

# The “Special Needs” Exception to the Warrant Requirement

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**T**he Fourth Amendment to the Constitution protects against unreasonable searches and seizures.<sup>1</sup> To be reasonable, a search generally must be supported by a warrant issued upon probable cause.<sup>2</sup> But, there are exceptions to this general rule.<sup>3</sup> One such exception applies when a search serves “special government needs” beyond the normal needs of law enforcement; in which case, the search may be reasonable despite the absence of a warrant, probable cause, or even

individualized suspicion.<sup>4</sup> The U.S. Supreme Court has recognized that, in certain limited circumstances, the government’s need to discover latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting a search without any measure of individualized suspicion.<sup>5</sup> A critical factor in the validity of suspicionless searching is the non-law enforcement nature of the special need asserted as a

justification.<sup>6</sup> General crime control programs designed to ferret out criminal activity and gather evidence must be distinguished from those that have another particular purpose, such as the protection of citizens against special hazards.<sup>7</sup>

This article examines the “special needs” exception as applied to situations in which law enforcement directly conducts searches and seizures without individualized suspicion for the purpose of minimizing a risk of harm.<sup>8</sup> In

responding to the realities of terrorism in the post 9/11 period, law enforcement may increasingly be required to adapt traditional legal authorities to confront and combat new threats.<sup>9</sup> In creating new types of security programs to further the “war on terror,” law enforcement agencies, of course, must respect the rule of law and preserve the legal and constitutional protections that define a free society. Where the risk to public safety is substantial and real, suspicionless searches calibrated to that risk may be reasonable; for example, routine searches at airports and entrances at courts and other official buildings have long been upheld.<sup>10</sup> The essential purpose of such security programs is not to detect weapons or explosives or to apprehend those who carry them but to

deter persons carrying such materials from seeking to board or enter.<sup>11</sup> Moreover, the absence of specific threat information does not vitiate either the authority or wisdom of conducting security screening generally for *all* flights. When the threat is to *any* flight, *every* flight may be protected by security searches.<sup>12</sup> Preemptive measures directed toward other likely targets also make sense given the possibility that terrorists continue to plan for large-scale attacks within the United States.<sup>13</sup> There is no reason to believe that specific target information is necessarily, or even frequently, available before a terrorist attack. Nevertheless, where the threat is real and where there is no foolproof method of confining a search or seizure to the few who are potential terrorists, the “special

needs” exception may be employed. Serious threats demand serious and effective responses.

### **Distinguish from a General Interest in Crime Control**

The “special needs” exception that has been used to uphold certain suspicionless searches and seizures is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.<sup>14</sup> While the “special needs” exception has been recognized in random drug testing cases and a comparable standard has been applied in highway checkpoint cases, the Supreme Court is particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue ordinary crime control ends. In *Ferguson v. City of Charleston*, the Court reviewed its prior “special needs” cases emphasizing that, in each case, the justification underlying the search was “divorced from the State’s general interest in law enforcement”<sup>15</sup> and noting that it had never “upheld the collection of evidence for criminal law enforcement purposes.”<sup>16</sup> Accordingly, in *Ferguson*, the Court concluded that the “special needs” doctrine was inapplicable to a state hospital drug abuse policy in which pregnant patients who met



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certain symptom criteria were given drug tests and the results were turned over to the police. Critical to the decision in *Ferguson* was the finding that the hospital policy was developed and enforced in conjunction with the police. Although the drug testing did have a deterrent purpose intended to reduce the incidence of cocaine-addicted mothers and newborns, the central feature of the policy was the collection of evidence resulting in a threat of prosecution designed to coerce patients into treatment. Its purpose was thus indistinguishable from a general interest in crime control and, therefore, was not within the “special needs” exception.<sup>17</sup> In *City of Indianapolis v. Edmond*, the Court found that the primary purpose of the city’s drug interdiction checkpoint program, wherein police officers demanded the drivers’ licenses and registrations, peered into windows, and led drug-sniffing dogs around automobiles, was indistinguishable from the city’s general interest in crime control. The checkpoint program was not justified by the severe and intractable nature of the drug problem and could not be rationalized in terms of highway safety or by its secondary purpose of keeping impaired motorists off the road.<sup>18</sup> The Court reasoned that if a program could be justified by its lawful

secondary purpose—such as deterring drunk driving—authorities would be able to establish roadblocks for virtually any purpose as long as they also included a sobriety check.

