Changing tides: A Lesser Expectation of Privacy in a post 9-11 World

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Since 1966, the Supreme Court has interpreted the Fourth Amendment to the U.S. Constitution to protect the privacy of the individual against unwarranted governmental intrusion by the state.¹ What an individual seeks to proclaim as private and what is protected by the Fourth Amendment is determined by a standard of reasonableness. The exclusion of evidence of the government’s electronic surveillance of an individual in a telephone booth on a street corner, in Katz v. United States, may be viewed differently in light of concerns about domestic terrorist threats.² Hence, the parameters of a search proscribed by the Fourth Amendment change over time with the evolution of society’s

¹ The Fourth Amendment to the U.S. Constitution provides:

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 support by oath or affirmation, particularly describing the places to be searched, and the persons or things to be seized.


²Katz v. United States, 389 U.S. 347, 359 (1967). The Court in the Katz case overruled its prior precedent established in the Olmstead case, which required a physical trespass of property in order to invoke privacy interests protected by the Fourth Amendment. The Court in Katz declared that the electronic eavesdropping was a search requiring probable cause and a warrant even though there was no physical intrusion of the phone booth. What an individual seeks to proclaim as private, in this case a phone conversation in a closed phone booth is a constitutionally protected interest so long as it is reasonable. The notion of “domestic terrorist threat” will be discussed throughout this article. Would Katz be viewed differently if the government viewed the speaker in the phone booth to fit a terrorist profile? Some would argue the warrantless searches would then be justified.
expectations of privacy. Yet, certain constitutional values remain constant, such as the right of the people to be secure in their homes and persons against unreasonable searches and seizures. This value is deeply rooted in the nation’s history.

Although originally interpreted to protect a “zone of property” and individual security, the modern court has viewed the Fourth Amendment to protect one’s reasonable expectation of privacy. How the Supreme Court views the Fourth Amendment changes with respect to society’s changing views of privacy. One commentator concludes that a Fourth Amendment based upon privacy must contend with the changing nature of the modern society. This raises the questions of how the law of criminal procedure is and will be affected in a post 9/11 world? Will the interest in “national security” or security from terrorists’ threats re-shape constitutional rights resurrecting Korematsu’s pernicious siren call, for example, of massive race- or national origin-based seizure and internment during a time of war? Many changes in criminal procedure doctrine have accompanied a perceived need for greater or more direct enforcement of criminal laws. The increase in

Herein, “domestic terrorism” is defined to mean any terrorist act aimed at injuring, killing or destroying persons or property for political motivations which are designed to destroy American political institutions. Under 18 U.S.C. §2331 domestic terrorism includes acts dangerous to human life, in violation of the criminal laws of the United States, which appear to be intended to intimidate or coerce a civilian population and to influence the policy of a government by mass destruction, assassination, or kidnapping, and occur within the territorial jurisdiction of the United States.

3 Id. at Justice Harlan’s concurring opinion in Katz formulated the modern test of reasonable expectation of privacy under Fourth Amendment analysis. His formulation of privacy became the talisman for Fourth Amendment protection. In his concurrence, Justice Harlan declared that the Fourth Amendment protects people, not places. Id. at 351 (Harlan, J., concurring).

4 Akil Amar, Fourth Amendment First Principles 107 Harv. L. Rev.757. Professor Amar argues for a return to first principles of the fourth amendment’s reasonableness clause. He contends that a careful simple reading of the words illustrates warrants were not required or probable cause before searches but reasonableness of searches defined the amendment. He cites to historical evidence and the role of juries for civil damages for unreasonable searches.

5 Scott E. Sundby, Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen, 94 COLUM. L. REV. 1751, 1754 (1994). Sundby asserts that the Fourth Amendment as a privacy-focused doctrine has not fared well in modern times and no longer fully captures the values at stake. His article re-examines the privacy-based doctrine of the Fourth Amendment and argues for a reciprocal government – citizen trust. See discussion infra Part III.
“on the street” police encounters with citizens led to a new standard for less than full-blown searches under the Terry Doctrine.\(^6\) Widespread usage, sale and importation of narcotics resulted in the courts granting greater leeway to conduct warrantless searches and seizures.\(^7\) Commentators have written widely about the drug war’s impact on the law of criminal procedure and the Fourth Amendment. As one commentator has stated, “Like the war on drugs before it, the war on terrorism is likely to leave us with a different law of criminal procedure than before.”\(^8\)

The “War on Terror” is changing society’s views of the Fourth Amendment privacy values. The interest in protecting domestic security has resulted in increased acceptance of airport searches of persons and property, mass video surveillance of the public on public thoroughfares, warrantless searches of citizens in public buildings, stadiums, office buildings, trains, subways, buses schools, public institutions and private workplaces. To what extent will the American public and the court believe that privacy and security are or should be subject to greater restrictions for some greater good? Is balancing privacy interests vs. security the proper framework to safeguard fourth amendment interests?\(^9\)

Terrorist bombings in July 2005 on public transportation systems in Madrid, Spain and London, England have heightened public awareness and concerns for safety.

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6. 392U.S. 1 (1968)
8. Stunz, at 2160.
The American public reacted to the London bombings with some skepticism, anxiety and an overall concern for greater security. Although there were no immediate known “terrorist threats” following the 2005 London bombings, municipal officials in New York and Washington claimed that security of public places could be assured by employing heavily armed policemen on subway stations and increasing video surveillance. Without any basis of reasonable suspicion or probable cause, New York City immediately initiated mass searches of baggage, luggage and personal belongings of persons using the subway system. Similarly, in Washington D.C, then Mayor Anthony Williams claimed that greater use of video camera surveillance of neighborhoods, recreation facilities, parks and commercial areas following the 2005 bombings would not be a “big mortal threat to civil liberties.”\(^{11}\) Transit officials in Washington also announced they were considering random searches of trains.\(^{12}\) Members of the United States House of Representatives immediately passed a bill after lengthy debate, extending the Patriot Act. The searches were billed as a necessary counterterrorism measure.

The tide immediately shifted from a reasonable expectation of privacy in one’s bags and personal effects to a heightened sense of insecurity without any perceived threat of terrorist violence. There were no major terror strikes on American soil since 9/11 prompting New York City to undertake suspicionless searches of subways. It was later

\(^{10}\) The anxiety and reaction were extraordinarily high in London following the bombings, where British police overreacted after another failed subway bombing by chasing and eventually shooing and killing an innocent bystander. The killings produced outrage through London and the rest of the world.

\(^{11}\) See, e.g., Eric M. Weiss, D.C. Considering More Police Cameras: London Bombings Prompt New Debate on Surveillance of Public Places, WASH. POST, July 14, 2005, at B1. Williams’ proposal would enlarge the use of video cameras which were approved by the D.C council without public knowledge. The guidelines called for cameras to be used only to monitor traffic, large demonstrations and city emergencies. The regulations also provide that the cameras be installed in public areas where people would have an expectation in being video taped.

determined that the London bombings were a product of a locally grown terror group in London. Yet, polls taken immediately following the London terrorist killings showed that Americans overwhelmingly favored checking of bags and persons upon entering mass transit cars. Expectations of privacy changed overnight. Transit officials in Washington also announced they were considering random searches of trains. Members of the United States House of Representatives immediately passed a bill after lengthy debate, extending the Patriot Act. Undoubtedly such measures may also lead to abuse, such as racial or ethnic profiling and unguided discretion by the individual conducting the search. Where will the public, and hence the Court, be willing to draw the constitutional boundary line between individual privacy and counter terrorism measures. Will warrantless or suspicionless searches of persons or cars on the public streets, or warrantless entries in the home, schools, churches and synagogues and places of worship be accepted as the need for domestic security increases? As the public’s privacy expectations change, so will the courts’. In New York, a lawsuit was ultimately filed challenging the random subway container searches under the Fourth Amendment. In *MacWade v. Kelley*, the District Court for the Southern District of New York upheld the warrantless and suspicionless searches under the Fourth Amendment and the special needs doctrine.14

The special needs doctrine, initially premised on a reduced expectation of privacy in certain areas as justification for warrantless searches without probable cause or reasonable suspicion, is expanding to cover random counterterrorism searches in the war

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14 See, e.g., MacWade v. Kelley, 460 F.3d 260,275 (2d Cir. 2006). See discussion infra, Subway Searches as special needs ,pps 30 through 37
on terror. How then should the courts look at what is a reasonable expectation of privacy in light of worldwide terrorist threats? One recent court decision asserted that we cannot restrict civil liberties until the war on terror is over, because the war on terror may never be over.\textsuperscript{15}

The government has expanded the warrantless wiretapping and datavellaince in the name of national security which has affected the privacy interests of thousands of Americans. The later public revelation of the National Securities Administration’s Terrorist Surveillance program, dubbed the TSP, a program which authorized secret warrantless surveillance of international telephone and email communications between persons in the United States with persons abroad suspected of being members of al Qaeda or affiliated with al Qaeda organizations which was partially enjoined by a federal district court, created widespread controversy concerning its secrecy and deliberate bypassing of constitutional and statutory safeguards.\textsuperscript{16} The program was established by secret presidential executive order. Congress later amended the Foreign Intelligence Surveillance Act to exercise oversight over the program and issued subpoenas seeking information concerning the program’s secret authorization by the president. There were recent revelations of over collection of domestic email communications of American citizens.\textsuperscript{17} Moreover, the program was challenged in federal court by the ACLU and a federal district court issued a partial summary judgment against the program’s operation.

\begin{footnotes}
\footnote{See e.g., Bourgeois v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2004) (reversing the District Court and invalidating the City of Columbus Policy of conducting check point magnetometer searches of persons wishing to protest outside the Fort Benning military base).}
\footnote{See www.nytimes.com/2009/06/17/us.html.}
\end{footnotes}
That decision was later reversed by the Sixth Circuit on standing grounds, without reaching the constitutional questions posed.\textsuperscript{18}

In sum, the Court has in recent years balanced the degree of government intrusion of the individual or place searched against the government’s need for the search. This article will attempt to address some of the questions posed by the evolution of the Fourth Amendment doctrine in light of terrorist concerns since 9/11.

Part I will address the history of Fourth Amendment jurisprudence from the Boyd Era of property protection and the use of general warrants to discover evidence of crime, to \textit{Olmstead vs. U.S.} and the development of the right of privacy under the Fourth Amendment. \textsuperscript{19} Part II will address the modern test under \textit{Katz v. U.S.} and current search and seizure doctrine, including Terry stops, racial, ethnic and terrorist profiles, airport and border searches, road blocks and mass video and data surveillance. Part III will discuss the recent assaults on privacy interests under the expectation of privacy test and address balancing liberty and privacy concerns under the fourth amendment with the need for domestic homeland security. Part IV will explore whether the current \textit{Katz} standard of reasonable expectations of privacy is sufficient under changing circumstances of the war on terror or whether the special needs doctrine or a domestic security exception to the Fourth Amendment’s test of reasonableness should govern under society’s changing expectations with respect to privacy and security.

\textsuperscript{18} See infra at n.163
Part I.

In the context of perceived terrorist threats to national security and the technology for ever greater scrutiny of individuals, changes in Fourth Amendment privacy doctrine appear to be eroding the traditional protections of individuals. How has our concept of Fourth Amendment protection of privacy from government intrusion changed in the context of modern law enforcement and counter terrorism law measures in the 21st century? The expansion of the internet, email communication, omnipresent cell phones, thermal image devices, biometric imaging, whole body imaging, mass video surveillance and mass data surveillance as measures in law enforcement or counter terrorism, have begun to present new challenges to privacy concepts under the Fourth Amendment. For over two centuries, protecting the individual citizen from overbroad unwarranted governmental intrusion has been a central meaning of the Fourth Amendment. At times it has been a delicate balance of security and liberty; an expansion of governmental powers during times of national emergencies, followed by judicial deference and retrenchment by the courts. Some would say there is an inherent check and balance in the constitutional system which restores the balance in favor of liberty after the threat has passed. In the

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20 See e.g., Patricia Mell, Big brother at the Door: Balancing National Security With Privacy Under the USA Patriot Act, 80 DENV. U. L. REV. 375 (2002). The author notes that today’s technology has the potential to eliminate the area in which an individual can legitimately declare privacy from the intrusion of the government. If allowed to do so, the very fabric of our democratic society would change. Whole body imaging is a device used by airport security officials to photograph air travelers through a millimeter wave scanner, producing a virtual, naked image of an individual. The images are shown on a screen in a separate, closed room. The travelers face is not identified with the image. Id. at 377.

21 See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE, SECURITY, LIBERTY AND THE COURTS 16 (2007) The authors argue for a trade-off thesis between security and liberty and a deference thesis that judges and legislators should defer to governmental balancing during times of emergencies. For example, if domestic security is at risk, then intrusive searches should be tolerated. This view would lead to a relaxing of the Fourth Amendment during times of emergencies. It would then be permissible under the Patriot Act, for executive officials to inspect records and books of patrons at libraries and bookstores.

22 Id. at See also Posner, Not a Suicide Pact supra at n.9 at 44. “Every time civil liberties have been curtailed… they have been fully restored when the emergency passed and before it passed long before”
case of the growing threat of international terrorism since 9/11, the war in Iraq, and the expansion of the war in Afghanistan, there appears to be no ending point where constitutional boundaries can be relaxed to restore any imbalance in the personal liberty, privacy and security paradigm. The nature of constitutional law changes with changes in threats to security and liberty yet the commands of the Fourth Amendment seem equally clear; the protection from the government against unreasonable searches and seizures of a person’s house, papers and effects. An historical overview of Fourth Amendment doctrine demonstrates how courts have interpreted the meaning of the Fourth Amendment principles to protect against unreasonable searches and seizures.

