

The Evolution of Search and Seizure Law:
The Changing Definition of 'Reasonable Search'

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Abstract

In the past five years, the Supreme Court has upheld numerous warrantless searches and seizures. What has permitted this increased in searches determined to be constitutional? Traditionally, the Supreme Court utilized a test-based approach in determining whether a search or seizure is constitutional. I argue that recent decisions justifying search programs have relied on a reasonableness balancing approach. Why has the Supreme Court abandoned the test-based approach in favor of a reasonableness analysis? To answer this question, I examine Supreme Court decisions dealing with search and seizure programs, determine common patterns in past decisions and in recent reasonableness decisions, and compare these patterns. To examine the evolution of search and seizure law, I: (i) track the development of the many tests used to justify warrantless searches and seizures: (ii) determine when the court abandoned the established test in favor of a reasonableness or 'totality of the circumstances' approach: and (iii) examine the rationale for this change. Although the Supreme Court offers no rationale for this turn to a reasonableness inquiry, there is strong reason to conclude that the terrorist attacks of September 11th, 2001 substantially affected Supreme Court Fourth Amendment adjudication.

Changes in law demand a thorough account; yet, the Supreme Court has offered no account for their recent changes in search and seizure law. In determining what searches and seizures meet the demands of the Fourth Amendment, the Supreme Court sets the parameters for permissible law enforcement action. Yet the Supreme Court is also vulnerable to the same impulses that tempt law enforcement officers to push the boundaries of the law. Over many decades, the Court has crafted a variety of legal tools to adjudicate these searches and seizures, including the *Brown v. Texas* test and the Special Needs analysis, and has also outlined other factors crucial in determining Fourth Amendment reasonableness. In the past five years, however, the Supreme Court has largely ignored these tests and factors in favor of a more general reasonableness analysis. This general reasonableness analysis seeks to balance the degree of intrusion into individual privacy with the governmental concerns furthered by the search or seizure. Using this analysis, the Supreme Court has approved many searches and seizures deemed unconstitutional by lower courts applying the previously prevailing tests and standards.

This paper has two main objectives. The first, which will comprise the bulk of the analysis, is to demonstrate that there has been a substantial change in the Supreme Court's Fourth Amendment adjudication over the past five years. The first two sections of this paper show how the Supreme Court abandoned its older, more stringent standards of review (the *Brown v. Texas* test and the Special Needs test) in favor of a newer, ad hoc analysis (the reasonableness analysis). The second aim of the paper is to interpret the reasons for and significance of this change. In particular, the evidence gives us strong reason to conclude that the terrorist attacks of September 11th, 2001 played a crucial role

in the substitution of the reasonableness analysis for previously established tests and standards in an expanding class of search and seizure cases.

In the past five years, the Supreme Court has approved eight warrantless, searches and seizures utilizing the reasonableness balancing analysis. Although the Supreme Court has recognized many exceptions to the warrant requirement, recent cases have expanded the use of the reasonableness analysis to circumstances previously adjudicated under tests or using a factor based analysis. This new, broader approach permits substantially more searches than the previously used tests and factors. The heavy reliance on this test occurred immediately after the terrorist attacks of September 11th, 2001, and the rationales offered for the new standard of adjudication echo common concerns raised by the challenge of fighting terrorism.

Since the passage of the Bill of Rights, the 4th Amendment has protected the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The requirements of this Constitutional provision are normally satisfied when a law enforcement official submits a warrant to search a specific location for specific items to a magistrate for approval. These searches are Constitutional because they satisfy the second clause of the Fourth Amendment: “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

During the 1970s and 1980s, the Supreme Court adopted several narrowly tailored balancing tests for determining the reasonableness of warrantless searches: the *Brown v. Texas* test for police searches and the Special Needs test for non-investigatory searches. However, since the terrorist attacks on the World Trade Center on September 11th, 2001,

there has been an increase in the number and types of warrantless searches and seizures upheld by the highest court. According to the Supreme Court Database, in the four years after September 11th, 2001, the Supreme Court approved *all* of the searches and seizures it considered, while in the four years prior to the attacks, it approved only two thirds of such cases.¹ To approve these searches, the Supreme Court has moved away from narrowly tailored tests and factors and turned toward a general reasonableness analysis.

Since the terrorist attacks of September 11th, 2001, members of the Court have expressed repeated concerns about how search and seizure cases under consideration will affect national security and law enforcement agencies.. Some argue that searches are a crucial tool in uncovering terrorist activity. Terrorists are trained to remain undetected by law enforcement, setting up their own roadblocks to law enforcement investigation. Terrorist activity is also more dangerous than general crime and relies more often on explosives and other advanced weaponry and communication technology. These factors suggest that searches could be a crucial tool in uncovering terrorist activity. In addition, the changing role of law enforcement since the terrorist attacks has lessened citizens' expectation of privacy. Since a citizen's expectation of privacy is a factor in all of the theories used to adjudicate Fourth Amendment cases, the diminished public expectation of privacy in certain areas affects the result of the various tests employed by the Supreme Court.

The increased use of the reasonableness analysis has not been noticed by the popular press or extensively examined in law review articles. However, this does not diminish its importance to all citizens. While the National Security Agency is cataloging every phone call placed inside the United States, the Supreme Court is permitting

¹ See appendix C.

warrantless searches and seizures of homes, vehicles, luggage, and persons. The rationale for upholding these searches must be thoroughly examined to ensure the protections of the Fourth Amendment are preserved.

D) Historic Analysis of Search and Seizure Cases

“But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.” Atwater v. Lago Vista

A) Development of Tests

During the 1970s and 1980s, the Supreme Court developed tests relying on objective criteria and a list of exceptions to the warrant requirement in an attempt to codify the law and establish guidelines for law enforcement agencies. These tests ensured that searches and seizures followed the Fourth Amendment by examining the intrusion caused by the search or seizure and the interests furthered by conducting the search. The enumerated exceptions upheld the Fourth Amendment by requiring individualized suspicion or exigent circumstances that made the warrant requirement impracticable.

1) Enumerated Exceptions to the Warrant Requirement

The first exception to the warrant requirement arose in 1925. In *Carroll v. United States*, Chief Justice William Howard Taft determined that a search of an automobile is constitutional if the totality of the circumstances provides officers with sufficient reason to believe a law was being violated.² The importance of preventing crime while it was being committed introduced exigent circumstances that made the warrant requirement impracticable. This case introduced a broad reasonableness analysis to be used when obtaining a warrant was impracticable. However, this exception still required

² In this case, the violation was bringing liquor across the US-Canadian border during prohibition. *Carroll v. United States*, 267 U.S. 132 (1925)

individualized suspicion – the ‘totality of the circumstances’ analysis was used to determine if the standard of suspicion was met.

Over the years, the Supreme Court condoned other suspicion-based, warrantless searches using different rationales.³ The first such search explicitly recognized was a pat-down search conducted with articulable, reasonable suspicion that the persons searched were recently involved in criminal activity.⁴ Searches conducted incident to the lawful arrest of an individual were also found constitutional. These searches are confined to the area immediately accessible to the suspect -- justified by the importance of controlling weapons in the immediate control of people in police custody for the safety of the police.⁵

Warrantless searches were also found to be permissible when the subject waived his expectation of privacy. Likewise, searches of heavily regulated industries, like gun sales, may be conducted with less than probable cause because frequent administrative inspections diminish the expectation of privacy.⁶ An officer may search a home, person, or vehicle with the freely given consent of the relevant party. Consent cases are reviewed under a totality of the circumstances analysis to ensure that law enforcement agents did not create a coercive environment that nullifies consent. This can only be determined through examining all the actions of law enforcement. Likewise, searches and seizures in public space of people believed to be involved in criminal activity are reviewed under a totality of the circumstances analysis to ensure officers met the standard of suspicion necessary to justify a Fourth Amendment intrusion. Many other warrantless searches earn approval under two more systematic tests developed by the Supreme Court.