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This line of precedent makes clear that the Fourth Amendment protects against the use of suspicionless searches or seizures undertaken for the specific purpose of gathering evidence for criminal proceedings. Only a few types of searches and seizures have been recognized expressly as falling within the “special needs” exception. In the context of safety and administrative programs, the special need addressed by the governmental program must be well beyond the normal need for law enforcement or a general interest in crime control. The Supreme Court has expressly applied the “special needs” exception to support suspicionless checkpoints, which are seizures under the Fourth

Amendment, designed to address the following interests.

In *Michigan Department of State Police v. Sitz*,<sup>19</sup> the Court held that the removal of drunk drivers pursuant to a sobriety checkpoint program, under which all vehicles passing through the checkpoint were stopped and their drivers briefly examined for signs of intoxication, did not violate the Fourth Amendment. The fact that approximately 1.5 percent of drivers passing through the checkpoint were arrested for alcohol impairment was sufficiently effective to justify the state’s interest in implementing the program. The purpose of the checkpoint was not to gather evidence of criminal activity but to deter drunk driving, which posed a significant public hazard.

The interception of illegal aliens was identified as a “special need” in *United States v. Martinez-Fuerte*.<sup>20</sup> It was constitutional for the Border Patrol, after routinely stopping vehicles at a permanent checkpoint, to refer motorists selectively to a secondary inspection area for questions about citizenship and immigration status, on the basis of criteria that would not sustain a roving patrol stop, and there was no constitutional violation even if such referrals were made largely on the basis of apparent Mexican ancestry. The Court concluded:

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A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operation, even though smugglers are known to use these highways regularly.<sup>21</sup>

A roadblock in which officers solicited voluntary cooperation from members of the public in the investigation of a serious crime was permitted in *Illinois v. Lidster*.<sup>22</sup> The roadblock at which all motorists were systematically stopped so that police could ask them for information about a recent fatal hit-and-run accident on that highway and hand each motorist a flyer requesting assistance in identifying the vehicle and driver involved in the accident was deemed reasonable by the U.S. Supreme Court. The relative public concern was grave, and the stop advanced that concern to a significant degree. The stop, which required a wait in line for a few minutes, at most interfered only minimally with liberty of the sort that the Fourth Amendment seeks to

protect. Unlike the checkpoint in *Edmond* or the drug testing policy in *Ferguson*, there was no purpose to gather evidence against the person subjected to the seizure. As the Court noted:

[U]nlike *Edmond*, the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say crowd control

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or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.<sup>23</sup>

Thus, in *Lidster* the Supreme Court suggested that, in addition to the specifically authorized checkpoints, there are other circumstances—public safety in particular—that may justify a law enforcement

checkpoint where the primary purpose would otherwise, but for some emergency or special hazard, relate to ordinary crime control. The existence of an emergency or special hazard combined with no practical means of addressing the emergency or hazard based on individualized suspicion brings the activity within the “special needs” exception. For example, there is support for the position that appropriately tailored roadblocks set up to prevent explosive or other dangerous devices from entering likely target areas or to catch a dangerous criminal likely to flee by way of a particular route could be conducted without individualized suspicion. As the Court observed in *Edmond*, “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.”<sup>24</sup> Further, Justice Ginsburg has observed that “the use of bomb-detection dogs to check vehicles for explosives without a doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond*... even if the Court were to change course and characterize a dog sniff as an independent Fourth Amendment search, the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.”<sup>25</sup>

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In his dissenting opinion in *Sitz*, Justice Stevens remarked that “permanent, nondiscretionary checkpoints could be used to control serious dangers at other publicly operated facilities. Because concealed weapons obviously represent one such substantial threat to public safety, I would suppose that all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search.”<sup>26</sup>

### The Threat Must Be Real and Substantial

The first essential question to ask concerning the validity of a search or seizure under the “special needs” exception is whether there is a substantial governmental need or public interest served by the activity in question. In determining the public necessity requiring a particular type of suspicionless search, the courts have examined the nature and degree of the threat of public danger arguably necessitating the search. In the early 1970s, the courts recognized the public necessity for warrantless airport searches because of the “great threat to hundreds of people”<sup>27</sup> and the “enormous potential for violence”<sup>28</sup> created by the rash of hijackings that occurred during that time. The courts found the nature of the threat

created by hijackings particularly grave in terms of the potential damage to persons or property, disruption of air traffic, and complication of foreign relations.<sup>29</sup> Similarly, in authorizing searches of courthouses and other government buildings, the courts recognized the very real threat to public safety that arose from the “outburst of acts of violence, bombings of federal buildings, and hundreds of bomb threats, resulting in massive evacuations of federal property” throughout the country.<sup>30</sup>