A. History of Fourth Amendment Doctrine

The Fourth Amendment to the Constitution provides: ‘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 particular describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment has drawn its historical meaning from the common law and the English case of *Entick v. Carrington*, which addressed the widespread abuses of the general warrants and the writs of assistance. In *Entick*, the Secretary of State issued general executive warrants authorizing local officials to roam about and to seize libelous material and libellants of the sovereign. *Entick*, a

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23 U.S. CONST. amend IV.
25 Writs of Assistance were like general warrants. The abuse of the general warrants and writs of assistance by the English colonist led to the ratification of the Fourth Amendment. The writs had been used by customs agents for the smuggling of illegal drugs. In February 1761, all writs expired six months after the death of George II and the colonists petitioned the Supreme Court in opposition to the granting of any new writs. See Nelson H. Larsson, The History and Development of the Fourth Amendment. United States v. U.S. District Court, E.D. Mich 407 U.S 297, 327 (1972) (Douglass, J. concurring) fn.6
victim of the searches, brought successful damage actions against the crown.26 Lord Camden in sustaining the appeal, wrote that if such sweeping tactics were validated, “the secret cabinets and bureaus of every subject in the kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect a person, to be the author, printer or publisher of seditious libel.”27 The abuses of the general warrant by the crown and un-checked governmental power were among the principal reasons the framers adopted the Fourth Amendment.

In *Olmstead v. U.S.*,28 the Court, in addressing the constitutionality of telephone wiretaps under the Fourth Amendment, acknowledged the purpose of the Fourth Amendment originally “directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man’s house, papers, and his affects, and to prevent their seizure against his will.”29 In the context of wiretapping of the defendant’s business, used for conspiracy to import alcohol, the Court stated that the language of the Fourth Amendment cannot be expended or expanded to include telephone wires reaching to the whole world from the defendant’s house or office.30 The Court noted that no prior cases had been brought to its attention to hold the “Fourth Amendment to have been violated… unless there has been an official search or seizure of his a person or such a seizures of his papers or his tangible material effects or an actual physical invasion of his house or curtilage.…”31 In Olmstead’s case, wiretaps were placed in the basement of his office building and near his home but there was no physical

26 Id. at 1029.
27 Id.
29 Id. at 476.
30 Id. at 463.
31 Id. at 466.
trespass of his home. The Court held that “the wiretapping did not amount to search or seizure within the meaning of the Fourth Amendment” and affirmed his conviction. The Olmstead court effectively required physical trespass of person or property to trigger Fourth Amendment protection, thus creating the trespass doctrine. Justice Brandeis, in a famous dissent, disagreed with the property-based theory of the Fourth Amendment and declared the amendment was much broader in scope than protection of material things and places.

The makers of our Constitution undertook to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, by whatever means employed must be a violation of the Fourth Amendment.

Justice Brandeis’ conception of a privacy right embodied in the Fourth Amendment severed the literal construction of the Fourth Amendment from its textual base. He noted that the Court had Time and again… refused to place a literal construction on the meaning of the Fourth Amendment” as was illustrated in the Boyd case. He thought it was immaterial where the physical connection with the telephone wires leading into the basement were was made or that the intrusion was made with the aid of law enforcement. Brandeis was prophetic in seeing a greater evil with respect to wiretapping:” the evil incident to invasion of the privacy of the individual is far greater

32 Id.
33 Id.
34 Brandeis’ first conception of a “right of privacy” was outlined in his law review article written with Samuel Warren in 1890 in the Harvard Law Review. Warren and Brandeis argued that privacy went beyond protecting physical property such as “personal writings of an individual against theft and physical appropriation but against publication in any form, is in reality not the principle of private property, but of an inviolate personality” 4 HARV. L. REV. 193, 205 (1890).
35 Id. at 476 (Brandeis, J. dissenting).
36 Id. at 475.
than that involved in tampering with the mails . . . . As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared to wiretapping."\(^{37}\) Despite the brilliance of Brandeis’ dissent, *Olmstead* remained the law for nearly forty years until the *Katz* Court finally lifted the Fourth Amendment from its property-based moorings.

**Shifting to *Katz* and the Right to Be Left Alone**

The modern conception of the Fourth Amendment as protecting privacy interests emerged from the Supreme Court’s decision in *Katz v. United States*. Like *Olmstead*, *Katz* involved government wiretapping of defendant Katz’s telephone conversations in a public telephone booth.\(^{38}\) The government argued there was no physical trespass in the wiretapping since it was outside the phone booth, and, therefore, the Fourth Amendment and its warrant clause were inapplicable.\(^{39}\) In overruling *Olmstead*’s trespass doctrine, the Court noted that the underpinnings of the trespass doctrine were no longer controlling. The fact that the electronic device employed by the government did not penetrate the wall of the booth had no constitutional significance. The Court held the Furth Amendment “protects people, not property. What a person knowingly exposes to the public even in his own home or office is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.”\(^{40}\) The Court noted that what *Katz* wanted to exclude by entering the phone booth was not the intruding eye but “the uninvited ear” of

\(^{37}\) *Id* at 477
\(^{38}\) *See supra* note 2,
\(^{39}\) The government also argued that a public telephone booth was not a constitutionally protected area and that if it was, a physical penetration of the phone booth was necessary for a search to occur. *Id*. at 353.
\(^{40}\) *Id.* at 351-352.
the government listening in on the conversations without a judicially authorized warrant. A person is entitled not to have his conversations broadcast to the world. The Court also rejected the government’s contention that the narrowness of the search, only listening to certain conversations, excused the requirement for a warrant. “Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government ignored the procedural antecedent justifications . . . . which were essential to the Fourth Amendment,”41 in this case a judicially authorized warrant.

The Court in Katz took the very important step in recognizing privacy as a central meaning of the Fourth Amendment but not the only principle. Justice Harlan’s concurrence laid out the more fundamental test which has emerged as the sine qua non of the search doctrine -- “the right to be let alone.” The two-fold requirement as stated by Justice Harlan requires that “a person have exhibited an actual subjective expectation of privacy and secondly, that expectation be one that society is prepared to recognize as reasonable.”42 The reasonable expectation of privacy formulation has been the “loadstar” for determining how and when the Fourth Amendment should be applied.43 Privacy thus emerged as the central meaning of the Fourth Amendment. It also determined what constituted a search subject to the commands of the amendment’s warrant clause and prohibition against unreasonable searches. If government action does not invade some justifiable expectation of privacy that society regards as reasonable, then it is not deemed a search under the Fourth Amendment’s warrant clause or reasonableness clause.44

41 Id. at 359
42 Id. at 360 (Harlan, J., concurring).
43 Sundby, supra note 5
44 Katz 389 U.S. at 352-353
While the *Katz* court defined what constituted a search for Fourth Amendment purposes, it did not define privacy interests.\(^45\) Matters exposed to the public view such as garbage left at the curbside of one’s home or information generally given to third parties such as bugged informants, phone records, pen registers or bank records are not searches governed by the warrant requirement.\(^46\) Crops left growing in open fields, heat emanating from homes, and observations made through partially open roof tops, windows or, doors are not deemed searches subject to the Fourth Amendment.\(^47\) Privacy was thus viewed as an aspect of secrecy; if it is observable from a lawful vantage point, then it is not private. The Fourth Amendment as a concept of privacy embodying secrecy has come under scholarly criticism,\(^48\) as was the old *Olmstead* formulation requiring physical trespass. As one commentator suggests, “[W]e have moved from the Boyd Era and *Olmstead* world of


\(^{46}\)See, e.g., California v. Greenwood, 486 U.S. 35,( no subjective expectation in privacy of garage left for pick up that society regarded as reasonable (1987). Smith v. Maryland, 442 U.S. 735, 745 (1979) (holding there is no search if the police discover numbers dialed from the telephone company because the customer voluntarily conveyed numerical information to the phone company). United States v. Miller, 425 U.S. 435, 445 (1976) (holding that a person has no reasonable expectation of privacy concerning information kept in bank records because that information was voluntarily given to third parties). The *Miller* decision has been criticized as highly questionable in its privacy analysis. The fact that customers have to turn over checks and deposits to banks as third parties does not indicate a lack of privacy interest by the customer. See, eg, WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2000).


\(^{48}\)Daniel J Solove, Conceptualizing Privacy, 90 CAL. L. REV. 1087, 1109 (2002). Solovoe examines the various conceptions of privacy under various categories such as right to be left alone, secrecy, intimacy, control over personal information and person hood. He believes it is a mistake to invoke a common denominator to define all privacy interests. For example he asserts that a number of theorists have claimed that understanding privacy as secrecy conceptualizes privacy too narrowly. Privacy according to Solove does not have universal value but must be looked at from particular practices and the social value of those practices. Id at 1093
physical papers to a new regime based upon expectation of privacy, there is a new
Olmstead one that is shortsighted and rigid in approach.”

Criticism directed at the concept of secrecy is embedded in the modern Fourth Amendment jurisprudence of privacy. “Many current problems in the Fourth Amendment jurisprudence stem from the Court’s failure to conceptualize privacy both in method and substance.” Some commentators have argued, for example, that privacy is not viewed as an abstract value or principal protected by the Fourth Amendment but rather as a fact-specific inquiry to determine if the Fourth Amendment should apply to a governmental intrusion. Some of the cases, for example, have focused on the frequency of helicopter aerial surveillance of 400 feet above one’s home, urine samples in hospitals, dog sniffing of cars and trucks on the public highways, manipulation of luggage and hand bags, or the physical distance of a barn away from a house. The traditional cases have therefore measured reasonable expectations of privacy from a factual matter rather than as constitutional values.

What constitutional values should the Fourth Amendment protect beyond the physical right to be left alone as an element of privacy in light of technological advances and the government’s professed need for domestic security? Some have argued that the privacy doctrine has led to a decline of Fourth Amendment protection. They contend that

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49 Daniel J. Solove, *Digital Dossiers and the Dissipation of the Fourth Amendment Privacy*, 75 S. Cal. L. Rev. 1083, 1109 (2002). Solove argues that we have moved to a new Olmstead by the court’s emphasis on secrecy. “This conception of privacy is not responsive to life in the information age, where most personal formation exists in records systems of hundreds of entities.”

50 Id. at 1122

51 Sundby, *supra* note 5, at 1759. Sundby concludes that when used as a factual matter, reliance upon privacy as the centerpiece of Fourth Amendment rights actually creates the potential for less overall protection. For example, he writes that because the Court is not asking whether bank or phone records should be kept private (thus invoking privacy as a value) but rather we as a factual matter expect others to see those records. Sundby advocates the constitutional value as trust between the government and the citizenry.

52 United States v. Dunn, 480 U.S. 294, 303 (1987) (holding that a barn sixty feet outside the house and the fence was outside the curtilage and not subject to protection).
it is a non-workable framework for protecting Fourth Amendment rights. As people’s expectations change, the law itself must adapt to changing circumstances. The extent to which the war on terror has changed individual expectations of privacy will be discussed more fully below.

**Unreasonable Searches and Seizures and The Fourth Amendment’s Warrant Clause.**

In addition to protecting one’s reasonable expectation of privacy against unwarranted government intrusion, the Fourth Amendment, by its literal terms, protects the right of the people to be secure in their persons, houses, papers and effects.\(^{53}\) The second clause of the amendment requires that “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 thing to be seized.”\(^{54}\) Historically, the framers of the Fourth Amendment were concerned about the abuses of the general writs of assistance in England which allowed government officials to indiscriminately seize private papers of person in their homes.\(^{55}\) In Britain, many of the writs of assistance were issued against critics of the Crown and the government sought to gather information in order to suppress political speech. The early English cases of *Wilkes v. Wood* and *Entick v. Carrington* involved the issuances of writs of assistance by the Crown to search and seize incriminating papers of government critics without proper judicial limitations protecting

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\(^{53}\) U.S. CONST. Amend. IV.

\(^{54}\) Id.

an individual’s right to privacy.\textsuperscript{56} The requirement of a judicially authorized warrant under the Fourth Amendment would protect privacy interests as well as operate as a shield against government intrusion.\textsuperscript{57} The modern Court in interpreting the Fourth Amendment had linked these two clauses together as defining the reasonableness of a search or seizure by whether it had complied with the warrant requirement. As the Court stated in \textit{Katz}, “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment.”\textsuperscript{58}

The warrant clause was the touchstone of the Fourth Amendment requirement of probable cause. It equally applied to arrest warrants as to search warrants.\textsuperscript{59} For much of the history of the Fourth Amendment, the judicial preference for a warrant guided the Court’s jurisprudence. This included a preference for both arrest and search warrants based upon an independent finding of probable cause by a detached and neutral magistrate. The warrant clause and its requirement of probable cause was the cornerstone of the Fourth Amendment.\textsuperscript{60} Some scholars have interpreted the historical evidence to suggest that the Fourth Amendment did not prohibit all warrantless searches.\textsuperscript{61} The Court later interpreted the Fourth Amendment to permit warrantless arrests of persons for felonies in public places in \textit{United States v. Watson}.\textsuperscript{62} Yet the warrantless felony arrest

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\textsuperscript{56}Wilkes v. Wood, 98 E. R. 489, (1763); Entick, 95 E. R. 807.
\textsuperscript{57}Scholars have also argued that the main point of the warrant requirement as to insulate officials from civil liability for exceeding the warrant. Searches and seizures conducted without warrants subjected officials to civil liability and false arrest. Akhil Reed Amar, \textit{Fourth Amendment First Principles}, 107 HARV. L. REV. 757, (1994); Akhil Reed Amar, \textit{The Bills of Rights as Constitution}, 100 YALE L. J. 1131(1991).
\textsuperscript{58}See \textit{supra} note 2, at 357.
\textsuperscript{59}LAFAVE ET AL., \textit{supra} note 46, at 147.
\textsuperscript{60}Id. at 141. As Professor LaFave has stated, the Supreme Court has long expressed a preference for the arrest warrant and the search warrant. See also, Silas Wallesserstorm, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev 257(1984)
\textsuperscript{61}Amar, \textit{supra} note 4.
did not extend to a person’s home where the Court viewed the warrant requirement as sacrosanct.  