³ For a review of approaches to the Fourth Amendment, see Clancy, Thomas K.. “The Fourth Amendment’s Concept of Reasonableness.” *Utah Law Review* (2004): 977- 1044.

⁴ *Terry v. Ohio*, 392 U.S. 1

⁵ *Chimel v. California*, 395 U.S. 752. *Agnello v. United States*, 269 U.S. 20

2) *Brown v. Texas* Test for Law Enforcement Actions in Public Space

For searches and seizures conducted to uncover evidence of criminal wrongdoing, the Supreme Court developed the Brown Balancing Test. This test determines if stops by police officers in public places are Constitutional. The test balances three factors: (1) the gravity of public interest in conducting the test, (2) the degree to which the search advances public interest, and (3) the severity of interference with individual liberty during the search or seizure.

This test was elaborated in the unanimous opinion written by Chief Justice Warren Burger in the 1979 case *Brown v. Texas*. This case dealt with a Texas statute that permitted the arrest of a man who refused to identify himself when lawfully stopped by the police. Ultimately, this seizure was deemed unconstitutional because the officer lacked any reasonable suspicion connecting Mr. Brown to any criminal activity. At the trial level, Mr. Patton the prosecutor attempted to justify the law by balancing the same interests. Patton stated:

"Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. (sic) I think these Governmental interests outweigh the individual's interests in this respect, as far as simply asking an individual for his name and address under the proper circumstances."⁷

The Court determined that this balance did not permit the seizure of the defendant. Many cases have appealed to the balancing test delineated in *Brown*.⁸ *Michigan Dept. of State*

⁶ United States v. Biswell: 406 U.S. 311

⁷ Brown v. Texas 443 U.S. 47, 54

⁸ Statutes guiding police stops: *Kolender v. Lawson*, 461 U.S. 352 (1983) Searching Factories for illegal aliens: *INS v. Delgado*, 466 U.S. 210 (1984).

Police v. Sitz stated that *Brown* is the relevant authority for evaluating checkpoints.⁹ Also in *Brown*, the arresting officers claimed they had reasonable suspicion to arrest Mr. Brown. The Court denied this assertion -- reasonable suspicion must be based on objective, articulable facts. The need for reasonable suspicion is *Brown's* major contribution to Fourth Amendment adjudication; however, in the absence of individualized suspicion, the *Brown* balancing test still governs.

3) Special Needs Test for Non-Investigatory Law Enforcement Action

While the *Brown* balancing test governs police conducted search and seizure programs, the Special Needs doctrine governs searches and seizures not aimed to discover evidence of criminal wrongdoing. These searches serve other important governmental ends, like ensuring a safe, educational environment in public schools. The Special Needs test balances the degree of intrusion into individual privacy or personal security represented by the search with the promotion of legitimate governmental interests served by the search. To avoid unbridled discretion, these programs require neutral criteria to determine who will be tested and insist that the search or seizure be limited in scope.¹⁰

The phrase "Special Needs" first appeared in Fourth Amendment jurisprudence in Justice Harry Blackmun's dissent in *Florida v. Royer*. He declared: "(t)he special need for flexibility in uncovering illicit drug couriers is hardly debatable."¹¹ To Blackmun the importance of uncovering narcotics smuggling allowed officers to search a closed suitcase based on reasonable suspicion -- a lesser standard than the required probable cause. Two years later, the majority used the Special Needs test in *New Jersey v. T. L. O.*

⁹ Michigan Department of Police v. Rick Sitz 496 U.S. 444 (1990)

¹⁰ Hubbart 283.

In *New Jersey v. T. L. O.*, a teacher entered the ladies restroom to find a student with the initials T. L. O. smoking cigarettes. T.L.O. denied that she had been smoking and refused to hand her cigarettes over to the teacher. The teacher brought T.L.O. to the principal's office. T.L.O. refused to cooperate and the principal opened her purse and removed a pack of cigarettes. After finding this contraband, the principal saw rolling papers and searched through T.L.O.'s purse and discovered marijuana. At this time, the principal called the police.

In a footnote, the majority opinion specifically recognized the Special Needs doctrine: "the Fourth Amendment applies to searches conducted by school authorities, but the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause." The Court decided that the degree of intrusion into individual privacy was small since the school principal only opened her purse to peer inside. Conversely, the governmental interest in promoting a safe learning environment is great. Teachers and administrators cannot and should not focus on uncovering evidence of wrong doing -- they are not trained, they have many students to tend to, and students should be able to trust teachers and not worry that they are under constant surveillance. To allow authorities to foster a better learning environment, they need not have probable cause for a search. These Special Needs allow school authorities to search based on reasonable suspicion that "the search will uncover evidence of an infraction of school disciplinary rules or a violation of the law." The search must be justified at its inception and limited in its scope. For T.L.O., this limited search revealed rolling papers that gave the principal probable cause for a further search.

B) Constitutional Warrantless Search and Seizure Programs prior to 2001

¹¹ Florida v. Royer, 460 US 491, 519 (1983)

"In the four years since this Court, in T. L. O., first began recognizing "special needs" exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patchwork quilt of settings Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test." Dissent Skinner v. Railway Employees

Under guidance from the tests established, the Supreme Court examined numerous warrantless search and seizure programs. These programs search or seize many people without individualized suspicion that any one of them is involved in criminal activity. Because warrants are impracticable, law enforcement developed other avenues of meeting the demands of the Fourth Amendment. At a minimum, the program must be neutral in its application. Often, additional steps must be taken to ensure the program does not unduly infringe on the privacy of individuals. One type of warrantless, suspicionless search program is searches of passengers on a bus. These programs earn constitutionality by relying on the consent of the passengers to be searched. The other types of prevalent warrantless, suspicionless programs are checkpoint seizures and drug testing searches.

1) Checkpoints – Authorized and Unauthorized Used

Checkpoints, also called roadblocks, are traffic obstructions constructed by law enforcement agencies to allow officers the chance to question passersby's. Since their first use at the US-Mexico border, these controversial search programs have divided the court. All checkpoints are suspicionless, warrantless seizures. Drivers are stopped without any facts indicating that any one driver has recently committed a crime, is in the process of committing a crime, or is planning to commit a crime. These programs are not

sanctioned by a magistrate-signed warrant. Furthermore, the Court has held that these checkpoints constitute seizures in the constitutional sense. In *Brower v. Inyo County*, the Court ruled that when a driver is forced to stop, he has been seized.¹² In *Brower*, the driver died after crashing into the police car set up to stop him; the Court unanimously held that this was a seizure. That particular seizure was denied Constitutional protection because it did not follow the standard established in *Brown v. Texas*.

Traditionally, the Court has limited the uses of checkpoints to investigating drunk driving and illegal immigration. These types of checkpoints are justified by the important governmental concern in securing the borders and ensuring safety on the highways. The Court upheld these uses based on a Special Needs analysis. The concerns are grave, the use of a checkpoint is closely tied to the goal of securing safe roadways, and the intrusion must be limited in scope.

