explicitly adopted the special-needs language from Justice Blackmun's concurrence in *T.L.O.* to describe this exception to the normal warrant and probable-cause requirements of the Fourth Amendment.[120] Third, it endorsed the approach taken by the lower courts in which the need for a warrant or particularized suspicion would be

115. *Id.* at 665–66.

116. *Id.* at 670.

117. *Id.* at 672.

118. *Id.* at 672 n.2 (analogizing to *Martinez-Fuerte* in that advance notification eliminates being subject to an "unsettling show of authority," similar to a motorist not being taken by surprise).

119. In *Skinner*, however, the Court held that absent a persuasive showing that the testing program was a pretext to enable law enforcement authorities to gather evidence of penal-law violations, it would "leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 621 n.5 (1989).

120. *Skinner*, 489 U.S. at 619 (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

determined in the particular context after balancing the government's interests against the individual's privacy interests.[121] Fourth, and perhaps most significantly, the Court determined that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."[122]

Interestingly, although the Court never directly reviewed an airport-security case, in *Von Raab*, it indicated its knowledge and approval of the approach taken by the lower courts in *Skinner and Von Raab*.

> Where . . . the possible harm against which the [g]overnment seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the [g]overnment's goal.
>
> The point is well illustrated also by the [f]ederal [g]overnment's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:
>
> > When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.[123]

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121. *Id.* at 619; *Von Raab*, 489 U.S. at 667 ("Our cases teach, however, that the probable-cause standard is peculiarly related to criminal investigations." (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987) (internal quotation marks omitted))).

122. *Skinner*, 489 U.S. at 624 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

123. *Von Raab*, 489 U.S. at 674–75, 675 n.3 (footnote omitted) (citations omitted) (upholding air piracy precautions adopted in response to observable national and international hijacking crises, but holding that the government's ability to conduct them is not predicated on a demonstration of danger as to a particular airport or airline).

> It is sufficient that the [g]overnment have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.
>
> Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the [g]overnment's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program.

Coming full circle, the Court thus endorsed contextual reasonableness balancing even when individualized suspicion was lacking, and this balancing would determine not only reasonableness under the Fourth Amendment but also "whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[124]

Von Raab proved an impetus for government search programs claiming a need apart from law enforcement. In *Michigan v. Sitz*, decided the year after *Von Raab*, the Court narrowly approved a police sobriety checkpoint, holding that the government's interest in preventing the scourge of drunk driving outweighed the minimal intrusion of the fixed checkpoint, which it likened to the immigration roadblocks in *Martinez-Fuerte*.[125] Although it had struck down a random, suspicionless traffic stop in *Delaware v. Prouse* ten years prior,[126] the Court upheld *Sitz*'s fixed sobriety checkpoint, reflecting perhaps a more nuanced understanding of the various governmental interests at stake and a recognition of the expansion of governmental search and inspection programs in that time frame.[127] Key to its determination of reasonableness was the fixed predetermined nature of the checkpoints and the requirement to stop every car.[128] The elimination of police discretion led to the Court's conclusion that the subjective intrusion was minimal.[129] Interestingly, the Court explained in *Sitz* that *Von Raab* was premised upon the balancing approach undertaken in both *Martinez-Fuerte* and *Brown v. Texas*, two earlier cases that balanced the government interest in the seizure against the intrusion the seizure entailed.[130]

In *Sitz*, although describing the danger posed by drunk driving, the Court did not use the special-needs language of *Von Raab*, instead relying on *Martinez-Fuerte*'s balancing test, justified under *Camara*, to uphold

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Id. at 675 n.3.

124. *Id.* at 665–66.

125. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990).

126. Delaware v. Prouse, 440 U.S. 648, 661 (1979).

127. *See Sitz*, 496 U.S. at 447–48.

128. *Id.* at 453.

129. *Id.* at 452–53.

130. *Id.* at 450; *see also* Brown v. Texas, 443 U.S. 47, 50–51 (1979) (holding that the constitutionality of seizures that amount to less than traditional arrest involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the "severity of the interference with individual liberty"). In its discussion of *Brown*, the Court did not examine its reliance on the requirements of *Terry* in first requiring that police have articulable suspicion to seize the defendant. *Sitz*, 496 U.S. at 453–54. The Court further attempted to distinguish *Prouse*, a case involving random traffic stops to check driver and vehicle licensing, as involving random stops with no empirical evidence of their effectiveness as to the stated goal of promoting roadway safety. *Id.* at 454.

Sitz's fixed sobriety checkpoints.[131] But as pointed out by the *Sitz* dissent, use of the *Brown/Terry* balancing test had been premised upon the intrusion first being determined as minimal or "substantially less intrusive than a typical arrest."[132] Only after such a determination was the requirement of probable cause for a seizure excused and subsequent use of the balancing test to determine reasonableness under the Fourth Amendment allowed.[133] Thus, in *Sitz*, the Court adhered to preexisting precedent under *Terry* and *Camara*, preferring to stay out of the special-needs arena,[134] but at the same time, expanding that preexisting precedent to situations lacking particularized suspicion beyond the border context. Nevertheless, in its examination of the magnitude of drunken driving as a measure of the government's interest in the search, the Court did in fact evaluate a need apart from that of general law enforcement.[135]

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131. In *Sitz*, the Court directly analogized the traffic checkpoint to that in *Martinez-Fuerte* and referred to the balancing in that case. *Sitz*, 496 U.S. at 450. In *Martinez-Fuerte*, the Fourth Amendment balancing was based on *Brignoni-Ponce*, which itself was premised on *Terry*. United States v. Martinez-Fuerte, 428 U.S. 543, 555–56 (1976). Thus the balancing in *Sitz*, premised on both *Martinez-Fuerte* and *Brown*, arose from *Terry*.

132. *Sitz*, 496 U.S. at 457 (Brennan, J., dissenting) (emphasis omitted) (citation omitted) (quoting Dunaway v. New York, 442 U.S. 200, 209 (1979)) (internal quotation marks omitted). *Dunaway* reined in attempts to expand *Terry* to justify the use of the balancing test more generally in replacement of the warrant and probable-cause requirement of the Fourth Amendment. *Dunaway*, 442 U.S. at 210–12. The dissent was concerned that by conflating the two inquiries, the majority was creating the impression that "the Court generally engages in a balancing test in order to determine the constitutionality of all seizures, or at least those dealing with police stops of motorist on public highways." *Sitz*, 496 U.S. at 456–57 (Brennan, J., dissenting) (internal quotation marks omitted). Thus, the dissent wrote to clarify the distinct predicate inquiry required to reach the balancing test—an intrusion substantially less intrusive than a typical arrest. While not disagreeing that the balancing test was appropriate, the dissent was concerned that the majority was conflating the first requirement—that the intrusion was substantially less intrusive than a typical arrest—with the second—the actual balancing of the privacy intrusion against the governmental interest. *Id.* at 457.

133. While the dissent concurred that the seizure in *Sitz* was minimal such that the *Brown* balancing test was appropriate, it castigated the majority for concluding, without explanation, that the balance weighed in the government's favor, taking issue with the majority's conclusion that no requirement of individualized suspicion was required. For Justice Brennan, no searching inquiry had examined the context of the sobriety program and significant differences existed between it and the program upheld in *Martinez-Fuerte*. *Id.* at 457–58.

134. *See id.* at 444–45 (majority opinion). It is ironic that *Sitz* is seen as a seminal special-needs case when the Court did not use either the language from its special-needs jurisprudence. This does, however, reflect that the special-needs exception is more nuanced, and in fact reflects three separate strands of authority and language: (1) those conceptualized as special needs, (2) those involving highway checkpoints that draw on the *Martinez-Fuerte* line of cases, and (3) cases supported as permissible administrative inspections. However, all three strands borrow language and precedent from the others.

135. *Id.* at 451–52; *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 39, 41 (2000) ("This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the

Thus, after *Sitz*, two routes to the reasonableness-balancing test existed, although they were often intertwined both conceptually and with the line of precedent supporting the Court's conclusion. The first, under the *Terry*, *Brown*, and *Martinez-Fuerte* line of cases, required a predicate of an intrusion substantially less than a typical arrest, and a purpose separate from general law enforcement; the second required a special need beyond the normal need for law enforcement.[136] Both could, in the appropriate circumstance, be reasonable even without particularized suspicion, although the Court at least implied that the appropriate circumstance would be where privacy interests were minimal.[137] In fact, a third avenue, that of administrative inspections arising directly from *Camara*, also served as the basis to use a more general, contextualized reasonableness-balancing test under the Fourth Amendment—cases that also served needs apart from criminal law enforcement.[138]

Moving forward, the Court was faced with two favorites: suspicionless drug testing and schoolchildren. In *Vernonia School District 47J v. Acton*, the Court upheld random, suspicionless drug testing of interscholastic athletes at an Oregon high school.[139] Drawing from *O'Connor*, the Court found special needs in the relationship of the school district "as guardian and tutor" of the students.[140] In its balancing of interests, the Court further diminished the students' already limited privacy interests by analogizing students who voluntarily participated in extracurricular sports to "adults who choose to participate in a 'closely regulated industry,'" such that both "expect intrusions upon normal rights and privileges, including privacy."[141] Thus, the subtle inference of implied consent was again present in the balancing of interests.[142] In the face of the compelling government need to

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imperative of highway safety and the law enforcement practice at issue. . . . We suggested in *Prouse* that we would not credit the 'general interest in crime control' as justification for a regime of suspicionless stops. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety." (citation omitted)).

136. *See Sitz*, 496 U.S. at 450–51.

137. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989); *Sitz*, 496 U.S. at 451 ("Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." (citing United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976))).

138. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001).

139. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649–50, 664–65 (1995).

140. *Id.* at 665.

141. *Id.* at 657 (citing *Skinner*, 489 U.S. at 627).

142. *See Ferguson*, 532 U.S. at 90–91 (Kennedy, J., concurring) ("An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences (e.g., dismissal from employment or disqualification from playing on a high school sports team) will follow from

address a pressing drug problem at the high school, the Court held the program to be reasonable and thus constitutional.[143]

Although the Court had examined seizures "substantially less intrusive than a typical arrest" in its traffic checkpoint cases, it had not fully articulated what governmental needs would qualify as "special needs[] beyond the normal need for law enforcement" sufficient to excuse compliance with the Fourth Amendment's warrant, probable cause, and individualized suspicion requirements.[144] In *Chandler v. Miller*[145] and *Ferguson v. City of Charleston*,[146] the Court examined both the nature of the special need and its required distinction from the normal need for law enforcement. Additionally, in *Indianapolis v. Edmond*, a case contesting drug interdiction highway checkpoints, the Court would further explain the purpose-based limitations for suspicionless government highway checkpoints, again bringing both lines of cases into rough alignment.[147]

In *Chandler v. Miller*, the Court struck down as unreasonable Georgia's suspicionless drug testing of candidates for designated state offices.[148] Although the Court determined Georgia's testing method to be relatively noninvasive, it held that Georgia had failed to establish a need that was substantial—or in the Court's words, "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[149] For the Court, Georgia had failed to establish in the record a "concrete danger demanding departure from the Fourth Amendment's main rule."[150] Georgia's desire to convey its commitment to the struggle against

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refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word. The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program." (emphasis omitted) (citations omitted)).

143. *Vernonia Sch. Dist. 47J*, 515 U.S. at 664–65; *see also* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 825 (2002) (upholding drug testing of all high school students participating in any extracurricular activities based on special needs).

144. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting) (emphasis omitted) (citation omitted); *Skinner*, 489 U.S. at 619.

145. Chandler v. Miller, 520 U.S. 305, 311 (1997).

146. *Ferguson*, 532 U.S. at 74.

147. City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000).

148. *Chandler*, 520 U.S. at 322–23.

149. *Id.* at 318.

150. *Id.* at 318–19. Georgia required that within thirty days of qualifying for nomination or election, a candidate provide a sample at the candidate's personal physician's office for submission to a certifying laboratory. *Id.* at 309. For the Court, the lack of a documented drug problem in the record, the ability of the candidate to determine the timing of the drug test and therefore control the results, and the lack of any concrete danger posed by drug use by these individuals highlighted the differences between this program and the one upheld in *Von Raab*. *Id.* at 321–22. The testing regime was not effective to identify drug use by candidates, nor did it serve

drugs, while laudatory, was symbolic and was not the type of special need that was sufficient to overcome the protections of the Fourth Amendment.[151] Significantly for the purposes of special-needs situations in terrorism cases, the Court in *Chandler* reiterated that blanket suspicionless searches remained permissible

> where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.[152]

In *Ferguson v. City of Charleston*, the Court explored not only the need asserted by the government but also the question of pretext it had reserved in *Skinner*.[153] *Ferguson* involved a state hospital's drug-testing program of pregnant patients as part of a coordinated program with law enforcement to force those patients into treatment for substance abuse and sometimes prosecute them.[154] After restating its special-needs balancing test,[155] the Court emphasized that the invasion of privacy in this case was far more substantial than its prior special-needs cases, as most patients did not expect their diagnostic test results to be shared with nonmedical personnel without their consent.[156] Rather than "accept[ing] the [government's] invocation of a special need," the Court focused on the nature of the special need asserted by the government, as it had done in *Chandler*, conducting a close review of the scheme at issue.[157] In so doing,

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as a deterrent. *Id.* ("But Georgia asserts no evidence of a drug problem among [its] elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law.").