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With respect to other public venues, in the so-called “rock concert” cases, involving searches for bottles, cans, drugs, and alcohol, the courts distinguished the airport and courthouse cases as involving unique circumstances.<sup>31</sup> The searches in these cases were not instituted to uncover weapons or other instruments of mass violence

but, rather, to find either contraband or objects that could be dangerous if broken or used as projectiles. Because the items for which the patrons were searched posed no threat of public danger equivalent to that posed by a bomb or gun, the courts have consistently held that the necessity of searching arena patrons is minimal compared with that for airport searches. Even a search for weapons has been found to be unjustified on a public necessity rationale under circumstances where the potential damage from a single individual’s weapon is not analogous to the mass destruction potential present in an airport or courthouse.<sup>32</sup> For example, a state statute that authorized warrantless searches of all bar patrons for weapons was found to be unconstitutional because “the public necessity addressed by these laws is apparently the danger to individuals in a bar at the hands of one who is armed and intoxicated. This public purpose in no way equals such national concerns as the foreign policy implicated by hijackings, or the threat to the judicial system implicated by courthouse bombings.”<sup>33</sup>

While the Supreme Court has hinted that certain types of suspicionless searches conducted for the purpose of maintaining public safety might be lawful, it has thus far maintained tight control of the

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potentially unlimited sweep of the “special needs” standard under a broadly applied public safety rationale. Searches motivated by only a general, though certainly logical, concern that public events or venues where large crowds gather might be targets of an unidentified terrorist attack are problematic. Line drawing in this area is never easy and can be enormously difficult given the stakes involved. The dilemma has been described by one court as:

[Law enforcement officers] should be commended for their efforts in a difficult, often impossible job, particularly given the post September 11 environment. They are criticized when their actions appear to tilt too much in favor of public safety and infringe upon fundamental rights, and they are criticized when they do not go far enough and a tragedy results.<sup>34</sup>

The city of Columbus, Georgia, attempted to address the public safety dilemma posed by the amorphous nature of the present danger of potential terrorist activity in *Bourgeios v. Peters* when it argued before the Eleventh Circuit that “[l]ocal governments need an opinion that without question, allows nondiscriminatory, low level magnetometer searches at large gatherings...post September 11,

2001, this Court can determine [that] the preventive measure of a magnetometer at large gatherings is constitutional as a matter of law.”<sup>35</sup> The court disagreed, holding that a city policy to conduct magnetometer searches of all protesters prior to entry into the protest area located near a U.S. military-run school at Fort Benning, Georgia, violated the protestors’ Fourth and First Amendment rights.<sup>36</sup> The court

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refused to extend the “special needs” exception as requested by the city, pointing out that no weapons had been found at the protest site and no protestors had been arrested for acts of violence during the group’s 13-year history.

The City’s position would effectively eviscerate the Fourth Amendment. It is quite possible that both protestors and passersby would be safer if the City were permitted to engage in mass, warrantless,

suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Nevertheless, the Fourth Amendment embodies a value judgment by the framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence—rather than potentially effective, broad, prophylactic dragnets—as the constitutional norm. We also reject the notion that the Department of Homeland Security’s threat advisory level somehow justifies these searches.<sup>37</sup>

Even granting that the threat of terrorism is omnipresent simply referring to 9/11 or otherwise to a threat of terrorism generally will not, without more, provide a sufficient basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people. For example, in *State v. Seglen*, the North Dakota Supreme Court held, citing *Bourgeios v. Peters*, that warrantless pat-down searches of patrons by a state university police officer as they entered an arena to attend a hockey game were not justified by an

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increased threat of terrorism or violence.<sup>38</sup> The state argued that the security needs at large arenas and sporting events are similar to airports and courthouses, especially in recent years. However, the court responded that the search could not be justified by a generally increased threat of terrorism and violence; there must be some factual basis to believe that a threat to public safety existed at the arena. “We agree with our colleagues in the Eleventh Circuit. There was no history of injury or violence in this case and nothing in the record supports a suspicionless search of all patrons by a University of North Dakota police officer.”<sup>39</sup>

For a “special need,” there must be some definitive basis for believing that the existence of a threat—terrorist or otherwise—is real and not imagined. As the court declared in *Bourgeois v. Peters*, “In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors.”<sup>40</sup> Although there must be some reason to believe that a special hazard exists at the venue in question, specific intelligence (meaning a time and place identification of a potential threat) indicating that the venue has been identified as an imminent target is not

required. The standard is not that restrictive but, instead, requires a showing that the threat to public safety is distinct or definite, rather than indefinite or generalized. In the air travel context, for example, the “special need” has been well established. There is a catalog of hijackings and other terrorist incidents involving air transportation that spans decades, and much attention has been

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given to airport security. Routine airport security searches pass constitutional muster because of a demonstrated compelling public interest in curbing air piracy and other dangerous criminal activity known to be directed against that particular mode of transportation.<sup>41</sup> The legality of such searches does not depend on specific intelligence suggesting that a particular flight is potentially subject to imminent attack.