The first checkpoint case, *United States v. Martinez-Fuerte* articulated objective criteria used to determine the intrusiveness of a stop.¹³ *United States v. Martinez-Fuerte* allowed checkpoints to question drivers and passengers about their national origin in order to investigate illegal immigration. These checkpoints were allowed because of the inherent difficulty of policing a long border and the minimized intrusion. The court noted the stationary nature of this semi-permanent checkpoint, the length of the stop, length of questioning, and presence and degree of a search as the objective elements of intrusion. Subjective elements of intrusion include visibility of checkpoint operation, signs of police authority, and amount of police discretion. The dissenters in *Martinez-Fuerte* lamented

¹² *Brower v. Inyo County* 489 U.S. 593 (1997).

¹³ *United States v. Martinez-Fuerte* 428 U.S. 543 (1976).

that Mexican appearance is still an acceptable justification for sending cars to the secondary staging area where officers have a great amount of discretion.

The Court has a long tradition of overruling checkpoints. Until 1990, the only checkpoints allowed were border checkpoints specifically sanctioned by *Martinez-Fuerte*. In *Michigan v. Sitz*, the Court determined that the Fourth Amendment allowed drunk driving checkpoints.¹⁴ After "weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty," the sobriety checkpoint was deemed constitutional since it dealt with the safety of the highways and passed the other two prongs of the *Brown v. Texas* test.¹⁵

Even this checkpoint caused controversy on the court. Two separate dissents argued that the majority misapplied precedent. Justice Stevens asserted that the Court abandoning the criteria established in *Martinez-Fuerte*. The Michigan checkpoint program established checkpoints at different locations on different days, so it depended on surprise. This contradicted the objective elements laid out in *Martinez-Fuerte*. Also, the officers must use subjective criteria to determine if a person is intoxicated. This makes searches and arrests at drunk driving checkpoints more discretionary than those arising from border checkpoints where people are investigated or arrested if they lack a proper driver's license or immigration papers.

In their dissent, Justices Brennan and Marshall argued that the majority was misapplying *Brown*. According to the dissent, sobriety checkpoints are ineffective relative to the amount of drunk driving arrests made by patrolling officers based on

¹⁴ *Michigan Department of Police v. Rick Sitz* 496 U.S. 444 (1990)

¹⁵ *Brown v. Texas* 443 U.S. 47 at 51

probable cause. The dissent also pushed for a more stringent standard of review: the government must justify their use of a checkpoint by demonstrating that stops based on reasonable suspicion would be impractical even for a minimally intrusive seizure.¹⁶

Dissenters also criticized the majority's reliance on *Martinez-Fuerte*. Investigating drunk driving and immigration entail very different tactics; officers could monitor cars and act based upon probable cause if a driver exhibits signs of intoxication.

Unauthorized Checkpoint Uses

In *Delaware v. Prouse*, the Supreme Court overturned a random patrol stop to check a driver's license.¹⁷ Citing a lack of discretion as the primary reason for overturning the stop, the Court stated that a checkpoint program may be an acceptable way to check drivers' licenses. The Court has not yet ruled on a driver's license checkpoint program.

The checkpoint in *City of Indianapolis v. Edmond* appeared to be a license checkpoint, furthering the public interest by ensuring unsafe drivers are kept off the roads.¹⁸ In *Prouse* the Court hypothetically approved a brief checkpoint designed to check drivers' licenses. However, while the cars were seized one officer checked licenses, and another officer walked a trained drug dog around the cars. Signs warning drivers of the stop stated that it was a narcotics checkpoint using a narcotics canine. The primary purpose of this checkpoint was admitted to be finding illegal drugs in the car.

Ultimately, the Court decided the primary purpose of searching for drugs was synonymous to the general interest in crime control and was too weak to justify any intrusion. *Edmond* was decided on a 6 to 3 vote; it is one of only two car search cases

¹⁶ Michigan v. Sitz 496 U.S. 444 at 457

¹⁷ Delaware v. Prouse 440 U.S. 648 (1979).

¹⁸ City of Indianapolis v. Edmond. 531 US 32 (2000).

decided liberally by this court. Justice O'Connor wrote the opinion of the court and reiterated the important purposes served by *Martinez-Fuerte* and *Sitz*, the difficulty of guarding a large border, and the importance of removing impaired drivers from the road immediately. Since the primary purpose was searching for drugs, the checkpoint was unreasonable and violated the Fourth Amendment. The court rejected the notion that since all checkpoints result in arrests they are all conducted in the general interest of crime control. Instead the court "must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue."¹⁹ Investigating smuggling contraband is not an acceptable purpose since it can be used to justify any stop. The court "cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."²⁰ The programmatic purpose of a seizure must go beyond the general interest in crime control. The court refused "to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes."²¹

The dissent argues that the checkpoint is valid under the *Brown* test and that the Court should not conduct further special needs analysis. While the majority stated that the checkpoint served no legitimate governmental interest, the dissent states that the secondary purposes of checking driver's licenses and looking for impaired drivers serve legitimate state interests. The author, Chief Justice Rehnquist, criticizes the majority for creating a non-law-enforcement primary purpose test. Since citizens have a lesser

¹⁹ *Indianapolis v. Edmond* 531 U.S. 32 at 42 – 43 (2000)

²⁰ *Indianapolis v. Edmond* 531 U.S. 32 at 41 (2000)

²¹ *Indianapolis v. Edmond* 531 U.S. 32 at 44 (2000)

expectation of privacy in a car,²² officers conducting a checkpoint do not need to meet the "special needs" test required for other suspicionless searches and seizures. Instead, the dissent views the *Brown* test as analogous to the "special needs" doctrine.

These interests allow the checkpoint to meet the other two prongs of the *Brown* balancing test according to the dissent. The minority reasoned that the objective intrusion was minimal since the driver's detention was short and the vehicle was not searched. The subjective intrusion was minimal because officers displayed visible evidence of authorization, followed guidelines, and had limited discretion

2) Drug Testing Programs – Authorized and Unauthorized Used

The Supreme Court accepts certain drug testing programs. In these programs, people are compelled to take a breathalyzer test or provide blood or urine samples that will be analyzed for the presence of substances such as illegal drugs or alcohol. In 1966, the Supreme Court held that a blood test was indeed a search that deserved Fourth Amendment protection.²³ Since drug testing programs test large numbers of people without having a warrant for the search or individualized suspicion connecting any individual one of to a crime, these programs were unconstitutional. After the introduction of the Special Needs test, the Supreme Court heard a pair of cases dealing with drug testing programs: *Treasury Employees v. Von Raab* and *Skinner v. Railway Labor Executives' Association*.²⁴

Of the two companion cases, *Von Raabs* was more controversial: only five members of the Court upheld the search program while seven Justices upheld the

²² *Cardwell v. Lewis*, 417 U.S. 583 at 590 (1974)

²³ *Schmerber v. California*, 384 U.S. 757 (1966). Breathalyzer test is a search, *California v. Trombetta*, 467 U.S. 479 (1984).

program in *Skinner*. The *Von Raab* drug program was implemented in 1986. The program pertained to people applying for a job that would require them to (1) have direct involvement in drug interdiction or enforcement or (2) carry firearms.²⁵ Applicants received a letter notifying them of this requirement; the prospective employee then produced a urine sample at a time of their choosing. The Treasury department took precautions to ensure the sample is not adulterated – a supervisor of the same gender as the applicant remained in the room with the applicant and the applicant was required to remove his coat and other outer garments. The test results were not turned over to law enforcement agencies without the employees' written consent, but applicants must pass this urinalysis to receive the jobs in any of the above mentioned two categories.