151. *Id.* at 322.

152. *Id.* at 323 (citation omitted); *see also* Ferguson v. City of Charlestown, 532 U.S. 67, 78 (2001) ("[W]e employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program.").

153. *Ferguson*, 532 U.S. at 79 & n.15.

154. *Id.* at 72–73.

155. *Id.* at 78.

156. *Id.* The Court discussed the fact that in the prior special-needs cases, there were no misunderstandings about the use of the test results. Test procedures were clearly spelled out in the materials that were provided to the tested individuals. Additionally, there were protections against the dissemination of the test results to third parties. Finally, in none of those cases did the circumstances involve the kind of expectation of privacy seen when a typical patient undergoes a diagnostic test in a hospital where the test results will not be shared with nonmedical personnel without the patient's consent. *Id.*

157. *Id.* at 81 (internal quotation marks omitted).

the Court considered "all the available evidence in order to determine the [program's] relevant primary purpose."[158]

Finding irrelevant the government's claim of a beneficent ultimate purpose, the Court instead evaluated the record evidence as clearly establishing the involvement of law enforcement in the development, implementation, and administration of the policy, and its continuing focus on the arrest and prosecution of drug-abusing mothers, as well as the policy incorporating the police's operational guidelines to include "chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests."[159] The involvement of law enforcement at every stage of the administrative program in *Ferguson*,[160] together with the program designed to generate evidence for use in criminal proceedings, rendered the government's purpose "indistinguishable from the general interest in crime control," and in effect answered the question reserved in *Skinner*.[161] Recognizing that although the ultimate objective may have been to get the women into treatment for drug abuse, the primary purpose of the program was "to generate evidence *for law enforcement purposes*."[162] For the Court, this distinction was key since every law enforcement purpose ultimately serves some societal goal, and allowing the government purpose to be drawn at such a high level would eviscerate the protections of the Fourth Amendment.[163]

Thus, the primary purpose of the government's asserted special-need program would become the focus of the balancing test in future special-needs cases. The majority signaled its unwillingness for the special-needs jurisprudence to become a Trojan horse that would undermine the protections of the Fourth Amendment, particularly in criminal cases.

The *Ferguson* decision relied in part on *Indianapolis v. Edmond*, a case decided the year prior in 2000.[164] *Edmond*, like *Sitz*, involved a suspicionless highway checkpoint program, but in *Edmond*, the program was designed to detect and interdict illegal drugs[165] rather than enhance

158. *Id.*

159. *Id.* at 82–84.

160. *Id.* at 83 n.20, 84 ("[A]t its core, [the policy was] predicated on the use of law enforcement. The extensive involvement of law enforcement and the threat of prosecution were . . . essential to the program's success.").

161. *Id.* at 81 (citing City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

162. *Id.* at 82–83, 85–86 ("The stark and unique fact that characterizes this case is that Policy M–7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.").

163. *Id.* at 84.

164. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

165. The checkpoint program in *Edmond* involved the brief checkpoint stop of a predetermined number of vehicles. *Id.* at 35. Police would ask motorists for their license and

highway safety through the detection of drunk drivers as validated in *Sitz*. Although the *Edmond* Court evaluated the three types of circumstances in which the Court had previously recognized that the ordinary rule requiring particularized suspicion may not apply—special needs, administrative inspections, and road checkpoints[166]—in *Edmond* it focused on its previous highway checkpoint cases. While the *Martinez-Fuerte* Court focused on the unique context of the immigration highway checkpoints near the border, in *Sitz*, the Court saw the checkpoint program as "clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and the[] . . . obvious connection between the imperative of highway safety and the law enforcement practice at issue."[167] Finally, the Court discussed its suggestion in *Prouse* that a stationary checkpoint with limited discretion to check licensing and registration might be a constitutional means of serving "the [s]tate's interest in roadway safety."[168] According to the Court, each of these checkpoint programs "was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety."[169] In *Edmond*, it was uncontested that the primary purpose of the checkpoint was interdicting illegal narcotics,[170] and for the Court this was indistinguishable from a general interest in law enforcement.[171]

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registration, and observe for signs of impairment. *Id.* Additionally, the police would walk a drug dog around the vehicle's exterior and only search a vehicle with consent or upon the appropriate quantum of individualized suspicion. *Id.*

166. *See id.* at 37–38. These three categories were: (1) certain regimes of suspicionless searches where the program was designed to serve special needs beyond the normal needs of law enforcement; (2) searches for certain administrative purposes without particularized suspicion of misconduct, provided those searches were appropriately limited; and (3) brief suspicionless seizures of motorists at checkpoints designed either to intercept illegal aliens or to remove drunken drivers from the road. *Id.* In its discussion of the first category, the Court cited *Vernonia* for its analysis of random drug testing of student–athletes; *Von Raab*, analyzing drug tests for United States Customs Service employees seeking transfer or promotion to certain positions; and *Skinner*, which analyzed drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations. *Id.* at 37. For the second category, the court looked to *Burger* for its analysis of warrantless administrative inspection of premises of closely regulated business; *Tyler*, for its analysis of the administrative inspection of fire-damaged premises to determine the fire's cause; and *Camara*, for the analysis of the administrative inspection to ensure compliance with the city's housing code. *Id.* Finally, for the third category, the court examined *Martinez-Fuerte* for the suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens; *Sitz*, for the sobriety checkpoint aimed at removing drunk drivers from the road; and *Prouse*'s suggestion concerning similar fixed roadblocks to verify driver's licenses and vehicle registrations. *Id.* at 37–39.

167. *Id.* at 39.

168. *Id.* at 39–40.

169. *Id.* at 41.

170. *Id.*

171. *Id.*

Again, the Court recognized the difference between the immediate purpose and the ultimate purpose of the various programs in *Martinez-Fuerte*, *Sitz*, and *Edmond*. Acknowledging that "[s]ecuring the border and apprehending drunk drivers" were law enforcement activities and were goals in pursuit of which arrest and criminal prosecutions were employed, the Court nevertheless rejected analyzing purpose at this high level of generality such that suspicionless checkpoints could be used for "any conceivable law enforcement purpose."[172] Instead, the Court, as it did in *Chambers* and *Ferguson*, closely reviewed the program, evaluated the "nature of the public interests that such a regime is designed principally to serve," and determined the primary purpose of the program.[173] Rejecting claims that *Whren v. United States* and *Bond v. United States* precluded inquiry into the purpose of the program,[174] the Court explained that while the subjective motivations of individual officers were "irrelevant to the Fourth Amendment validity" of an objectively relevant traffic stop justified by probable cause, *Whren* and *Bond* had expressly distinguished cases involving searches conducted in the absence of probable cause.[175]

Thus, the Court underscored that the inquiry into "programmatic purposes" was "relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[176] It also highlighted that both administrative-inspection searches and special-needs cases "have often required an inquiry into purpose at the programmatic level,"[177] and that a similar inquiry was appropriate to determine the government purpose for this suspicionless search as well.[178] Additionally, while programmatic purpose was relevant to programs of seizures without probable cause in *Edmond*, the Court in *Ashcroft v. al-Kidd* stated in dicta that "[i]t was not the absence of probable cause that triggered the invalidating-purpose inquiry in *Edmond*. . . . Purpose was relevant in *Edmond* because 'programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken *pursuant to a general scheme without individualized suspicion*.'"[179]

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172. *Id.* at 42.

173. *Id.* at 43–44.

174. *See* Bond v. United States, 529 U.S. 334, 338 (2000); Whren v. United States, 517 U.S. 806, 813 (1996).

175. *Edmond*, 531 U.S. at 45.

176. *Id.* at 45–46.

177. *See id.* at 46.

178. *Id.*; *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (recognizing two limited exceptions to the general rule that Fourth Amendment reasonableness is predominantly an objective inquiry under *Whren* and *Bond*—special-needs and administrative-search cases "where 'actual motivations' do matter").

179. *al-Kidd*, 131 S. Ct. at 2081 (quoting *Edmond*, 531 U.S. at 45–46).

Although dicta, the Court recognized that "special-needs and administrative-inspection cases" require a purpose inquiry that involves both subjective and objective components.[180]

In *Edmond*, the Court was undaunted by the challenges inherent in such inquiries, instead recognizing that they remained a routine means for courts in constitutional analysis to "sift[] abusive governmental conduct from that which is lawful."[181] In its final analysis in *Edmond*, the Court "decline[d] to approve a [suspicionless] program whose primary purpose is ultimately indistinguishable from the general interest in crime control."[182] Thus, after *Edmond* and *Ferguson*, the primary purpose of the asserted government program was not only relevant, but it was also *the* element that would be weighed against the privacy intrusion to determine ultimate reasonableness. The Court indicated that it was not reticent about inquiring into the "nature of the public interests that such a regime [was] designed principally to serve," and that it would not approve a lower Fourth Amendment standard for a purpose indistinguishable from general law enforcement.[183] Ever cautious, the Court also noted an exception for emergencies that would allow an appropriately tailored checkpoint to thwart an imminent terrorist attack, and cautioned that the opinion did not affect "the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."[184]

Further clarifying the contextual nature of the inquiry into governmental purpose, the Court in *Illinois v. Lidster* approved a highway checkpoint that was set up to seek information from the motoring public about a fatal hit-and-run accident that had occurred at that location a week prior.[185] Although the checkpoint was broadly designed to serve a law enforcement purpose, the Court declined to implement an *Edmond* litmus

180. *Id.*

181. *Edmond*, 531 U.S. at 46–47.

182. *Id.* at 44.

183. *Id.* at 43.

184. *Id.* at 44, 47–48 ("Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, as the [c]ourt of [a]ppeals noted, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control." (citation omitted)).

185. Illinois v. Lidster, 540 U.S. 419, 427 (2004).

test equating anything with a law enforcement purpose with *Edmond*'s prohibition against searches based on a general interest in crime control.[186] After closely evaluating the government's purpose in this case, the Court saw a distinction in the fact that the police were not seeking evidence of the vehicle occupants' wrongdoing, but instead seeking their help as members of the public to solve a fatal accident.[187] After balancing this governmental interest against the minimal privacy intrusion of the brief checkpoint stop, the Court held the intrusion reasonable.[188]

The role of consent had been a contentious issue in the early special-needs and administrative-inspection cases, with the stringent tests required by the Supreme Court to waive a constitutional right confounding the early courts evaluating airlines-security searches.[189] While consent had little applicability in the cases concerning highway checkpoints, it was a component of the special-needs cases after *T.L.O.* In both *Skinner* and *Von Raab*, the expectation of privacy of the railroad workers and government employees was diminished because of their participation in a pervasively regulated industry[190] or their application for certain positions.[191] Although not seen as a waiver of a constitutional right or as consent per se, the circumstances of the employment relationship and the special safety and security needs asserted by the government were relevant to the overall reasonableness of the search.[192] In *Vernonia* and *Earls*, the schoolchildren were similarly seen to have diminished privacy interests not only due to the special relationship of the school district as guardian and tutor but also because the voluntary participation of the schoolchildren in sports or extracurricular activities in general further diminished their reasonable expectation of privacy.[193] Of particular significance for the Court in *Ferguson*, the privacy interest of maternity patients in not having their medical tests shared with third parties without consent was significantly

186. *Id.*
187. *Id.*
188. *Id.* at 428.
189. *See* United States v. Albarado, 495 F.2d 799, 806–07 (2d Cir. 1974); United States v. Davis, 482 F.2d 893, 913–14 (9th Cir. 1973); United States v. Lopez, 328 F. Supp. 1077, 1092–93 (E.D.N.Y. 1971); *see also* United States v. Meulener, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972).
190. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989).
191. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 & n.2 (1989) ("Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions.").
192. *Id.* at 672.
193. *See* discussion *supra* notes 139–43.

different than the privacy interests in *Chandler*, *Vernonia*, *Skinner*, and *Von Raab*.[194] As Justice Kennedy explained in his concurrence:

> An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences (e.g., dismissal from employment or disqualification from playing on a high school sports team) will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.[195]

Thus, the Supreme Court wrestled with the same problems with consent in the early airline-security cases because the requirements for a knowing waiver of a constitutional right were rarely met, leaving the issues of consent to bear on the overall reasonableness of the search instead.

IV. THE "NEW" TERRORIST THREAT & POST 9/11

Beginning in the 1960s or earlier, the U.S. and Western Europe experienced extensive domestic and international terrorist movements and attacks.[196] Groups such as the Red Army Faction, ETA, PKK, the Irish Republican Army in Europe and numerous others were augmented by international groups such as the Palestinian Liberation Organization (PLO), Hezbollah, Hamas, and the Abu Nidal Organization.[197] The terrorist threats that emerged after the attacks of 9/11 were not new, but the string of deadly high-profile terrorist attacks that quickly followed[198]—including the 2004 Madrid train bombings and the July 2005 London bombings—focused the world's attention on the radical Islamist terrorist threat and its perceived ability to strike worldwide.[199]

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194. Ferguson v. City of Charleston, 532 U.S. 67, 77–78 (2001).