To what extend did the founders anticipate that the warrant clause would not extend to searches or arrests conducted for national or domestic security during the present climate of widespread surveillance? The Fourth Amendment on its face contains no such exception, despite the new republic’s newfound freedom from the occupation by troops of the British Crown during times of war. In fact, the evidence suggests that the Fourth Amendment itself was adopted in response to the occupation of homes by British troops and the fears of the general warrant.  

Certainly, the threat of British spies, saboteurs and foreign agents and general searches were on the minds of the founding fathers in drafting the constitution when balancing concerns of liberty and security during a national crisis. They struck the balance in favor of liberty.  

Some scholars have recently suggested that the framers intended the Fourth Amendment reasonableness clause to govern in cases of searches in the interest of national or domestic security.  

Over the years, judicially crafted exceptions to the warrant clause such as exigent circumstances, plain view, hot pursuit and other doctrines began to weaken the warrant clause as the governing clause of the Fourth Amendment and lessening its moorings. The modern view of the Fourth Amendment bifurcates the warrant clause and the

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64 See supra note 57, See also Glenn Sulmasy & John Yoo, Katz and the War on Terrorism, 41 U.C. DAVIS L. REV. 1219, 1234 (2008) Nonetheless, Sulmasy and Yoo suggest that the founding fathers would allow the Fourth Amendment to conduct reasonable searches against foreign threats to national security.
65 “They that can give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.” Benjamin Franklin, See American Heritage Dictionary of Quotations p. 434(1997)
66 Sulmasy & Yoo, supra note 64, 1219. The authors maintain that by the inclusion of the reasonableness clause, the framers understood the need for searches and seizures in the absence of a warrant. They go further to conclude that there was no evidence that the Fourth Amendment was meant to apply to national security.
reasonableness clause. This fits squarely within the doctrine that the reasonableness clause governs most searches, with the exceptions being the governing rule. The government’s need to conduct warrantless searches has, thus, expanded over time and the court has taken the path of balancing the government’s justifications for search with the individual’s privacy interest. The *Katz* regime of reasonable expectations of privacy began to give way to the government’s interest in conducting searches under a variety of contexts for crime control, administrative searches, airports, and border patrols to name a few. The question emerging is whether the *Katz* expectation of privacy test and the warrant clause will withstand the present regime of reasonable searches for national and domestic security?

**Less than Probable Cause: The Dominant Reasonableness Clause and Terry Type Suspicion**

The government’s interest in conducting warrantless searches during the present age of terror for a variety of reasons, including national or domestic security, may likely find support among the Supreme Court cases relaxing the Court’s probable clause standard for administrative searches and special needs. Aside from exigent circumstances, the Supreme Court first upheld searches without probable cause in cases where the government asserted the need for administrative searches. Beginning with the Court’s decision in *Camara v. Municipal Court* upholding the constitutionality of

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67 Professor Amar has suggested that the modern court has reversed the original linkage between the fourth amendment’s two different commands. It is not that a search or seizure without a warrant was presumptively unreasonable, as the court has assumed, rather a search or seizure with a warrant was presumed reasonable as a matter of law and thus immune from jury oversight. *Supra* note 57, at 1180.
administrative searches for housing inspections on less than probable clause, the Court
began to invite a balancing analysis in assessing Fourth Amendment interests of
reasonable expectations of privacy.\(^68\)

In *Camara v. Municipal Court*, the Court held that although housing inspections
conducted in the city of San Francisco without a warrant invoked the Fourth
Amendment’s warrant clause requirement, the searches could be upheld on a less than
probable cause standard pursuant to reasonable legislative or administrative standards
under a balancing test.\(^69\) Rejecting the probable cause standard as the basis for the
housing inspection search, the Court held that reasonable administrative standards would
suffice and looked to the long history of judicial and public acceptance of housing
inspections, whether the practice was essential to achieving results and whether the
practice involved a relatively limited invasion of privacy.\(^70\) Regarding the nature of the
privacy interest, the Court found that the privacy interests were minimal because the
searches were neither personal in nature nor aimed at the discovery of evidence of a
crime. The searches were aimed at housing code violations of fire, plumbing, heating or
electrical equipment rather than personal papers. Notably they did not involve the
searches of persons on the property, yet the privacy interests remained. The Court’s
decision in *Camara* marked a turning point for invoking reasonableness of the search and
balancing of governmental interests on less than probable clause against the nature of the
privacy interests at stake. It was also a turning point away from the factual analysis and
individual based probable cause requirement of the warrant clause onto a slippery slope
of reasonableness in weighing policy factors.

\(^{68}\) Camara v. Municipal Court, 387 U.S. 523 (1967).
\(^{69}\) *Id* at 538
\(^{70}\) *Id.*
Commentators have noted that *Camara* marked the emergence of the reasonableness clause of the Fourth Amendment\(^{71}\) as the basis for justification for searches, rather than probable cause-based warrants.\(^{72}\) It later formed the basis for the Terry “stop and frisk” doctrine and diminishing the probable cause requirement for searches conducted without warrants.\(^{73}\)

The Terry Type Balancing and the Modern Reasonableness Test

*Camara*’s balancing test opened the door to acceptance of infringement on privacy interests when the government needs to conduct searches on less than probable cause. The government’s justifications for administrative searches broadened to include the need to further law enforcement in general and later to a wide variety of articulated needs such as Terry type searches inventory searchers, border searches, special needs roadblocks and warrantless searches in the name of national security, such as wiretapping under the terrorist surveillance program. The growing acceptance of warrantless searches in the wake of 9/11 on less than probable cause or even reasonable suspicion is a direct offshoot of the Court’s interpretation of the reasonableness clause under *Camara* and *Terry v. Ohio.*\(^ {74}\) It was in response to the government’s interest in combating crime in the streets which saw the Court engaged in a balancing approach to address the government’s needs. When there is a balancing of interests, the Court then confronts liberty and privacy on one hand with the government’s articulated need for searches or seizures. Thus,

\(^{71}\) *LAFAVE ET AL., supra* note 46 at 229.

\(^{72}\) See *Sundby, supra* note 5, at 1768 (“[O]nce the express weighing of government interests and privacy interests had a foothold in the warrant clause for so called administrative searches in *Camara*, it was only a matter of time before the reasonableness balancing test would be applied to a variety of searches undertaken the reasonableness clause as well.”)

\(^{73}\) See *LAFAVE ET AL.: supra* note 46, at 229.

\(^{74}\) *Terry v. Ohio*, 392 U.S. 1 (1968).
privacy as a constitutional value standing alone as the principle of the Fourth Amendment is subject to a balancing of interests and costs effectiveness. Society’s expectations then are subject to a scale of changing expectations.

In *Terry v. Ohio*, the Court upheld the police practice of stopping individuals pursuant to a police officer’s observations about pending criminal activity to justify a brief seizure and search of a person suspected of criminal activity. In *Terry*, the Court viewed restraining of a person on the street on the basis of suspicion of criminal activity as a limited seizure under the Fourth Amendment, and the search of the outer clothing, on fears that the suspect was armed or dangerous, as a limited pat down search for weapons. In assessing the reasonableness of the police officers actions in *Terry*, the Court said it was important to focus on the governmental interests that justified the official intrusion upon constitutionally protected interests of the private citizens; a balancing of the need for the search against the privacy interest of the defendant. The Court held that in some circumstances it was appropriate for a police officer to approach a person in order to investigate criminal activity without probable cause for arrest.

Under *Terry* not all seizures under the Fourth Amendment are arrests, nor are all searches full searches requiring probable cause and a warrant. These searches were viewed as limited intrusions of privacy interests for Fourth Amendment purposes in light of the government’s demonstrated need for crime prevention, detection and safety.

The Court’s rationale for approving of the search on less than probable cause was the balancing of interests under the Reasonableness Clause as the Court had done.

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75 Id at 30.
76 Id.
77 Id.
78 Id. at 27.
79 Id. at 30.
previously in Camara. The Court cited the Camara case, thus signaling the balancing of privacy interest under the fourth amendment. Thus the Terry “Stop and Frisk” was viewed as a tool to assist law enforcement officers on the street in combating crime. In upholding the pat down, the Court said, “[T]here must be narrowly drawn authority to permit a search for weapons where [the officer] believes the person is armed and dangerous regardless of probable cause for an arrest.”

The shift in balancing in Terry was an example of changing circumstance. The Terry decision was based on the need to assist law enforcement with on the street encounters in investigating crime. Increased crime, the growth of drug trafficking and aircraft high jacking all had impacts on Fourth Amendment doctrine and in particular the Court’s expansion of searches under the Terry doctrine. Several airport cases concerned the propriety of airport Terry-type stops for suspected drug activity on the grounds that such stops were mere police-citizen encounters not invoking the Fourth Amendment interests. Later cases developed the drug courier profile to help determine the parameters of Terry-type searches in airports. The Terry stop and frisk doctrine also led to the emergence of racial or ethnic profiles in investigation crime. Race was used in some cases as a proxy for individualized reasonable suspicion. The police practice of stopping African Americans motorists on the basis of race, known as Driving While

80 30-31.
81 Id at 26
82 Id. at .26
83 See, e.g., Stunz, supra note 7, at 2160.
85 See Stunz, supra note 7.
86 Ryan J. Sydejo, International Influence on Democracy: How Terrorism Exploited a Deteriorating Fourth Amendment, 7 J.L. Soc’y 220 (2005). The author notes that Justice Brennan in a memorandum on an earlier draft of the Terry opinion was concerned about the impact of Terry on minority communities. Justice Brennan feared that the impact in cities such as Miami, Chicago and Detroit.
Black, exposed the widespread practice of racial profiling.\textsuperscript{87} The Fourth Amendment, although safeguarding one reasonable expectation of privacy, also fluctuates with the changing rules that govern police behavior and aid law enforcement.

\textit{Terry}, thus, ushered in an era of warrantless searches for less than probable cause based on an ostensibly minimal intrusion on privacy. The law of criminal procedure changes in both quality and quantity with respect to dealing with and responding to crime.\textsuperscript{88} As one commentator has stated, the suicide bomber will now play a larger role in Fourth Amendment cases than before.\textsuperscript{89} Random stops and searches of people only of Arab or Muslim descent at airports following 9/11 without any individual suspicion was simply ethnic profiling and discriminatory. Such practices have an impact on a group’s expectations of privacy as victims of these practices. Thus, racial or ethnic minorities may have lesser expectations of privacy for fear of being illegally stopped or questioned\textsuperscript{90} as other situational searches have resulted in diminished expectations of privacy. Airport encounters between citizens and police have reduced expectations of privacy interests to a minimum, so that people seldom find reason to decline an officer’s inquiry and walk away. \textit{Terry}-type balancing of interests has therefore expanded warrantless searches

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\textsuperscript{87} See Robert Power, \textit{Changing Expectations of Privacy}, 16 WIDENER L. REV. 43 n. 60 (2006). The author notes the substantial body of literature on racial profiling aimed at African Americans. He points out that racial profiling became a matter of public discourse between 1998 and 2001, producing a national consensus against profiling. Such a shift may now change in response to the war on terror.
\textsuperscript{88} See e.g., Stuntz, \textit{supra} note 84, 2147. Stuntz argues that higher crime rates have led to cutbacks in legal protections. He argues that the Fourth and Fifth amendment rights varied with crime and will do so again in the future, as they will, if the law must also reflect a sensible balance between the social need for order and individual’s desire for privacy and liberty. Power raises the fair question about the one-day crime wave of September 11. “Will the Supreme Court react as they have to other spikes in serious crime.”
\textsuperscript{89}Id. 2161. Changes since 9/11 have already produced changes in people’s behavior. It stands to reason that courts, like other public institutions and the public itself, will likewise see some changes in behavior. Sooner rather than later.
\textsuperscript{90}See e.g., Andrew E. Talsitz, \textit{Respect and the Fourth Amendment}, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003). The author notes that expectations vary among groups and a distinction is to be made about what degree of privacy people want, and what they expect and what they have a right to expect. He notes for example relatively few middle class whites expect to be stopped and questioned on the street; for young black males of all social classes, however, the opposite expectations may hold.
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under the reasonableness umbrella of the Fourth Amendment. The Bush Administration saw the need to justify warrantless searches for national security on the basis of perceived terror threats. A recently released classified document from the United States Department of Justice confirmed the Bush doctrine of warrantless searches to combat the war on terror. After September 11, 2001, the Bush administration also launched the Terrorist Surveillance Program, a secret program aimed at warrantless surveillance of communications where one party to the communication is outside United States and the government had belief to believe was a member of al Qaeda or affiliated with al Qaeda.

