Notes

The Special Needs Doctrine, Terrorism, and Reasonableness

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> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual[,] and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[1]

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I. INTRODUCTION

The last decade and a half has seen the rise of motivated and mobilized terrorists across the globe.[2] In order to protect citizens and to prevent future terrorist attacks, law enforcement agencies and the intelligence community in the United States are constantly monitoring communications and searching for those with plans to attack the U.S.[3] The search for terrorists, both through the use of electronic surveillance and through physical searches, implicates the Fourth Amendment of the United States Constitution. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[4]

The constitutionality of a search conducted by a governmental actor turns on whether the search is reasonable in light of the circumstances in which it is conducted.[5] A search supported by probable cause and the issuance of a warrant is presumed to be reasonable and generally constitutional.[6] One of the exceptions to the probable cause standard for searches is when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[7]

This paper will discuss the special needs doctrine and the ways in which the doctrine applies to searches conducted in response to the threat of terrorism. First, this paper will discuss the special needs doctrine and three contexts in which the doctrine justifies searches lacking probable cause. These three proposed special needs are administrative searches, public safety, and foreign intelligence collection. The analysis will look at each of these special needs in turn and apply that specific situation to anti-terrorism searches. This application of the doctrine will be used to determine if and when terrorism can be a special need such that anti-

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[1] Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)) (internal quotations omitted).

[2] *See* Geraldine Baum & Maggie Farley, *Terror Attack*, L.A. TIMES (Sept. 11, 2001), http://articles.latimes.com/2001/sep/11/news/ss-44619, <http://perma.cc/2XU6-2DRW>; Tom Vanden Brook, ISIL Activity Drives Up Pentagon Threat Level, USA TODAY (May 8, 2015), http://www.usatoday.com/story/news/nation/2015/05/08/pentagon-security-isis/26976725/, <http://perma.cc/E6U7-EZ3H>.

[3] *See, e.g.*, Ric Simmons, *Searching for Terrorists: Why Public Safety is not a Special Need*, 59 Duke L.J. 843, 883 (2010).

[4] U.S. Const. amend. IV.

[5] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

[6] *Id.*

[7] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

terrorism searches can be conducted absent probable cause. Next, the paper will argue that under the Fourth Amendment, as interpreted by the U.S. Supreme Court, searches justified by terrorism are only reasonable, and therefore constitutional, in certain limited contexts.

II. THE SPECIAL NEEDS DOCTRINE

The special needs doctrine evolved from the language of the Fourth Amendment, which determines that searches must be reasonable in order to be constitutional.[8] Absent individualized suspicion leading to probable cause and the issuing of a warrant, a search can be reasonable if the search serves a valid special need.[9] A valid special need exists in situations where the search's purpose is something other than the detection of crime and is outside of the normal needs of law enforcement.[10] The special needs doctrine provides a narrow exception to the probable cause requirement and is a "closely guarded category of constitutionally permissible suspicionless searches."[11]

An example of a search based on individualized suspicion of wrongdoing is a urinalysis test of an individual who is on probation for a drug offense.[12] This search comports with Fourth Amendment requirements, as would a urinalysis of a probationer after he tells his probation officer he has taken drugs.[13] The searching of a probationer who has not been arrested for or convicted of a drug-related offense and who does not have a history of substance abuse would lack probable cause and would be unreasonable absent a special need.[14] However, the courts have held that "a State's operation of a probation system" is a special need.[15] Supervision of probationers is outside the realm of ordinary crime control because it seeks to supervise offenders and manage their transition towards becoming law-abiding citizens, not to uncover further evidence of wrongdoing.[16] Other situations where the Court has found a special need include: drug urinalysis searches to deter drug use and to prevent promotion of drug users to sensitive positions within the U.S. Customs Service,[17] drugs tests of railroad employees to limit the threat to public safety of railway crashes,[18] and searches

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[8] *Id.*

[9] *Id.*

[10] *See id.*

[11] Chandler v. Miller, 520 U.S. 305, 309 (1997).

[12] *See* United States v. Knights, 534 U.S. 112, 122 (2001) (warrantless search of probationer is constitutional based on a showing of reasonableness).

[13] Berry v. District of Columbia, 833 F.2d 1031, 1035 (D.C. Cir, 1987).

[14] *Id.*

[15] *Knights*, 534 U.S. at 117.

[16] Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

[17] Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988).

[18] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 633 (1989).

conducted of students within the school environment.[19] These situations create special needs, in part, because requiring a warrant would be impracticable[20] or would unduly frustrate or interfere with the government's proposed purpose for the search.[21] Although some of these situations resemble searches to find evidence of criminal activity and appear to serve a normal law enforcement function, they do not because the results of the search were not turned over to law enforcement.[22]

In contrast to the cases where the Supreme Court upheld the constitutionality of suspicionless drug urinalysis searches, in *Ferguson v. City of Charleston*, the Court declined to find a special need because there was no valid non-law enforcement purpose for the search.[23] Specifically, the Court found that pregnant women could not be drug tested for the purpose of collecting information that could lead to their prosecution for drug use while pregnant.[24] The Court called the distinction between whether the results of the search were turned over to law enforcement or not "critical" in the special needs analysis.[25] Even though a non-law enforcement purpose existed—to get drug addicted women into treatment—"the extensive involvement of law enforcement officials at every stage of the policy" pushed the search outside of the special needs doctrine and into the general category of crime control.[26]

After a court has determined that an important governmental interest other than crime control exists for a search, the court will engage in a balancing test to determine if the search is reasonable.[27] The test balances the governmental interest against the individual's privacy interests "to assess the practicality of the warrant and probable-cause requirements in the particular context."[28]

> These balancing factors include (1) the weight and immediacy of the governmental interest, (2) the nature of the privacy interest allegedly compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest.[29]

This balancing test is not a bright-line test, but is based on the facts

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[19] Vernonia Sch. Dist. v. Acton, 515 US 646, 657–60 (1995) (school district's drug testing of student athletes was reasonable due to special needs of the school environment and students lowered expectations of privacy).

[20] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

[21] *Von Raab*, 489 U.S. at 666.

[22] *See Skinner*, 489 U.S. at 620–21 (drug tests are not conducted to prosecute employees for drug use, but to prevent train accidents).

[23] Ferguson v. City of Charleston, 532 U.S. 67, 83–84 (2001).

[24] *Id.* at 86.

[25] *Id.* at 79.

[26] *Id.* at 84.

[27] *Skinner*, 489 U.S at 619.

[28] *Id.*

[29] MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citations omitted) (quotation marks omitted).

and interests in each case as a context-specific inquiry.[30] A special need exception to the probable cause requirement is reasonable when the individual's privacy interests intruded on by the search are low and the governmental needs furthered by the search are high.[31] For example, in *Chandler v. Miller*, the Supreme Court held that drug testing of all candidates for state office in Georgia was not a special need.[32] The Court noted that there was a non-law enforcement purpose and the intrusion on the individual's privacy interest was minimal.[33] However, the Court found the test unreasonable because there was not a substantial governmental interest that justified deviating from the probable cause requirement.[34] Whether suspicionless administrative searches, public safety, and the gathering of foreign intelligence are valid special needs in the face of terrorism concerns turns on whether this balancing test can be passed in the specific context within which each search is conducted.