195. *Id.* at 90–91 (Kennedy, J., concurring) (emphasis omitted) (citing *Skinner*, 489 U.S. at 615).

196. *See* John Moore, *The Evolution of Islamic Terrorism: An Overview*, FRONTLINE http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/modern.html (last visited Oct. 6, 2014).

197. *See* OFFICE OF COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM (2007). ETA is an acronym for Euskadi Ta Askatasuna, "Basque Homeland and Liberty," an armed separatist and nationalist movement in Spain, while the PKK is the Kurdistan Workers' Party, a Kurdish organization that fought Turkey to establish an autonomous Kurdish state in Turkey. *See ETA Admits Killings and Bombings*, BBC NEWS (Sept. 22, 2000, 11:30 GMT), http://news.bbc.co.uk/2/hi/europe/937193.stm; *Profile: The PKK*, BBC NEWS, http://www.bbc.com/news/world-europe-20971100 (last updated Mar. 21, 2013, 9:30 ET).

198. Subsequent attacks included the October 2002 Bali bombings, the attacks on the Madrid train system in March 2004, the London bombings in July 2005, and the Mumbai attacks in November 2008. *See After 9/11: Global Effects on the 'War on Terror'*, BBC NEWS MAG., http://www.bbc.co.uk/news/world-14844727 (last updated Sept. 9, 2011, 17:00).

199. *See id.*

In response, nations implemented new security measures or updated existing statutory authorities within the limits of their respective legal systems in order to protect against future attacks. In the U.S., suspicionless blanket searches on subways or other mass transportation systems, or at public demonstrations, were implemented under the special-needs exception to the Fourth Amendment;[200] in contrast, Britain updated its antiterror legislation to authorize similar suspicionless searches in declared security zones—zones that quickly became ubiquitous.[201] Many of these security measures affected civil liberties and were soon challenged in the courts. In the U.S., the special-needs exception became the primary theory under which the Executive Branch sought to sustain new security search regimes; and in Britain, § 44 of the Terrorism Act of 2000 was used to justify hundreds of similar searches. Initial deference to security needs in the aftermath of the 9/11 attacks in the U.S. and the July 2005 attacks in Britain diminished as judicial and public scrutiny of these security initiatives disclosed racial and religious discrimination and negative effects on free speech and a free press.

A. American Cases

In the aftermath of 9/11, government entities, concerned with possible future domestic terrorist attacks—particularly in light of the attacks on Madrid's railways in 2004, Moscow's 2004 and 2010 subway attacks, and the London attacks in July 2005, among other high-profile terrorist attacks around the world—instituted new suspicionless-search programs in an effort to prevent similar attacks in the U.S.[202]

1. U.S. Cases Implicating First Amendment Liberties

From October 2001 to March 2004, the New York City Police Department (NYPD) instituted a policy requiring bag searches as a condition of attending certain demonstrations and applied the practice in

200. *See, e.g.*, Stauber v. City of New York, Nos. 03 Civ. 9162(RWS), 03 Civ. 9163(RWS), 03 Civ. 9164(RWS), 2004 WL 1593870, at *11 (S.D.N.Y. July 16, 2004). In the aftermath of the 9/11 attacks, the New York Police Department (NYPD) implemented a policy requiring the consent to search the possessions of members of the public wishing to attend certain demonstrations. *Id.*

201. *See generally* Terrorism Act, 2000, c. 11, § 44 (U.K.) (authorizing suspicionless searches in certain contexts in efforts to prevent terrorism).

202. *See generally Implementing 9/11 Commission Recommendations: Progress Report 2011*, U.S. DEP'T HOMELAND SEC. (2011), http://www.dhs.gov/xlibrary/assets/implementing-9-11-commission-report-progress-2011.pdf (discussing the Department of Homeland Security's heightened security recommendations)..

approximately ten public demonstrations during that period.[203] In challenging this practice in the case of *Stauber v. City of New York*,[204] the plaintiffs claimed that *Wilkinson v. Forst* was controlling.[205] In *Wilkinson*, the Second Circuit concluded that the police practice of setting up checkpoints to search automobiles and conduct suspicionless searches of individuals and their possessions at a series of KKK and anti-KKK demonstrations, regardless of whether those in attendance were suspected of carrying weapons, violated the Fourth Amendment.[206] In making this determination, the court "balanc[ed] . . . the need for the particular search against the invasion of personal rights that the search entails," and in so doing, considered "the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted."[207]

The plaintiffs in *Stauber* argued that *Wilkinson* controlled the court's evaluation of the contested bag search policy, and prohibited "blanket bag searches as a condition for entry to demonstrations."[208] In response, the city argued that the contested practice was closer to the magnetometer searches authorized by *United States v. Edwards* than *Wilkinson*, which involved pat-down searches.[209] The district court, however, rejected the city's position and determined that *Edwards* was distinguishable because the bag search in *Edwards* occurred only after a magnetometer alarm, in effect providing additional indicia of individualized suspicion in the context of an airport search.[210] The *Stauber* court also evaluated the factors, enunciated by the Supreme Court in *Bell v. Wolfish*,[211] and concluded that a bag search is not minimally intrusive as it involves a greater expectation of privacy

203. *Stauber*, 2004 WL 1593870, at *11.

204. *Id.* at *1. The plaintiffs sought a preliminary injunction challenging the NYPD's practice of "unreasonably impeding access to demonstration sites," unreasonably depriving access to demonstration sites by using metal "pens" where demonstrators were required to assemble, unreasonably searching the "possessions of persons as a condition of attaining access to certain demonstrations (the 'bag search policy')," and unreasonably using "horses forcibly to disperse peacefully assembled demonstrators." *Id.*

205. *Id.* at *29.

206. Wilkinson v. Forst, 832 F.2d 1330, 1335, 1341–42 (2d Cir. 1987).

207. *Id.* at 1336.

208. *Stauber*, 2004 WL 1593870, at *30.

209. *Id. Edwards* was one of the early airport-security cases authorizing a bag search after the airport magnetometer was activated. United States v. Edwards, 498 F.2d 496, 497–98 (2d Cir. 1974). Additionally, the Second Circuit in *Wilkinson* allowed the use of blanket magnetometer searches of rally attendees based on the demonstrated likelihood of violence at KKK rallies, and past experience that the search policy had inhibited KKK members from carrying weapons. *Wilkinson*, 832 F.2d at 1338, 1340–41.

210. *Stauber*, 2004 WL 1593870, at *30.

211. Bell v. Wolfish, 441 U.S. 520 (1979).

than a magnetometer search;[212] that the location of this search posed a danger of discouraging protected constitutional expression because of potential stigma attached to the decision to search;[213] and finally, that the NYPD had given no notice of its intent to perform bag searches at particular demonstrations, placing potential demonstrators in the position of choosing between submitting to the search or forgoing attendance at the demonstration.[214]

More importantly, the court held that the NYPD had failed to provide specific information on the nature of the threats faced by the officials or how the bag search policy would address those kinds of threats, and rejected the city's general invocation of the terrorist threat as justification for the blanket search policy.[215] Feeding into the court's determination, although not explicitly addressed, was the fact that no written policy controlled the decision of whether bags would be searched, and the decision to search bags was often left to the police officers on-site.[216] This unbridled discretion further weighed against the legitimacy of the city's policy under these circumstances. The court, however, was careful to preserve the city's ability to respond when "such a need is legitimately presented in another context,"[217] and held that the city was not required "to seek prior approval if in the judgment of the NYPD the threat to public safety meets the standards laid out in *Wilkinson* and *Edwards*."[218] In making this determination, the court cited to a special-needs case, *Chandler v. Miller*, for the proposition that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable,'" providing as an example "searches now routine at airports and at entrances to courts and other official buildings."[219] Thus, even though the court rejected the city's position in *Stauber*—perhaps because of the lack of evidence of a substantial and real threat or because of the unbridled discretion of the NYPD in implementing the policy—it did recognize that a special need might justify such a policy in appropriate circumstances.[220]

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212. *Stauber*, 2004 WL 1593870, at *30.
213. *Id.* at *31.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at *32.
218. *Id.*
219. *Id.* (quoting Chandler v. Miller, 520 U.S. 305, 323 (1997)).
220. *See id.* at *33 (enjoining bag searches at particular demonstrations but allowing such searches where both the probability of a threat to public safety and a determination that blanket searches could reduce the threat are shown; exempting magnetometer searches as a lesser intrusive means; and distinguishing the injunction against bag searches at public demonstrations from other

Also in 2004, in *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*, another district court upheld the Massachusetts Bay Transportation Authority's (MBTA) policy of requiring all persons within a territorial zone surrounding the Fleet Center—the location of the Democratic National Convention that year—to submit to a search of all hand-carried bags, briefcases, and other items carried by passengers on the MBTA's trains and buses.[221] In the face of a Fourth Amendment challenge, the MBTA claimed the searches were justified as an administrative search similar to security searches conducted at airports and entrances to courthouses and military installations.[222]

In upholding the search practice, the court recognized the substantial governmental and public interests in the administrative-search regime after evaluating the evidence presented on the threat. In doing so, the court recognized that in addition to air transportation, other mass transportation systems had become targets of terrorism, noting the recent attacks in Madrid on March 11, 2004, which resulted in over 200 dead, and another on a subway in Moscow on February 6, 2004, with over forty dead.[223] Thus, in light of the timing of the Madrid bombings—likely planned to impact the Spanish democratic elections—and recent warnings by the Department of Homeland Security of a heightened threat designed to impact the U.S. democratic process, the court determined the threat to be real.[224] Although the court recognized that assessment of either the likelihood or imminence of any particular threat would be difficult, it analogized the situation to that of airport security, where the lack of threat information as to a particular flight or airport did not "vitiate either the authority or the wisdom of conducting security screenings generally for *all* flights."[225]

The second part of the test—whether the searches were reasonable under the Fourth Amendment—required a determination of "whether the privacy intrusion is reasonable in its scope and effect, given the nature and dimension of the public interest to be served."[226] Acknowledging that the intrusion was "not insignificant," the court nevertheless found the MBTA's policy to be reasonable.[227] In making this determination, the court found

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threats to public safety akin to the Madrid 2004 bombings, since the order addresses only the NYPD's prior policy of bag searches at public demonstrations).

221. Am.-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *1 (D. Mass. July 28, 2004).

222. *Id.*

223. *Id.* at *2–4.

224. *Id.*

225. *Id.* at *2.

226. *Id.* at *3.

227. *Id.*

several factors to be important. First, the fact that the MBTA gave notice of the prospective searches both reduced the subjective anxiety (and mitigated any stigma) of MBTA riders, and provided an opportunity for persons who did not want to submit to a search to avoid travel on the MBTA during the applicable time.[228] Second, the search plan was limited in scope and duration, affecting only those subway, rail, and bus lines that would actually pass through the Secret Service security zone, and was limited to the four days of the Convention.[229] Finally, the plan provided little discretion to the police, with the written plan prescribing the inspection method and defining prohibited objects.[230] The plan also subjected police to supervision and required recordkeeping so that the conduct of the inspections could be reviewed afterward.[231]

Thus, in the face of a real threat, a limited-search inspection program with notice to the public and minimal discretion for the implementing officers was held to be reasonable under the Fourth Amendment.[232] The court reached this conclusion only after reviewing the contextual reasonableness balancing required under the Supreme Court's administrative-inspection jurisprudence, even without using the special-needs doctrine to justify the reasonableness of the search program.[233] The MBTA has subsequently established a permanent security inspection program that requires the swabbing of the exterior of random passengers' bags to detect explosives residue.[234]

The impact on other protected constitutional rights, particularly First Amendment free speech, assembly, and press rights would continue to affect the determination of reasonableness under the Fourth Amendment. In *Bourgeois v. Peters*, the Eleventh Circuit evaluated a Georgia city's implementation of a magnetometer search requirement for participants in an

228. *Id.*
229. *Id.*
230. *Id.* at *4.
231. *Id.* at *3–4.
232. *Id.*
233. *Id.* at *3.
234. *MBTA Security Inspections*, MASS. BAY TRANSP. AUTH., http://www.mbta.com/transitpolice/default.asp?id=19050 (last visited June 26, 2014) ("The MBTA has been conducting random security inspections regularly since October 2006. Passengers are selected on a random basis through the use of a computer generated sequence of numbers. These inspections involve the brushing, with a swab, of the exterior of a carry-on. This swab is then placed in explosive trace detection equipment. The entire process should take approximately 10-20 seconds if no positive reading occurs. There are notices posted at the entrance to the station that the inspection is in progress. A passenger may choose not to be inspected but then is prohibited from riding on the MBTA. Through a cooperative partnership with the Transportation Security Administration (TSA), TSA personnel assist us at some of the inspection sites. Their authority to assist is derived from 49 U.S.C. § 114(d).").

annual protest against the School of the Americas at Fort Benning, a protest that had been ongoing for thirteen years.[235] While acknowledging the impact of 9/11, absent "some reason to believe that international terrorists would target or infiltrate this protest," the court rejected both the occurrence of the 9/11 attacks or sporadic elevated Homeland Security threat advisory levels as justifications for the search of the protestors.[236] Tellingly, the court also rejected the city's assertion of a special need separate from law enforcement—in this case, "to keep the protestors and others safe by detecting weapons and contraband."[237] Concluding that the interests in public safety and law enforcement were inextricably intertwined, the court rejected the city's attempt to cast its interest in ferreting out weapons and contraband as separate from its general interest in law enforcement.[238]