The majority opinion, written by Justice Kennedy, applies the Special Needs test. According to the majority, this search serves a strong governmental interest by assisting in drug interdiction and ensuring that customs agents are unimpaired physically or with regards to their integrity and judgment. The drug tests prevent employees who are more easily bribed, blackmailed, assaulted, and engaged by drug dealers in violence in virtue of their drug use from holding positions on the front-line of interdiction.²⁶ The drug testing of applicants for positions carrying firearms was justified by the government interest in ensuring people authorized to use deadly force are not impaired by drugs.

The Treasury employees attacked the governmental interest by arguing that drug use would not be detected because samples could be altered and drug use could be hid by temporary abstinence. The majority noted that adulteration attempts would likely be

²⁴ *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989). *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989).

²⁵ The procedure tests for marijuana, cocaine, opiates, amphetamines, and phencyclidine. *Treasury Employees* 489 U.S. 656 at pg. 662.

caught, and employees would not have enough time to abstain from drug use and provide a clean sample. The Treasury employees also argued that the testing procedures demonstrated that the governmental interest was weak by proving there was no drug use problem among customs employees.²⁷ In dissent, Justice Scalia echoed this concern -- other suspicionless search programs responded to grave, almost epidemic, societal concerns.²⁸ The majority rejected this argument and appealed to border checkpoints and administrative searches as evidence that search programs may be constitutional even if they do not uncover much evidence of infractions. Furthermore, the governmental interest in ensuring that employees are not susceptible to bribes and blackmail justifies measures taken to ensure that all employees are not using illegal drugs.

According to the majority opinion, the degree of governmental intrusion is acceptable because the regulations took steps to ensure privacy during the urine collection process. Also, the customs employees' expectation of privacy is reduced because being responsible for drug interdiction and using firearms demands exploring the employees' trustworthiness, judgment and dexterity. The drug-testing program also pertained to people seeking jobs that would require them to handle classified material.

²⁶ Treasury Employees v. Von Raab at 670

²⁷ On five of 3,600 tests conducted showed evidence of drug use. Brief for Petitioners 37, 44; Transcript of Oral Argument 11

²⁸ "Thus, in upholding the administrative search of a student's purse in a school, we began with the observation (documented by an agency report to Congress) that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *New Jersey v. T. L. O.*, 469 U.S. 325, 339 (1985). When we approved fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that "the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country," and that "[i]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." *United States v. Martinez-Fuerte*, 428 U.S. 543, 551-552 (1976). And the substantive analysis of our opinion today in *Skinner* begins, "[t]he problem of alcohol use on American railroads is as old as the industry itself," and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that "23% of

The Court declined to decide whether these tests were constitutional because the record was insufficient.²⁹

Along with *Von Raab*, the Supreme Court considered whether railway employees who had been in work-related accidents or break safety rules could be subjected to drug tests.³⁰ The Federal Railway Association established the regulations permitting either blood or breathalyzer tests. Justice Kennedy wrote the majority opinion. His opinion begins by citing statistics showing that many railway employees drink while on the job and that these incidents have caused serious accidents. In 1985, the Federal Railway Association added the drug testing policy to help detect the already forbidden substance abuse. Immediately after an accident, all involved employees would be taken to a medical facility to give blood and urine samples that are later tested for drugs and alcohol.

Justice Kennedy applied the Special Needs test. The governmental interest advanced by the search is ensuring safety on the railroads. According to the majority opinion, "(t)he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, likewise presents Special Needs."³¹ Kennedy also noted that railroad workers are part of a highly regulated industry; therefore, they are subject to more regulations.

The district court held these tests unconstitutional because employers lacked particularized suspicion that the employee was impaired at the time of the accident. The district court argued that since requiring such a suspicion would impose "no insuperable

the operating personnel were "problem drinkers." *Skinner*, ante, at 606, and 607, n. 1." *Treasury Employees v. Von Raab* at 681

²⁹ *Treasury Employees v. Von Raab* at 677

³⁰ *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989)

burden on the government" it was not too strong a requirement.³² The dissent echoed these concerns: "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when Special Needs make them seem not."³³ In dissent, Justice Marshall noted that previous Special Needs cases still relied on individualized suspicion.³⁴ The district court also found the regulation unconstitutional because this testing scheme mandated urine tests that revealed the use of drugs at sometime in the past. In contrast, blood analysis revealed only the current presence of these substances. If the testing were based on individualized suspicion, employees who were not impaired at the time of the accident but had traces of drugs still in their system from previous use would be less likely to be tested. The dissent also highlighted this concern, noting that urine tests revealed much more personal information about the employee, including if the individual is pregnant, epileptic, or diabetic, and should be used only to corroborate the presence of substances found in a blood test.

As evidence that the individualized suspicion requirement demanded too much of safety personnel investigating accidents and infractions, the majority argued that low levels of impairment may still be dangerous and are hard to observe. Before these testing regulations were enacted, railroad officials had difficulty discovering substance use. The chaotic accident scene makes it hard for investigators to determine who even played a role in the accident let alone determine if these individuals were impaired at the time. The

³¹ Skinner v. Railway Labor Executives' Association, 489 U.S. 602 at 620 (1989)

³² Railway Labor Executives' Assn. v. Burnley, 839 F.2d 575, 588 (1988).

³³ Skinner v. Railway Labor Executives' Association, 489 U.S. 602 at 637 (1989).

³⁴ "And until today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. No longer: in contrast to the searches in T. L. O., O'Connor, and Griffin, which were supported by individualized evidence suggesting the culpability of the persons whose property was searched, the regulatory regime upheld today requires the post-accident collection and testing of the blood and urine of all covered employees - even if every member of this group gives every indication

dissent argued that a search conducted by collecting fluid samples might be authorized without a warrant because the accident scene introduces exigent circumstances. Testing the samples for evidence of drug use, however, is a further search. Justice Marshall argued that this search must be authorized by a warrant. The majority also found deterring substance use to be a weighty goal of this program. Three Justices rejected this supplemental rationale.

The majority found that the degree of governmental intrusion is minimal. Since employees have a lesser expectation of privacy when they are at work, and since they are subject to many work-related regulations as workers in the railway industry, ordering the employee to go to the medical facility where he will produce a sample is not problematic. The majority also asserts that blood tests are commonplace; people provide blood samples as part of a routine physical, and the breathalyzer tests permitted by the regulation are even less intrusive. These tests are not significant Fourth Amendment intrusions. Justice Kennedy had more difficulty addressing the urine sample collection. Again he found that since steps were taken to ensure the privacy of the employee, the invasiveness of urine sample collection was outweighed by the important governmental concern. The dissent notes that drawing blood is an invasion of privacy and cited precedent noting that past cases held that drawing blood demanded individualized suspicion.³⁵

Kennedy argued, as he did in *Treasury Employees v. Von Raab*, that the traditional role played by warrants was filled in other ways in this process.³⁶ The wisdom

of sobriety and attentiveness." *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 at 640 (1989).

³⁵ *Schmerber v. California* 384 U.S., at 769 -770.