III. SUSPICIONLESS ADMINISTRATIVE SEARCHES

The special needs doctrine is an extension and evolution of the doctrine of administrative searches. The Supreme Court did not use the phrase "special needs" until 1985.[35] However, the Supreme Court created the precedent for the special needs doctrine by allowing administrative searches without probable cause for non-law enforcement purposes where the burden of obtaining a warrant would be likely to "frustrate the governmental purpose behind the search."[36] In 1967, in *Camara v. Municipal Court*, the Court reasoned that code enforcement inspectors could conduct area inspections without probable cause or a criminal warrant.[37] The Court justified this holding by balancing the State's interest in preventing public hazards, such as fires, with the fact that the inspections "are neither personal in nature nor aimed at the discovery of evidence of crime."[38] Administrative searches for code enforcement purposes also "involve a relatively limited invasion of the urban citizen's privacy."[39] In this case, however, the Court ruled in favor of the plaintiff, who faced criminal consequences for refusing such a search.[40] The Court ruled for the plaintiff because there was no urgency or other frustrating factors to bring the warrantless search under the reasonableness

[30] Chandler v. Miller, 520 U.S. 305, 314 (1997).
[31] *Skinner*, 489 U.S. at 624.
[32] *Chandler*, 520 U.S. at 318.
[33] *Id.*
[34] *Id.* at 318–19.
[35] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).
[36] Camara v. Mun. Ct., 387 U.S. 523, 533–34 (1967).
[37] *Id.* at 537.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 540.

requirement of the Fourth Amendment.[41]

A. Closely Regulated Businesses

This doctrine of administrative searches articulated in *Camara* has extended to the warrantless administrative searches of closely regulated businesses.[42] Warrantless searches can be reasonable when there is a regulatory scheme that authorizes such searches.[43] The regulatory statute must act in place of a traditional warrant by "advis[ing] the owner of the commercial premises that the search is being made pursuant to the law, has a properly defined scope, and it must limit the discretion of the inspecting officers."[44] Administrative searches of closely regulated businesses follow the balancing scheme of special needs analysis. There must be a substantial governmental interest in both the regulatory scheme and the inspection, which weighs in favor of the government.[45] On the other side of the balance are the privacy interests of the individual, which are significantly lessened due to acquiescence to the regulatory scheme by engagement in the closely regulated business.[46] The Supreme Court has found valid suspicionless administrative searches across a wide range of regulated industries, including liquor purveyors,[47] federally licensed firearm dealers,[48] and vehicle dismantlers.[49]

Many closely regulated businesses and industries are key targets for terrorists' attacks. Terrorism, therefore, may be the justification for the regulatory scheme, but standing alone, it is not a justification for lowering the probable cause standard for these types of searches. Warrantless administrative searches are reasonable because the regulations provide the same notice and protections as a warrant.[50] Statutorily authorized searches must be regular and necessary to monitor the business within the statutory guidelines.[51] In *Club Retro LLC v. Hilton*, a raid conducted on a business engaged in liquor sales, which is a closely regulated business, was held to be unconstitutional because the statutes governing the business did not authorize the manner and scope of the search.[52] Although there is no case law directly on point, routine

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[41] *Id.*

[42] Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77 (1970) (liquor purveyor is engaged in a closely regulated industry, and Congress has created rules that govern inspection that are reasonable but do not require probable cause).

[43] New York v. Burger, 482 U.S. 691, 702 (1987).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 700.

[47] *Colonnade*, 397 U.S. at 75.

[48] United States v. Biswell, 406 U.S. 311, 317 (1972).

[49] *Burger*, 482 U.S. at 705.

[50] *Id.* at 702.

[51] *Id.*

[52] Club Retro LLC v. Hilton, 568 F.3d 181, 200 (5th Cir. 2009).

searches of closely regulated businesses that raise terrorism concerns—such as nuclear power plants and shipyards—fall within the administrative search doctrine and are constitutional, absent probable cause, when there is a valid statutory scheme.[53] The section on the special need of public safety will discuss when an otherwise unreasonable search conducted outside of the regulatory scheme might be constitutional absent the requisite probable cause.[54]

Because the airline industry is closely regulated, the courts have justified suspicionless searches of airline passengers with the statutes that authorize these routine searches.[55] The statutes that govern airline passenger searches were justified when enacted by Congress by the real threat of hijackings and terrorist activity related to air travel.[56] Although preventing terrorist attacks may be the goal of suspicionless airline passenger searches,[57] the special need is not terrorism. Rather, the special need is created by the statutory scheme that regulates and establishes a constitutionally reasonable justification for the searches.

B. Checkpoint Searches

Airport searches are also constitutional under the administrative search doctrine as checkpoint searches.[58] Suspicionless checkpoint searches are constitutional under the Fourth Amendment when there is a non-law enforcement purpose and a court finds a favorable balance between "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."[59] Other examples of valid special needs in the context of checkpoint searches include sobriety checkpoints[60] and border checkpoints.[61] While rejecting drug interdiction as a valid non-law enforcement reason for a checkpoint, the Supreme Court said "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist

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[53] *See Burger*, 482 U.S. at 700 ("Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.") (citations omitted).

[54] *See infra* text accompanying notes 74–125.

[55] United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005).

[56] *See* Simmons, *supra* note 3, at 846.

[57] Corbett v. Transp. Sec. Admin., 767 F.3d 1171, 1180 (11th Cir. 2014).

[58] United States v. Hartwell, 436 F.3d 174, 178 (3d Cir. 2006).

[59] Illinois v. Lidster, 540 U.S. 419, 420 (2004) (internal quotations omitted) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).

[60] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (noting the low level of intrusiveness of the brief searches and the magnitude of "alcohol-related death and mutilation on the nation's roads").