In essence, the court found unpersuasive the city's attempt to premise its interests on the public policy motivating the law in question rather than the law itself, concluding that such a holding would eviscerate the protections of the Fourth Amendment.[239] Similar to the Supreme Court's determination in *Ferguson*, the Eleventh Circuit in this case refused to premise its evaluation of the governmental interest pursuant to the Fourth Amendment balancing test at a high level of generality. Rejecting the city's final argument that the magnetometer searches were reasonable under the Fourth Amendment,[240] the Eleventh Circuit instead went back to the general rule "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions."[241] It concluded that no such exception applied to the facts of this case, and that most of the recognized exceptions to the individualized suspicion requirement applied where a person had a diminished expectation of privacy—a fact not present in this case.[242] Enhancing the city's difficulty was the fact that police had successfully controlled the prior peaceful protests with no magnetometer searches for the last twelve years,[243] and the burden of these searches on protected First Amendment activity also militated against a conclusion of reasonableness

235. Bourgeois v. Peters, 387 F.3d 1303, 1307 (11th Cir. 2004).
236. *Id.* at 1311–12.
237. *Id.* at 1312.
238. *Id.* at 1312–13.
239. *Id.* at 1313.
240. *Id.* at 1316.
241. *Id.* at 1313 (internal quotation marks omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971)).
242. *Id.* at 1314–15.
243. *Id.* at 1314 n.9.

under the Fourth Amendment.[244] Thus, no evidence was presented in *Bourgeois* of a specific, real threat that the city sought to address through its suspicionless-search program; as such, it was held to be not reasonable under the Fourth Amendment.[245]

2. *Other U.S. Cases*

Concerns over continuing terrorist attacks after 9/11 motivated new suspicionless-search programs designed to detect and deter future terrorist attacks, particularly those affecting mass transportation. Although not directly impacting First Amendment concerns, these cases did, in some instances, implicate the constitutifonal right to interstate travel, akin to the challenges to the early airport-security cases.[246]

Following the July 2005 London bombings, New York City implemented a random subway search program, in which it conducted random but preplanned searches of containers carried into the New York City subways.[247] The purpose of the searches was to detect explosive devices being carried onto the subways, as they had been in the earlier

244. *Id.* at 1318.

245. *See id.* at 1322–23, 1325.

246. Wilkinson v. Forst, 832 F.2d 1330, 1339 (2d Cir. 1987) (explaining that suspicionless searches at courthouses likewise impact the constitutional right to attend public trials). The common factor between the airport and courtroom-security search cases is "the perceived danger of violence, based on the recent history at such locations, if firearms were brought into them." *Id.*

247. Timothy Williams & Sewell Chen, *In New Security Move, New York Police to Search Commuters' Bags*, N.Y. TIMES, (July 21, 2005), http://www.nytimes.com/2005/07/21/nyregion/21cnd-security.html. Numerous other cities have followed New York's lead in the establishment of random bag inspections. *See MBTA Security Inspections*, *supra* note 234; *Metro Transit Police to Step Up System Security*, WASH. METROPOLITAN AREA TRANSIT AUTH. (Dec. 16, 2010), http://www.wmata.com/about_metr o/news/PressReleaseDetail.cfm?ReleaseID=4776; *see also* Gayle Anderson, *Sheriff's Units Increase Random Checkpoint Screenings at Metro Rail Stations*, SOURCE (Nov. 16, 2011), http://thesource.metro.net/2011/11/16/sheriffs-units-increase-random-checkpoint-screenings-at-metro-rail-stations/; Eric Fidler, *Metro Bag Searches Aren't Always Optional*, GREATER GREATER WASH. (June 13, 2013), http://greatergreaterwashington.org/pos t/19170/metro-bag-searches-arent-always-optional/; Mimi Hall, *Amtrak Security Is Visibly on Track*, USA TODAY, July 10, 2008, 11:37 PM, http://usatoday30.usatoday.com/travel/news/2008-07-10-amtrakinside_n.htm; Gene Healy, *New Homeland Security Schemes Prove We're Just Stuck on Stupid*, S.F. EXAMINER, Dec. 22, 2010, http://www.sfexaminer.com/sanfrancisco/new-homeland-security-schemes-prove-were-just-stuck-on-stupid/Content?oid=2166667; Mike Morris, *Metro Says It Won't Do Random Bag Checks*, HOUS. CHRON., http://www.chron.com/news/houston-texas/article/Metro-says-it-won-t-do-random-bag-checks-3514008.php (last updated Apr. 26, 2012, 9:54 PM); Ted Oberg, *Metro Faces Public Backlash Over Counter-Terror Initiative*, ABC 13 EYEWITNESS NEWS (Apr. 27, 2012, 3:36:08 AM PDT), http://abc13.com/archive/8637693/; Robert Thomson, *Metro's Bag Searches Will Treat Everyone Like Terrorists*, WASH. POST (Dec. 18, 2010, 7:39 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/18/AR2 010121802562.html.

London bombings.[248] This "container inspection program" established checkpoints at which police would search the bags of passengers as they entered the station.[249] At each designated location, supervisors would establish the frequency of passengers subject to the search, depending on the passenger volume and available police resources.[250] Passengers selected for search could decline but would not be permitted to enter the subway system with an uninspected item.[251] Refusing the search would not constitute probable cause to arrest or reasonable suspicion for a forcible stop, although attempts to enter the subway system after declining a search could result in arrest.[252]

In *MacWade v. Kelly*, the Second Circuit upheld this program under the special-needs exception to the Fourth Amendment, holding that the exception applied even though passengers retained an undiminished expectation of privacy in their belongings.[253] In its evaluation, the court agreed, as a threshold matter, that the government had established that the program served as its immediate purpose a special need distinct from its general interest in law enforcement—in this case preventing, through deterrence and detection, a terrorist attack on the New York subways.[254] To reach this conclusion, the court used expert testimony concerning terrorist operations and the likely efficacy of a seemingly random checkpoint system to disrupt terrorist planning and coordination.[255] After recognizing the government's special need, the court then balanced the weight and immediacy of the government's interest, the nature of the privacy interest affected by the search, the character of the intrusion, and the efficacy of the search in advancing the government's interest to determine the overall reasonableness of the search under the Fourth Amendment.[256] Based on past thwarted attacks on the New York subways, its continued viability as a terrorist target, and the attacks on mass transportation systems in Madrid, Moscow, and London, the court concluded that "the risk to public safety

248. MacWade v. Kelly, No. 05CIV6921RMBFM, 2005 WL 3338573, at *5 (S.D.N.Y. Dec. 7, 2005), *aff'd*, 460 F.3d 260 (2d Cir. 2006).

249. *Id.* at *5–6.

250. *Id.*

251. *Id.* at *6.

252. *Id.* at *6 n.14 (noting that passengers were subject to arrest if they attempted to re-enter the subway from another entrance after refusing to subject their items to search).

253. *MacWade*, 460 F.3d at 263.

254. *Id.* at 271 ("Where, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need.").

255. *Id.* at 266–67.

256. *Id.* at 268–69 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830–837 (2002)).

[was] substantial and real,"[257] and then turned its attention to the remaining factors identified by the Supreme Court in *Earls*.[258] In reaching its conclusion after balancing the remaining criteria, the court conceded that the privacy interests of subway passengers in their belongings remained undiminished and not insignificant, but ultimately determined that those interests were outweighed.[259]

In its evaluation, the court also spent considerable effort clarifying that the NYPD had significantly limited the nature and character of the intrusion by providing passengers notice and allowing them to decline the search if they left the subway, searching only containers likely to contain explosives, inspecting containers visually unless it was necessary to manipulate their contents, limiting most searches to only a few seconds, and ensuring the searches occurred in the open with little stigma or fear associated with searches conducted in a more hidden location.[260] Significant to the conclusion that the program was narrowly tailored to its purpose was the fact that the officers "exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority."[261] By evaluating the program "at the level of its design," the court determined that the program was reasonably effective in deterring terrorist operations, giving significant weight to the executive's decision among various methods to achieve the program's goals of deterring and detecting terrorist attacks.[262] The limitations (or the narrow tailoring) of the program recognized by the court were significant to its conclusion of reasonableness under the Fourth Amendment, particularly in light of the "'enormous dangers to life and property from terrorists' bombing the subway."[263]

Also in 2006, in *Cassidy v. Chertoff*, the Second Circuit reviewed a challenge to a Lake Champlain ferry company's random searches of "persons, cargo, vehicles, or carry-on baggage" conducted pursuant to

257. *Id.* at 272. In evaluating the gravity of the government's interest, i.e., whether it was substantial and real (as required under *Chambers*), the court here traced the development of the special-needs doctrine back to its 1970s-era case *Edwards*, in which it discussed the dire nature of the risk of aircraft hijacking. *Id.* at 271–72. Explaining that *Edwards*'s rationale was "lodged . . . within the broad rubric of reasonableness," the court stated that its reasoning became known as the special-needs exception in *New Jersey v. T.L.O.* *Id.* at 268.

258. *Earls*, 536 U.S. at 838 (upholding drug testing of all high school students participating in any extracurricular activities as a special need).

259. *MacWade*, 460 F.3d at 273.

260. *Id.*

261. *Id.*

262. *Id.* at 273–75.

263. *Id.* at 271–72 (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)).

federal law and Coast Guard regulations.[264] The law and implementing regulations were passed after 9/11 to enhance maritime security and required the private ferry company to implement random searches.[265] Once again, the court upheld the searches as reasonable under the special-needs exception to the Fourth Amendment after conducting the contextual reasonableness-balancing test it had applied in *MacWade*.[266] Recognizing an undiminished privacy interest in the passengers' carry-on baggage, and assuming such an interest in the cars' trunks, the court determined, as it had in *MacWade*, that the balancing required under the special-needs exception ultimately supported the reasonableness of these searches.[267]

The court evaluated the character and degree of the governmental intrusion and looked to various factors to determine if the intrusion was substantial or minimal. Among these factors were "the duration of the search or stop, the manner in which government agents determine [whom] to search, the notice given to individuals that they are subject to search and the opportunity to avoid the search by exiting the premises, as well as the methods employed in the search."[268] Because the searches consisted primarily of cursory visual inspections of vehicles and their trunks and brief examinations of the contents of the luggage, the court concluded the intrusion was minimal.[269] As is evident, the limited nature of the intrusion in time and degree as well as the lack of discretion given to the government agents weighed heavily in favor of the conclusion that the intrusion was minimal.

Finally, in evaluating the nature of the government's need, the court gave substantial deference to the Coast Guard's finding that large ferries

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264. Cassidy v. Chertoff, 471 F.3d 67, 72 (2d Cir. 2006).

265. *See id.* at 74 (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989)). Because federal laws and regulations required the private ferry company to implement the searches at issue, and because of the government's significant involvement in the search policy, the parties conceded that the search was within the ambit of the Fourth Amendment. *Id.*

266. *Id.* at 75 ("In applying the special needs doctrine, courts must assess the constitutionality of the challenged conduct by weighing 'the government conduct—in light of the special need and against the privacy interest advanced'—through the examination of three factors: (1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs." (citing Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir. 2004))). This three-part test is taken from *Earls*. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830–34 (2002).

267. *Cassidy*, 471 F.3d at 87.

268. *Id.* at 78–79 (citations omitted). In its evaluation, the court considered that there was no evidence suggesting that the police had "unbridled discretion" to carry out the searches in an arbitrary or discriminatory manner, nor was there any allegation of unlawful or discriminatory activity during the searches. *Id.* at 79. Moreover, the court again rejected the claim that the government was limited to the least intrusive means to accomplish its special need. *Id.* at 80.