There is a substantial basis to believe that the threat posed to urban mass transit systems parallels that of air travel. As one court observed when upholding administrative security searches of passenger carry-on items prior to boarding Boston city trains and buses, “other transportation systems, including mass transit systems, have become targets of terrorists as well,” and “there is no reason to have separate constitutional analyses for urban mass transportation systems and for airline transportation.”<sup>42</sup> That is, provided the threat is established, the fundamental legal issues should not be affected by the mode of transportation involved. In the Boston case, the trains and buses in question were traveling in the vicinity of the Democratic National Convention. In supporting its program, the city made reference to the Madrid train bombing on March 11, 2004, and the possibility that the attack may have been timed to maximize its disruptive effect on the Spanish elections. This pointed up the potential attractiveness to terrorists of timing an attack against mass transit targets in connection with the convention to have an impact on the democratic process within the United States.<sup>43</sup> In another case in which a New York City subway system container inspection program was found to be

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lawful, city officials also made reference to the train bombing in Madrid, as well as the subway bombings in Moscow on February 6, 2004, and in London on July 7 and 21, 2005, to substantiate the threat.<sup>44</sup> According to the officials, these prior incidents “raised the risk level for the New York City’s subway system” because 1) “they reaffirmed the shift to transportation systems as targets”; 2) “they were carried out by individuals belonging to groups with links to similar groups operating in New York”; and 3) “they were carried out notwithstanding a substantial security system which included extensive video surveillance.”<sup>45</sup>

Mass transportation systems have been described as attractive targets.<sup>46</sup> This is supported by evidence of past attacks on mass transportation systems. While few post 9/11 cases provide guidance in other contexts, it is clear enough that individual circumstances determine when a potential threat will be deemed a credible justification for a “special needs” search. Oblique references to the threat of terrorism generally will not provide adequate justification for mass suspicionless searches at all large gatherings of people. Moreover, an inapposite reference to a specific terrorist event may do little more to substantiate public necessity

than a reference to 9/11 generally. For example, in attempting to justify a program where all protestors’ bags were searched as a condition of entry to a demonstration site, New York City officials once again pointed to the Madrid train bombing and the use of knapsacks in that attack. Without deciding the legality of the search program, the court did

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note that “the circumstances of the Madrid bombings differ from an organized public demonstration” and a “bag search in the context of the exercise of constitutionally protected speech calls for a different analysis.”<sup>47</sup> This different analysis was required, in part, because the threat evidence presented did not adequately relate to an ostensibly peaceful protest and due, in part, to the potential chilling effect the

government’s action may have on activities protected by the First Amendment. The court, nevertheless, said that “it must be emphasized, however, that the ban on searches at demonstrations is not categorical and may be justified under different circumstances.”<sup>48</sup> The “special needs” exception must be based on a real and substantial threat to public safety.<sup>49</sup>

### **Consider the Relative Intrusiveness of the Search**

The constitutionality of “special needs” seizures or searches is determined by balancing the gravity of the public interest they serve, the degree to which they advance that interest, and the degree to which they interfere with individual freedom and privacy.<sup>50</sup> In addition to limiting the discretionary nature of the search, the type and degree of search conducted must be considered. Guidelines for establishing that the level of intrusiveness of a “special needs” search is constitutionally permissible should include consideration of whether:

1) *The location, time, and duration of the checkpoint is established—preferably as a written policy or plan—by supervisory personnel, rather than as a matter of discretion exercised by individual officers in the field.* Where the 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, there is less opportunity for arbitrary, abusive, or harassing activity.<sup>51</sup> The written plan should describe the inspection method and define those items prohibited. Supervision should be exercised over the activities of officers in the field to ensure that they remain within the plan.<sup>52</sup>

2) *Advance warning of the official nature of the checkpoint is given.*<sup>53</sup> Notice is a significant factor for at least two reasons. It tends to reduce the subjective anxiety that might otherwise be experienced by individuals asked to submit to a search if they had no reason to anticipate the inspection and also provides an opportunity for persons who do not want to submit to the inspection to avoid the venue. While notice always reduces intrusiveness, it may not always translate into implied consent to search. Submission to apparent authority is not voluntary consent to search. Therefore, a showing of acquiescence based on the presence of “conspicuously posted signs” warning persons that they are “subject to search” will not necessarily establish consent.<sup>54</sup>