The Emergence of Reasonableness and Special Needs Doctrines

Although Terry required reasonable suspicion as the basis for a limited search to justify minimal intrusions of privacy, the Court has expanded suspicion less, warrantless searches to include administrative searches, inventory searches, border patrols, sobriety roadblocks and searches conducted under the special needs doctrine to combat threats to national security. Following Camara, the Court upheld warrantless administrative searches or inspections of a liquor store licensee in Colonade Catering Company v. United States, firearms stores in United States v. Biswell pursuant to an administrative warrant authorizing such searches, and searches of an automobile junkyard

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91 See Bush-Era Anti Terrorism Documents Made Public, by Jeffery Smith And DanEggen WASH. POST (MARCH 3, 2009 at A5...)
in *New York v. Burger*\(^\text{95}\) pursuant to an administrative warrant, even though there was an incidental criminal purpose. Most of these cases involved heavily regulated businesses where searches were conducted for inspection purposes. The Court noted in *Burger* that the discovery of evidence of crime in the course of an otherwise proper administrative search does not render the search illegal or the administrative scheme suspect.\(^\text{96}\)

The administrative searches balanced the government’s need for the search against the privacy interests of regulated business owners and paved the way for recognizing the validity of searches based on reasonableness, dispensing with the warrant requirement and probable cause. In *Michigan v. Sitz*, the Court extended the warrantless and suspicionless searches by upholding, on reasonableness grounds, highway sobriety roadblocks to check for drunk drivers on the basis of a balancing of factors.\(^\text{97}\) The checkpoints must first serve a purpose independent of general crime control. Dispensing with the warrant requirement, these searches were deemed reasonable because of the slight intrusion of motorists on the highway at a brief check point, stopped every approaching vehicle uniformed checkpoints, and were established pursuant to guidelines. Earlier, in *Delaware v. Prouse*, the Court had invalidated discretionary, suspicion less spot-checks of a motorist’s drivers licensee and vehicle registration.\(^\text{98}\) Acknowledging the validity of the governmental interests in highway safety at stake, the Court noted that “questioning of all oncoming traffic at roadblocks type stops, might be lawful means of

\(^{95}\text{New York v. Burger, 482 U.S. 691(1987).}\)

\(^{96}\text{Id. at 76. Some scholars note that Burger was not a search under the special needs doctrine although its significance is important in cases such as Illinois v. Edmond where the court invalidated a road block whose purpose was ordinary criminal activity. See, e.g., Tracy Maclin, Is Obtaining an Arrestee’s DNA a Valid Special Needs Search under the Fourth Amendment? What Should the Supreme Court Do? 34 J.L. MED. \\& ETHICS 165, 177 (2006).}\)

\(^{97}\text{Michigan v. Sitz, 496 U.S. 444 (1990).}\)

\(^{98}\text{Delaware v. Prouse, 440 U.S. 648 (1990).}\)
serving highway safety.” The Court’s decision paved the way for the emergence of the roadblock checkpoints under the special needs doctrine. *Sitz* was therefore important as the first case in which the Court upheld warrantless and suspicionless searches at roadblocks, outside of international borders, on public streets of the country.

The special needs doctrine has developed in cases where the government has demonstrated an interest independent of the need to conduct an ordinary criminal investigation and where it would be impracticable to attain a warrant. The doctrine first emerged in *New Jersey v. T.L.O.* In upholding the warrantless search of student’s purse for cigarettes, in a New Jersey high school, which later led to a search for marijuana, the Court said that warrants were not required when school officials conduct searches for students who are violating school rules. Although the Court upheld the warrantless search as a reasonable search under a balancing test, it was Justice Blackman’s concurrence which established the special needs exception. Justice Blackmun, disagreeing with application of the balancing test for this case, cautioned that the doctrine should be used “only in those exceptional circumstances in which special needs, beyond the need for law enforcement, make the warrant and probable cause requirement impracticable.” The Court later applied the special needs exception but still retained the balancing test for administrative searches. What were deemed special needs was not defined, but the result was to remove a whole category of searches from the Fourth Amendment warrant requirement. The result is a diminution in value of certain privacy interests. The Court has subsequently found special needs unrelated to law enforcement

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99 *Id.* at 663; *also quoted* in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).
101 *Id.* at 341-342.
102 *Id.* at 351.
103 *Id.*
to justify an employer’s work-related search of an employee’s office,\textsuperscript{104} a warrantless search of a probationer’s home for weapons,\textsuperscript{105} drug testing of federal railroad workers for alcohol, or drug testing\textsuperscript{106} of federal custom agents.\textsuperscript{107} In several cases, the government’s chief concerns were for the safety interests of employees and the public. Thus, although these comprise a narrow category of cases so far, a high degree of individuals’ privacy interests are involved in testing for safety purposes. The Court has looked to the government’s articulated interest to determine if the need is separate from a law enforcement purpose.

In cases where the government was chiefly aimed at law enforcement or crime prevention, the Court has declined to extend the special needs protection. Thus, the Court has refused to apply the doctrine to general police road blocks used for the purpose of gathering evidence of drugs or. For example, in \textit{Indianapolis v. Edmond}, the Court held roadblocks, whose primary purpose was the discovery of illegal narcotics, did not amount to a special need because of the criminal evidence gathering purpose, despite the secondary interest of keeping roads safe.\textsuperscript{108} The roadblocks at issue required a certain number of automobiles to be stopped for a brief period; searches could only be conducted by consent unless the appropriate level of individualized suspicion existed; and a narcotics detection dog walked around each stopped vehicle.\textsuperscript{109} The Court first stated that the Fourth Amendment required all searches to be reasonable, departing from the traditional requirement of a warrant and probable cause.\textsuperscript{110} The Court further noted that

\begin{footnotes}
\item[108] 531 US. 32 9. See supra note 96, at .
\item[109] Id. at 33.
\item[110] Id.
\end{footnotes}
there were special circumstances where it had refused to require individual type suspicion; searches under special needs, administrative searches and highway checkpoints to intercept illegal aliens, drunk driving and violations of vehicle registration.\textsuperscript{111} All of these searches fall under the rubric of reasonable searches requiring not probable cause but a balancing test. The central focus under the special needs cases is first whether the search serves a purpose independent of law enforcement needs. This is the single most important factor.\textsuperscript{112} If this threshold question is answered in the affirmative, the Court then engages in a balancing of factors to weigh the need for the search against the offensiveness of the intrusion.\textsuperscript{113}

In \textit{Edmond}, the Court found that the primary focus of the Indianapolis checkpoint was to advance the general interest in crime control.\textsuperscript{114} Justice O’Connor, writing for the majority, was reluctant to recognize exceptions to the general rule of individual suspicion where the primary reason for the search was the government’s own interest in general crime control. According to Justice O’Connor, these road blocks were very different than the sobriety and immigration roadblocks the Court upheld in \textit{Stiz} and \textit{Martinez}.\textsuperscript{115} Although these were law enforcement activities, Justice Connor stated if the court allowed crime control roadblocks, there would be little check on the ability of the

\textsuperscript{111} Id at 37
\textsuperscript{112} Professor Tracy Maclin has identified several factors in the special needs analysis. See Supra note 93. Although no one factor is determinative in the Court’s analysis, the purpose factor appears to be the first among equals. He examines the propriety of the special needs analysis for determining the constitutionality of special needs for DNA sampling of arrested persons. The criteria for special needs appears to be an examination of the purpose of the search; whether law enforcement persons have access to the results of the search; the extent of police involvement in conducting the search; and whether the search can be identified as serving civil and criminal interests. Maclin concludes that DNA collecting statutes serve general law enforcement purposes and are unlikely to meet the first factor in the special needs analysis.
\textsuperscript{113} See MacWade v. Kelley, 460 F.3d 260 (2d Cir. 2006) (upholding district court’s application of the special needs doctrine in upholding the Container Search Program on New York City subways. The court engaged in a balancing analysis of the program’s reasonableness.
\textsuperscript{114} Edmond, 531 at 44.
\textsuperscript{115} Edmond, 531 U.S. at 39.
government to construct roadblocks for any conceivable purpose and “would do little to prevent such intrusions from becoming a routine part of everyday life.” 116 Thus, general crime control roadblocks are prohibited under Edmond. However, to what extent would the Edmond decision hold today for anti terrorism type roadblocks at airports, not at international borders? Such roadblocks would be undoubtedly having a law enforcement purpose, searching for evidence of explosives or weapons to prevent terror type attacks. Thus the threshold requirement of the special needs doctrine would preclude such roadblocks. However, there is language in Edmond to suggest a different result. Justice O’Connor suggested that the” fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart a terrorist attack.” 117 Certain exigent circumstances might justify such roadblocks, however, as discussed in the next section. 118

**Subway Searches as Special Needs**-

Warrantless and suspicionless searches under the special needs doctrine have widened to include searches conducted on subways and mass transits, although the Supreme Court has not yet addressed the subject. In one of the first important post 9/11 cases, MacWade v. Kelley, the District Court and Second Circuit Courts of Appeals addressed the constitutionality of random search of passenger belongings pursuant to a container search program on the New York City subways. 119 In response to bombings of the public transit system in Madrid in 2004 and in London in 2005, the New York City Police Department inaugurated the Container Inspection Program to search passenger

116 Edmond, 531 U.S. at 40.

117 Id. at 44.

118 Id. For an example, an exigent circumstance might justify an appropriately tailored roadblock to thwart the imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.

bags for explosives on the New York City subway system.\textsuperscript{120} Without any specific threat against the subways, the city began the program to prevent attacks or deter terrorists from carrying concealed explosives onto the subway system.\textsuperscript{121} Under the program, the searches were to be conducted at certain fixed check points among the city’s subways; informing riders that backpacks and containers would be searched. Uniformed officers would give notice of the search and those wishing to avoid the search could leave.\textsuperscript{122} Declining a search was not a basis for arrest or individual suspicion but the police could later search persons who tried to reenter the subway after declining a search. Officers had no discretion to choose individuals for search; they were chosen using a numerical selection rate.\textsuperscript{123} The program operated at randomly selected stations without prior notice. Importantly only bags or containers capable of concealing explosives were subject to the search; individuals were not subject to any stop or frisk unless individual suspicion was later established or contraband was discovered.\textsuperscript{124}

Plaintiffs later challenged the city’s program under the equal protection statute, 42 USC § 1983, asserting the searches violated the Fourth Amendment to the U.S. Constitution. They further claimed that the special needs exception did not apply, that the program was ineffective in discovering terrorists or explosives, and that persons who refused to be searched should be able to re-enter the subway at a different stations or checkpoints without fear of being searched. As a threshold matter, the plaintiffs claimed that the special needs doctrine applies only where the subject of the search has a reduced

\begin{thebibliography}{9}
\bibitem{120} Id. at 264.
\bibitem{121} Id. at 268. The city of New York began the program in response to bombings on subways and buses in London and Madrid. The purpose was to prevent such explosives attacks in New York.
\bibitem{122} Id. at 264.
\bibitem{123} Id. at 265.
\bibitem{124} MacWade, supra note 111, at .
\end{thebibliography}
privacy interest and checking passenger belongings was not minimally intrusive. The city claimed that the program served the important governmental interest of preventing a terrorist attack and the threat of an explosive device being taken into the subway system in a carryon container, as had occurred in Moscow, Madrid and London. Following a bench trial, the District Court found that the program was constitutional as a special need because it aimed to “prevent, through deterrence and detection, a terrorist attack on the subways.” The court held that the risk to public safety of a terrorist bombing of the subway was real and substantial and further found that it was not directed to evidence of ordinary criminal wrong doing. The District Court then engaged in a balancing of interests to determine if the program was reasonable under the fourth amendment.

Finding testimony of the city’s experts reliable and credible, the District Court found that the government’s need to prevent a terrorist bombing on new city’s subway system “[was] a governmental interest of the highest order.” In weighing the level of intrusion on the privacy interest, the court found that the program was narrowly tailored and only minimally intrusive upon the privacy interests for the following reasons: first, the passengers were given notice of the searches by announcements and signs; second, the searches were conducted openly and randomly at fixed checkpoints to subway entrances; third, individuals could decline the searches; and fourth, the searches were limited in

125 Id. at 269.
126 Id. at 267.
127 Id. 20005 WL 3338573 p17.
128 The District Court looked to the gravity of the government’s interest, the degree to which it advances public interest and the severity of the interference with individual liberty. See Illinois v. Lidster, 540 U.S. 419, 427 (2004).
129 Id at 19 noting that the Supreme Court had counseled against a searching examination of effectiveness in assessing special needs programs, the District Court was comfortable relying upon the city’s experts who testified that the container programs would improve the safety of the subway system. The court cited their testimony that the deterrent effect of the program was embedded in the uncertainty when inspections would apply and that the introduction of bag searches improved the security of the subway system.
130 Id. at 30
scope as cursory searches for explosives and were limited in duration, lasting only seconds rather than minutes.\textsuperscript{131}

The Second Circuit, reviewing the case \textit{de novo}, affirmed the District Court’s findings and upheld the container search program.\textsuperscript{132} It was the first post 9/11 case involving mass warrantless searches conducted on public transportation systems. The Second Circuit had previously upheld metal detectors and airline passenger bag searches, in \textit{Edwards v. United States}, to prevent terrorist hijacking.\textsuperscript{133} In dispensing with the traditional warrant requirement in \textit{Edwards}, the Court upheld those searches on the basis of reasonableness, balancing the need for the searches against the offensiveness of the intrusion.\textsuperscript{134} In contrast, in \textit{MacWade}, the Second Circuit addressed the applicability of the special needs doctrine to subway searches. Judge Straub, writing for the court, addressed the central issue of the privacy interest at stake.\textsuperscript{135} The plaintiffs had argued that the special needs doctrine only applied in cases where the subject of the search possesses a reduced expectation of privacy.\textsuperscript{136} Prior cases such as \textit{United States v. Lipshitz} had involved only minimal privacy interests.\textsuperscript{137} While acknowledging that in most special needs cases the relevant privacy interests were some what limited, the court said the “Supreme Court has never implied much less actually held that a reduced expectation of privacy is the sine qua non of the special needs analysis.”\textsuperscript{138} It noted that while privacy interests were an important factor in special needs cases, it had not imposed privacy as a threshold

\begin{itemize}
\item \textsuperscript{131} \textit{Id}.
\item \textsuperscript{132} MacWade, \textit{supra} note 111 268
\item \textsuperscript{133} \textit{Edwards v. United States}, 523 U.S. 511 (1998). \textit{Edwards} predated the special needs doctrine.
\item \textsuperscript{134} \textit{Id.} at 501.
\item \textsuperscript{135} MacWade, \textit{supra} note, 111 at
\item \textsuperscript{136} \textit{Id.} at 268.
\item \textsuperscript{137} \textit{United States v. Lifshitz}, 369 F.3d 173 (2d Cir. 2004); Nichlad v. Goord, 430 F.3d 652 (2d Cir. 2005).
\item \textsuperscript{138} MacWade, \textit{supra} note, 119 at 269.
\end{itemize}
requirement that the privacy interests must be diminished. The court noted that it had expressly rejected the contention that special needs depends on the privacy interests at stake. The privacy interests according to the court were just one of the factors to be weighed in the balancing of interests. Those factors were later developed to include (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; and (4) the efficacy of the search in advancing the government’s interest. The court cited the roadblock cases and airport searches as illustrating the reasonableness of the searches and the minimum level of intrusion.