269. *Id.* at 81.

were at "high risk" of a terrorist attack.[270] Concluding that there was a special need distinct from the general interest in law enforcement in preventing terrorist attacks on large vessels engaged in mass transportation that the Coast Guard had determined to be at a heightened risk of attack, the court again looked to *Edwards*'s description of the increased risk of air hijacking together with its endorsement by the Supreme Court's decision in *Von Raab*.[271] Finally, the court once again rejected any requirement that the least intrusive means be employed to achieve the government's special need, instead recognizing that the choice among reasonable alternatives remains with democratically accountable governmental officials with special knowledge and understanding of the risks.[272] Having determined "that the central purpose of random security screening on high-risk maritime vessels is to deter[] a transportation security incident,"[273] the court concluded that the random security searches at issue were a reasonable means of deterring the prohibited conduct.[274]

The court once again refused to second-guess executive decisions on how to accomplish these security goals, particularly in light of the fact that the government had chosen a minimally intrusive method designed to deter terrorist attacks.[275] Significant to the court's holding was that the intrusion was minimal, and little discretion had been left to the employees conducting the search, limiting the possibility of discriminatory application.[276]

Courts have also applied the special-needs exception in the absence of a direct terrorist justification, and in some cases, the parallel legal reasoning between the special-needs exception and traffic checkpoint cases remains operative as well.[277] Regardless, the fundamental test is consistent across

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270. *Id.* at 84.
271. *See id.* at 83–84.
272. *Id.* at 85.
273. *Id.* (alteration in original) (internal quotation marks omitted).
274. *Id.* at 87.
275. *See id.* at 84.
276. *See id.* at 79.
277. *See, e.g.*, Johnston v. Tampa Sports Auth., 530 F.3d 1320, 1329 (11th Cir. 2008) (per curiam) (affirming NFL-mandated search at the entry to a stadium on the basis of consent rather than the special-needs exception because the conditions of entry and consequences of nonconsent were established solely by a nongovernmental entity); United States v. Amerson, 483 F.3d 73, 81–82 (2d Cir. 2007) (recognizing special need in government collection of DNA from probationers); Palmieri v. Lynch, 392 F.3d 73, 85–86 (2d Cir. 2004) (holding that the special-needs exception applied to trespass by a government agent who was conducting an administrative inspection of property on wetlands); United States v. Green, 293 F.3d 855, 860 (5th Cir. 2002) (holding that the checkpoint at the entrance to a military base was valid under the Fourth Amendment because the purpose of ensuring traffic safety and security was distinct from the general interest in law enforcement, and because officers on the ground had no discretion as to whom to search or the search's scope); *see also* Lynch v. City of New York, 589 F.3d 94, 97 (2d Cir. 2009) (evaluating NYPD policy mandating breathalyzer tests after any police shooting resulting in injury or death

these cases. First, certain regimes of suspicionless searches are reasonable under the Fourth Amendment where the program was designed to serve special needs beyond the normal need for law enforcement, and the program's primary purpose is not a general interest in crime control.[278] Similarly, suspicionless highway checkpoint cases are permissible only if they are not designed to serve the general interest in law enforcement.[279] This requires reviewing courts to conduct inquiries into the "purpose at the programmatic level."[280] Although the subjective intent of officers is irrelevant for normal Fourth Amendment probable-cause analysis, it remains valid for the assessment of programmatic purpose under the special-needs doctrine, or in other cases involving "Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[281]

Finally, if a court determines that the primary purpose of the program is not the general interest in law enforcement, the court must conduct a reasonableness-balancing test, weighing the special need against the privacy interests advanced.[282] To do so, a court balances "(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs."[283] Thus, although seemingly limited to programmatic purpose, subjective issues such as subterfuge are relevant either to the direct evaluation of programmatic purpose or in the analysis of the character and degree of the governmental intrusion. When evaluating the character and degree of government intrusion, courts have routinely analyzed the amount of official discretion, notice, and the ability of the citizen to decline the search, in addition to the

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under the special-needs exception). In *Lynch*, although there were multiple governmental purposes in the policy, the primary purpose was not that of general law enforcement. *Lynch*, 589 F.3d at 102. Once a special need was recognized, then the reasonableness-balancing test was conducted. *Id.* at 103–04. As discussed earlier in this Article, the Supreme Court's analysis of special-needs cases is often inextricably intertwined with highway-checkpoint cases, sharing both legal tests and supporting Supreme Court precedent.

278. *Lynch*, 589 F.3d at 102–03.

279. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000); *see also* Illinois v. Lidster, 540 U.S. 419, 426 (2004).

280. *Lynch*, 589 F.3d at 100 (quoting *Edmond*, 531 U.S. at 46).

281. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (emphasis omitted) (describing the holding of *Edmond* and the categories of special-needs and administrative-search cases where "actual motivations do matter" (internal quotation marks omitted)); *see also Lynch*, 589 F.3d at 100.

282. *Lynch*, 589 F.3d at 100.

283. *Id.* (quoting United States v. Amerson, 483 F.3d 73, 83–84 (2d Cir. 2007)).

specific nature of the intrusion, while recognizing that unbridled discretion may lead to government abuse of suspicionless searches.[284]

Because actual motivations do matter for courts evaluating suspicionless-search regimes, consideration of the government's primary programmatic purpose, as well as how the government implements its program, is highly relevant to a determination of reasonableness under the Fourth Amendment. Nevertheless, as the case law indicates, courts remain resistant to examining motivations of individual police officers. This is where a rule of evidence akin to Rule 313, focusing on both the purpose of the search and its implementation, may prove valuable by allowing courts a means to capture objectively these inherently subjective elements.

B. British Approach to Suspicionless Terrorism Searches: How Complete Discretion Leads to Racial Disparities and Adverse Effects on Fundamental Rights and Is Incompatible with the Rule of Law

Examination of Britain's implementation of a similar antiterrorist suspicionless-search regime is highly instructive in illustrating the evils that unbridled police discretion involve, including racial, ethnic, and religious discrimination, as well as interference with free speech, press, and assembly rights. Many of these evils are mirrored in recent U.S. cases, particularly in challenges to the NYPD's controversial stop-and-frisk program.[285]

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284. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 275 (2d Cir. 2006) (holding that notice and opportunity to decline a search are beneficial aspects of a suspicionless-search program because those factors minimize intrusiveness).

285. *See* Thomas Kaplan, *Cuomo Seeks Cut in Frisk Arrests*, N.Y. TIMES, June 3, 2012, http://www.nytimes.com/2012/06/04/nyregion/cuomo-seeks-cut-in-stop-and-frisk-arrests.html; *see also* Russ Buettner & William Glaberson, *Courts Putting Stop-and-Frisk Policy on Trial*, N.Y. TIMES, July 10, 2012, http://www.nytimes.com/2012/07/11/nyregion/courts-putting-stop-and-frisk-policy-on-trial.html. A New York court, in analyzing the data from 4.4 million stops conducted by the NYPD from January 2004 to June 2012, found that 83% of the stops involved African-American or Hispanic persons—with those two groups accounting for a little over half of the population—and concluded that these numbers indicated racial discrimination. *See* Editorial, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html ("The evidence clearly showed that the police carried out more stops on [B]lack and Hispanic residents even when other relevant factors were controlled for, and officers were more likely to use force against minority residents even though stops of minorities were less likely to result in weapons seizures than stops of whites."); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013), *superseded per curiam in part sub nom.* Ligon v. City of New York, 736 F.3d 118 (2d Cir. 2013), *vacated per curiam in part*, 743 F.3d 362 (2d Cir. 2014); *see also* Ligon v. City of New York, 925 F. Supp. 2d 478, 484–85 (S.D.N.Y. 2013). The evidence further supported claims that the NYPD regularly performed stop-and-frisks in the absence of reasonable suspicion and routinely stopped persons based, at least in part, on race or ethnicity. *See Floyd*, 959 F. Supp. 2d at 559–61; *see also* Sherry F. Colb, *A Federal Court Holds New York Stop-and-Frisk Policy Unconstitutional in* Floyd v. City of New York, JUSTIA (Aug. 21, 2013), http://verdict.justia.com/2013/08/21/a-federal-

However, the prevalence of stop-and-frisk programs in the United Kingdom, a country that shares similar liberty values as the U.S., raises the specter that these common evils are inherent in, and arise directly from, unbridled governmental discretion.

The UK's approach is captured in § 44 of the Terrorism Act of 2000 (the Act), which authorizes police to stop and search persons and vehicles at random where it would be expedient to prevent acts of terrorism.[286] This section arose from an earlier counterterrorism provision to combat IRA bombings in London in the 1990s. This law provides for a two-step process. First, if a senior police officer believes it "*expedient* for the prevention of acts of terrorism," the officer may authorize use of the § 44 authority within certain specified geographic areas for up to twenty-eight days.[287] Second, the Secretary of State must then confirm the authorization within forty-eight hours.[288] Renewals of the authority must comply with the same procedures, and the existence and contents of such authorizations are not available to the public.[289] If authorized, police are not required to have reasonable suspicion prior to exercising the authority to search individuals and vehicles.[290] Although the power may only be exercised for the purpose of searching for items that could be used in connection with terrorism, a police officer is not required to have grounds for suspecting the presence of such

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court-holds-new-york-stop-and-frisk-policy-unconstitutional-in-floyd-v-city-of-new-york (explaining two baselines that can potentially serve as an appropriate race-neutral standard to measure racial disparities in police stops: (1) the proportion of African-American and Hispanic criminal suspects in the relevant area, or (2) the population demographics and crime rates in the relevant area). Although the cases were stayed for other reasons, the data produced indicate that unfettered police discretion can result in racial discrimination. The ultimate result should provide additional insights into the need for an articulation of reasonable suspicion, and is relevant to an evaluation of potential problems in search protocols based on special needs. Dispensing with the requirement for reasonable suspicion, either de facto (as in this case) or de jure (as in the British § 44 searches discussed below) leads to inevitable governmental misuse, impacting equal protection, free speech, and free assembly rights.

286. Terrorism Act, 2000, c. 11, §§ 43–44 (U.K.). The UK police have the authority to stop and search individuals under a variety of legislation, each with its own prerequisites. *Id.* This analysis will involve only the power under §§ 43 and 44 of the 2000 Terrorism Act, which prior to the 2010 European Court of Human Rights opinion in *Gillan v. United Kingdom*, did not require any predicate reasonable belief on the part of the police in order to conduct a search. Gillan v. United Kingdom, 2010-I Eur. Ct. H.R. 223, 225. *See generally* JOHN IP, SUSPICIONLESS SEARCHES AND THE PREVENTION OF TERRORISM *in* COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11 88 (Andrew Lynch et al. eds., 2010) (providing an excellent discussion of both the *MacWade* case and the facts and authorities underlying *Gillan v. United Kingdom*).

287. *Gillan*, 2010-I Eur. Ct. H.R. at 225 (emphasis added).

288. *Id.*

289. Terrorism Act, 2000, c. 11, § 46(7) (U.K.).

290. *Gillan*, 2010-I Eur. Ct. H.R. at 227.

items.[291] While supposedly limited to twenty-eight days, successive § 44 authorizations covering the entirety of London had been ongoing from the Act's inception in February 2001 until 2010, when the European Court of Human Rights (ECHR) held in *Gillan v. United Kingdom* that the program violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[292]

In 2003, a graduate student named Kevin Gillan traveled to London to protest an arms fair in East London, and was stopped and searched near the protest site by two policemen, while Pennie Quinton, a freelance journalist, was also stopped and searched when she went to the arms fair to film the protest.[293] Both searches were conducted under the authority of § 44. Gillan's search took approximately twenty minutes, while Quinton's lasted from five to thirty minutes.[294] Both Gillan and Quinton contested the searches in lower courts and, when unsuccessful, pursued an appeal to the House of Lords.[295] On appeal, the House of Lords rejected their claim that a proper construction of the Act permitted the § 44 authorization to be made only if the authorizing senior police official "had reasonable grounds for considering that the powers were necessary and suitable . . . for the prevention of terrorism," concluding that the word "expedient" in the Act was distinct from "necessary."[296] The House of Lords also rejected their contentions that the continuous, rolling § 44 authorizations for London in effect since the Act's inception were ultra vires, and that their authorization had become a routine bureaucratic inference without the informed consideration required by §§ 43 and 44.[297] Finally, the House of Lords also

291. The "constable" may detain the person or vehicle for as long as necessary to conduct the search and may only require the removal of headgear, footwear, outer coat or jacket, or gloves, and must provide a written statement that the search occurred under the authority of § 44 if requested. Terrorism Act, 2000, c. 11, §§ 44–45 (U.K.). Failure to comply with the search or interfering with the search is a criminal offense. *See* Terrorism Act, 2000, c. 11, §§ 45, 47 (U.K.). The police were required to comply with Code A of the Police and Criminal Evidence Act 1984 (PACE), issued by Secretary of State, together with general guidance on the conduct of searches; however, PACE did not alter § 44's lack of reasonable suspicion. *See Gillan*, 2010-I Eur. Ct. H.R. at 244.

292. *Gillan*, 2010-I Eur. Ct. H.R. at 265; *see* R v. Comm'r of Police for the Metropolis, [2006] UKHL 12, [2006] A.C. (H.L.) 307, 23 (appeal taken from Eng. & Wales) (showing how English courts once allowed suspicionless searches without any boundaries).

293. *Comm'r of Police for the Metropolis*, [2006] A.C. at 1–2.

294. *Id.*

295. *Gillan*, 2010-I Eur. Ct. H.R. at 231–34.

296. *Id.* at 234–35.