³⁶ *Treasury Employees v. Von Raab* 489 U.S. 656, 667

of a neutral magistrate is unnecessary because there are no subjective factors to weigh: all employees involved in serious accidents must undergo testing. Notice of the scope of the search and authorization of law is given by notice of the testing program. The majority also asserts that taking the time to obtain a warrant would compromise the search since substances are eliminated from the body at a constant rate.

Treasury Employees v. Von Raab and *Skinner v. Railway Labor Executives Association* established the ground rules for mandatory drug testing programs. Both of the opinions focused on the compelling governmental interest in safety and the relatively low intrusion. Members of the very same court questioned these cases for operating without sufficient reason to believe the searches would achieve the proposed results, approving searches without individualized suspicion that the subjects had committed an infraction, and infringing on the privacy of subjects during the sample collection process. Although these cases were controversial at the time, *Von Raab* and *Skinner* are now the basis for evaluating drug testing programs.

In *Von Raab* and *Skinner*, the Supreme Court stated that the government had a 'compelling interest' in the search programs it upheld. The district courts followed suit and approved only search programs in which the government had a compelling interest. The Court changed this standard in the 1995 school drug test case *Vernonia v. Acton*.³⁷ Six Supreme Court justices agreed that compulsory drug testing of student athletes was justified by the Special Needs test and did not violate the Fourth Amendment. Justice Scalia began the majority opinion by establishing the important governmental interest by recounting the difficulties faced by Vernonia School Districts due to the recent increase in drug use among students that led them to enact the drug testing program in 1989. The

school informed student athletes that they would be tested, obtained written consent from the students and their parents, and tested the students at the beginning of the sports season and randomly throughout the season. Students produced urine samples in a bathroom while a monitor ensured there was no tampering. Samples were identified by numbers and tested by an independent facilities.³⁸

The majority used a three part analysis to determine the degree of governmental interest in the drug testing program. Justice Scalia looked at (1) the nature of the governmental concern, (2) the immediacy of the concern, and (3) the efficacy of the search program for meeting the governmental concern. The majority found that the nature of the governmental concern was threefold: (1) to deter drug use among developing students, (2) to prevent the educational process from being disrupted, and (3) to avoid physical harm among student athletes.³⁹ Deterring drug use was especially important since students in middle school and high school are still developing physically and mentally. The educational process was often disrupted as testified to by teachers and administrators from Vernonia schools. Finally, since student athletes are involved in contact sports, they are of special concern. If students are taking certain strength enhancing substances, it increases the chance they will harm other students. Students who

³⁷ Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)

³⁸ Samples were tested for amphetamines, cocaine, and marijuana.

³⁹ "Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response, making them a very dangerous drug when used during exercise of any type. Marijuana causes [i]rregular blood pressure responses during changes in body position, [r]eduction in the oxygen-carrying capacity of the blood, and [i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.*, at 94. Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure, and [p]ossible coronary artery spasms and myocardial infarction." Internal citations omitted.

are on substances that impair their functioning are more likely to be harmed in these contact sports.

The majority determined that the governmental concern was immediate since teachers reported the prevailing drug use among students and its adverse effects on the school environment. The majority held that the search program sufficiently furthered the governmental concern because it tested students without subjecting the entire student body to random drug tests or forcing teachers to try to detect drug use in their own classrooms. Justice Scalia again noted that the drug use can be hard to detect and teachers are not trained or well suited to examine their students for the limited symptoms.

Justice O'Connor's dissenting opinion noted that schools already investigate infractions and punish students based on the observations of teachers. Since teachers do this, they would be able to undertake the similar process of detecting symptoms of drug use that would amount to individualized suspicion and require the student in question to submit to a drug test and Vernonia's policies already permitted suspicion-based drug testing. The dissent also objected that the program required middle school students to submit to drug testing even though there was no evidence that drug abuse was prevalent or problematic at the middle school. James Acton, the child who refused to give his written consent to the drug test program and brought suit, was in seventh grade. Justice O'Connor further questioned the relationship between testing student athletes and detecting or preventing disruptive drug use by students at Vernonia's high schools. There was little evidence that drug use was causing sports related injury and much evidence that it was disrupting classrooms. This focus calls into question the efficacy of the testing.

The dissent objected to the search program because it tested all student athletes without individualized suspicion that any one of them was using drugs. Requiring individualized suspicion would still act as a deterrent because the surest way to avoid suspicion action is to avoid the underlying action: drug use at school or school functions. Justice O'Connor appealed to the Framers' conception of the Fourth Amendment. According to O'Connor and the authorities she cites, the Fourth Amendment was crafted to avoid the general searches and blanket searches that were prevalent during the colonial period and to allow only searches based on individualized suspicion.

The dissent argued that individualized suspicion is workable in a school environment so it should be the preferred standard for searching students. Indeed, all other school search cases have dealt with suspicion-based searches and relaxed those standards. The examples of suspicionless searches provided by the majority, vaccinations and physical examinations, are justifiably suspicionless because the conditions searched for in those procedures rarely manifest outward signs and the medical searches are not accusatory. Drug use exhibits outward signs and failing to submit to the drug test resulted in suspension from school athletics.

The majority argued that the *in loco parentis* function of schools is coupled with the other, governmental concerns that they display in various ways. These other concerns lessen their expectation of privacy and subject them to a variety of regulations. Children undergo vaccinations, vision and hearing screenings, and censorship of their work in student papers. As a more practical note, student athletes forfeit even more of their privacy because they dress and shower together and must meet other requirements set out by the athletics association. The majority argues that this quality of sports significantly

diminishes the privacy expectation of students.⁴⁰ The intrusion is also minimal because students use the facilities everyday. The students argued that since the test requires students to disclose any prescription medications they are on to teachers and school administrators, it is more intrusive. The majority recognizes that this is true, but denies that it is significant enough to invalidate the drug-testing program.

Unauthorized Drug Testing Programs

The Supreme Court does not approve all drug-testing programs. *Chandler v. Miller* and *Ferguson v. City of Charleston* presented drug-testing programs that were ultimately deemed unconstitutional. *Chandler v. Miller* dealt with a drug program where all candidates for public office must be tested to be placed on the ballot. The state of Georgia contended that drug use interferes with a candidate's ability to hold office: it impairs her ability to do public functions, and undermines public confidence and trust in elected officials.

Eight of the Supreme Court justices agreed that there was no Special Need for testing candidates for public office. The test did not address a fear or belief that public officials were using illegal drugs or that such use would substantially interfere with the performance of their jobs. Instead, candidates could choose the date of their drug test and avoid detection by abstaining from drug use. Furthermore, law enforcement could use traditional means to detect these law breakers.

To demonstrate the difference in governmental interest, the court distinguished *Chandler* from *Von Raab*. The customs employees in *Von Raab* encounter illegal substances and organized crime on a daily basis; this heightens the governmental interest

⁴⁰ "In Vernonia's public schools, they must submit to a preseason physical exam they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with

in uncovering drug use by employees. Public officials, unlike customs agents who act without supervision, face daily scrutiny which is likely to uncover evidence of drug use.

The lone dissenter, Chief Justice Rehnquist, argued that candidates for public office clearly forfeit much of their right to privacy. Taking a drug test in the comfort of her own doctor's office is not a significant intrusion into the lessened expectation of privacy. Chief Justice Rehnquist noted that when considering employees who handle classified information in *Von Raab*, the majority noted that the government may have a compelling interest in ensuring this information is not compromised by individuals who use drugs. Chief Justice Rehnquist compared some state offices to these positions in the Treasury Department. No other Justice agreed with his view of the facts or analysis.