3) *The seizure of persons is for a minimal length of time required to achieve the purpose*

*of the checkpoint.*<sup>55</sup> The search must be limited in scope and duration. In the checkpoint cases, waiting in line for a few minutes followed by a brief and minimally intrusive exchange with officers has been upheld.<sup>56</sup>



4) *Systematic nondiscretionary criteria is used for stopping persons and inspection of their property.*<sup>57</sup> Where the decision to search is left entirely to the discretion of the searching officers, courts have repeatedly found that the intrusion can be particularly great. The common rationale behind these cases is that when the search procedure is not applied indiscriminately but only to isolated individuals at the officer’s discretion, the search potentially causes fear, surprise, and embarrassment to the individual subjected to the search that otherwise could be avoided.<sup>58</sup>

5) *The search only minimally intrudes on privacy interests.* It is a well-established U.S. Supreme Court doctrine that “even a limited search of the person is a substantial invasion of privacy.”<sup>59</sup> A search of persons entering a public building or other public venue, including searches into parcels, handbags, and other items carried by persons, is a warrantless search unreasonable per se under the Fourth Amendment unless it falls within one of the recognized exceptions to the warrant requirement.

The “stop and frisk” or *Terry* exception to the warrant requirement is based on a reasonable suspicion of criminal activity and that the person detained is armed and poses an imminent danger to the officer or to the safety of other persons.<sup>60</sup> Searches not based on reasonable suspicion do not fall within the *Terry* exception and there appears to be no case that has expressly permitted a frisk or pat-down search of a person under the “special needs” exception. Other techniques, such as magnetometers and limited container inspection programs, have been expressly permitted.

The search must be limited so that it does not sweep too broadly, and the government must demonstrate how a particular need is addressed by the type of search employed.

The use of a magnetometer is generally considered to be less intrusive than physically inspecting personal property. For example, in prohibiting a bag search program a court ruled:

[T]he NYPD is hereby enjoined from searching the bags of all demonstrators without individualized suspicion at particular demonstrations without the showing of both a specific threat to the public safety and an indication of how blanket searches could reduce that threat. Less intrusive searches, such as those involving magnetometers, do not fall within the scope of the injunction.”<sup>61</sup>

In turn, while the visual inspection of personal property is more than a minimally intrusive search, it is ordinarily considered to be less intrusive than a pat down of a person’s outer clothing.<sup>62</sup> The means employed must bear a close and substantial relation to the government’s interest in pursuing the search.<sup>63</sup>

6) *The program is reasonably effective.* Courts will limit the inquiry in this area to whether the search is a reasonably effective method of deterring the prohibited conduct.<sup>64</sup> It is not necessary to present statistical evidence, which is often unavailable, to support the program. Nonstatistical expert

testimony can afford a sufficient basis to demonstrate the deterrent effect of a “special needs” search.<sup>65</sup>

## Conclusion

As one court has recently observed, “the need for implementing counterterrorism measures is indisputable, pressing, ongoing, and evolving.”<sup>66</sup> Nevertheless, to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. The use of suspicionless searches for the purpose of deterring a possible

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terrorist attack will be carefully examined. To fall within the “special needs” exception, a deterrent program must address a special need beyond the ordinary needs of law enforcement, the governmental interest behind the program must be compelling, the program must only intrude minimally upon privacy interests, and the program must be reasonably effective. ♦

## Endnotes

<sup>1</sup> “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend IV.

<sup>2</sup> *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S. Ct. 1384, 103 L.Ed.2d 685 (1989).

<sup>3</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n. 15, 121 S. Ct. 1281, 149 L.Ed.2d 205 (2001).

<sup>4</sup> *Von Raab*, 489 U.S. at 666; *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 624, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989).

<sup>5</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (Policy requiring all students who participate in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district’s important interest in preventing and deterring drug use among its school children. Interest was important, students had lowered expectation of privacy, degree of intrusion was negligible given method of urine sample collection, and the consequence of a failed drug test was to limit student’s privilege of participating in extracurricular activities.); *cf. Chandler v. Miller*, 520 U.S. 305 (1997) (Requirement that all candidates for state office pass drug test did not fit within the closely guarded category of constitutionally permissible suspicionless searches. Alleged incompatibility of unlawful drug use with holding high state office did not establish a special need; there was no evidence of drug problems among the state’s elected officials, those officials typically did not perform high-risk, safety-sensitive tasks, and required certification immediately aided no interdiction effort.); *See also, Griffin v. Wisconsin*, 483 U.S. 868 (1987) (Allowed a warrantless entry by a probation officer into a probationer’s residence to investigate the suspected presence of contraband because of the “special needs” of law enforcement. Need to act on less than probable cause due to probationary status.). *Wyman v. James*, 400 U.S. 309 (1971) (Allowed a warrantless entry and visit by a social case worker to determine compliance with welfare requirements as a reasonable administrative tool and not a search in the traditional criminal law context of the Fourth Amendment.).