297. *Id.* at 236.

rejected claims that § 44 searches violated Gillan's and Quinton's rights under Articles 5, 8, 10, and 11 of the Convention.[298]

Gillan and Quinton then brought a complaint to the ECHR, alleging that the § 44 searches subjected them to a deprivation of liberty under Article 5, § 1 of the Convention; was an interference with their right to respect for their private lives under Article 8; and a violation of their rights to freedom of expression under Article 10, and freedom of assembly under Article 11.[299] The court rejected the UK's contention that the brevity of the detention and the nature of the stop and search did not necessarily amount to a deprivation of liberty under Article 5.[300] Instead, finding the element of coercion and complete deprivation of the freedom of movement as "indicative of a deprivation of liberty within the meaning of Article 5 § 1," the court nevertheless did not finally determine the issue because it held that the § 44 stop and search did amount to an interference with Gillan's and Quinton's Article 8 right to respect for their private lives.[301]

Central to its decision concerning interference with Article 8 rights was the interference with the physical and psychological integrity and personal autonomy of a person. For the court, "use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life."[302] Addressing the exception allowing such interference when it was "in accordance with law" under Article 8, paragraph 2, the court explained that to be "in accordance with the law," the measure must "have some basis in domestic law" and be "compatible with the rule of law."[303] To meet these requirements, domestic law

> must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. . . . [I]t would be contrary to the rule of law, one

298. *See id.* at 236–37; IP, *supra* note 286, at 94 ("The House of Lords held that the stop-and-search, given its brief duration, was not a deprivation of liberty for the purposes of Article 5 of the European Convention. Further, even if it were a deprivation of liberty, the exception under Article 5(1)(b)—lawful detention in order to secure the fulfillment of an obligation prescribed by law—would apply. A claim based on Article 8 (respect for private and family life) was rejected on the basis that the right would not be infringed by the relatively superficial search involved in a § 44 stop-and-search, and that even if it were, it was a justified and proportionate counter-terrorism measure. Further claims based on Articles 10 (free expression) and 11 (free assembly) were also dismissed on the basis that they would not be infringed by the proper exercise of the § 44 power." (footnotes omitted)).

299. *Gillan*, 2010-I Eur. Ct. H.R. at 231.

300. *See id.* at 254–55.

301. *Id.*

302. *Id.* at 257.

303. *Id.* at 262.

> of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.[304]

The court recognized that § 44 had a basis in domestic law, but concluded that the powers conferred were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They [were] not, therefore, 'in accordance with the law.'"[305]

The factors leading to the court's conclusion on this matter were as follows: the lack of any limitations on the statutory authority for the search authorization, with the words "expedient for the prevention of acts of terrorism" to be so broad as to make judicial challenge of its use difficult; the failure of the geographical and temporal limits in the Act as a "real check" on the issuing of authorization as shown by the continuous renewal of London's authorization since the powers were first granted; the limited protections provided by the Independent Reviewer's annual reports; the breadth of discretion conferred on the individual police officer, with no requirement of any suspicion, authorizing stop and searches on hunches or intuition; and the limitations on any meaningful judicial review given the broad nature of the statutory language requiring no suspicion at all to initiate a search.[306]

Of particular concern to the court was the "statistical and other evidence showing the extent to which resort is had by police officers to the powers of stop and search under section [§] of the Act," and the "clear risk of arbitrariness" shown by the disproportionate use of the powers against Black or Asian persons in the available statistics, a risk recognized by the House of Lords.[307] Fundamentally, it was "the absence of any obligation on the part of the officer to show reasonable suspicion," rendering any legal challenge to its exercise futile, that led to the court's conclusion that the powers were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse," and were therefore not in accordance with law and a violation of Article 8 of the Convention.[308] Similar to its disposition of the allegation of violations of Article 5 rights, the court also

304. *Id.*
305. *Id.* at 265.
306. *Id.* at 263–65.
307. *Id.* at 264–65.
308. *Id.* at 265.

declined to examine the allegations of Article 10 and 11 violations, given its conclusion that Gillan's and Quinton's Article 8 rights had been violated.[309]

Significant to both the House of Lords and the ECHR were concerns that § 44 authority was being abused in a variety of ways. Specific concerns arose over the terrorist search authority being used as a convenient subterfuge for general criminal law enforcement investigations rather than being limited strictly to terrorist investigations; being used deliberately to balance racially disproportionate statistics; being used in a racially disproportionate manner; being used to intimidate journalist and peaceful protestors; and being used ubiquitously rather than as a narrow emergency power. Provisions of the Act required the government to provide annual reports on the efficacy of the Act to Parliament, in addition to annual reports required by the Criminal Justice Act of 1991, which required the Secretary of State to publish information on the criminal justice system with reference to avoiding racial discrimination.[310] The data in these reports show an exponential increase in the use of the § 44 search authority overall, with a significantly disproportionate impact on racial minorities. Total searches rose from 33,177 searches in 2004–2005, to 44,543 in 2005–2006, 37,000 in 2006–2007, 117,278 in 2007–2008, to over 200,000 in 2008–2009, and falling back to just over 100,000 in 2009–2010.[311]

As an illustrative example of the racial disparities, of the increase in searches between 2003–2004 and 2004–2005, searches of Asian people increased by 84%, and searches of Black people increased by 51%, with searches of White people increasing only 24% in the same period.[312] The annual reports of the Independent Reviewer required under the Act highlighted increasing controversy over the operation of § 44 search powers, noting that the entire City of London was subject to continuous rolling authorizations. In the six years of these reports analyzed by the ECHR, the Independent Reviewer became increasingly concerned with the escalating use of the power by police with inadequate training on its scope and limitations, resulting in negative impacts on communities and citizen comfort with the practice. Complaints of police targeting journalists and unpopular protestors,[313] other misuses of the search authority—including

309. *Id.* at 266.
310. *Id.* at 246, 248.
311. *Id.* at 248.
312. *Id.*
313. *Id.* at 230–31. *See generally Independent Reviews on the Terrorism Act 2000 and the Terrorism Act 2006*, HOME OFF., http://tna.europarchive.org/20100419081706/http:/security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/ (last visited July 28, 2014) (reporting annually the impact of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006).

stops of nonminorities solely to produce a racial balance in § 44 statistics—and disproportionate uses of the authority impacting racial and ethnic minorities, joined with evidence of dramatic increases in such searches, "show that [§] 44 [was] being used as an instrument to aid non-terrorism policing on some occasions."[314] These concerns led the Independent Reviewer to call for limits on the application of this exceptional power.[315]

In response to the ECHR's opinion, in July 2010 the Home Secretary suspended the use of § 44 to support suspicionless searches and initiated a review process to evaluate possible government responses.[316] In its report, the UK government evaluated possible abuses of power and sought remedies to bring the statutory authority into compliance with the UK's obligations under the Convention; it also outlined perceptions of racial profiling in the use of § 44's search powers and raised questions concerning both its necessity—since few such searches led to convictions for terrorism offenses—and the targeting of journalist and photographers using these powers.[317] Its recommendations included retaining the § 44 suspicionless-search authority but severely limiting its use to situations where there was reasonable suspicion that an act of terrorism will take place and that the stop-and-search powers are necessary to prevent such an act.[318] Limiting the authorization process, both geographically and temporally, to situations necessary to prevent specific suspected acts of terrorism was one of the main recommendations of the Independent Reviewer's report, and included

314. *See Gillan*, 2010-I Eur. Ct. H.R. at 247.

315. *See* LORD CARLILE OF BERRIEW, Q.C., REPORT ON THE OPERATION IN 2006 OF THE TERRORISM ACT 2000 32 (2007), *available at* http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/lord-carlile-report-07?view=Binary.

316. *See generally* Terrorism Act 2000 (Remedial) Order 2011, S.I. 2011/631, art. 2 (U.K.), http://www.legislation.gov.uk/uksi/2011/631/pdfs/uksi_20110631_en.pdf (suspending the previously authorized suspicionless searches); DAVID ANDERSON, Q.C., REPORT ON THE OPERATION IN 2010 OF THE TERRORISM ACT 2000 AND OF PART 1 OF THE TERRORISM ACT 2006 65–66 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243552/9780108510885.pdf [hereinafter REPORT ON THE OPERATION IN 2010] (discussing the findings of the government-initiated review of the antiterrorism legislation).

317. SEC'Y OF STATE FOR THE HOME DEP'T, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS 15–16, 21 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97972/review-findings-and-rec.pdf [hereinafter REVIEW FINDINGS AND RECOMMENDATIONS]; SEC'Y OF STATE FOR THE HOME DEP'T, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: SUMMARY OF RESPONSES TO THE CONSULTATION 1–2 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97969/sum-responses-to-cons.pdf [hereinafter SUMMARY OF RESPONSES TO THE CONSULTATION].

318. REVIEW FINDINGS AND RECOMMENDATIONS, *supra* note 317, at 18–19.

substantial statutory guidance on the exercise of discretion by the police.[319] In January 2011, the Home Secretary recommended a moratorium on the use of § 44 searches of individuals, forcing reliance on § 43's reasonable-suspicion requirement. As a result, § 44 was repealed and replaced by § 60 of the 2012 Protections of Freedom Act.[320] Under § 60, searches in "authorisation zones" require reasonable suspicion that an act of terrorism will take place.[321] As a consequence of these reforms, the number of terrorism searches conducted during 2010–2011 was 9,652, falling from 102,504 in 2009–2010.[322]

C. *Common Problems*

The three lines of U.S. cases that support searches in the absence of particularized suspicion, as well as the British experience with § 44 searches, show that a core concern is unbridled discretion of the government agents performing the search. While subjective intent on the part of these agents is irrelevant when probable cause is required to justify a search, a key concern in the special-needs, vehicle-checkpoint, and administrative-inspections cases is the concern that these searches, because of the very lack of any particularized suspicion, are particularly susceptible

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319. *Id.*; *see also* Nick Dent, *Section 44: Repeal or Reform? A Home Secretary's Dilemma*, U. ESSEX, http://projects.essex.ac.uk/ehrr/V8N1/Dent.pdf (last visited June 26, 2013).

320. *Section 44 Terrorism Act: The Protection of Freedoms Act*, LIBERTY, https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act (last visited Oct. 6, 2014).

321. *Protection of Freedoms Bill: Explanatory Notes*, PARLIAMENT.UK (Feb. 11, 2011), http://www.publications.parliament.uk/pa/cm201011/cmbills/146/en/11146en.htm; *Protection of Freedoms Bill, Fact Sheet—Part 4: Counter-Terrorism Powers*, HOME OFF. (Oct. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98407/fact-sheet-part4.pdf; Max Rowlands, *Statewatch Analysis UK: Review of Counter-Terrorism Powers Fails to Deliver Definitive Change*, STATEWATCH 4, http://www.statewatch.org/analyses/no-135-uk-ct-powers.pdf (last visited July 28, 2014).

322. *See 91% Decrease in Terrorism Stop-and-Search Powers*, BBC, http://www.bbc.co.uk/news/uk-15290176 (last updated Oct. 13, 2011, 14:27); *Police Use of Terrorism Stop and Search Powers Drops 90 Per Cent*, TELEGRAPH, Oct. 13, 2011, 11:26 AM BST, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8824203/Police-use-of-terrorism-stop-and-search-powers-drops-90-per-cent.html; *see also* Teodora Beleaga, *Terror Stop and Police Statistics*, GUARDIAN, Apr. 19, 2012, 12:17 PM EDT, http://www.theguardian.com/news/datablog/2010/jun/10/stop-and-search-terror-police-statistics; *Rules on Stop and Search Changed*, BBC NEWS U.K., http://www.bbc.co.uk/news/10555430 (last updated July 8, 2010, 20:22). *But see* Pat Strickland, *Stop and Search*, HOUSE OF COMMONS LIBR. 8 (Jan. 23, 2014), www.parliament.uk/briefing-papers/SN03878.pdf (discussing searches under § 47A, which was adopted as an interim change after the ECHR's decision in *Gillan & Quinton*). From 2010 to 2011, the number of searches was 11,792, down from a peak of 210,000 in 2008–2009, with the decrease coinciding with the replacement of § 44 with § 47A. Strickland, *supra* note 322, at 8. The grounds for the use of § 47A did not authorize its use during the Royal Wedding in April 2011. *See* REPORT ON THE OPERATION IN 2010, *supra* note 316, at 7.

to misuse, subterfuge, or pretext by the government. This weakness potentially eviscerates the protections of the Fourth Amendment. Because of this, courts should be particularly concerned at ferreting out instances or programs designed to achieve illegitimate ends or that involve means prohibited by the Constitution, such as profiling based on race, ethnicity, or religion. Identification of programmatic purpose at the appropriate level can prove difficult. Evaluation of an individual police officer's subjective intent is similarly difficult to discern but remains a core judicial task. It is in the evaluation of both the programmatic intent and the implementation of special-needs search programs that a rule similar to Rule 313 could prove valuable.

Rule 313, which uses the mechanism of shifting presumptions that shift the burden of persuasion to the government to disprove subterfuge at a high evidentiary level—that of clear and convincing evidence—can prove a valuable tool in the evaluation of special-needs searches. Even under the special-needs exception in the U.S., unbridled discretion is constitutionally suspect. By restoring the principled cabining of police discretion by courts through the use of objective evidentiary tests, the evils of unchecked police discretion can be curtailed. The creation of an analog Federal Rule of Evidence would serve multiple purposes. First, it would provide a means for defense counsel to attack suspected subterfuge searches, legitimizing the inquiry and providing a rule under which a motion to exclude can be made and discovery can be sought. Second, because of its high evidentiary burden, it would provide incentives to the police to ensure that special-needs searches can be justified both at their inception, and in implementation when challenged in court. Finally, enactment of a federal rule of evidence akin to Rule 313 that restricts police discretion would also contribute to the achievement of a long-term constitutionally supportable balance between national security and liberty, and recognizes that the personal autonomy and liberty protected by the Fourth Amendment is both an individual and societal good.[323]

V. PROPOSAL

In an attempt to balance the legitimate needs of military commanders to inspect their soldiers to ensure readiness and good order and discipline with respect for soldiers' constitutional rights, the President promulgated Rule 313.[324] This rule explicitly authorizes the conduct of inspections by

323. Reinert, *supra* note 8, at 1521.

324. *See* MCM, *supra* note 6, MIL. R. EVID. 313.