In *Ferguson v. City of Charleston*, The Medical University of South Carolina decided to test pregnant women for drug use. The hospital was concerned about the large number of women using cocaine while pregnant, despite the hospital's efforts to educate them on the dangers of such drug use. Beginning in 1989, the hospital collected and tested urine samples for evidence of cocaine use; the women were not informed of this additional test on the samples they provided. If patients refused to comply with treatment and counseling procedures, the hospital turned results over to local police. The appellants in *Ferguson* were arrested for abusing their fetuses by taking drugs.

The Supreme Court held, in a six to three decision, that the Special Needs doctrine did not apply to the Medical University of South Carolina's drug testing program. The drug-testing program did not deal with medical treatments for the mother and child; it merely discussed how to collect and maintain samples for use in court.

any rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval."

Police were involved in the day to day operations of the drug testing programs; the Charleston police used the test results for criminal prosecutions. Since the immediate goal of the drug search program was to uncover evidence of criminal wrongdoing, the governmental interest is indistinguishable from the general interest in crime control. Testing bodily fluids for evidence of drug use is a substantial intrusion. The privacy expectation of patients is that their medical information will not be turned over to other individuals without their consent. Although even state officials are required to report evidence of crimes to law enforcement, they have no duty to seek out such evidence to incriminate their patients. Furthermore, state officials have a duty to inform citizens of their constitutional rights. Because the governmental interest was not compelling and the intrusion was significant, the Special Needs doctrine does not apply to the drug test program.

II) The Turn to Reasonableness

In the past five years, the Supreme Court has issued fifteen search and seizure opinions; fourteen of these opinions upheld the search or seizure at issue. Below I examine three cases considering search and seizure programs and four dealing with searches or seizures of individuals conducted without probable cause or a warrant. In each of these cases, the Supreme Court rejected the analysis of the lower court, and often that of the litigants, in favor of a reasonableness analysis. Each of these cases expanded the ability of the authorities to search and seize citizens.

A) Newly Approved Searches of Individuals

"[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."
Brown v. Texas

1) Investigatory Searches of Probationers

In *United States v. Knights* the Supreme Court unanimously upheld a warrantless search of a person on probation conducted without probable cause.⁴¹ As a condition of his probation, Mr. Knights signed an order agreeing to "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."⁴² The issue was whether the consent to be searched granted in the probation order has to be for a search that is substantially related to the purposes of the probation or can be for the normal needs of law enforcement.

⁴¹ *United States v. Knights* 534 U.S. 112. (2001). The case was argued November 6, 2001 and decided December 10, 2001, this is the first search and seizure case heard after the 2001 terrorist attacks on the World Trade center

⁴² *United States v. Knights* 534 U.S. 112 at 114. (2001).

Law enforcement set up surveillance around Mr. Knights' apartment after suspecting he was involved in several area thefts and incidents of vandalism. Local police conducted the watch, not a probation officer. An officer observed someone leaving Knights' apartment with large canisters he rightly thought to be explosive materials and other items related to the theft. Since the officer knew of Knights' probation, he searched Knights' apartment even though he lacked a warrant and probable cause that Knights had committed a crime and a warrant. The search revealed other explosive materials and more items related to the theft and vandalism.⁴³

The Ninth Circuit Court found this search unconstitutional because it exceeded the conditions of the parole order. According to the lower courts, the search was investigatory; only probationary searches were permitted by the Special Needs test established in 1987.⁴⁴ In *Griffin v. Wisconsin*, the Court asserted that a "State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents Special Needs."⁴⁵ This search was not a probationary search because it was conducted by normal law enforcement officers, not parole officers and because it was conducted to discover evidence of a specific crime. Since this search was not conducted within the confines of the probationary system, the warrant and probable cause requirements obtain. The respondent also noted that few state probation programs allowed random searches like the search conducted on Mr. Knights.⁴⁶

⁴³ Mentioned twice by Justice O'Connor: "with the help of hindsight, it looked like an eminently reasonable search, for goodness sakes."

⁴⁴ *Griffin v. Wisconsin*, 483 U. S. 868 (1987).

⁴⁵ *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

⁴⁶ Although many states authorize the search of premises by probation officers, California and Virginia are the only states who do not limit the search program to searches conducted by probation officers and searches with probable cause.

The petitioner argued that the search was a product of consent: Knights consented to the search by signing his probation order when released from prison.

The Supreme Court rejected both of these arguments. The Court did not decide if Mr. Knights had consented to be searched by signing the probation order, or if the search was justified by Special Needs. The Court offered no reason for ignoring the arguments of the appellants, stating,

We need not decide whether Knights's acceptance of the search condition constituted consent...because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances," with the probation search condition being a salient circumstance.⁴⁷

Without offering any rationale for abandoning the arguments of the parties and the decision of the lower court, the Court proceeded to balance the degree to which the search intruded upon an individual's privacy and the degree to which it is needed for the promotion of legitimate governmental interests. This reasonableness balancing analysis considers the same elements as the Special Needs test, but it is not limited to civil circumstances like the Special Needs test.

The unanimous Court asserted that being in the probation system and signing the probation order severely diminished Knights' expectation of privacy. Knights' probationary status increased the governmental interest in searching his home because of high rates of recidivism and a greater likelihood that probationers will attempt to evade detection of their crimes.⁴⁸ Using this balance, the Supreme Court determined that reasonable suspicion, not probable cause, authorizes a search of a probationer's home.

⁴⁷ United States v. Knights at 119 Quotation from Ohio v. Robinette, 519 U.S. 33, 39 (1996).

⁴⁸ "And probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which

During the oral argument, many Justices expressed approval of investigatory searches of probationers.⁴⁹

As support for this view, the Supreme Court cited other temporary seizures and minimally intrusive searches conducted with reasonable suspicion.⁵⁰ The Court also appealed to the limited ability of officers to temporarily seize drivers near the border.⁵¹ The Court drew an analogy between the decision in *Knights* and the decision that officers may prevent a person from entering his residence (a temporary seizure) while obtaining a search warrant based on probable cause that the search will reveal evidence of criminal activity.⁵²

Knights differs significantly from the precedents cited. This search was a full search of a person's home, traditionally the area receiving the most protections and the location where individuals have the highest expectation of privacy. It differed significantly from temporary detentions, like those authorized in *Terry* that resulted in a short questioning and a pat down search because this was a full scale search that must traditionally be accompanied by a warrant or another exception. The only exceptions to the warrant standard for searches of the home are searches conducted with consent, "plain view" searches, searches pursuant to arrest or after hot pursuit, and probationary searches authorized by the Special Needs doctrine. The search pursuant to a lawful seizure is justified by the same rationale that allows searches incident to arrest: safety of the

the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." *United States v. Knights* at 120.

⁴⁹ Justice Souter: "why is it unreasonable for the State to say we want to encourage this kind of thing (intermediate punishments including probation), but part of it has to be checkups on people to make certain they're not committing crimes?" Justice Ginsburg: "why isn't this an entirely reasonable condition to say we have to check up on you to see that you're not engaging in crime anymore?" Transcript of oral argument

⁵⁰ *Terry v. Ohio*, 392 U. S. 1 (1968).