<sup>6</sup> *Ferguson*, 532 U.S. at 79; *New Jersey v. TLO*, 469 U.S. 351, 105 S. Ct. 733 (1985)

(Blackmun, J. concurring) (stating that an agency may invoke the “special needs” exception “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable”).

<sup>7</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 44, 121 S. Ct. 447, 148 L.Ed. 333 (2000).

<sup>8</sup> This article addresses the legality of law enforcement activity constituting a search or seizure within the meaning of the Fourth Amendment conducted without individualized suspicion of criminal activity. Searches and seizures by government entities other than law enforcement pursuant to the “special needs” doctrine are not addressed. Further, the “administrative search” exception (warrantless inspections and searches of pervasively regulated businesses; see, e.g., *Donovan v. Dewey*, 452 U.S. 594 (1981)) and the “community caretaking” exception (seizures of persons based on individualized reasonable suspicion that a detention is necessary to address a hazardous condition or to otherwise minimize the likelihood of disorder); see, e.g., *Cady v. Dombroski*, 413 U.S. 433 (1973), *U.S. v. Garner*, 416 F.3d 1208 (10th Cir. 2005) although closely related to the “special needs” exception, are not covered in this article.

<sup>9</sup> See, e.g., *In re Sealed Case*, 310 F.3d 717, 744 (2002) (“After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date.”).

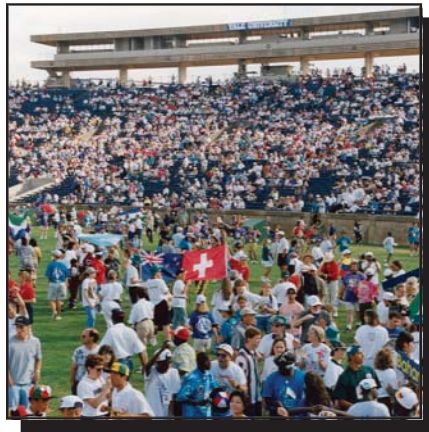
<sup>10</sup> See *Von Raab* 489 U.S. at 1395-1396, and n.3. (“The point is well-illustrated also by the federal government’s practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of carry-on luggage without any basis for suspecting any particular passenger of an untoward motive.”); *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002) (“the events of September 11, 2001, only emphasize the heightened need to conduct searches at this nation’s international airports”); *U.S. v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005) (“Airport screening of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment.”); *U.S. v. Hartwell*, 436 F.3d 174 (3rd Cir. 2006).

<sup>11</sup> See *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973); *Marquez*, 410 F.3d at 616 (“Little can be done to balk the malefactor after weapons or explosives are successfully smuggled aboard, and, as yet, there is no foolproof method of confining the search to the

few who are potential hijackers.”); *Hartwell*, 436 F.3d at 179 (“As this court has held, ‘absent a search there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane.’” (citing *Singleton v. Comm’r of Internal Revenue*, 606 F.2d 52 (3rd Cir. 1979)).

<sup>12</sup> See *American-Arab Anti-Discrimination Committee v. Mass. Bay Transp. Auth.*, 2004 WL 1682859 (D. Mass 2004) (Not reported in F. Supp 2d).

<sup>13</sup> Certainly, preemptive measures can include activity that does not implicate the Fourth Amendment. Police presence that does not constitute a search or seizure is one example. See, e.g., Lena H. Sun, *Police, Dog Teams Check Trains, Alarming Some Metro Riders*, The Washington Post, March 30, 2006, at B3 (“Metro Transit Police Chief Poly L. Hanson said police wanted to be more noticeable after al-Qaeda leader Osama bin Laden’s voice was heard on an audiotape in late January threatening attacks in the United States.”).



<sup>14</sup> *Edmond*, 531 U.S. at 54 (J. Rhenquist dissenting).

<sup>15</sup> *Ferguson* at 79-80, 81 n.15.

<sup>16</sup> *Id.* at 84 n.20.

<sup>17</sup> *Id.* at 79.

<sup>18</sup> *Edmond*, 531 U.S. at 44 (“We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes.”).