Rule 313. Inspections and inventories in the armed forces.

military leaders "to determine and ensure the security, military fitness, and good order and discipline" of the "unit, organization, installation, vessel, aircraft, or vehicle."[325] Codifying the long-standing authority to conduct

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(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Id.

325. MCM, *supra* note 6, MIL. R. EVID. 313 analysis, at A22-21 to -26. Although Rule 313 included an explicit authorization for inspections, the drafters recognized that it merely codified the longstanding law of military inspections. *Id.*

> [A]n inspection is conducted for the primary function of ensuring mission readiness, and is a function of the inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they must be considered as a condition precedent to the existence of any effective armed force and inherent in the very concept of a military unit. . . .
>
> . . .
>
> An effective armed force without inspections is impossible—a fact amply illustrated by the unfettered right to inspect vested in commanders throughout the armed forces of the world.

inspections of military units and personnel,[326] Rule 313 also recognizes that commanders will have secondary motives beyond those authorized by the rule. Rule 313(b) specifically authorizes inspections for contraband, with its inherent possibility of prosecution.[327] Although commanders may have a secondary motive to prosecute those in possession of contraband, for an inspection to be legitimate under Rule 313, its primary purpose must be administrative—to ensure the fitness of the military unit.[328] The inquiry into the commander's primary purpose in conducting an inspection is analogous to the Supreme Court's inquiry in *Ferguson* into the "primary" purpose of the special-needs program, or as explained in *Edmond*: "[P]rogrammatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[329]

Despite the long history of the military inspection and its necessity and constitutional validity, the drafters of Rule 313 recognized three circumstances where inspections for contraband objectively raise a strong likelihood of subterfuge: (1) when the examination was directed immediately following a report of a specific offense in the unit and was not previously scheduled; (2) when specific individuals were selected for examination; and (3) when inspected persons are subject to substantially different intrusions during the same examination.[330] In these three circumstances, Rule 313 shifts the burden to the prosecution to prove by clear and convincing evidence that the primary "purpose of the examination was to determine and ensure security, military fitness, and good order and discipline, and not for the primary purpose of prosecution."[331] This language was added to Rule 313 "to provide objective criteria by which to measure a subjective standard, i.e., the commander's purpose."[332] Rather than make the existence of the circumstances conclusive, however, the drafters chose instead to employ a burden-shifting rule that "provide[s]

Id. at A22-21.

326. *See* United States v. Middleton, 10 M.J. 123, 127–28 (C.M.A. 1981) (sustaining the authority of commanders to conduct unit inspections).

327. MCM, *supra* note 6, MIL. R. EVID. 313(b).

328. *See* MCM, *supra* note 6, MIL. R. EVID. 313 analysis, at A22-21.

329. *See* Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 45–46 (2000).

330. MCM, *supra* note 6, MIL. R. EVID. 313(b); *see also* MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-25 ("'Specific individuals' means persons named or identified on the basis of individual characteristics, rather than by duty assignment or membership in a subdivision of the unit, organization, installation, vessel, aircraft, or vehicle such as a platoon or squad, or on a random basis.").

331. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-25.

332. United States v. Jackson, 48 M.J. 292, 298 (C.A.A.F. 1998) (emphasis omitted) (internal quotation marks omitted).

concrete and realistic guidance for commanders to use in the exercise of their inspection power, and for judicial authorities to apply in reviewing the exercise of that power."[333]

The implementation of this rule has been controversial. Military courts-martial judges are often required to evaluate and parse evidence of the commander's intent in ordering the inspection. The triggering of the rule is often clear-cut,[334] but the evaluation of whether the government has met its burden to show by clear and convincing evidence that a proper purpose motivated the inspection is often difficult and dependent on the military judge's determination of the credibility of the ordering and implementing official's testimony.[335]

But despite the difficulty of evaluating the subjective motivations of the persons involved in a military inspection, the existence of Rule 313

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333. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-26.

334. Although there are practical difficulties in scaling this rule of evidence up to address a large city's implementation of a suspicionless-search regime, some instances of misuse will still be relatively obvious and accessible to civilian defense attorneys. For example, the establishment of a subway checkpoint immediately following the report of a robbery in a neighborhood, when such a checkpoint was not planned prior to the report, would support the inference of subterfuge, just as it would in the military context. This is not to understate the difficulties of the defense establishing the predicates to trigger the rule in all instances, but the existence of the rule provides an incentive to the police not to abuse the special needs search exception in the first place, and does incentivize the prior planning of both the searches and their implementation by higher level, "insulated" police officials, leaving little discretion to officers in the field. *But see* Corn, *supra* note 7, at 162–63.

335. *See, e.g.*, United States v. Ayala, 69 M.J. 63, 64–66 (C.A.A.F. 2010) (applying the clear-and-convincing standard and holding that the primary purpose of the commander's policy requiring a follow-up urinalysis after a positive result from a prior random urinalysis was not to obtain evidence for trial; therefore, the evidence was obtained from a lawful inspection); United States v. Attucks, 64 M.J. 518, 521–522 (A.F. Ct. Crim. App. 2006) (finding none of the three Rule 313(b) triggering circumstances present; therefore, the appropriate standard was preponderance of the evidence); *Jackson*, 48 M.J. at 296 (finding that the government satisfied the clear-and-convincing standard necessary to rebut the presumption under Rule 313); United States v. Thatcher, 28 M.J. 20, 25 (C.M.A. 1989) (finding that the government failed to establish under the clear-and-convincing standard that the primary purpose of the room inspection was not the collection of evidence where the defendant was the primary suspect in the theft of tools and where no further inspections of other rooms were conducted until later in the day); United States v. Parker, 27 M.J. 522, 524–25, 527–28 (A.F.C.M.R. 1988) (holding that the government failed to meet the clear-and-convincing standard that urinalysis inspection was for a proper purpose when the two conditions of Rule 313(b) were met); United States v. Ellis, 24 M.J. 370, 371–72 (C.M.A. 1987) (holding an inspecting officer's inspection of a zipped bag hanging from a bed during a health-and-welfare inspection did not stray from the authorizing officer's instructions to check for "neatness and cleanliness" and confiscate any unauthorized property found within the barracks rooms); United States v. Johnston, 24 M.J. 271, 274–75 (C.M.A. 1987) (holding that the selection of a date based on operational requirements did not violate the regulation requiring that urinalysis dates be chosen at random; therefore, the search was not a subterfuge); United States v. Shepherd, 24 M.J. 596, 600 (A.F.C.M.R. 1987) (finding nothing in the record to support a conclusion that the search of the defendant was a subterfuge).

serves three important purposes. First, it provides a concrete authorization for judges to evaluate the subjective motivations of the government officials ordering and performing the searches, with explicit burdens of proof established by law. Second, it establishes a government policy protective of the Fourth Amendment through its requirement of clear and convincing evidence to rebut the presumption. Third, and perhaps most importantly, the existence of Rule 313 ensures that the legal standard is incorporated into the government's planning and implementation of the inspections themselves.

Military commanders, knowing the requirements for valid inspections under Rule 313, often plan the parameters of inspections in depth, selecting persons to be inspected either at random or using neutral selection criteria that will withstand scrutiny and challenge under Rule 313—e.g., every third person on a unit roster being tested in a routine urinalysis, often with the pattern determined by random draw, or searching every person living in the barracks. Persons implementing inspections are trained to inspect each person in the same way and to the same level of detail, with increased scrutiny only allowed if it is justified by an articulable suspicion or probable cause developed during the inspection.[336] Thus, the knowledge that the military commander may be required to prove a valid purpose in court ensures not only the education of government officials authorizing the searches on the applicable law but also their tailoring of inspections to comply with the law in the first instance. Similar effects on civilian police authorities can be expected if an analogous federal rule is adopted. While courts already evaluate many of the factors that are delineated in Rule 313,[337] such a rule would provide a framework for courts to look into the details of purpose and implementation, while still giving appropriate deference to the Executive in its determination of security needs. If enacted by Congress, the existence of such an analog rule would legitimize the Judicial Branch's inquiries into these security searches. Further, the rule's use of rebuttable presumptions would create incentives for the police to plan their operations with the knowledge that they would be subject to challenge if mismanaged.

The creation of a rebuttable presumption of improper purpose in the circumstances identified in Rule 313(b) is particularly relevant to searches conducted under the special-needs exception. The Supreme Court has required a special need apart from the general interest in law

336. *See, e.g.*, Cpt. Craig E. Tellcr, *Litigating the Validity of Compulsary Urinalysis Inspections Under Mil. R. Evid. 313(b)*, ARMY LAW., Mar. 1986, at 41, 43–44; United States v. Hay, 3 M.J. 654, 656 (A.C.M.R. 1977).

337. *See* MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006).

enforcement.[338] This is remarkably similar to the requirement for a nonprosecutorial primary purpose required by Rule 313(b). Also, the three circumstances in Rule 313(b) are relevant in ferreting out improper purposes or implementation by government agents in special-needs searches, and serve the additional purpose of cabining the discretion of the implementing government officers.

Under Rule 313(b), the burden of persuasion shifts when the timing of the decision to search occurs after the report of a specific offense, in effect creating a presumption that the primary purpose of such a search is to gather evidence of criminal wrongdoing.[339] The burden also shifts when particular persons are chosen to be searched, or when specific persons are subject to different intrusions in the inspection.[340] These three circumstances are objective manifestations of a possible improper purpose, and although not barring the evidence categorically, Rule 313(b) instead imposes a higher burden on the government in order to use such evidence, serving as a deterrent to subterfuge searches.

Additionally, under Rule 313(b), while the prosecution can show an improper purpose in the absence of these three circumstances, it "need not meet the higher burden of persuasion when the issue is whether the commander's purpose was prosecutorial, in the absence of these circumstances."[341] Thus, implementing a similar rule in the Federal Rules of Evidence to evaluate special-needs searches, or other searches without individualized suspicion,[342] should attempt, as Rule 313(b) does, to achieve

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338. *See* discussion *supra* Part IV.B.

339. *See* NICHOLAS RESCHER, PRESUMPTION AND THE PRACTICES OF TENTATIVE COGNITION 1 (2011)("[P]resumptions provide a way of filling in—at least pro tem—the gaps that obtain in conditions of incomplete information. . . . Such a legal presumption (*praesumptio juris*) is an inference from a fact that, by legal prescription, stands until refuted.").

340. MCM, *supra* note 6, MIL. R. EVID. 313(b).

341. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-26.

342. Such a proposed rule might look something like the following:

> Proposed Federal Rule of Evidence: Special Needs or Other Searches/Inspections Not Requiring Individualized Suspicion.
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> An "inspection" is an examination of persons and their belongings when the examination serves a special need apart from the general interest in law enforcement as defined by relevant case law. If a purpose of an examination is to locate weapons or contraband, and if:
>
> (1) the examination was directed immediately following a report of a specific offense in the area where the search is implemented and was not previously scheduled;
>
> (2) specific individuals are selected for examination on a nonrandom basis; or
>
> (3) persons examined are subjected to substantially different intrusions during the same examination,
>
> the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion. Inspections may utilize any reasonable natural or technological aid

a balance between legitimate governmental needs and the privacy interests of the person undergoing the search. The potential remedy of exclusion, absent clear and convincing evidence of a proper purpose, provides a deterrent to government overreach or pretext. Layering such an evidentiary rule on top of the current requirements to sustain a valid special need, highway checkpoint, or administrative search may provide similar protections against subterfuge or pretext searches, or as stated in the analysis to Rule 313(b), "provide[] objective criteria by which to measure a subjective standard."[343]

The three circumstances and their potential to be rebutted are explained in the analysis of Rule 313(b):[344]

> For example, when an examination is ordered immediately following a report of a specific offense in the unit, the prosecution might prove the absence of subterfuge by showing that the evidence of the particular offense had already been recovered when the inspection was ordered and that general concern about the welfare of the unit was the motivation for the inspection. Also, if a commander received a report that a highly dangerous item (e.g., an explosive) was present in the command, it might be proved that the commander's concern about safety was the primary purpose for the examination, not prosecution.

When commanders examine specific individuals or subject them to more intrusive examinations than others, these signs of subterfuge may be rebutted by proof that these individuals were not chosen in anticipation of prosecution, but on other grounds—e.g., persons were chosen because they had not been examined previously or were new to the unit.[345]

In order to overcome the presumption of subterfuge established by Rule 313, the government would have to provide clear and convincing evidence of similar neutral or legitimate motivations. This requirement would in turn provide an incentive for government entities establishing such search regimes to ensure that legitimate reasons and neutral, permissible implementing guidance was provided to meet such a high burden.

New York City's Subway Container Inspection Program is a good example of a program that would, properly implemented, meet the requirements of both the special-needs exception and the proposed Rule 313(b) analog. In its evaluation of *MacWade*, the Second Circuit found persuasive that the NYPD

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and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

343. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-26.

344. *See id.* at A22-25 to -26.

345. *Id.* at A22-26.