⁵¹ *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975).

officers (in this case those surveying the home while waiting for the warrant), and a concern that evidence will be destroyed. Furthermore, the Supreme Court rarely lowers the standard of justification for searches conducted without Special Needs driving the search. This search was conducted only to uncover evidence of a crime. Temporary seizures conducted before constitutional searches are even less intrusive: no evidence is seized, the seizure merely ensures nothing is destroyed.

In using the reasonableness analysis, the Court cites two cases: *Ohio v. Robinette* and *Wyoming v. Houghton*.⁵³ Both cases used the balancing analysis, but neither is an appropriate precedent for the search in *Knights*. *Robinette* is a consent case; the reasonableness analysis was used to determine if the environment was coercive. *Houghton* dealt with whether or not an officer had probable cause to search a vehicle where the warrant requirement is impracticable. Both consent and vehicle suspicion cases are traditionally adjudicated with balancing tests. Home searches are prohibited unless conducted with a warrant or consent.⁵⁴ The application of a balancing test to a search of the home was unprecedented.

It is also unusual that the Court opted for a less objective analysis. The Court consistently aims to codify the law so it is easier to apply and follow. In Oral Argument, Chief Justice Rehnquist even expressed concern over using a balancing test. During respondent's argument, Chief Justice Rehnquist stated, "Well, then – then one would never know. A police officer would never know how a court was going to react to a search on reasonable suspicion like this. He would have to evaluate for himself how serious the offense was versus all the other balancing?"

⁵² *Illinois v. McArthur* 531 U. S. 326 (2001).

⁵³ *Ohio v. Robinette* 519 U.S. 33 (1996). *Wyoming v. Houghton* 526 U.S. 295 (1998).

2) Border traffic stops

In *United States v. Arvizu*, a unanimous Supreme Court once again applied the ‘totality of the circumstances’ test in determining that an officer had reasonable suspicion to seize a driver and search him when general suspicion circumstances applied.⁵⁵ The arresting officer followed a minivan that turned away from a border checkpoint. While following the vehicle, the officer observed odd behavior, and stopped the minivan. After running the license number through the police system and discovering it was registered in a high drug area, the officer searched the vehicle.

According to *United States v. Cortez*, law enforcement may stop and search a person based on a reasonable belief that the person is in the process of committing a crime or about to commit a crime.⁵⁶ The Ninth Circuit Court held the search in *Arvizu* was unconstitutional because the officer lacked probable cause based on their analysis. These courts discounted many reasons for the search in their analysis because the reasons could be the result of innocent action, so they could not be the appropriate basis of probable cause.⁵⁷ In oral argument, Justice Scalia conceded that some of these factors might not be suspicious, but later followed up on this discussion saying “Why shouldn’t I give the Border Patrol agent and the district court the benefit of the doubt?⁵⁸” Respondent argued that the officer failed to couch his observations in his experience and it was

⁵⁴ *Illinois v. Rodriguez*, 497 U. S. 177 (1990). *Payton v. New York*, 445 U. S. 573 (1980).

⁵⁵ *United States v. Arvizu* 534 U.S. 266 (2002).

⁵⁶ *Terry v. Ohio* and *United States v. Cortez*, 449 U.S. 411 (1981).

⁵⁷ Including that officer observed in the back on the van, and noticed that the children’s knees were raised as if something was under them, and factors questioned by Justice Scalia below.

⁵⁸ Including respondent’s slowing down to the normal speed limit, his failure to acknowledge the officer after being caught speeding, and children’s extended waving at the officer.

appropriate to discount these factors. According to the Ninth Circuit Court, the remaining factors did not support a constitutional stop.⁵⁹

The Supreme Court held that the totality of the circumstances gave the officer reasonable suspicion for the search. It was improper for the lower court to ignore some of the factors. The Court admitted the situation was not inherently suspicious, but asserted that reasonable suspicion still permitted the search. Justice O'Connor addressed the appropriateness of the 'totality of the circumstances' analysis in oral argument. She asked:

Let me tell you what concerns me frankly. We live in a perhaps more dangerous age today than we did when this event took place. And are we going to back off from totality of the circumstances in an era when it may become very important to us to have that as the overall test? *And I'm concerned that the Ninth Circuit opinion seemed to be a little more rigid than our precedents require or that common sense would dictate today.*⁶⁰

Here it is clear that the concerns arising from the terrorist attacks of September 11th, 2001 are close to the minds of at least some members of the Court. Notably, this case does not deal with terrorism or violent crimes; but rather with drug smuggling. Justice O'Connor is not merely concerned about safety; she is concerned about potentially stifling law enforcement. In this case, an officer used his experience to determine that a car was likely transporting contraband and stopped that car. Ultimately, the decision issued by the Court rejected the factor parsing of the Ninth Circuit and instead granted deference to law enforcement agents in the field. After reexamining the facts taken in the totality of the circumstances, the Court utilized a reasonableness analysis to uphold this search.

3) 'Knock and Announce' warrant service

⁵⁹ Factors remaining after the Ninth's Circuit's parsing included the fact that the road was rarely used, the road's frequent use by smugglers, the trip's occurrence near the checkpoint shift change, and the frequent use of minivans by smugglers. *United States v. Arvizu* 534 U.S. 266 (2002).

The Supreme Court also reevaluated ‘knock and announce’ warrant service. In this type of warrant service, the officers, having already obtained a search warrant, knock on the door and use force to enter the home and execute the warrant even if the occupant does not open the door. In the particular service considered by the Supreme Court in *United States v. Banks*, the officers followed their standard procedure.⁶¹ The officers knocked loudly on the door front door while other officers waited at the back door, waited twenty seconds, and then used a battering ram to knock down the door and enter the home. It was at this time that they encountered Mr. Banks leaving the shower having never heard the knock on his door – only the sound of it being shattered.

The Ninth Circuit Court held the search unconstitutional and suppressed the evidence using factors they identified as important to determining the reasonableness of using no knock warrant service.⁶² Petitioners argued that the use of force was constitutional under *United States v. Ramirez* which stated that the governmental interest in executing the warrant overcomes the occupants’ interest in their physical property.⁶³ The Supreme Court unanimously held this search constitutional based on a ‘totality of the circumstances’ analysis. The opinion rejected the case-based analysis of petitioners and the factor-based analysis of respondents.

In approving this use of force, the Supreme Court rejected both arguments. No precedent authorized the use of force to enter after the officers knocked on the door. The

⁶⁰ Arvizu was arrested in January 1998. Emphasis added.

⁶¹ *United States v. Banks* 537 U. S. 1187 (2003).

⁶² Factors in determining whether it is appropriate to use force to enter residence: (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect’s guilt; (g) suspect’s prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.” 282 F. 3d 699 (CA9 2002). at 704.

⁶³ *United States v. Ramirez* 523 U. S., at 70–71 (1998).

arguments all dealt with whether the officers could assume that the occupants had denied them entry—then they can use force to exercise a valid warrant. The Court ignored the factors enumerated by the Ninth Circuit Court to determine if the entry was reasonable in favor of a totality of the circumstance analysis.

The Court asserted that police has reason to believe that exigent circumstances existed such as to make their timely entrance crucial for obtaining the evidence they sought.⁶⁴ The opinion cites previous cases dealing with no-knock warrant service, where police forcefully enter a residence without announcing their presence at all. Police may execute no-knock service with reasonable suspicion that announcing their intent to enter would "be dangerous or futile, or ... inhibit the effective investigation of the crime."⁶⁵ In *Banks*, this reasonable suspicion arose because the evidence sought increased the likelihood that waiting for an occupant to answer the door would compromise the search. The search warrant was for cocaine, an easily disposable substance. The apartment was small (the knock was heard by officers at the back door) so officers had reason to believe occupants heard the knock. The exigent circumstances arose since after the knock, the occupant would be alerted to the police's imminent entry and destroy the evidence.