[61] United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976) (noting the low level of intrusiveness of the visual searches, the lowered expectation of privacy in a vehicle, and the government's high concern at the border related to smuggling and immigration issues). *See infra* text accompanying notes 84–87.

attack."[62]

The Supreme Court of Massachusetts addressed this issue of how to appropriately tailor roadblocks to interdict terrorists in *Commonwealth v. Carkhuff*.[63] The Massachusetts court held that stopping all persons traveling near a reservoir with the goal of preventing terrorist attacks was not constitutional.[64] As a threshold matter, the court found that in light of the recent September 11 terrorist attacks,[65] "preventing potential terrorist saboteurs from contaminating or interrupting the water supply by keeping them away from the reservoir in the first place" was a valid non-law enforcement reason to set up a road block.[66] However, the search procedures instituted were too intrusive.[67] Also, no prior warning was given to motorists concerning the search and the court found "where the objective of a proper administrative search is prevention, not apprehension of criminals, the giving of notice operates to reduce the intrusiveness of the subsequent stop without undermining the government's legitimate objective."[68] Given the circumstances, the court ordered a suppression of the evidence because the search was not reasonable.[69]

In addition to searches being appropriately tailored to reduce intrusiveness, searches must be implemented because of imminent and exigent threats.[70] The reasonableness of a roadblock, absent probable cause or reasonable suspicion, depends upon the imminence and exigence of the terrorist threat. Roadblocks to stop general terrorism are not constitutional, just like roadblocks to stop general drug trafficking are not constitutional.[71] Stopping either terrorism or drug trafficking is a general crime control function and does not, in the eyes of the Court, rise to the same magnitude as drunk driving and border security.[72] Although terrorism is viewed as a constant threat in the United States today, without a specific and imminent threat, roadblocks are not a

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[62] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[63] *See generally* Commonwealth v. Carkhuff, 441 Mass. 122 (Mass. 2004).

[64] *Id.* at 129–30.

[65] *Id.* at 124. The stop occurred just days after the September 11, 2001 attacks on the World Trade Center in New York.

[66] *Id.* at 127.

[67] *Id.* at 127–28.

[68] *Id.* at 130.

[69] *Id.*

[70] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[71] *Id.*

[72] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (annual death toll on the nation's highways tops 25,000); U.S. DEPT. OF STATE, BUREAU OF COUNTERTERRORISM, TERRORISM DEATHS, INJURIES AND KIDNAPPINGS OF PRIVATE U.S. CITIZENS OVERSEAS IN 2013 (2013), http://www.state.gov/j/ct/rls/crt/2013/224833.htm, <http://perma.cc/SDZ3-MDRV> (sixteen non-military U.S. citizens were killed by terrorists oversees in 2013); Wm. Robert Johnston, TERRORIST ATTACKS AND RELATED INCIDENTS IN THE UNITED STATES (July 19, 2015), http://www.johnstonsarchive.net/terrorism/wrjp255a.html, <http://perma.cc/T8EQ-EGFY> (table detailing all terrorist related fatalities and injuries in the U.S. since 1865); John Mueller & Mark G. Stewart, *Witches, Communist, and Terrorists: Evaluating the Risks and Tallying the Costs*, 38 HUMAN RIGHTS 18, 18 (2011) (explaining the risk of terrorism in the U.S. is "massively exaggerated").

constitutional means to search for general terrorist activity, which is indistinguishable from general criminal activity.[73]

IV. PUBLIC SAFETY

Public safety is commonly invoked as a special need to lessen the probable cause standard. Although "the Court has repeatedly sanctioned searches conducted without probable cause where significant safety and security concerns were present,"[74] these safety concerns were both imminent and specific.[75] In the special needs analysis, the non-law enforcement purpose cannot be blanket public safety, but instead, public safety in a specific context.[76] "Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as reasonable .... [b]ut where ... public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search ...."[77]

In *Skinner v. Railway Labor Executives' Association*, the Supreme Court found the threat to public safety of railway crashes to be substantial, real, and a special need.[78] First, the prevention of railway accidents was determined to be a non-law enforcement purpose.[79] The analysis of whether railway safety was a law enforcement function was bolstered by the fact that these searches were "not to assist in the prosecution of employees," but rather "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."[80] After determining that a non-law enforcement purpose existed, the Court then balanced the government's interests, which included the need to act quickly after an accident to get accurate toxicology data with the minimal intrusion of a blood, breath, or urine test on an individual.[81] It was also noted that railway employees had a diminished expectation of privacy because of the high level of regulation that exists in the railroad industry.[82] The Court held that "in light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological

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[73] *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (U.S. FISA Ct. Rev. 2002) ("International terrorism refers to activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.") (internal quotations omitted).

[74] Ronald J. Sievert, *Time to Rewrite the Ill-Conceived and Dangerous Foreign Intelligence Surveillance Act of 1978*, 3 NAT'L SEC.. L.J. 47. 76–77 (2014).

[75] *E.g.*, Chandler v. Miller, 520 U.S. 305, 319 (1997).

[76] *Id.* at 323.

[77] *Id.* (citations omitted) (internal quotation marks omitted).

[78] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989).

[79] *Id.* at 620.

[80] *Id.* at 620–21.

[81] *Id.* at 624.

[82] *Id.* at 627.

tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees," these suspicionless searches were reasonable.[83]

The U.S. Supreme Court has also found there to be a special need related to public safety in deterring and preventing drug use among U.S. Customs Service employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.[84] The special need used to justify the searching of U.S. Customs Services employees overlaps with the public safety concerns that arise at the border.[85] Special concerns raised by the nature of the border have created a presumption of reasonableness for border searches that is unique in Fourth Amendment jurisprudence.[86] The border itself creates a special need "pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, [border searches] are reasonable simply by virtue of the fact that they occur at the border."[87] Searches at the border are reasonable absent probable cause or even reasonable suspicion.[88] A balancing test is still conducted, but "the government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," weighing the balance heavily in favor of the government's interest in conducting the search.[89] Unwanted persons at the border include terrorists who may try and cross the border to gain access to the U.S. It is these high level concerns—terrorists, diseases, smuggling of drugs, weapons, and persons, and related public safety implications—that have combined to create a special context for the border wherein most searches will balance in favor of the government even absent any individualized suspicion.

There is no U.S. Supreme Court opinion holding that ensuring public safety from terrorism is a special need. The Court has said in dicta that "the Fourth Amendment would almost certainly permit an appropriately tailored [search] set up to thwart an imminent terrorist attack" absent individualized suspicion that any one individual is the terrorist.[90] Lower courts have grappled with the issue of when keeping the public safe from terrorism constitutes a special need and makes suspicionless searches reasonable.

In *Bourgeois v. Peters*, the Eleventh Circuit interpreted the special

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[83] *Id.* at 634.

[84] Nat'l Treasury Emps. v. Von Raab , 489 U.S. 656, 666 (1988).

[85] *Id.* at 668.

[86] *See* United States v. Flores-Montano, 541 U.S. 149, 152 (1976) ("Time and again, we have stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border'").

[87] United States v. Ramsey, 431 U.S. 606, 616 (1977).

[88] *See Flores-Montano*, 541 US at 152 (holding that a search of a vehicle's gas tank at a border crossing was reasonable even absent individualized suspicion of drug smuggling).