The Second Circuit affirmed the District Court’s finding that preventing terrorist attacks on subways was a special need, noting that courts have traditionally found “special needs” in cases involving either latent or hidden hazards involving public safety on mass transportation systems such as trains, airplanes and highways. Accordingly, the court held that preventing a terrorist from bombing subways was a “special need” distinct from an ordinary criminal purpose. The Court of Appeals rejected the plaintiff’s argument that terrorist checkpoints could serve special needs only in cases of imminent attack, as an extraordinarily broad principle. Such checkpoints would be still subject to a balancing analysis of interests according to the court. After determining that the special needs cases applied, the Court of Appeals affirmed the District Court and concluded that the subway search program was reasonable and constitutional.

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139 Id. 268. citing Nicholas v. Goord,430.F.3d 652, 653 (2d Cir. 2005).
140 MacWade, supra note 119, at 269.
141 Id. at 269.
142 Id. at 268.
143 Id. at 276.
immediacy. Following the *Edwards* decision, the court held that no express threat is required. All that was required was a real and substantial threat. Preventing terrorists attacks on subways was an immediate and substantial need. Although subway riders had a full expectation of privacy, the threat to the privacy interests was minimal; and the check point program was reasonably effective. In affirming the District Court findings as not clearly erroneous, the Court of Appeals said it would not second-guess city officials’ belief regarding the number of checkpoints and their deterrent effect on terrorism. The court declined to engage in a searching analysis of the deterrent effect of the checkpoints.

The application of the special needs analysis to subway checkpoints poses many problems under the special needs doctrine. Several commentators have criticized its application. First, because after acknowledging that passengers had a full expectation of privacy, the court in *MacWade* diminished privacy interests and broadened the ability of the government to advance suspicionless, warrantless searches. The Court of Appeals rejected the application only to cases of a diminished expectation of privacy interest such as automobile roadblocks or the earlier public safety cases involving transportation. The government’s articulated need to protect public safety against unknown terrorist threats would trump the privacy interests of an individual in their right to be secure in their persons and papers and effects against unreasonable searches and seizures. Second, the random nature of the subway searches was unlike airport searches or roadblock

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144 *Id.* at 270.
145 *Id.* at 272.
146 See, e.g., *Recent Cases, Criminal Law, Fourth Amendment, Second Circuit Holds New York City Subway Searches Constitutional Under Special Needs Doctrine, Mac Wade v. Kelly, 460 F.3d 260 (2d Cir. 2006), 120 HARV. L. REV. 613 (2006).* MacWade’s broad construction of the special needs doctrine threatens the privacy interests that the Fourth Amendment is designed to protect.
checkpoints, where every person or vehicle is stopped. Random searches allow for the opportunity for individualized discretion or impermissible factors such as race or ethnicity. One could argue that subway searches are sui generis and mass transportation in general.\textsuperscript{147} Such a question raises the extent to which society would regard such searches as reasonable trade-off for security. Would searches on mass transportation such as of subways, buses, ferries or trains be justified as an exception to requiring Terry type individual suspicion?\textsuperscript{147}

In \textit{Cassidy v. Chernoff}, the Second Circuit upheld the warrantless searches of passenger belongings and automobiles on ferries pursuant to the Maritime Transportation Security Act.\textsuperscript{148} The plaintiffs alleged that the policy of requiring passengers to submit to security checks of the bags and the trunks of the cars before boarding ferries violated the Fourth Amendment. They alleged that passengers retain an undiminished and full expectation of privacy in their carryon baggage onboard ferry vessels as well as in the trunks of their automobiles. They relied on \textit{Bond v. United States} where the Supreme Court had found that travelers on an intra-city bus enjoyed a full expectation of privacy in their carryon luggage because they did not expect bus employees to feel their bags in an exploratory manner.\textsuperscript{149} The Court of Appeals, in an opinion by Judge Sotomayor, however, did not accept the plaintiff's contention that \textit{Bond} precluded a finding of an undiminished privacy interest; holding that, as with any privacy interest analysis, such expectations depend on the context.\textsuperscript{150} Although agreeing with the plaintiffs that

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\textsuperscript{149} Bond v. United States, 529 U.S. 334 (2000).
\textsuperscript{150} Cassidy, 471 F.3d at 85. In this context, the passenger searches took place on mass transportation
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MacWade was persuasive because it concerned the issue of privacy and mass transportation, the Court of Appeals found there was no diminished expectation of privacy in passenger belongings as distinct from automobiles.\footnote{151}{Id. at 77.} The appeals court, nonetheless, assessed whether there was a special need to justify the warrantless search of vessels and cars. It held that prevention of terrorist attacks on large vessels engaged in mass transportation, as determined by the Coast Guard to be a heightened risk of attack, constituted a special need.\footnote{152}{Id. at 85.} Applying MacWade, the Court of Appeals held that deterring large scale terrorist attacks was distinct from general law enforcement. The warrantless searches on roadblocks, checkpoints involving mass transportation, ferries and the special needs doctrine is unsettled doctrine under the Fourth Amendment. Yet, the fact remains that individual privacy interests and expectations are subject to change in response to the government’s interests in preventing terror attacks.

Part III Assaults on Reasonable Expectation of Privacy Interests

The Fourth Amendment privacy interests of the American public have diminished as a result of courts’ expanding warrantless searches under the special needs doctrine in support of the government’s interest in combating terrorism. The expansion of warrantless searches to include subway searches under the special needs exception has further broadened the category of reasonable searches under Fourth Amendment analysis. The government’s interest in protecting national security has successfully challenged

\footnote{151}{Id. at 77.}
\footnote{152}{Id. at 85. The plaintiffs had argued there was no special need to protect the ferries of Lake Champlain where there was no obvious terrorist threat. The Court of Appeals noted that the Supreme Court has held the government need not demonstrate a specific threat in order to demonstrate a special need, citing Board of Education v. Earls, 536 U.S. 822, 833 (2002). The Court of Appeals gave great deference to the Coast Guard’s determination of a high risk of terrorist attack.}
individual liberty and privacy interests since the 9/11 World Trade Center attacks. An ABC /Washington post poll found that 66% of those surveyed were willing to give up some civil liberties to prevent future terrorist attacks.\textsuperscript{153} Magnetometers and other passenger screening devices measures at airports, public buildings and sporting venues are now widely accepted. Personal identification checks and checking of bags and personal belongings of travelers at airports is so commonly accepted as to be reasonably expected. Thus one can assume there is a diminished expectation of privacy in airport travel.\textsuperscript{154} Mass video surveillance on the public streets through cameras and biometric identifications are changing societal expectations of privacy.\textsuperscript{155}

Government’s use of power to respond to the war on terror has abrogated traditional Fourth Amendment search doctrine and is expanding. The National Security Administration’s increasing use of warrantless wiretapping and data surveillance to gather foreign intelligence information, for example is impacting individuals’ privacy interests. The Terrorist Surveillance Program (TSP) of secret wiretapping of telephone calls of American citizens has been justified on a perceived basis of national security interests and inherent presidential power to enact wartime measures. The constitutionality of these measures is premised on the argument that Fourth Amendment protections against unreasonable searches and seizures and of warrants and probable cause do not apply to the government’s need to conduct domestic intelligence gathering. Yet such

\textsuperscript{154} Power, supra note 86. Polling data of public attitudes following 9/11 illustrate certain findings. People are willing to part with some measure of individual privacy as a part of the war on terror, but at the same time they are increasingly aware of inroads on privacy and are concerned about giving up too much.
\textsuperscript{155} Professor Jeffery Rosen argues, for example, that government video surveillance to deter terror activities threatens privacy interests and promotes social conformity and threatens traditional values of equality. Rosen writes that the British system of widespread video cameras has reduced terror attacks or violent or no violent crime, it has also had subtle but far reaching social costs; the social cost of conforming people will behave differently if they perceive they are being viewed on camera.
arguments completely ignore judicial precedent as well as explicit legislative enactments such as the Foreign Intelligence Surveillance Act.\textsuperscript{156} Further, Congressional responses to terror, including the Patriot Act and FISA Amendments, have broadened the government’s investigatory power to conduct warrantless.\textsuperscript{157}

**The Warrantless Terror Surveillance Program**

The government’s interception of international telephone and internet communications of certain individuals without benefit of warrant or probable cause completely bypass the Fourth Amendment’s warrant requirement. After 9/11, the Bush Administration launched the Terror Surveillance Program as a secret program without congressional authorization or judicial oversight. It was established by secret order of the President in 2002 and reauthorized thirty times prior to litigation.\textsuperscript{158} The TSP program first became public in an article in the New York Times in 2005.\textsuperscript{159} The following day, the President confirmed the existence of the program to combat terrorist threats to the homeland. The program allowed for intercepts of communications where one party to the communication is outside the United States and the NSA has “a reasonable basis to conclude that one party to the communication is a member of al Qaeda affiliated with al

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\textsuperscript{156} United States v. United States Dist. Court for the Eastern Dist. of Mich., Southern Div, 407 U.S. 297 (1972) The Court rejected the governments’ claim of a national security exemption from the fourth amendment for domestic security. See discussion infra of FISA. In 1978, following the church committee investigation of intelligence abuses, Congress passed FISA by making it the exclusive means by which electronic surveillance of foreign intelligence communications may be conducted, requiring a FISA judicial warrant of probable cause to believe that a target is either a foreign power or an agent of foreign power. 18 U.S.C. § 2511 (2) (f).

\textsuperscript{157} Mell, supra note 20, at .The article addresses some of the provisions of the Patriot Act and its severe restrictions of the privacy protected by the Fourth Amendment. The author notes that several provisions of the patriot act reduce privacy interests by allowing governmental surveillance with out judicial oversight and the probable cause and warrant requirements.

\textsuperscript{158} Transcript available at http://www.whitehouse.gov/news/release/2005/12print/2005

\textsuperscript{159} See Risen et al., supra note 16 at .
Quadra or a member of an organization affiliated with or working with al Qaeda.”

President Bush announced the program on his own authority without a finding of probable cause or a judicial warrant. It completely bypassed the congressional framework established in FISA, which requires a warrant based on probable cause for domestic surveillance of foreign communications. The President based its authority on the Authorization for the Use of Military Force adopted by Congress and the inherent powers of the President under Article II of the Constitution. The Attorney General claimed that the program was a very limited program, aimed solely at obtaining information from the enemy. The TSP program was subsequently challenged in federal district court by the ACLU and a group of journalists, lawyers, and academics who claimed the program violated the First and Fourth Amendments to the Constitution, Separation of Powers and statutory claims based on, FISA, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The plaintiffs contended that the TSP program violated Fourth Amendment rights and individuals’ legitimate expectations of privacy in their overseas communications. The plaintiffs asserted a well grounded belief that their communications under the warrantless surveillance program were being taped or intercepted in violation of the Fourth Amendment and FISA and Title III. They further contended that FISA and Title III are the exclusive means by which electronic surveillance may be conducted and

160 See supra note 91.
161 Letter from U.S. Department of Justice to Sen. Harry Reid, publication see also John Yoo, Terrorist Surveillance Program and the Constitution, 14 GEO. MASON. L. REV. 565 (2007).
162 ACLU v. National Sec. Agency, 4438 F.2d 754 ((E.D. Mich.)). The plaintiffs, journalists, academics and lawyers who regularly communicate with people overseas claim that the NSA’s TPS program violates the First and Fourth Amendments to the U.S. Constitution and the Separation of powers, including Title III of the Omnibus Crime Control and Safe Streets Act and the Foreign Intelligence Surveillance Act. The plaintiffs asserted on “well founded beliefs” that their telephone conversations and emails are being intercepted by the NSA without warrants as required by the FISA Statute and the Fourth Amendment.
the TSP program operates outside of those statutes.\textsuperscript{163} In response, the NSA invoked the state secrets doctrine that the disclosure of or admission of relevant evidence would expose confidential matters which would affect the national interest. The NSA argued that, without the privileged information, none of the named plaintiffs could establish standing for the alleged injuries.\textsuperscript{164} The District Court dismissed the data mining internet communication claim, but granted summary judgment regarding the warrantless wiretapping.\textsuperscript{165} The court issued an order enjoining the program, finding that the warrantless surveillance program violated the Fourth Amendment, the First Amendment, and the statutory requirements of FISA and Title III.\textsuperscript{166}