<sup>19</sup> 496 U.S. 444 (1990).

<sup>20</sup> 428 U.S. 543 (1976).

<sup>21</sup> *Id.* at 557.

<sup>22</sup> 540 U.S. 419 (2004).

<sup>23</sup> *Id.* at 424-425.

<sup>24</sup> *Edmond*, 531 at 44.

<sup>25</sup> *Illinois v. Caballes*, 543 U.S. 405, 424-425 (J. Ginsburg, dissenting).

<sup>26</sup> *Sitz*, 496 U.S. at 474 (J. Stevens, dissenting).

<sup>27</sup> *United States v. Albarado*, 495 F.2d 799, 806 (2nd Cir. 1974).

<sup>28</sup> *Davis*, 482 F.2d at 910.

<sup>29</sup> *Id.*

<sup>30</sup> See *Downing v. Kunzig*, 454 F.2d 1230, 1231 (6th Cir. 1972).

<sup>31</sup> See *Gaioni v. Folmar*, 460 F. Supp. 10, 13 (D.C. Ala. 1978); *Collier v. Miller*, 414 F. Supp. 1357 (D.C. Tex. 1976).

<sup>32</sup> See *Ringe v. Romero*, 624 F. Supp. 417, 422 (W.D. La. 1985) (Patrons of “Rod’s Wammer-Jammer Motorcycle Shop, Bar and Lounge” were searched pursuant to a Louisiana statute and similar city ordinance revealing nine knives and one gun.).

<sup>33</sup> *Id.*

<sup>34</sup> See *Bourgeois v. Peters*, 387 F.3d 1303, 1311 n.8. (11th Cir. 2004) (quoting the district court).

<sup>35</sup> *Id.* at 1311.

<sup>36</sup> Public safety programs that indirectly place restrictions on First Amendment protected activities can raise complex legal issues outside the scope of this article. See, generally, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005); *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L. REV. 327 (2005); *Speech and Spatial Tactics*, 84 Tex. L. Rev. 581 (2006).

<sup>37</sup> *Peters*, 387 F.3d at 1312.

<sup>38</sup> 700 N.W. 2d 702, 708 (N.D. 2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Peters*, 387 F.3d at 1311.

<sup>41</sup> See, e.g., *U.S. v. Doe*, 61 F.3d 107, 109-110 (1st Cir. 1995). Note that an irrevocable implied consent theory also has been used to uphold the constitutionality of security screening in the airport context. See *Torbet v. United Airlines, Inc.*, 298 F.3d 1087 (9th Cir. 2002) (Airport security regime upheld to the extent that it is confined to detecting weapons or explosives. Passenger must elect not to fly, rather than submit to search, and, to avoid search, must elect not to fly prior to placing bag on X-ray machine. Thereafter, implied consent cannot be withdrawn for subsequent random opening of the bag.); *U.S. v. Aukai*, 440 F.3d 1168 (9th Cir. 2006) (Citing *Torbet*, implied consent to secondary screening cannot be revoked after submitting to initial screening

because it would undermine the essential deterrent purpose of airport screening.)

<sup>42</sup> *Arab-American Anti-Discrimination Committee*, 2004 WL 1682859 at 2.

<sup>43</sup> *Id.*

<sup>44</sup> *MacWade v. Kelly*, 2005 WL 3338573, at 4 (S.D.N.Y. 2005) (Slip Op.).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (Police Commissioner Michael Sheehan testified that “about 40 to 50 percent around the world, depending on how you count terrorist acts, are directed against transportation systems traditionally, and in New York City, our subway system, in my view, is a prime target for terrorists.”).

<sup>47</sup> *Stauber v. City of New York*, 2004 WL 1663600 at 1, *amending*, 2004 WL 1593870 (S.D.N.Y. 2004) (Not reported in F. Supp. 2d.).

<sup>48</sup> *Stauber*, 2004 WL 1593870 at 32.

<sup>49</sup> *Chandler*, 523 U.S. at 323.

<sup>50</sup> *Lidster*, 540 U.S. at 427 (citing *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61, 61 L.Ed.2d 357 (1979)).

<sup>51</sup> *See Martinez-Fuerte*, 428 U.S. at 559.

<sup>52</sup> *See Delaware v. Prouse*, 440 U.S. at 648 (Suspicionless searches and seizures must be carried out according to a plan embodying explicit neutral limitations on the conduct of individual officers.); *Arab-American Anti-Discrimination Committee*, 2004 WL 1682859 at 4 (“The written plan prescribes the inspection method and defines those items that are deemed to be ‘prohibited.’ The plan provides for supervision of the officers who actually do the inspection.”).