[89] *Id.*

[90] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

needs exception to exclude searches justified by concerns for "the safety of participants, spectators, and law enforcement" at a protest.[91] The State sought to use metal detectors to search all protestors due to the threat of terrorism that existed generally in the post-September 11 world.[92] The court found the reliance on terrorism and public safety "troubling."[93] The court acknowledged that "while the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people."[94] The Eleventh Circuit did note, as did the U.S. Supreme Court in *Indianapolis v. Edmond*, that evidence of a specific, imminent threat "that international terrorists would target or infiltrate this protest" could create a situation that a suspicionless search of all the protestors was reasonable.[95]

Additionally, the Eleventh Circuit questioned whether public safety could ever be a stand-alone special need.[96] The first step in finding a special need is articulating a valid non-law enforcement purpose for the warrantless search.[97] In this case, the government's proposed reason for lowering the search standard was public safety, and the government proposition to protect public safety was to conduct searches enforcing a law prohibiting certain objects, like weapons.[98] The objects found during these searches would be used to prosecute individuals for violating the law.[99] Here, the Eleventh Circuit said that it "is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined."[100] The court went on to find that no special need existed that could justify a deviation from standard Fourth Amendment requirements.[101]

The Second Circuit also addressed the issue of suspicionless searches conducted for the purpose of preventing terrorist attacks and public safety. In *MacWade v. Kelly*, the Second Circuit held that random, suspicionless subway baggage searches were constitutional.[102] This holding turned on the finding of a non-law enforcement purpose for the search—prevention, through deterrence and detection of "a terrorist attack on the subways."[103] This purpose for the suspicionless searches passed the balancing test in part because the threat to the New York subway system was real, not theoretical, as exemplified by past threats

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[91] Bourgeois v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2004).
[92] *Id.* at 1311.
[93] *Id.*
[94] *Id.*
[95] *Id.*; *Edmond*, 531 U.S. at 44.
[96] *Bourgeois*, 387 F.3d at 1312–13.
[97] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).
[98] *Bourgeois*, 387 F.3d at 1312.
[99] *Id.* at 1313.
[100] *Id.* at 1312–13.
[101] *Id.* at 1316.
[102] MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006).
[103] *Id.* at 267.

and recent bombings of subway systems by terrorists abroad.[104] Subway passengers did not have a reduced expectation of privacy;[105] however, the nature of the searches was minimally intrusive, the officers conducting the searches were told to look for explosives, not regular contraband, and the officers had little discretion over who to search.[106]Additionally, notice of the search was given to every passenger, and passengers were free to refuse, so long as they left the station and did not return.[107] All of these factors, weighed together with the immediate and substantial governmental interest of preventing a terrorist attack on the subway, created, under these specific circumstances, a special need that made these suspicionless searches reasonable.[108]

Using similar reasoning, the Second Circuit also held that suspicionless searches of ferry passengers and their luggage were reasonable.[109] The court found that the government was seeking to deter an actual terrorist attack.[110] This finding was based on a risk assessment conducted by the Coast Guard, "pursuant to a Congressional directive," that determined that this particular vessel was a high-risk terrorism target.[111] "It is clear to the Court that the prevention of terrorist attacks on large vessels engaged in mass transportation and determined by the Coast Guard to be at heightened risk of attack constitutes a special need."[112] Like the subway searches in *MacWade*, these searches were minimally intrusive and notice was given to passengers, which would enable them to choose to avoid the search.[113] Airport searches, which are permissible under the administrative search doctrine, are also justified by the Second Circuit under the public safety doctrine, utilizing similar logic as was used to justify the suspicionless subway and ferry passenger searches.[114]

State courts have also weighed in on the issue of when the threat of terrorism to public safety creates a special need. The Supreme Court of North Dakota found that a search of all patrons who entered a hockey arena was unconstitutional.[115] The North Dakota court noted that patrons were given notice and that the search was minimally intrusive;[116] however, there was no non-law enforcement purpose that created a basis

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[104] *Id.* at 270.
[105] *Id.* at 272.
[106] *Id.* at 270.
[107] *Id.* at 264–65.
[108] *Id.* at 271–72.
[109] Cassidy v. Chertoff, 471 F.3d 67, 87 (2d Cir. 2006).
[110] *Id.* at 86.
[111] *Id.* at 83.
[112] *Id.* at 82 (internal quotation marks omitted).
[113] *Id.* at 73, 79 (Providing notice to passengers weighs in favor of the search being for a non-law enforcement purpose. Notice indicates that the search is not to detect criminal activity but to prevent terrorism. Even if the notice allows potential terrorist to avoid apprehension; the terrorist target, in this case the ferry, is unmolested when the notice diverts the attack due to fear of detection.).
[114] United States v. Edwards, 498 F.2d 496, 499–501 (2d Cir. 1974).
[115] State v. Seglen, 700 N.W.2d 702, 705 (N.D. 2005).
[116] *Id.* at 709.

for a special need because "there was no history of injury or violence presented in this case."[117] The alleged threat used to justify the search was not real or substantial, and the court found that terrorism in the abstract is not enough to bypass Fourth Amendment requirements.[118]

Suspicionless terrorism searches, in limited instances, can be justified by public safety.[119] As the case law indicates, these limited contexts include: situations where there is a valid non-law enforcement purpose for the search, which can, but does not always, include terrorism;[120] where a warrant would unduly frustrate the search and put the public unnecessarily in harm's way;[121] and where the risk to public safety is real, imminent, and not just symbolic.[122] Additionally, the balance between the intrusiveness of the search and the privacy safeguards in place weigh against the government's need to conduct the search without a warrant or probable cause.[123] The public safety exception to the warrant requirement is a narrow exception.[124] General terrorism threats that have become commonplace in the United States are not the kind of specific, imminent threat that the special needs doctrine covers.[125]

V. THE GATHERING OF FOREIGN INTELLIGENCE

One of the ways in which the U.S. law enforcement community monitors, prevents, and prosecutes terrorist activity is through the gathering of foreign intelligence related to terrorism. The Federal Intelligence Surveillance Act (FISA) governs the gathering of foreign intelligence.[126] FISA was enacted in 1978. FISA was legislation in response to documented abuses by the U.S. intelligence community such as the surveillance of those suspected of communism and anti-war and civil rights activists.[127] This legislation was a reform attempt by Congress aimed at documented constitutional violations and civil rights

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[117] *Id.* at 708.

[118] *Id.*

[119] MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006); *See* Chandler v. Miller, 520 U.S. 305, 321 (1997).

[120] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring); *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (FISA Ct. Rev. 2002).

[121] Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988); United States v. U.S. Dist. Court, 407 U.S. 297, 315 (1972).

[122] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000); *see* Chandler, 520 U.S. at 321.

[123] *Chandler*, 520 U.S. at 311.

[124] *Id.* at 309.

[125] *See Edmond*, 531 U.S. at 44; Bourgeois v. Peters, 387 F.3d 1303, 1318 (11th Cir. 2004).

[126] Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783 (codified as amended in sections of the United States Code, primarily §§ 18 and 50).