In a highly critical opinion, District Judge Ann Dixon, after a brief discussion of the history of executive abuses through the writs of assistance from the British Crown, found that the Fourth Amendment requires reasonableness in all searches and that searches conducted without prior approval by a judge or magistrate were per se unreasonable.\textsuperscript{167} Judge Taylor also engaged in a brief history of electronic surveillance addressing Title III of the Omnibus Crime and Control and Safe Streets Act (governing domestic wire and electronic interceptions warrants) and the establishment of FISA as the exclusive means by which electronic surveillance of foreign intelligence may be

\begin{footnotes}
\item[163] \textit{Id.} At 760. The plaintiffs claim that the TSP program has operated outside of FISA, despite the fact that Congress has declared FISA to be the exclusive means by which the government can engage in electronic surveillance for foreign intelligence purposes in this country. 18 U.S.C. § 2511 (20) (f)
\item[164] \textit{Id.} The state secrets privilege shields such lawsuits from discovery. The privilege is an evidentiary rule developed to prevent the disclosure of information which maybe detrimental to national security. It invokes two applications; a rule of evidentiary privilege and a rule of non justifiability. 438 F.Supp.754
\item[165] \textit{Id.} at 766.
\item[166] \textit{Id.}
\item[167] \textit{Id.} at 776.
\end{footnotes}
conducted.\textsuperscript{168} The court noted that Congress had allowed concessions for the executive to engage in surveillance by complying with the statutory scheme of FISA.\textsuperscript{169} Judge Taylor found that the TSP program had been instituted for five years without regards to FISA requirements and the more stringent requirements of Title III and was in violation of the Fourth and First amendments.\textsuperscript{170}

The NSA appealed the decision to the Sixth Circuit, arguing that the plaintiffs lacked standing to assert the constitutional claims and that the State Secrets doctrine prevented a decision on the merits.\textsuperscript{171} The Sixth Circuit agreed and reversed the district court, finding that the plaintiffs lacked standing to raise their claims and that the state secrets doctrine prevented them from establishing that they have ever been subject to the alleged wiretapping and data mining.\textsuperscript{172} The court held that the plaintiffs had only asserted a well-founded belief that they had been subject to search by the NSA or TSP. According to the court, the plaintiffs’ main argument is was that the NSA violated their legitimate expectation of privacy in overseas telephone and email conversations without complying with FISA,\textsuperscript{173} yet the plaintiffs could not produce evidence that their communications had ever been intercepted or were ever subject to search; the plaintiffs alleged injury stemmed only from their reframing from communications to their clients.

\textsuperscript{168} Id. at 774. Title III contained specific requirements for warrants for domestic eavesdropping, including the, name of target, place to be searched, duration of the search, providing for emergency measures and a post interception warrant within forty-eight hours. 18 U.S.C. § 2518 (1).

\textsuperscript{169} FISA was established as a result of concerns of the domestic abuse of surveillance by the government following findings by the Church committee. It requires a statutory scheme of a foreign intelligence surveillance court. The court may issue a warrant upon application by the government to obtain foreign intelligence if there is probable cause to believe that the target of the surveillance is a foreign power or agent of a foreign power. It is distinguishable from traditional warrant in that there is no requirement that there be probable cause that a crime has been committed. The FISA warrant proceedings are \textit{ex parte}. After the September 11, attacks Congress passed the Patriot Act which amended FISA to expand its coverage.

\textsuperscript{170} Id. at .

\textsuperscript{171} Id 493 F.3d 644 at 683

\textsuperscript{172} Id. at.

\textsuperscript{173} Id. at 674.
The court said it would be unprecedented to allow plaintiffs to litigate the Fourth Amendment claim “without any evidence that they have been subject to an illegal search or seizure.” The court engaged in a detailed analysis of the standing doctrine of injury in fact, causation and redress ability, and held that the plaintiffs failed to establish standing under the separation of powers doctrine as well as statutory claims under FISA and Title III. The court concluded that the plaintiffs could not establish standing under FISA for the same reasons they could not maintain their Fourth Amendment claim, they could not establish that they were actually the target of, or subject to, NSA’s surveillance, and thus were not aggrieved persons under FISA’s statutory scheme. The Sixth Circuit Court of Appeals’ decision reversed the district court on standing grounds, therefore precluding any decision on the constitutionality of the NSA’s TSP surveillance program and its impact on the privacy rights of Americans.

Public criticism of the TSP surveillance program has been overwhelming. The public first learned of the program through published press reports through reports of the New York Times. Civil Liberties groups, law professors and members of congress criticized the warrantless surveillance program for infringing on privacy rights of American citizens. Some legal scholars, however, were critical of the reasoning of the

\[174\] Id.
\[175\] Id. at 678-681.
\[176\] The court of appeals also found that the plaintiffs failed to establish standing for claims under the Administrative Procedure Act, 5 U.S.C. §101-913 (2006) for failure to demonstrate that the NSA program was conducted pursuant to agency action. Agency action was defined as the whole or part of an agency, rule order, license sanction, relief or the equivalent or denial thereof, or failure to act .The NSA program did not constitute any of the required elements.
\[177\] Id at 683The court also held that the plaintiffs had not demonstrated that the NSA wiretapping satisfies the statutory definition of electronic surveillance, required by FISA and, finally, that FISA did not authorize the declaratory or injunctive relief sought by the plaintiffs, but only recovery of monetary damages.
\[178\] See Risen et al., supra note 16
District Court in invalidating the program on First Amendment grounds and the failure by
the court to engage in sufficient analysis of the role of the FISA requiring warrants from
the secret FISA court. They also criticized the decision for failure to take into account the
special needs exception to the warrant requirement.\textsuperscript{180} Members of Congress later called
for special investigation into the domestic spying program, reminiscent of the widespread
domestic spying in \textit{United States v. United States District Court} (The Keith Case).\textsuperscript{181}
They contended that respect for the rule of law commands that the wiretapping program
comply with the FISA requirements or other congressionally mandated means to conduct
counter intelligence. The Court’s decision in 1972 in the \textit{Keith} case squarely addressed a
question left open in \textit{Katz} -- whether domestic eavesdropping, even for national security
purposes, required a judicial warrant. The Court had declined to address whether the
Fourth Amendment applied to foreign intelligence.\textsuperscript{182} The Court rejected the
government’s claim of national security exception for domestic spying because of its
impact on civil liberties.\textsuperscript{183} The Court concluded “that the Government’s concerns do not
justify departure from the customary Fourth Amendment requirement of judicial approval
prior to the imitation of a search or surveillance. Although some added burden will be
imposed upon the Attorney General, this inconvenience is justified in a free society to
protect constitutional values.”\textsuperscript{184}

\begin{footnotesize}
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Members of Congress Call for Special Counsel Investigation into Domestic Spying After Being Refused
by Government Agencies}, Wash Post, July 2009
\textsuperscript{182} \textit{See supra} note 158 The Keith Case involved electronic eavesdropping authorized by the Attorney
General Mitchell involving certain conversations of a defendant who was charged with bombing of the
central intelligence agency. The wiretaps were not authorized by law or a judicial officer. The government
claimed that the surveillance was lawful to protect national security as a reasonable exercise of
governmental authority 407 U.S. 297 (1972)
\textsuperscript{183} \textit{Id.} at 321.
\textsuperscript{184} \textit{See supra} note 154, at 321.
\end{footnotesize}
Many commentators also believed that evidence obtained through the TSP program without a warrant may have been used in applications for FISA warrants. Recent revelations in April 2009 have now indicated that the NSA had been engaged in over-collection of domestic communications of American citizens, even after efforts at bringing the surveillance program under statutory authority of the FISA.\textsuperscript{185} Again the public was alarmed and President Barack Obama and members of Congress called for a review of the operations of the TSP program.

The public outcry over the TSP program has produced controversy and swift reform. Numerous lawsuits challenged the TSP program on constitutional grounds and as a violation of FISA.\textsuperscript{186} The Bush Administration abandoned the program in the midst of public outcry of the failure to follow the Fourth Amendment and the FISA warrant requirements. Later in the summer of 2007, Congress passed the Protect America Act, (PAA) which amended FISA to include the type of surveillance under the TSP program.\textsuperscript{187} The administration contended that gathering foreign intelligence of targets overseas did not require a warrant. The new law changed the Foreign Surveillance Intelligence Act to exclude “surveillance directed at persons reasonably believed to be outside the United States.”\textsuperscript{188} It changed the requirements for a warrant by giving authority to the Attorney General and Director of Intelligence to authorize telecommunication companies to acquire foreign intelligence of persons believed to be outside the United States up to a period of one year. It was later renewed following a six month sunset provision.

\textsuperscript{186} See, e.g., Hepting v. AT&T, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006); Al Harmain Islamic Foundation v. Bush, 507 F.3d 1190 (9th Cir. 2007).
\textsuperscript{188} Id at
Under the new law, if the purpose of wiretapping was to gather information on persons outside the United States who communicated with person in the U.S., such communications would not be electronic surveillance under the new FISA statute. Thus, there was no longer a requirement of a prior judicial warrant to gather surveillance evidence. Moreover, the authority was now shifted to the Attorney General and the Director of National intelligence, away from the judicial process. The PAA shifted the authority to authorize the acquisition of foreign intelligence information concerning persons outside the United States from the FISA Court to the Director of National Intelligence and the Attorney General.\textsuperscript{189} The PAA came under new criticism as well for broadening surveillance powers.\textsuperscript{190} The TSP only authorized warrantless surveillance of Americans communicating with al Qaeda and/or persons associated with al Qaeda. There is no limitation here for the purposes of gathering of information. The original FISA statutory scheme of requiring judicial warrants was based on protecting a person’s reasonable expectation of privacy. There are no prior statutory safeguards here. The legislation did provide for minimization procedures to minimize the privacy impact of U.S. citizens. Moreover, the determination by the DNI and the AG that a person reasonably thought to be outside the United States and communicating with persons in the U.S. was subject to judicial review by the FISA court. This same statutory framework was later included in the subsequent legislation by Congress in adopting the FISA Amendment Act of 2008.\textsuperscript{191} Civil Liberties groups challenged the new law on grounds

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\textsuperscript{189} Protect America Act, §2 105B(a), 121 Stat. 552 (2007).
\textsuperscript{190} Recent Developments, 45 HARV. J. ON LEGIS. (2008).
\textsuperscript{191} Foreign Intelligence Surveillance Act of 1978 as \textit{amended} by the FISA Amendment Acts of 2008.
\end{flushleft}
that it violates the First and Fourth amendment by allowing for such broader surveillance of communications.\textsuperscript{192}

The extent to which the Fourth Amendment constrains Congressional power to authorize foreign surveillance of American communications is unsettled.\textsuperscript{193} The larger question is whether the \textit{Katz} reasonable expectation of privacy framework and the subsequent doctrine of special needs exceptions should apply to surveillance conducted for national security purposes. \textit{Katz} itself was a case involving wiretapping for purely general law enforcement purposes and not foreign intelligence. Some have argued that the playing field has changed; that expectations have changed in favor of broadening the government power to conduct warrant less searches for national security. The Supreme Court has not made clear the scope Fourth Amendment protection within the context of foreign surveillance. Some scholars have argued that searches undertaken for national security should pass the court’s test for reasonableness for warrantless searches. They contend that there are compelling reasons for favoring warrantless searches during the war on terror and that the security of the nation is a compelling interest. “No governmental interest is more compelling than the war on terror”.\textsuperscript{194} John Yoo and Glenn Sulmasy, for example, write that the \textit{Katz} and FISA framework of probable cause is unworkable in today’s national security applications. “[T]he real problem with warrant requirements and \textit{Katz} [is] that searches and wiretaps must target a specific individual already believed to be involved in criminal activity… . Rather that individual suspicion, searching for terrorists will depend on probabilities just as in road blocks or airport

\textsuperscript{193} \textit{Recent Developments, supra} note 187, at 591.
\textsuperscript{194} Sulmasy et al, supra note 44.
screening.” 195 This is premised on the view that foreign intelligence will require a much larger net to capture necessary information and that the FISA or Katz warrant based requirements” sacrifice speed and breadth of information in favor of individualized suspicions.” 196 Yet, FISA itself, prior to present amendments, allowed for temporary wiretaps without a warrant in emergency and war situations. Yoo and Sulmasy suggest that Katz is inapplicable to searches conducted for national security matters and would harm national security. 197

Should the Reasonable Expectation of Privacy Test Apply in Counter Terrorism?

The elasticity of the reasonable expectation of privacy test bodes ill for protection of an individual’s privacy in the context of terrorist threats. As the discussion in earlier parts of this paper demonstrate, both the courts and the public have acquiesced to intrusive government measures instituted in the cause of prevention of terrorism and protection of national security. As the public accepts each new encroachment on personal liberty as necessary for personal and national safety, the courts acquiesce as well on the basis of the public’s reduced expectations of privacy. Expectations of privacy that once accompanied an individual’s walk through the world, have, since Katz, shrunk to the threshold of a person’s dwelling, the expectation of privacy in one’s home. Similarly the warrant protections of the Fourth Amendment have lost their power in the context of technological searches of masses of information that do not identify particular individuals, places or things to be searched. Once the data reveals certain patterns of information categorized as potentially threatening to security, however, individuals are

195 Id. at 1219.
196 Id. 1245.
197 Id. at 1219.
then targeted for further investigation or seizure of the content of their communications made via email and other technology. Because the gathering of the information does not identify individuals, i.e., without individualized suspicion, the searches are deemed both public and innocuous, and thus not subject to privacy protections.

In the context of the government’s technology-enhanced search capabilities, such as dataveillance, the Fourth Amendment appears to offer little or no protection of privacy based on either the reasonableness test or the general warrant clause. Is there any hope, then, for protection of individual privacy when the technology enables the government, citing, the threat to national security in light of world-wide terrorism, to gather information which individuals think is private and personal.