> selects the checkpoint locations "in a deliberative manner that may appear random, undefined, and unpredictable[,]" . . . var[ying] their number, staffing, and scheduling so that the "deployment patterns . . . are constantly shifting." While striving to maintain the veneer of random deployment, the NYPD bases its decisions on a sophisticated host of criteria, such as fluctuations in passenger volume and threat level, overlapping coverage provided by its other counter-terrorism initiatives, and available manpower.[346]

Officers give both verbal and written notice of the searches, and make clear they are voluntary and "exercise virtually no discretion in determining whom to search."[347]

> The supervising sergeant establishes a selection rate, such as every fifth or tenth person, based on considerations such as the number of officers and the passenger volume at that particular checkpoint. The officers then search individuals in accordance with the established rate only.
>
> Once the officers select a person to search, they limit their search as to scope, method, and duration. As to scope, officers search only those containers large enough to carry an explosive device, which means, for example, that they may not inspect wallets and small purposes.[348]

Moreover, an officer searching an eligible container must only inspect "what is minimally necessary to ensure that the . . . item does not contain an explosive device."[349] They may not deliberately seek out other contraband, but if officers happen to find such contraband during the limited inspection, they may arrest the individual carrying it.[350] Finally, because an inspection must last no longer than necessary to ensure an item does not contain an explosive device, a typical inspection only lasts for a couple of seconds. [351]

For the Second Circuit, factors such as the notice to passengers, the limited scope of the searches and limited time for a typical search, the fact that the searches were conducted by uniformed personnel in the open thereby reducing fear and stigma, and that "police exercise no discretion in selecting whom to search, but *rather employ a formula that ensures they do not arbitrarily exercise their authority*," were critical to the reasonableness

346. MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006) (fourth alteration in original).
347. *Id.* at 264–65.
348. *Id.* at 265.
349. *Id.* (alteration in original).
350. *Id.*
351. *Id.*

of the program under the Fourth Amendment.[352] The factors evaluated by the Second Circuit in *MacWade* are evidence of the lack of the three circumstances listed in Rule 313, and are relevant even in the presence of full privacy interests on the part of the passengers.[353] In fact, all three of the circumstances in the proposed rule focus on containing the discretion of the government agents, thus encouraging the use of programmatic guidelines to deter subterfuge or pretext searches.

Additionally, an analog to Rule 313 of the Federal Rules of Evidence would also impose limitations on the implementation of suspicionless searches. Taking *MacWade* as an example, the rule would be triggered if police either choose to search specific people based on something other than neutral criteria (every fifth person, for example), or subjected some individuals to more in-depth searches than others (for example, more extensive searches for African-American men). Knowing that the rule would trigger the government's obligation to prove with clear and convincing evidence that the search was not a subterfuge, police would be less likely to misuse that authority. Although the Second Circuit examined these elements in *MacWade*, a rule would focus a court's attention on those issues as relevant in all cases.

The key to the special-needs exception, highway checkpoint, and administrative-inspection cases is the focus on the requirement for a need apart from the general interest in law enforcement in the first instance. The Supreme Court, although using different language in these three lines of cases, required a government interest apart from normal law enforcement to sustain these government intrusions.[354] These interests included border enforcement in *Martinez-Fuerte*, safety of roadways from the perils of drunken driving in *Sitz*, the government's interest in railway safety in *Skinner*, its interest in the fitness of government agents who carried firearms or held critical positions in *Von Raab*, and programs held to be unconstitutional in the absence of such a separate interest as in *Edmond* and *Ferguson*.[355]

But the point of contention in the dispute seen between Justices O'Connor and Rehnquist, Thomas, and Scalia in *Edmond*, and continued in

352. *Id.* at 273 (emphasis added) (citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667 (1989)) (upholding military-base entrance inspections).

353. *Id.* at 270–73, 275 (concluding both that the Container Inspection Program serves "special needs," and that subway riders retain a full expectation of privacy in their containers). Recall that Justice Brennan dissented in *Sitz* on the basis that the reasonableness-balancing test only applied where there was a diminished privacy interest. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting).

354. *See* discussion *supra* Part III.

355. *Id.*

dicta by Justice Scalia in *al-Kidd*, was the relevance of the subjective motivations of the government officials in traffic checkpoint cases. For Justice O'Connor and the majority, such subjective motivations were relevant in evaluating programmatic purpose for search programs not involving individualized suspicion.[356] Thus, Justice O'Connor limited *Whren* to those instances not requiring probable cause, or later in the opinion, not requiring individualized suspicion.[357] Chief Justice Rehnquist, joined in dissent by Justices Thomas and Scalia, however, unsuccessfully argued that a more general test should apply.[358] For the three dissenting Justices, the subjective motivations or primary programmatic purpose of such a traffic checkpoint were irrelevant if a valid governmental purpose outweighed the minimal intrusions on the privacy rights of motorists:

> The reasonableness of an officer's discretionary decision to stop an automobile, at issue in *Whren*, turns on whether there is probable cause to believe that a traffic violation has occurred. The reasonableness of highway checkpoints, at issue here, turns on whether they effectively serve a significant state interest with minimal intrusion on motorists. The stop in *Whren* was objectively reasonable because the police officers had witnessed traffic violations; so too the roadblocks here are objectively reasonable because they serve the substantial interests of preventing drunken driving and checking for driver's licenses and vehicle registrations with minimal intrusion on motorists.[359]

In *al-Kidd*, Justice Scalia, recognizing that this view had not prevailed in *Edmond*, conceded that subjective motivations in determining primary programmatic purpose were relevant for special-needs and administrative-

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356. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 46–47 (2000).

> Petitioners argue that the Indianapolis checkpoint program is justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations. If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful. As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.

Id. (citations omitted).

357. *Id.* at 45–46.

358. *Id.* at 49–50 (Rehnquist, C.J., dissenting).

359. *Id.* at 51–52.

search cases "where actual motivations do matter."[360] Nevertheless, in reframing *Edmond*, Justice Scalia rejected the Ninth Circuit's view that "'programmatic purpose' is relevant to Fourth Amendment analysis of programs of seizures without probable cause."[361] Instead, he cast the *Edmond* test as another exception to the general practice of not probing subjective intent, with the subjective inquiry "relevant [only] to the validity of Fourth Amendment intrusions undertaken *pursuant to a general scheme without individualized suspicion*."[362] Thus, in traffic checkpoint cases, in addition to administrative-search and special-needs cases, programmatic purpose is relevant to intrusions undertaken pursuant to a general scheme without individualized suspicion. Because of the continued validity of these subjective inquiries into primary programmatic purpose in all three categories of cases—special needs, administrative exceptions, and traffic checkpoints—providing a "means of sifting abusive governmental conduct from that which is lawful" will remain critical for courts evaluating searches undertaken pursuant to a general scheme without individualized suspicion.[363] An analog to Rule 313 of the Federal Rules of Evidence would provide a tool for that judicial task.

Equally important, these three categories all attempt to establish limitations that would prohibit the particular exception from swallowing the Fourth Amendment rule, creating functional limitations beyond focusing on needs that are apart from the general interest in law enforcement.[364] Key to these cases and those implementing the Supreme Court's guidance are the existence of alternatives to the constraints provided by the Fourth Amendment's warrant requirements. For administrative inspections, these constraints are provided either through administrative warrants, or sufficient "reasonable legislative or administrative standards," to limit the scope of such searches, as in *Camara* or *Davis*, or even *Skinner*.[365]

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360. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (internal quotation marks omitted).

361. *Id.* at 2081 (quoting al-Kidd v. Ashcroft, 580 F.3d 949, 968 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011)).

362. *Id.* (quoting *Edmond*, 531 U.S. at 45–46).

363. *Edmond*, 531 U.S. at 47.

364. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–55 (1990) (upholding suspicionless highway sobriety checkpoint based on the state's specific interest in preventing drunk driving and the reasonableness of the intrusion upon individual motorists); *see also Edmond*, 531 U.S. at 37–38 (noting that the three categories of exceptions go beyond the state's general interest in law enforcement).

365. *See* Camara v. Mun. Court, 387 U.S. 523, 538–39 (1967); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667, 672 n.2 (1989) (holding that the program's procedures established the scope and date of the search in advance and that the program participants were aware of the requirements); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 622 (1989) (allowing the search because detailed regulations curtailed discretion).

For cases involving highway checkpoints, the contextualized reasonableness-balancing test imposed similar constraints, with the intrusion limited by a required nexus to the government's claimed purposes and external constraints on officers' discretion. Thus, in *Martinez-Fuerte*, as opposed to *Brignoni-Ponce*, the intrusion was brief and the location of the checkpoints was established not by "officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources[,] . . . [with] less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops."[366] Further, in *Delaware v. Prouse*, after disapproving roving-traffic stops to enforce vehicle and driver registration, the Court suggested that a fixed checkpoint, which stopped all oncoming traffic at a roadblock-type stop, and which did not involve the "unbridled discretion of law enforcement officials," might be constitutionally reasonable.[367] In *Sitz*, the sobriety traffic checkpoints were selected pursuant to guidelines: the police stopped all oncoming vehicles, leaving no discretion to exercise, and the intrusion was brief, as in *Martinez-Fuerte*.[368]

For special-needs cases like *Von Raab* and *Skinner*, the program regulations themselves limited the government's discretion.[369] Again, the specifics of New York City's Container Inspection Program, evaluated by the Second Circuit in *MacWade*, substantially curtailed the discretion of the individual officers, and were reflections of neutral policy determinations made at a much higher level in the NYPD.

The statistics gathered from Britain's § 44 searches, which required no articulable suspicion at all, clearly show the evils that unbridled discretion can bring—racial, ethnic, and religious discrimination, and interferences with free speech, assembly, and press rights.[370] Similar findings are apparent in *Floyd v. City of New York*, the case attacking the NYPD's practice of stopping and frisking minority members of the population based on specious justifications of reasonable suspicion under *Terry*.[371] It is this same unbridled discretion that has been of concern to the Supreme Court in

366. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976). The Court concluded: "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief [follow-on] questioning involved." *Id.* at 563–64.

367. *See* Delaware v. Prouse, 440 U.S. 648, 661–63 (1979) (emphasis added).

368. *Sitz*, 496 U.S. at 453.

369. *See Von Raab*, 489 U.S. at 672–73 n.2; *Skinner*, 482 U.S. at 622.

370. *See generally* REVIEW FINDINGS AND RECOMMENDATIONS, *supra* note 317 (analyzing the statistics regarding which ethnicities and races are stopped most frequently when there is no reasonable-suspicion requirement); SUMMARY OF RESPONSES TO THE CONSULTATION, *supra* note 317 (discussing public opinions and reactions to the suspicionless-search program).

371. *See* authorities cited *supra* note 285.

many of the cases discussed in this Article. The military has a long history of balancing the need for legitimate inspections to ensure the fitness and readiness of military units with the need to protect against illegitimate subterfuge searches based on that ability—with the primary means of policing this balance being Rule 313.

A similar Federal Rule of Evidence, such as that proposed in this Article, provides two advantages as the nation attempts to achieve a similar protective balance. First, it provides a judicial tool to sift the lawful from the unlawful when evaluating searches based on no individualized suspicion, one well within the institutional competency of courts. Rather than forcing courts to substitute their determination of the necessary measures to achieve security for that of the Executive, the rule instead evaluates the reasons for the implementation of the special-need security search, requiring a special need separate from that in general law enforcement, and also requires a program that is implemented in a neutral way, oriented or calibrated to the accomplishment of the government need motivating the search. The existence of Rule 313 provides a framework to challenge in the same way that the Supreme Court's prophylactic rule in *Miranda* provided the framework to challenge unwarned custodial confessions.

The structure of the proposed rule also creates incentives for police to plan and implement their special-needs searches to meet the requirements of the exception. The heightened burden to rebut the presumption will encourage documentation of valid search programs, in the same way that military commanders have incorporated the requirements of Rule 313 into the planning of unit inspections. For example, an understanding of Rule 313's requirements has resulted in commanders who plan unit urinalysis inspections in advance, and who use neutral criteria to select those personnel subject to the administrative inspections and to ensure that all persons are subject to the same degree of intrusion in the inspection.[372] This compliance with Rule 313's requirements is done partially out of concern that the results will be challenged in court, but also because commanders are trained to understand and comply with the requirements of the law because of the existence of Rule 313. This is a true example of the rule of law being the best tool to reconcile the needs of security and liberty.

The increase in these "security" special-needs searches in all aspects of modern life, from the now familiar airport searches, to those in subways, on ferries, or in public venues, including courthouses themselves, make judicial involvement in their evaluation critical to the continued viability of

372. *See* discussion *supra* Part V.

the Fourth Amendment. In addition to providing a tool for the courts, the proposed rule's structure—the shifting burden of proof triggered when the three categories most likely to evidence subterfuge or pretext exist—shows a policy determination that however valid security special-need searches remain in our modern post-9/11 society, the courts will remain the final arbiter of reasonableness under the Fourth Amendment. Implementation of such an analog rule would also encourage creation of search regimes likely to withstand the scrutiny imposed by Rule 313. By contributing to the achievement of a balance between liberty and security, such an evidentiary rule allows courts to appropriately test these measures against the Constitution. It also reflects the continued importance of the Fourth Amendment's protection of individual privacy as one of our nation's foremost values, one necessary to liberty.