[127] ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CENTER FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT 13–14 (2015) (These abuses were documented in the Church Report, which included analysis of government surveillance programs during the Red Scare and the U.S. government's Counter Intelligence Program (COINTELPRO).).

abuses that had resulted from warrantless searches conducted in the name of national security.[128] FISA created a specialized court, the Federal Intelligence Surveillance Court (FISC), to handle all electronic surveillance requests when the purpose of the surveillance was to gather foreign intelligence.[129] In addition to creating an oversight court, FISA created a standard of review for the court to use in deciding whether to issue a court order allowing electronic surveillance.[130] The standard of review is "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or agent of a foreign power."[131] The definition of "agent of a foreign power" for U.S. persons differs from non-U.S persons.[132] "The statute defines 'foreign power' broadly, to include not only foreign governments, but also: factions of foreign nations, entities that foreign governments control, international terrorist groups, foreign-based political organizations, and foreign entities engaged in the proliferation of weapons of mass destruction."[133] For a U.S. person to be the subject of a FISA order there must also be a showing of a nexus to criminal activity.[134] In addition to the probable cause standard codified in FISA, the statute contains an emergency clause.[135] This clause allows for the deployment of "electronic surveillance to obtain foreign intelligence information" in an emergency situation without obtaining a FISA court order and based only on a reasonableness determination by the attorney general.[136]

A. The Federal Intelligence Surveillance Act

Since its enactment in 1978, Congress has amended FISA several times.[137] Originally, FISA only covered activities where foreign intelligence gathering was "the purpose" of the investigation.[138] In 2001, the Patriot Act amended the language so that foreign intelligence gathering only needs to be "a significant purpose."[139] This change is important because it has opened up the debate on whether the information gathered through FISA orders can constitutionally be used in

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[128] *Id.*
[129] 50 U.S.C. § 1803 (2012).
[130] *Id.* § 1805(a)(2)(A).
[131] *Id.*
[132] *Id.* §1801(a); Goitein, *supra* note 127, at 16.
[133] *Id.*
[134] 50 U.S.C. § 1801(i) (2012); *Id.* § 1801(b)(2).
[135] *Id.* § 1805(e).
[136] *Id.*
[137] See *e.g.*, FISA Amendments Act of 2008, Pub. L. No. 110–261, §§ 701–03, 122 Stat. 2436 (codified as 50 U.S.C. § 1881 (2008)).
[138] Goitein, *supra* note 127, at 23.
[139] 50 U.S.C. § 1804(a)(6)(B) (2012). In 2001 the words "a significant purpose" were substituted in the code for the words "the purpose" which was the original language of FISA.

criminal prosecutions.[140] The standard of review for warrants for electronic surveillance in a criminal investigation is if "there is probable cause for belief that an individual is committing, has committed, or is about to commit" a particular criminal offense.[141] This standard is much higher than the probable cause standard in FISA and historically justified the separation between using electronic surveillance to gather foreign intelligence and using electronic surveillance to gather evidence as a precursor to criminal prosecution.[142] The FISA Amendments Act of 2008 (FAA) amended FISA to include programmatic surveillance.[143] Although a current source of vigorous debate, the FAA is not relevant to an analysis of whether the gathering of foreign intelligence is a special need.[144]

Although, there is no Supreme Court case directly on point for the issues FISA was aimed at addressing, one case, decided before FISA was enacted, provides guidance on Congress's motivation for FISA.[145] In 1972, the Supreme Court heard *United States v. United States District Court (Keith).*[146] *Keith* raised questions about whether purely domestic electronic surveillance of a domestic terrorist threat required a warrant under the Fourth Amendment.[147] The Court held that even in the face of national security concerns, domestic electronic surveillance could only be undertaken if law enforcement first obtained a warrant.[148] The Court justified its holding because Title III of the Omnibus Crime Control and Safe Streets Act articulates the standards for obtaining an order to conduct domestic electronic surveillance.[149] These standards include: probable cause that a crime is being or will be committed, timeline of the surveillance, and certification that other less-invasive investigative procedures have been unsuccessful.[150] The Court stated that "the Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the

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[140] Goitein, *supra* note 127, at 23–24.

[141] 18 U.S.C. § 2518(3)(a) (2012).

[142] *See* Goitein, *supra* note 127, at 24 (discussing whether the wall caused the terrorist attack on September 11, 2001). The historical divide between intelligence gathering and prosecution has been referred to as the wall.

[143] FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 701–3, 122 Stat. 2436 (codified at 50 U.S.C. § 1881 (2008)).

[144] *See* Goitein, *supra* note 127, at 23–24. The FAA broadened surveillance authority under FISA. It is this amendment that authorized the programmatic surveillance made public by the Snowden leaks. Although this amendment is important, this portion of FISA is not relevant to the analyses of whether the gathering of foreign intelligence is a special need.

[145] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 297 (1972).

[146] *Id.*

[147] *Id.* at 299 (The defendants were American citizens who conspired to destroy government property; one defendant was convicted of destroying government property with dynamite).

[148] *Id.* at 323–24.

[149] *Id.* at 301–02, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, §§ 801–02, 82 Stat. 197; *see* 18 U.S.C. §§ 2510–13, 2515–22 (2012).

[150] 18 U.S.C. § 2518 (2012).

constitutional requirements for electronic surveillance."[151] Although the holdings in *Keith* focused on domestic electronic surveillance, its dicta touched on the gathering of foreign intelligence.[152] The Court said that in some situations there may be standards other than probable cause that comport with Fourth Amendment requirements.[153] Drawing on the Court's previous decision in *Camara*, the Court in *Keith* noted that:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.[154]

The dicta in *Keith* left open the question of what was the constitutional standard for the gathering of foreign intelligence.[155] It was in light of this that Congress enacted FISA with a lower probable cause standard for conducting electronic surveillance of foreign powers or their agents.[156]

B. The Foreign Intelligence Exception

In addition to creating the FISC to hear FISA applications, FISA also created the Foreign Intelligence Surveillance Court of Review (FISCR).[157] The FISCR hears appeals from the government for denials of FISA order applications.[158] The FISCR, on at least two occasions, has looked at the gathering of foreign intelligence and its relationship to the special needs doctrine.[159] In 2002, the FISCR decided *In re Sealed Case* and held that FISA as written was constitutional because a FISA order provided similar safeguards as a traditional criminal warrant under Title III.[160] Specifically, the court said that FISA orders meet Fourth Amendment standards of reasonableness because they are issued by a neutral magistrate, have a probable cause requirement, and describe what

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[151] *Keith*, 407 U.S. at 302.
[152] *See id.* at 322–24.
[153] *Id.* at 322–23.
[154] *Id.*
[155] Goitein, *supra* note 127, at 10–11.
[156] *See id.*
[157] 50 U.S.C. § 1803(b) (2012).
[158] Goitein, *supra* note 127, at 31.
[159] *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (U.S. FISA Ct. Rev. 2002); *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008).
[160] *In re Sealed Case*, 310 F.3d at 737–38.