The courts do continue to protest that individuals have a reasonable expectation of privacy in their personal space, at the maximum, within their home, and, at the minimum, within their personal effects closely connected to their persons, such as traveling bags. Is this rather limited protection of privacy strong enough to offer protection to other aspects of the personal, such as the contents of private communications using technology? If the courts have protected the contents of letters, although not their outside address information, could the courts also accept as a reasonable expectation of privacy the contents of personal communications intended to be private, such as personal email, but not Facebook, Twitter, or mass emailing, for example? This Part contends that both the reasonable expectations test and the general warrant clause should be re-invigorated for the protection of an individual’s person, belongings, and self-expression or self-actualization behavior, so long as it does not harm or threaten harm to others.
Modern technology has created a form of the general warrant through the use of mass data surveillance of individual personal records under the need for national or domestic security, which threatens privacy interests as well. A form of data profiling has also emerged creating a prototype of who is to be searched or seized before embarking upon airplane. Yet, the increased perceived threat to security from unknown individuals cannot ignore the everyday threat from the erratic, unpredictable criminal suspect who unleashes violence upon public institutions and individuals. Courthouse and school house and college shootings have been the recipients of targeted and untargeted violence and tragedy.  

Confronting terrorism and engaging in covert intelligence are necessary measures in protecting national security. Yet individual liberty and privacy as guaranteed by the Fourth Amendment should not be sacrificed for these goals. As previously discussed, the nation itself was founded on the perceived needs of safeguarding liberty and security of the individual against unreasonable searches and seizures by the government. Fourth Amendment requirements of a probable cause based warrant and reasonableness of searches has changed over time, however. For much of the history of the modern Fourth Amendment, reasonable searches were premised on obtaining a judicial warrant based on probable cause. *Katz* has declared that Fourth Amendment protections must be grounded on a reasonable expectation of privacy that society regards as reasonable. Those privacy expectations changes over time and in conjunction with the governments expressed needs for more intrusive searches. Moreover changes in communications technology and

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198 See, Stories on Fulton County Courthouse Shootings in Atlanta, Georgia, Fulton. Co. Daily Report, March 2004, at page
surveillance have affected privacy interests as well. “With each new surveillance technique, the Supreme Court has refined the notion of privacy under the Fourth Amendment. As a result, the parameters of privacy rights are in flux.” The Fourth Amendment’s warrant requirements have similarly solidified judicial protection of privacy, at least in an individual’s home, against unreasonable searches and seizures. Courts have stood firm in halting technological intrusion at the front door.

In *Kylo v. United States*, the Court determined that the use of thermal imaging devices to gather information regarding the interior of a home without physical invasion, constituted a search for Fourth Amendment purposes. Because the thermal imaging devices were not in general public use, but were used to explore the details of the home previously have been unknowable without the physical intrusion, the Court held that *Kyllo* was entitled to Fourth Amendment protection. The holding of *Kyllo* was limited to searches of the home and the expectation of privacy in the home, however. Although the Court had previously ruled that pen registers, registering the phone numbers dialed from the home, are not entitled to Fourth Amendment protection, it is unclear if this protection extends to internet and email communications that leave the home or the area under an individual’s control. The *Smith* decision was premised on the notion that pen registers did not reveal the content of oral communications but only the numbers dialed. Yet, present technology for intercepting of email and internet communications outside the United States into a person’s home are now authorized for foreign intelligence gathering purposes.

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199 Mell, *supra* note 20, at .
201 See , Protect America Act, *supra* footnote 189
widespread, privacy expectations will diminish. Other intrusive forms of surveillance technology such as CCTV cameras forms, GPS locators, and RFID also enhance the government’s ability to monitor private lives. Although people, who share information with others via Facebook, mass email mailings, or Tweeter, appear to have limited privacy expectations while using those tools, they do appear to expect privacy in other forms of technologically enhanced communication. Mass dataveillance, scanning of private information from home computers of Americans by the government, is different, therefore, and, arguably, falls within the area of fundamental privacy interests in the home and person that courts continue to protect.

Mass dataveillance of communications originating from the home, as Professor Jeffery Rosen has noted, gives the government unlimited discretion to search through masses of personal information in search of suspicious activity, without specifying the people, places or things it expects to find.\(^\text{202}\) Thus it is like a fishing expedition, and could be interpreted as violating the privacy rights of individuals and citizens. The attempts to reform the FISA program to include the TSP type surveillance of foreign communications outside the U.S. indicate the continuing existence of an expectation of privacy in those communications. Thousands of emails and telephone calls of Americans have been intercepted under the new surveillance program. It is not clear whether the NSA listened to conversations or simply had access to the email addresses and phone numbers.\(^\text{203}\) This kind of government action underscores the real problem with surveillance that is not suspicion- or target-based but rather seeks to cast a wide net of information gathering. In the absence of any demonstrated threat to security, it infringes

\(^{202}\) Rosen, supra note 151, at 149.
on the privacy rights of innocent persons in the name of national security. Privacy is, thus, harmed not as an abstract value, but as an aspect of liberty affecting freedom to communicate ideas using telecommunications technology. We expect our communications through telephones, emails or cell phones to be private. Congressional investigations hope to determine if any further searches of the content of the communications violated the Act.204

This instance of mass data surveillance is not unique. Other electronic surveillance measures undertaken pursuant to the Patriot Act have also resulted in seizures of email communications and internet communications. The Patriot Act broadens the scope of pen registers and trace statutes to permit the government to track email and internet communications. Under section 216 of the Act, courts are permitted to authorize the installation of a pen register and track and trace device to capture internet and telephone dialing, routing, addressing or signaling information whenever the government believes the information is relevant to an ongoing criminal investigation.205 In essence, the government can collect information about an individual’s search of the web. This raises the question of whether privacy interests are infringed. The Court in Katz long ago held that the wiretapping of a telephone conversation constituted a search under the Fourth Amendment and required a warrant. Likewise, websites and interest addresses reveal more than the telephone numbers of a pen register or the addresses on an envelope. They provide insight into an individual’s mind and thoughts, the essence of

204 Congress has called for an investigation into the abuse of the surveillance program. Congressional investigations hope to determine if any further searches of the content of the communications violated the Act.

personhood, and should be protected by the Fourth Amendment privacy doctrines. An individual’s expectation of privacy should not diminish as a result of usage of internet or email communications. The privacy implications are no less important. Although distinct from the phone numbers dialed and collected, computers users do not expect the government or the internet providers to monitor their content or web usage. Individuals have an expectation of privacy in their use of emails at the internet, although information regarding web browsing maybe readily available through software. Expectations of privacy should extend to non-content communications such as addresses. The seizure of email addresses, for example, exposes the content of the communications like an unsealed. Yet, the Ninth Circuit has held that there is no fourth amendment protection of the “to or from” envelop of an email or the IP addresses of websites. This is based on the notion that what is communicated to third parties, such as phone numbers dialed is not subject to Fourth Amendment protection. The Court relied on Smith v. Maryland which upheld the constitutionality of the use of a pen register to intercept dialed phone numbers, but not the content of communications. Smith was premised on the notion that there is no expectation in the phone number dialed, even from the privacy of the home, because callers voluntarily give this information to third parties such as the phone companies. The Ninth Circuit extended this rationale to include the addresses of internet communications. But that reasoning is flawed because email

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206 See, e.g., Smith, the USA Patriot Act violates Reasonable expectation of privacy Protected by the Fourth Amendment Without Advancing National Security, 82 Nev. L. Rev. initial page (2003). The author argues that the Fourth Amendment protects all electronic communications, both content and envelope information. The Fourth Amendment requires recognition of an expectation of privacy because monitoring of computer usage and communication implicates privacy concerns that are absent in monitoring numbers dialed.
209 However for a contrary view, see Smith, supra note 203, at where the author criticizes application of the Smith rationale to computer information that is subject to surveillance under the Patriot Act.
addresses do reveal content, unlike telephone numbers in pen registers or addresses on envelopes.

Recent cell phone technology has also expanded law enforcement’s ability to monitor the whereabouts of cell phone users by using the cell phone as a “tracking device.” Wireless providers can now monitor their location whenever a phone is turned on. Operators have recently turned over such data to prosecutors when presented with court orders. Moreover, prosecutors have argued that expansion of powers under the Patriot Act could be read to allow cell phone tracking on less than probable cause. In contrast, compare *Kyllo* where the Court held that use of digital technology for electronic invasion of the home without a warrant violates Fourth Amendment interests. The court in *Kyllo* expressed limitations on the role of technology in criminal law enforcement in the home, when such technology is not in public use. Moreover, the expansion of government surveillance of private information for purposes of national security under the patriot act has weakened fourth amendment privacy interests.

At least one court has recognized privacy interests are at issue in electronic surveillance in the home without a warrant. One court has ruled that “permitting surreptitious conversations of a cell phone into a tracking device without probable cause raises Fourth Amendment concerns, especially when the phone is monitored in the home.

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*Live Tracking of Mobile Phones Prompts Court fights on Privacy*, *N.Y. Times*, Dec. 10, 2005, at A1.; *FBI Dealt Setbacks on Cellular Surveillance*, WASH. POST, Oct. 28, 2005, at A.5. Courts in Texas and New York denied the FBI’s request to track the location of cell phone users without showing evidence that a crime has occurred or was in progress. The courts did grant the FBI requests for information pertaining to the logs of phone numbers called and received from the cell phones. See *In Re Application for Pen Register and Trap/Trace devices with cell site location authority*, 396 F.Supp2d 747 9 (S.D. Tex.2005); *In the Matter of an Application of the United States for an order authorizing the use of Pen Registers and Trap Devices and Authorizing the release of subscriber information*, 396 F Supp 2d 294 (E.D. N.Y. 2005)
or other places where privacy is reasonably expected.”211 Cell phone tracking obviously aids law enforcement in emergency situations but it is unclear what standards courts will use in permitting the general use of cell phone tracking, without reasonable suspicion, of individuals outside the home on public streets. One District Court has ruled that probable cause is not required when the cell phone cite information is used only to track calls made or received by the cell phone user. In that case, no data as to the location of the cell phone was disclosed which would triangulate the precise location of the cell use. 212

On the Street Surveillance.

Expansion of government searches through video surveillance, cell phone tracking searches of passengers belongings on public transportation, stadium searches, stop and seizures of person on the streets or vehicle searches raises concerns about Fourth Amendment privacy interests. Simply because something is viewed publicly doesn’t necessarily lessen one’s privacy interests, under the Katz reasonable expectation test, which provides protection for privacy interests that society regards as reasonable. What one exposes to the public or can be observed from a lawful vantage point has been regarded as not deserving of Fourth Amendment protection, however, under the plain view doctrine213. This category has been broadened to a large degree by technological surveillances since 9/11. Mass video surveillance, digital face imagery and biometric surveillance in public reduce objective expectations of privacy and, correspondingly, Fourth Amendment protections. The inherent dangers of unsupervised video data

213 Katz, supra note 2.
collection and false positives may be viewed as infringing on liberty interests. Individuals, for example, could be identified for low level crimes and permanently identified in data files for suspected activity. Moreover, surveillance of innocent, yet suspicious, activity violates privacy interests. Ostensibly to prevent terrorist activities, a growing number of police departments in cities such as Boston, Chicago and Los Angeles are monitoring public behavior which they deem suspicious.\textsuperscript{214} Police have monitored activities such as taking pictures of power plants and public buildings, and purchasing police or firefighter uniforms. The police explain this approach as stemming from the behavior of terrorists who typically engage in surveillance of targets before an attack. The information gathered by the police is later catalogued on a terror tips list which may be used for intelligence gathering purposes.\textsuperscript{215} Ultimately, the police hope to have a nationwide reporting system of codes for suspicious activity. The privacy concern that arises here is that the overbroad recording of innocent activity interferes with the privacy rights of individuals. Such activity is deemed both public and innocuous therefore not subject to privacy concerns, despite the paramount liberty interests of innocent individuals.

Even more latitude is given to law enforcement officers in street encounters, regardless of improper motivation. According to the \textit{New York Times}, a twenty-four year old Muslim American journalism student was stopped by Veteran Affairs Police in New York for taking pictures of flags in front of a VA building as part of a class assignment.\textsuperscript{216} The officers took the student into custody for questioning and deleted the images from the camera. In a similar situation, a fifty-four year old artist and fine arts

\footnotesize{\textsuperscript{214} See Surveillance Effort Draws Civil liberties Concerns, \textit{supra} note 198, at A1.} \\
\footnotesize{\textsuperscript{215} Id.} \\
\footnotesize{\textsuperscript{216} Id at 15}
professor at the University of Washington was stopped, handcuffed and placed in a police
squad car for taking photographs of electrical power lines as part of an art project.²¹⁷
Innocent activity such as taking photographs of public buildings can trigger application of
a terror checklist when combined with other factors such as race or ethnicity. Such
practices may lead to the potential for abuse and for religious, racial and ethnic, profiling.

These factors alone don’t justify individualized suspicion under the Terry Stop
and Frisk doctrine. Stopping and seizing a person of Arab descent for taking a picture of
a public building should still be an unreasonable search in a free society. Yet, a recent
trial of a suspected terrorist, Syed Harris Ashmed in federal court in Atlanta revealed that
the defendant used casing videos of the World Bank building in Washington to prove that
he could engage in surveillance ‘when terrorist overseas could not even get in the
country.” In the Ahmed case, however, it evidence showed the defendant also bought a
one way ticket to a Pakistan military training camp,²¹⁸ which, combined with the videos,
was sufficient to bypass privacy protections. Race or national origin or ethnicity alone
cannot form the basis for the police to stop and question the public on the basis of
innocent activity.