<sup>53</sup> *See Martinez-Fuerte*, 428 U.S. at 558-559 (Notice reduces the intrusiveness of the seizure because “motorists can see other vehicles are being stopped, he can see visible signs of the officer’s authority, and he is much less likely to be frightened by the intrusion” (internal quotations omitted)); *Stauber*, 2004 WL 1593870 at 31 (“the NYPD has given no advance notice of its intent to perform bag searches at particular demonstrations.”).

<sup>54</sup> *Seglen*, 700 N.W. 2d at 709 (The North Dakota Supreme Court held that university police officer’s warrantless pat-down search of a state university student as the student entered an arena to attend a hockey game was not justified by consent exception to the warrant requirement. There was no affirmative conduct indicating consent, mere failure to object is not sufficient to support finding of voluntary consent particularly where signs do not provide advice of a right to refuse.); *Nakamoto v. Fasi*, 635 P.2d 946 (Haw. 1981) (Where patron was

stopped by uniformed security guard at entry to city-owned arena and was told that guard had to inspect contents of her handbags for bottles or cans before she would be allowed to enter but was not told that she had a right to refuse inspection, there was no valid consent to inspection.).

<sup>55</sup> *See, e.g., Downing v. Kunzig*, 454 F. 2d 1230, 1232 (6th Cir. 1972) (Upholding bag searches at federal buildings that were “cursory in nature and made for the strictly limited purpose of determining that no explosives or dangerous weapons were transported into the building.”).

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***The search must be limited so that it does not sweep too broadly, and the government must demonstrate how a particular need is addressed by the type of search employed.***

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<sup>56</sup> *See Sitz*, 496 U.S. at 448 (upholding delays of 25 seconds; *Lidster*, 540 U.S. at 427 (upholding a wait in line of “a few minutes at most” and contact with police that “lasted only a few seconds”).

<sup>57</sup> *See Arab-American Anti-Discrimination Comm.*, 2004 WL 1682859 at 4 (“All riders on the buses and trains about to transit the security zone are subject to the inspection, so the officers do not exercise any choice or judgment about whose bags to inspect”); *MacWade*, 2005 WL 3338573 at 19 (“Subway passengers are randomly selected for a bag search pursuant to a selection formula the rationale for which is determined by a supervisor based on neutral factors. Officers have little or no discretion in selecting individuals for inspection except to determine whether a bag or container is large enough to contain an explosive device” (internal citations omitted)).

<sup>58</sup> *See Prouse*, 440 U.S. at 661 (“standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”).

<sup>59</sup> *T.L.O.*, 105 S. Ct. at 741 (citing *Terry v. Ohio*, 392 U.S. 1, 24-25).

<sup>60</sup> *Terry*, 392 U.S. at 30-31.

<sup>61</sup> *See Stauber*, 2004 WL 1593870 at 33-34 (The court cited *Wilkinson v. Forst*, 832 F.2d 1330 (2nd Cir. 1987) in which the Second Circuit held that mass pat-down searches of persons entering rally sites violated the Fourth Amendment but that police could conduct general magnetometer searches at sites of rallies without regard to standards of reasonable suspicion or probable cause.).

<sup>62</sup> *See Bond v. U.S.*, 529 U.S. 334, 337, 134 S. Ct. 1462, 146 L.Ed.2d 365 (2000) (The physical manipulation of the outside of a bus passenger’s soft luggage implicated the Fourth Amendment. The court distinguished “visual as opposed to tactile, observation”); *Seglen*, 700 N.W. 2d at 709 (citing dicta in *Jensen v. City of Pontiac*, 317 N.W. 2d 619 (1982), “[a] physical pat-down search by a guard is more intrusive than a limited visual search”).

<sup>63</sup> *MacWade*, 2005 WL 3338573 at 7 (Officer training to implement a New York City subway system container inspection program advised officers not to “inspect wallets, purses or other containers that are too small to contain an explosive device, intentionally look for other contraband or read or attempt to read any written or printed material or remove individuals a significant distance from the entry point to transit” (internal quotations omitted)).

<sup>64</sup> *Id.* at 18.

<sup>65</sup> *Id.* at 1 n.1, 10 (“Commissioner Cohen is clearly an expert in the field of terrorism and counterterrorism.... His testimony that the Container Inspection Program has a deterrent effect which is ‘embedded in the uncertainty regarding where and when an inspection will occur’ was both credible and persuasive.”).

<sup>66</sup> *Id.* at 1.

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***Law enforcement officers of other than federal jurisdiction interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.***

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