is to be searched with particularity.[161] In addressing whether electronic searches conducted pursuant to a FISA order are constitutionally reasonable, the FISCR drew upon the doctrine of special needs.[162] The FISCR went through the special needs analysis, noting that the doctrine applies in "extraordinary situations" and involves a balancing test to determine whether a special needs search is reasonable.[163] The FISCR did not say that the gathering of foreign intelligence was a special need. Rather, it used the doctrine by analogy to show that searches made under FISA warrants are also reasonable because the procedures come close to the procedures for obtaining a criminal warrant, and in balance, FISA is reasonable and constitutional.[164] The *In re Sealed Case* court did not hold that the gathering of foreign intelligence was a special need and, therefore, the intelligence community does not need to follow the FISA statute when it conducts foreign intelligence searches. The court merely notes the similar justifications for the two doctrines, which both are exceptions to the warrant and probable cause standard of the Fourth Amendment.[165]

Six years after the FISCR decided *In re Sealed Case*, the court decided another case related to the gathering of foreign intelligence and the Fourth Amendment requirement of reasonableness.[166] The question in *In re Directives* was whether the Protect America Act (PAA),[167] which amended FISA and required service providers to assist in the gathering of foreign intelligence data, was constitutional.[168] The question regarding the constitutionality of the PAA is not relevant to the question of whether the gathering of foreign intelligence is a special need. What is relevant is the FISCR's discussion in this case of the foreign intelligence exception to the Fourth Amendment's warrant requirement.[169]

The FISCR held that, "the surveillance at issue satisf[ied] the Fourth Amendment reasonableness requirement."[170] The language of the court's holding is important because the court does not hold that the gathering of foreign intelligence *is* a special need.[171] Rather, the court's analysis used the special needs doctrine's reasoning to analogize and

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[161] *Id.* at 738.

[162] *Id.* at 745.

[163] *Id.* at 745–46.

[164] *See id.* at 742, 744 (indicating the totality of the circumstances test is not specific to the doctrine of special needs); *See* Robert C. Power, *"Intelligence" Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620, 666 (2010) ("The dominant theme of the last thirty years of Supreme Court jurisprudence on the Fourth Amendment. . .is built on the concept of the totality of the circumstances.").

[165] *Sealed Case*, 310 F.3d at 745–46.

[166] *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008).

[167] Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) (expired 2008).

[168] *Directives*, 551 F.3d at 1006.

[169] *Id.* at 1010.

[170] *Id.* at 1016.

[171] *See id.*

justify "a foreign intelligence exception to the warrant requirement."[172] The court used language indicating that it was not creating a new category under the special needs doctrine, but that it was using the "reasoning" and applying the "principles derived from the special needs cases."[173] This reasoning and principals are what enabled the court, by analogy to the special needs doctrine, to conclude that "this type of foreign intelligence surveillance possesses *characteristics*," that take the case out of the strict rigors of a warrant requirement.[174] A FISC decision following *In re Directives*, held that the FISCR had not found a new special need, but that "the Court has previously concluded that the acquisition of foreign intelligence information pursuant to Section 702 falls within the *foreign intelligence exception* to the warrant requirement of the Fourth Amendment."[175]

The concept that there is a foreign intelligence exception to the warrant requirement in the Fourth Amendment is not a new one.[176] In fact, the U.S. Supreme Court in *Keith* articulated the idea that a lower standard for foreign intelligence searches might be reasonable.[177] The dicta in *Keith* were, at least in part, what led to the enactment of FISA, which took into account the foreign intelligence exception in the creation of the FISA probable cause standard.[178] This standard is the heart of FISA and is a lower standard than the probable cause and warrant requirement of the Fourth Amendment.[179] The factors articulated by the FISCR in *In re Directives* are the factors that make the lower probable cause standard in FISA reasonable and constitutional.[180]

Furthermore, the FISA statute itself creates a foreign intelligence exception by articulating a standard that is lower than the Title III warrant requirement.[181] The FISA standard is itself outside of the Fourth Amendment warrant requirement, but because of the limitations found in FISA, is still considered reasonable. In *Keith*, the Supreme Court found that Congress had created Title III with constitutionality in mind.[182] The Court gave deference to Congress's intention to create a standard for electronic surveillance related to criminal searches that comported with prior Court decisions and the Fourth Amendment.[183] In the context of foreign intelligence gathering, it should be assumed that Congress

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[172] *Id.* at 1009.
[173] *Id.* at 1011.
[174] *Id.* (emphasis added).
[175] Redacted, 2011 U.S. Dist. LEXIS 157706, at *95 (FISA Ct. Oct. 3, 2011) (emphasis added) (internal quotation marks omitted).
[176] *E.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 911 (4th Cir. 1980).
[177] United States v. U.S Dist. Court (*Keith*), 407 U.S. 297, 321–24 (1972).
[178] United States v. Duggan, 743 F.2d 59, 73 (2d Cir.1984).
[179] Goitein, *supra* note 127, at 18.
[180] *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010–14 (FISA Ct. Rev. 2008); 50 U.S.C. § 1805(a)(2)(A) (2012).
[181] *Keith*, 407 U.S. at 302.
[182] *Id.* at 302.
[183] *Id.*

likewise enacted FISA with constitutionality in mind. In addition to constitutionality concerns, FISA was drafted "to accommodate the government's need to obtain surveillance orders secretly and in a hurry."[184] Congress could amend FISA to include a lesser standard, which might also satisfy the reasonableness requirement of the Fourth Amendment.[185] However, currently it would be circumventing Congress and FISA for a court to find that the gathering of foreign intelligence is a special need and therefore should be held to a separate, non-FISA lower standard. In passing FISA, Congress passed a clear statute that built the specific concerns of national security and the gathering of foreign intelligence directly into the statute.

The FISA statutes also include an emergency procedure that allows the attorney general to authorize electronic surveillance absent a FISA court order in the face of an emergency upon a showing of reasonableness.[186] This emergency procedure is further evidence that Congress drafted FISA with national security concerns in mind by providing flexibility for law enforcement to conduct surveillance quickly in emergency situations. This emergency provision is not the same as a special need, but a specific statutory response to the important question of foreign intelligence gathering. Other courts have recognized that a lesser probable cause standard exists for foreign intelligence gathering and concluded that the lower standard articulated in FISA satisfies the Fourth Amendment's reasonableness requirement.[187]

The previous discussion provides strong evidence that the foreign intelligence exception is a parallel exception, not a new branch of the special needs exception to the warrant and probable cause requirement of the Fourth Amendment. However, let us assume for the sake of argument that the FISCR was not using the special needs doctrine as an illustration of a parallel doctrine to bolster why the FISA probable cause standard is constitutionally reasonable, but was articulating a separate branch of the special needs doctrine.[188]

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[184] Goitein, *supra* note 127, at 7.

[185] *See* Sievert, *supra* note 74, at 98 (arguing that Congress should lower the FISA standard to reasonable suspicion); Goitein, *supra* note 127, at 45–49 (arguing for a wide-range of reforms, including narrowing what constitutes foreign intelligence).

[186] 50 U.S.C. § 1805(e) (2012).