Individual liberties cannot be curtailed for purposes of intelligence gathering. A
public search or seizure, without a warrant, probable cause or reasonable suspicion,
violates fourth amendment liberty and privacy interests. Racial profiling, under the Terry
stop and frisk doctrine had long been condemned prior to the 9/11 terror attacks.
According to a gallop poll, 81 % of Americans opposed racial profiling.²¹⁹ Yet there

²¹⁷ Id. at 15
²¹⁹ Frank Newport, Racial profiling is seen as wide spread, particularly among young black men, Gallup
appears to be an emerging public acceptance of some form of ethnic profiling. After 9/11, an ABC/Washington Post poll found that 66% of Americans were willing to give up some liberties to prevent future terrorist attacks. Undoubtedly, there has been some public acceptance of airport passenger profiling based on people of Middle Eastern descent.\textsuperscript{220} Increases in police encounters with people of Arab ancestry sharply increased after 9/11. Some have argued that it is rational to stop and question persons of Arab ancestry.

Fortunately, civil libertarians have opposed these measures and airports have adopted rules and regulations requiring screening of all persons aboard a passenger aircraft.

Airport searches, it must be noted, are generally viewed as special needs or \textit{sui generis}, without a requirement of probable cause or reasonable suspicion.\textsuperscript{221} Americans, who during vacations or otherwise, take pictures of public monuments in Washington should not expect that their very identities be recorded as part of general surveillance. But, our expectations of privacy may shift when we are in a public space. Public surveillance, however, is quite different from general warrantless physical searches.

As preventive measures, physical searches of individuals entering public buildings such as museums, football stadiums and public transportation systems affect Fourth Amendment privacy interests. In addition, to searches of handbags or containers for explosive devices, law enforcement has been expanding the scope of physical searches in the name of public security. In \textit{Johnston. Tampa Sports Authority}, a Tampa Bay football season ticket holder sued the Tampa stadium authority on the basis of the Fourth Amendment for its practice of requiring all spectators to submit to a pat-down

\textsuperscript{220} See Power, \textit{supra} note 86, at 65, n.67.

\textsuperscript{221} Id at 60
search. The Tampa Bay Buccaneers instituted the policy based on an NFL mandated pat down search as a condition for entrance to NFL events. As in the New York City subway searches, the NFL policy was instituted following the 2004 and 2005 suicide bombings in London and Madrid, and threats made to sporting events such as the soccer venues in Spain. Prior to this policy, bags, purses and other containers were searched, but there were no physical searches of persons. Johnston was searched upon entering a Tampa football game and brought suit.

Prior to this policy, bags, purses and other containers were searched, but there were no physical searches of persons. The District Court found that the searches violated the Florida Constitution and the Fourth Amendment and granted a preliminary injunction. The Eleventh Circuit reversed, finding that the District Court abused its discretion and misapplied the consent exception. The court held that Johnston’s football ticket was a revocable license to attend. NFL games and that Johnston had voluntarily consented to the pat down searches. The Tampa Bay Buccaneers, had simply given Johnston a revocable license to enter the stadium to attend football games, which could be revoked or rescinded at any time. The court also held that the consent doctrine was applicable under Florida law. In a footnote, the Court of Appeals declined to address whether any

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222 Johnston v. Tampa Sports Authority, 530 F.3d 1320 (11th Cir. 2008).
223 Id. at .
224 Id. at 1327. The court disagreed with the district court that the consent doctrine did not apply in this case because of the unconstitutional conditions doctrine citing State v. Iaccarino, 767 So. 2d 470, 476 (Fla. Dist. Ct. App. 2000). Applying the consent factors under Florida law, the court found Johnston had voluntarily consented and was aware that he could refuse to be searched and leave the stadium. The doctrine of unconstitutional conditions prohibits terminating benefits, though not entitlements, on the basis of relinquishing of a constitutional right., citing State v. Iaccarino, 767 So. 2d 470, 476 (Fla. Dist. Ct. App. 2000). Johnston did not have any right or entitlement to enter the stadium.
other special needs exception applied to the case.\footnote{Id. at n.7. Because the court found the consent doctrine applicable, the court declined to engage in any special needs analysis. It noted however, there was “at least a question, whether Johnston’s constitutional rights would have been violated by the pat down search, even if he had not consented.”} It noted however, that it had addressed the constitutionality of warrantless searches in other contexts involving entrance to public lands. In Bourgeois v. Peters,\footnote{Peters, 387 F.3d at . or See supra note 13, at .} the Court invalidated a municipal policy that required suspicionless magnetometer searches of all persons seeking to attend demonstrations on public property outside of Fort Benning, Georgia. The city justified the searches in light of past conduct of trespassing, smoke bombs and heightened homeland security threats occurring at demonstrations. The Court of Appeals invalidated the program on the ground that it had impaired First Amendment rights as well as Fourth Amendment rights. Moreover, the city enacted magnetometer policy served the traditional law enforcement function of public safety and was therefore not a special need.\footnote{Id. at 1312-1313. It is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined.} The Court of Appeals did not address the special needs doctrine in the Tampa case, finding that Johnson had no parallel constitutional right to enter the Tampa stadium. Nonetheless, the court said that unlike searches for bottles, drugs or cans, the pat down search supported an interest well beyond general law enforcement. " The NFL quite clearly instituted the pat down policy with the intent of preventing terrorist attacks and ensuring the safety of persons in the stadium."\footnote{Id. at 1328.}

These cases, along with McWade v. Kelley involving subway searches, illustrate an individual’s diminished expectation of individual privacy that exists in access to public stadiums and public transit systems based on perceived basis of terrorist threats.
Pat down searches at stadium sporting events are now widely expected and accepted. Under the *Katz* formulation, such expectations are objectively reasonable even though there may be no credible or reliable threat. In *Tampa*, the NFL adopted the policy on the basis of the suicide bombings in Madrid and Spain and the threats made to sporting events. The FBI later determined that the threats presented no threats to NFL stadiums. Pat down searches which restrict individual privacy and liberty are viewed as reasonable searches under the Court’s balancing analysis. These limitations on individual privacy are deemed acceptable as non-emergency matters of public safety.

Although the subway searches and the Tampa stadium search involve perceived external, international threats of terrorist activity under a special needs approach, they pose special concern because Fourth Amendment rights change relative to the weight of the liberty and safety interest at stake. Would such searches be acceptable at entrances to city buses and trains as a routine aspect of American life, absent emergency threats to public security? Even under the special needs category, there must in fact be a special need, independent of general criminal enforcement of the law. The Supreme Court has never applied the special needs exception to suspicionless searches on subways, public buildings, parks and stadiums. The administrative search doctrine applicable to housing inspections in *Camara* seems inapplicable to the search of people and their belongings at public arenas and venues.

There are inherent problems in identifying threats to public safety and security as special needs in the absence of an emergency situation. Public safety measures as a part of general law enforcement must meet the requirements of the Fourth Amendment. Emergencies and extraordinary circumstances may justify a limited warrantless search as

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229 *See* Posner, *supra* note 8, at 41.
reasonable searches to prevent widespread public harm. In such cases, the weight of the intrusion of privacy interests is weighed against the degree of public harm. Emergency measures may be taken when there are extraordinary governmental needs where public security and safety would be threatened and imminent. The recent shooting and killing of a security guard at the Washington D.C. Holocaust museum by a lone gunman illustrates the problem.

The Holocaust museum is frequented by thousands of visitors each year, hundreds during the day. Visitors and their bags and containers are subject to magnetometer searches and armed security guards are stationed at the public entrances. Yet, a lone gunman was able to enter the building, firing his weapon and killing a security guard, and threatening the safety of hundreds of visitors. There was no known general terrorist threat. It was later determined that the alleged gunman was a white supremacist who acted alone out of personal hatred of Jews and blacks and had a history of anti-Semitic writings. Further investigations revealed that the gunman had visited public monuments, churches and synagogues as possible targets. An increase of security at other museums and public buildings in the Washington area followed the shooting. No one would suggest that security measures should not be taken in such cases, which might include, for example, further pat down consensual searches, such as in the Tampa case. The need here is for emergency public safety measures as reasonable limited searches of all passengers and belongings entering public buildings such as museums.

As a case of domestic terrorism, although unaffiliated with a known group, the question arose as to whether a prior criminal investigation and surveillance was warranted of the suspect. Surveillance of personal communications must require warrant,

230 Author, Museum Suspects Writings Had not Triggered a Probe, WASH. POST, June 12, 2009, at .
absent emergency circumstances for public security. There are no blanket war on terror measures which justify warrantless searches of domestic communications, although officials were aware of the alleged holocaust shooter’s hateful writings against Jews and religious minorities, no criminal investigation had begun.\textsuperscript{231} As one official said, Law enforcement’s challenge every day is to balance the civil liberties of the United States citizen against the need to investigate activities that might lead to criminal conduct.\textsuperscript{232}

As the Keith case demonstrated, a warrant is required for purely domestic surveillance. Although acts of domestic terrorism threatens public safety and liberty as well as external terrorist threats, judicial protection should be afforded to fourth amendment privacy interests. Law enforcement profiles of terror suspects and investigations of criminal behavior must conform to existing Fourth Amendment protections without regard to the special needs doctrine. Physical surveillance of possible criminal or terrorist activity, as well as private email or internet communications must conform to the reasonable expectations of privacy protected by the Katz doctrine. The Supreme Court has recently reaffirmed Katz’s holding that “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the fourth amendment—subject only to a few specific established and well defined exceptions.”\textsuperscript{233} In Arizona v. Gant, the Court reaffirmed the privacy interest the passengers have in the contents of their cars, and that police may not search the vehicle following an arrest of an occupant, unless it is reasonable to believe that evidence of the arrest might be found in the vehicle.\textsuperscript{234} In Gant, the occupant was arrested for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{231} Id. at A4.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Arizona v. Gant, 129 S. Ct. 1710 (2008).
\item \textsuperscript{234} Id.
\end{itemize}
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driving with a suspended license and it was unlikely that the police could find evidence in
the passenger compartment of his car relating to the arrest. In so holding, the Court noted
that a rule authorizing searches whenever a traffic offense is committed without any basis
for evidence of the offense creates a threat to the privacy of the individuals.235

Although Gant involved searches of vehicle following an arrest, it is uncertain
whether other precedents will withstand the reasonable expectation of privacy test. In
Bond v. United States, the Court held that a government agent’s physical manipulation of
a petitioner’s bag aboard a bus violated the Fourth Amendment.236 The Court held that
passengers aboard buses have an expectation of privacy that their carryon bags will not
be manipulated when placed in an overhead bin, although there is no privacy interest in
bags being moved or touched aboard a bus by governmental agents or other
passengers.237 The inquiry under Katz asks whether an individual’s privacy interest is
one that society regards as reasonable. Bond was a pre-9/11 case, before the increase in
container and bag searches under the special needs doctrine in use on public subways. It
is unclear if tactile manipulation of a bag on a public bus or train, without reasonable
suspicion or probable cause, would be an objectively reasonable search under the special
needs exception.238 The MacWade decision upheld such searches on a random basis in
response to an alleged terrorist threat. The court’s balancing analysis weighed in favor of

235 Id. at 12.
237 Id. at .
238 What if the would be shooter in the Holocaust Museum killing had used a public bus and was subjected
to an exterior search of a bag, which when manipulated indicated the presence of a rifle. What if it further
indicated explosive devices which were not discoverable absent a search. A search of all bags aboard buses,
would violate the fourth amendment, absent an emergency exception involving a threat to public safety..
Manipulation of luggage is now common place for entrances in public buildings and sporting events as I
have discussed. .
the government’s demonstrated need and broadened the special needs doctrine and diminished the expectation of privacy in such warrantless physical searches.

Expansion of warrantless searches in combating domestic or foreign threats under the special needs exception undermines Fourth Amendment privacy interests. Although privacy expectations have reduced in response to perceived threats to domestic security, absent evidence of domestic or foreign threats to national security which warrant extraordinary measures, the warrant requirement is still valid under the Fourth Amendment. There is no mass transportation exception to the Fourth Amendment.

Technological surveillance, data mining, cell phone tracking devices and other forms of information gathering by the government continue to threaten liberty and privacy interests. The expansion of the special needs category now including DNA testing of persons arrested for crimes has further diminished expectations of Privacy. The investigatory net has widened in response to the government’s need to combat crime and terrorism in the present times. As the need for government searches has grown reasonable expectations of privacy have fluctuated as well. Courts should continue to provide Fourth Amendment warrant limitations on the government’s ability to broadened searches for national security purposes absent extraordinary government circumstances. Absent evidence of extraordinary government circumstances such as an immediate imminent threat to public safety of widespread harm or national security, the Katz test should govern government searches impacting Fourth Amendment privacy interests involving physical searches of individuals, as well as electronic information.

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240 See Stunz supra note 7 at 2142
gathering from the privacy of the home. As Justices Brennan and Marshall wrote, dissenting in the *New Jersey v. T.L.O.*, the first special needs case, to require a showing of some extraordinary governmental interest before dispensing with the warrant requirement does not to undervalue society’s need to apprehend violators of the law.

**Conclusion**

This article has shown that the expansion of physical searches under the special needs exceptions and the warrantless searches of personal communications in the name of national security will erode fourth amendment privacy interests unless proper safeguards are observed to protect society’s reasonable expectation of privacy and liberty interests from unwarranted government intrusion. Those privacy expectations are grounded in the very structure of the fourth amendment which has not changed. 241 Extraordinary circumstances such as massive terrorist threats in domestic security matters must be weighed against a heightened level of privacy to justify warrantless searches.242 The warrant clause itself stands as the final bulwark against enhanced intrusions which are at the today’s virtual doorstep.

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242 Jonathan Marks 9/11+ 3/11 + 7/7= What Counts in Counterterrorism 37 Colum. Hum Rts. L. Rev 559. Marks discusses the notion of mass terrorism as opposed to smaller scale attacks and our collective responses to such attacks and how our behavior can influence and shape our counter terrorism policy.