[187] United States v. Marzook, 435 F. Supp. 2d 778, 782–783 (N.D. Ill. 2006); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) ("FISA's numerous safeguards provide sufficient protection for the rights guaranteed by the Fourth Amendment within the context of foreign intelligence activities."); United States v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987) ("FISA satisfies the constraints the Fourth Amendment places on foreign intelligence surveillance conducted by the government."); *In re* Sealed Case No. 02-001, 310 F.3d 717, 746 (FISA Ct. App. 2002) ("[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly. . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable."); cf. United States v. Spanjol, 720 F.Supp. 55, 58 (E.D. Pa. 1989); United States v. Duggan, 743 F.2d 59, 73 (2d Cir.1984) (Such is the case, courts have reasoned, because "the procedures fashioned in FISA [are] a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information."); *Cavanagh*, 807 F.2d at 790 (Explaining FISA's probable cause standard satisfies Fourth Amendment's reasonableness requirement).

[188] *But see* Sievert, *supra* note 74, at 47 ("The FISA Court of Review explicitly found that the special

Even if assumed for arguments sake, that the FISCR held that the gathering of foreign intelligence is always a special need, the FISCR opinion, if it is binding at all, is only binding on the FISC and future decisions by the FISCR.[189] As to other non-FISA courts, FISCR opinions are persuasive at best.[190] The nature of FISC and FISCR opinions, which are usually secret and redacted if published, creates problems for both the courts' perceived legitimacy and their opinions' precedential value.[191] The only published FISCR opinions are the two previously discussed, and they are highly redacted.[192] On this issue, the secretive nature of the court creates a lack of opinions with precedential value.[193]

At least one U.S. District Court has "decline[d] to adopt the analysis and conclusion reached by the FISCR in *In re Sealed Case*."[194] The Oregon District Court disagreed that the gathering of foreign intelligence after the Patriot Act was analogous to a special need.[195] Specifically, the district court referred to the FISCR's analysis of the issue as "without merit."[196] Although vacated on other grounds, the *Mayfield v. United States* decision highlights the fact that FISCR decisions are not binding on courts outside of the FISA arena. This is important because it is these non-FISA courts that will ultimately decide issues related to the constitutionality of Fourth Amendment searches.

C. When Might the Gathering of Foreign Intelligence Fit Within the Special Needs Doctrine?

The first step in determining whether a special need exists is to articulate a non-law enforcement purpose to conduct the search.[197] There is considerable disagreement as to whether the gathering of foreign intelligence is a law enforcement function.[198] The FISCR has acknowledged that the definition of an "agent of a foreign power," at least as applicable to a U.S. person, "is closely tied to criminal activity."[199] The FISCR went further, noting that international terrorism

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needs doctrine should apply to these cases.").

[189] Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Court*, 124 YALE L.J. 2189, 2192 (2015).

[190] *See* Mayfield v. United States, 504 F. Supp. 2d 1023, 1041 (D. Or. 2007) (declining to follow the FISCR decision in *In re* Sealed Case No. 02-001).

[191] Boeglin, *supra* note 189, at 2193–94.

[192] *Id.* at 2191; *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008); *In re* Sealed Case No. 02-001, 310 F.3d 717 (FISA Ct. Rev. 2002).

[193] Boeglin, *supra* note 189, at 2200 n.67.

[194] Mayfield, 504 F. Supp. 2d at 1041.

[195] *Id.*; *see also Sealed Case*, 310 F.3d at 742–46.

[196] *Mayfield*, 504 F. Supp. 2d at 1041.

[197] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

[198] *See* Simmons, *supra* note 3, at 911–12.

[199] *Sealed Case*, 310 F.3d at 723.

refers to activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.[200] If terrorism were generally defined as a criminal act, then stopping terrorism generally would be a law enforcement function.

Another argument for removing terrorism-related intelligence gathering from the rubric of general crime control is the magnitude of the threat of terrorism.[201] The U.S. Supreme Court has addressed this question in the context of the War on Drugs.[202] In *Edmond*, the Court held that drug interdiction was a law enforcement function.[203] The Court came to this holding fully aware of the "severe and intractable nature of the drug problem" in the United States.[204] However, the Court found that the "gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[205] This holding in *Edmond*, is transferrable to terrorism interdiction.[206] Terrorism, like drug trafficking, poses a severe problem, but is overarchingly a law enforcement function.

That is not to say that specific acts or instances of terrorism cannot create a non-law enforcement function. Whether a particular search falls under the doctrine of special needs can only be determined based on a context specific inquiry.[207] Some of the factors the U.S. Supreme Court has established as important in the special needs inquiry are if a warrant (or in this case a FISA order) would unduly frustrate the search and put the public unnecessarily in harm's way,[208] and whether the threat is real and imminent—not just symbolic.[209] There may be situations in the future that justify special needs searches outside of the constraints of FISA, perhaps when a person or organization "is engaged in an effort to employ a [weapon of mass destruction] in the United States" or an emergency situation of a similar magnitude.[210] But, there must be a showing that a proposed threat is substantial and real based on a case-by-case analysis in order to be compatible with the doctrine of special needs.[211] The special needs exception is a narrow exception, and without such a showing, this blanket category of searches is unconstitutional.[212]

For the sake of this analysis, let us assume that the gathering of

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[200] *Id.* (internal quotation marks omitted).

[201] *See* Sievert, *supra* note 74, at 50. *But see* Mueller, *supra* note 72, at 18 (comparing the hunt for terrorists to past witch hunts and the red scare).

[202] City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000).

[203] *Id.* at 41–42.

[204] *Id.* at 42.

[205] *Id.*

[206] *See id.* at 41 (stating "our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion").

[207] Chandler v. Miller, 520 U.S. 305, 314 (1997).

[208] Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988); United States v. U.S Dist. Court (*Keith*), 407 U.S. 297, 315 (1972).

[209] *Chandler*, 520 U.S. at 321–322; *Edmond*, 531 U.S. at 44.

[210] Sievert, *supra* note 74, at 98.

[211] *Chandler*, 520 U.S. at 319.

[212] *Id.* at 323 (citations omitted) (internal quotation marks omitted).

foreign intelligence is in some instances a non-law enforcement function. The special needs analysis will then move to the balancing test, balancing "(1) the weight and immediacy of the government interest, (2) the nature of the privacy interest allegedly compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest."[213] The government interest in preventing a terrorist attack is extremely weighty, and the weight of that interest grows exponentially based on the immediacy of an attack. In instances where the government interest is high and there is a non-law enforcement purpose, the search can be intrusive and still be constitutional because of the balance between the high governmental interest and the level of intrusiveness.[214] The search, however, still needs to be tailored to advance the actual governmental interest.[215] Because of the strong governmental interest involved in national security, an appropriately tailored search is likely to be constitutional if based on a valid non-law enforcement purpose.[216] As was noted previously, what qualifies as a non-law enforcement purpose, in the context of the gathering of foreign intelligence, is likely a narrow category based on factors of immediacy, undue frustration of obtaining the FISA order, and the substantial and real nature of the threat.[217]

It is difficult to compare the gathering of foreign intelligence, which under FISA is ordered by a secret court and conducted in secret, to other types of special needs searches. Whether a particular search is a special need often turns on whether notice was given that the search would be conducted, as the main purpose of special needs searches is often deterrence, not crime control.[218] "It would be as if Transportation Security Agents were told to look primarily for drugs and counterfeit money, but then expected to justify their searches as based on protecting airplanes and passengers."[219] As is noted in several special needs cases, deterrence is the main goal; even if the terrorist is not caught, then the search has performed its function if he chooses a different target.[220] The special needs model, which requires a search to have a primary purpose other than law enforcement, like deterrence, is not in accordance with the current model of gathering foreign intelligence; gathering foreign intelligence cannot be a deterrent if it is done in secret.[221] In special

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[213] MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citations omitted) (quotation marks omitted).

[214] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976).

[215] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[216] *See id.*

[217] *Chandler*, 520 U.S. at 321; New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring); *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (FISA Ct. Rev. 2002); Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988); United States v. U.S Dist. Court (*Keith*), 407 U.S. 297, 315 (1972); *Edmond*, 531 U.S. at 44.

[218] *MacWade*, 460 F.3d at 264–65.

[219] Power, *supra* note 164, at 669.

[220] *MacWade*, 460 F.3d at 275.

[221] Power, *supra* note 164, at 668–69.

needs cases related to terrorism, deterrence is a victory.[222] In the context of the gathering of foreign intelligence, prevention and prosecution go hand in hand with fighting terrorism, and a terrorist abandoning a plan is not a law enforcement victory. [223]

VI. CONCLUSION

The U.S. Supreme Court has never specifically articulated under what circumstances terrorism is considered a special need. However, Supreme Court opinions in which the Court has declined to extend the special needs doctrine provide guidance.[224] In 1997, the Court held that requiring all candidates for state office in Georgia to pass a urinalysis was an unconstitutional search.[225] Georgia argued that this search "serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office."[226] However, the Court held that this did "not fit within the closely guarded category of constitutionally permissible suspicionless searches."[227] Furthermore, "nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical."[228] The main takeaway from this decision is that the risk to public safety must be real and supported by fact finding in order for there to be a special need.[229]

In 2000, the Supreme Court again decided a case involving a special needs argument by deciding that a roadblock to detect drugs was not conducted pursuant to a special need.[230] In *Edmond*, the Court found that the primary purpose of the roadblock was to detect drugs, which is evidence of ordinary criminal wrongdoing.[231] The Court held that this program to stop drugs from entering the community was not a special need because it was a crime control search, "notwithstanding the obvious public health and safety ramifications of illegal drug use."[232] What this means is that the special need must be the primary need of a search and not just a secondary need.[233] The *Edmond* decision "raises serious

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[222] *MacWade*, 460 F.3d at 275.

[223] *See* Goitein, *supra* note 127, at 23–24. (If deterrence and prevention were the main purpose of gathering foreign intelligence, there would have been no reason to change the language of FISA from purpose, to significant purpose, in order to bring down the barrier between intelligence and criminal prosecution.).

[224] City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Chandler v. Miller, 520 U.S. 305 (1997); Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[225] *Chandler*, 520 U.S. at 318.

[226] *Id.*

[227] *Id.* at 309.

[228] *Id.* at 319.

[229] *Id.* at 323.

[230] City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

[231] *Id.*

[232] Power, *supra* note 164, at 662.

[233] *See id.* at 663.

questions about the attempts to shoehorn criminal enforcement purposes" into terrorism searches.[234]

Finally, in 2001, the Supreme Court decided *Ferguson v. City of Charleston*.[235] The Court held that a program that tested pregnant women for drugs and then reported the results to police was unconstitutional.[236] The Court struck down this law, despite having previously decided that drug testing in other contexts is a special need.[237]

> Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of special needs.[238]

The holdings in *Ferguson*, along with those in *Edmond*, highlight the line that the Court has drawn in special needs analysis between stopping crime and searches conducted for other civil purposes.[239]

Taking into account what the Supreme Court has held on the subject, in order for terrorism to be a special need, the threat must be real, substantial, imminent, and not primarily criminal in nature.[240] There are situations that would no doubt be a special need due to an actual imminent terrorist emergency. Furthermore, it must be shown that preventing the attack will be dangerously frustrated by the Fourth Amendment warrant and probable cause requirement.[241] However, the special needs doctrine is not to be used flippantly or for routine matters, as the safeguards built into the Constitution were done with emergency situations in mind.[242]

To summarize, there are some categories of special needs that overlap with terrorism searches. Suspicionless administrative searches pursuant to a valid regulatory statute are a special need, but are not specifically terrorism searches.[243] Roadblock searches can be conducted

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[234] *Id.* at 665.

[235] Ferguson v. City of Charleston, 532 U.S. 67 (2001). The author notes that the U.S. Supreme has not decided a major case on the special needs doctrine since the attacks of September 11, 2001. This fact could imply that the doctrine is out of date or it could imply that the Supreme Court believes the doctrine as it stands provides the appropriate limitations on Fourth Amendment searches.

[236] *Id.* at 86.

[237] *E.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 633 (1989); *See* Vernonia v. Acton 515 U.S. 646, 657–59 (1995).

[238] *Ferguson*, 532 U.S. at 84.

[239] *Id.* at 88 (Kennedy, J. concurring) ("The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.").

[240] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 52 (2000); Chandler v. Miller, 520 U.S. 305, 323 (1997); *Ferguson*, 532 U.S. at 85–86.

[241] *See* Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988).

[242] *See Ex parte* Milligan, 71 U.S. 2, 120–21 (1866).

[243] *See* New York v. Burger, 482 U.S. 691, 702–03 (1987).

under the administrative search doctrine to stop an imminent terrorism threat.[244] When the threat of terrorism to public safety is real and imminent, public safety may be a special need.[245] And as was previously argued in this analysis, the gathering of foreign intelligence is not a special need.[246] This conclusion is based in the fact that the gathering of foreign intelligence is covered by FISA, which creates a lesser probable cause standard than criminal probable cause under Title III.[247] Additionally, FISA has an emergency provision worked into the statute, which shows Congress took the nature of the threat of international terrorism into account when it drafted the statute.

It is times like these, where citizens of the U.S. live under the constant threat of terrorism, that the protections and rights found in the Constitution matter the most. The government's adherence to the Fourth Amendment is not optional.[248] The special needs exception is meant to be a narrow exception that allows flexibility in searches without compromising the civil rights of those who are searched. As such, broad searches justified in the name of terrorism are not constitutional.

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[244] *Edmond*, 531 U.S. at 44.

[245] *Chandler*, 520 U.S. at 323.

[246] *See supra* text accompanying notes 157–196.

[247] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 302 (1972).

[248] Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).