In *United States v. Banks*, the Supreme Court again rejected the arguments of the parties and the decision of the lower court and applied a totality of the circumstances analysis. Although the Court did not employ the reasonableness inquiry, they did deviate from the law as understood by the appellants and the lower court. Like the reasonableness inquiry, a totality of the circumstances analysis leaves the law vague and more difficult to

⁶⁴ When asked by Justice O'Conner, petitioner said the Court should not analyze this case as an exigent circumstance case. "QUESTION: Well, could you answer my question? Are you relying? We have to reweigh this, I assume, and do you want us to treat this as an exigent circumstance case or not? Yes or no? MR. SALMONS: No, Your Honor" Transcript of oral argument at page 14.

apply. Law enforcement officials have lots of discretion in serving warrants. The Supreme Court again employed a new rationale to uphold the decision of an officer in the field.

4) Drug Dog Searches

The Court considered the use of drug dogs in suspicionless searches in *Illinois v. Caballes*.⁶⁶ Respondent Caballes was stopped for speeding. Upon learning of the stop, a second officer -- a K-9 drug unit -- came to the scene and conducted a drug interdiction sniff search. The lower courts upheld this search, but the Illinois Supreme Court found it unconstitutional. Since the canine sniff was performed without any specific and articulable facts suggesting drug activity, the use of the dog unjustifiably enlarged the scope of a routine traffic stop into a drug investigation.

The Court sought to determine if reasonable, articulable suspicion is necessary to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop. Mr. Wray (amicus curae for petitioner) reminded the Court that “dogs are used all over the country with great effectiveness in law enforcement, and the -- we -- that is a -- a technique that we want to encourage law enforcement to pursue.” Public safety concerns also arose when Justice O’Connor asked, “does it matter if, for instance, *in today's world on Capitol Hill we're concerned about terrorist attacks*. What if the dog is trained to alert to explosives? Now, can the police just decide they're going to sniff any car that's parked on Capitol Hill?”⁶⁷

⁶⁵ Richards v. Wisconsin, 520 U. S. 385, 394 (1997).

⁶⁶ Illinois v. Caballes. 543 US ____ (2005).

⁶⁷ Transcript of oral argument Pg 26 Ln 13-16 dogs are also used to detect produce at the borders and to detect explosive materials. O’Connor: Pg. 35 lns. 15-20. Argued November 10, 2004. Emphasis added.

Petitioner argued that the sniff of a drug dog is not a search. The State also asserted that since citizens do not have a privacy interest in contraband, and dog sniffs only reveal the presence of contraband, the use of drug dogs does not violate citizens' expectation of privacy. The trial court determined that this dog was reliable enough to provide probable cause for a search of Mr. Caballes' trunk. Justice Kennedy repeatedly asserted that dog sniffs are not searches because they are not intrusions.

Respondent argued that the sniff was a limited search and Mr. Caballes had a privacy interest in the contents of his vehicle. Caballes exercised this interest when he did not consent to a search of his vehicle. Respondent relied on *Indianapolis v. Edmond*'s asserting that searches cannot be conducted merely to further the general interest in crime control. During oral argument, Justices tried to square petitioner's assertion that dog sniffs are searches with the plain view exception to the warrant requirement.⁶⁸

In a six to two decision, the Supreme Court overturned the Illinois Supreme Court and found the search reasonable.⁶⁹ The Court agreed with petitioner that no legitimate privacy interest was violated because citizens have no legitimate privacy interest in contraband.

In dissent, Justice Souter introduced evidence showing that drug dogs give many false positives and argued that the enhanced ability of drug dogs to detect contraband is a search like the thermal imaging searches conducted in *Kyllo v. United States*.⁷⁰ In *Kyllo*, the Court determined that thermal imaging tests violate the Fourth Amendment because

⁶⁸ For example *Ker v. California*, 374 U.S. 23 (1963).

⁶⁹ Chief Justice Rehnquist did not participate in the proceedings.

⁷⁰ Similar concerns were voiced in oral argument: "JUSTICE STEVENS: I just learned this morning that some very well trained dogs that are trained to alert for explosives will also alert for certain kinds of rubber in a tire. They didn't realize that. And I think it's entirely possible that dogs would -- there will be false alerts by -- by dogs because it's triggered by something that -- that is not really anticipated." Page 11 lines 16-22. *Kyllo v. United States*, 533 U. S. 27 (2001).

they reveal private information about the home beyond the information that could be discovered through simple observation. This precedent held that non-intrusive methods of gathering information are searches and need justification.

According to Justices Ginsburg and Souter, *Terry v. Ohio* governs traffic stops and limits the scope of the search. Bringing a drug dog to the car extended the scope of the stop by searching the vehicle and changed the nature of the search by making it more adversarial.⁷¹ *Terry* “requires holding that the police do not have reasonable grounds to conduct sniff searches for drugs simply because they have stopped someone”⁷²

Furthermore, the dog’s alert indicates the reasonable chance of finding contraband in the sniffed container. Under this analysis, the State of Illinois needs justification for the drug dog search. In oral argument, Justice Ginsburg noted that other suspicionless uses of drug dogs are justified by Special Needs that do not apply to this search.⁷³ Justice Souter ended his dissent with this note:

I should take care myself to reserve judgment about a possible case significantly unlike this one. *All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion.* Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.⁷⁴

Justice Ginsburg closed with a similar assurance:

A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter... This Court has distinguished between the general interest in crime control and more immediate threats to public safety... As the Court observed in *Edmond*: “[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist

⁷¹ 543 U. S. ____ (2005) GINSBURG, J., dissenting Page 5, “drug dogs are not lap dogs” quoting *United States v. Williams*, 356 F. 3d 1268, 1276 (CA10 2004) (McKay, J., dissenting)

⁷² 543 U. S. ____ (2005) SOUTER, J., dissenting Page 6, Ginsburg expressed similar concerns in Page two of her dissent.

⁷³ Transcript of oral argument *Illinois v. Caballes* Page 6 lines 14-18.

⁷⁴ 543 U. S. ____ (2005) Souter, J., dissenting Footnote 7 emphasis added.

attack” *The immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.*⁷⁵

Here the dissenting justices announce that they have considered national security concerns, but determined they do not control the outcome of this case. In fact, they explicitly announce that national security concerns would introduce new arguments: the very arguments rejected by the majority in this opinion.

In *Illinois v. Caballes*, the Supreme Court allowed drug dog searches to be used even when there is no suspicion that the individual possesses drugs. This allows law enforcement officials to seek evidence of drug possession anytime they have lawfully stopped a person as long as the drug dog search does not extend the length of the stop. Although the decision is consistent with precedent that a drug dog sniff is not a search, it is certainly a expansion of existing law by sanctioning these suspicionless searches.

B) Newly Approved Search Programs

“For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual.” Dissent *Vernonia v. Acton*

1) Drug Testing of Students

Pottawatomie Schools implemented a drug testing policy that applied to all students participating in extracurricular activities. This program is broader than that approved in *Vernonia v. Acton* because it tested all extracurricular participants, not merely athletes. Pottawatomie differed from *Vernonia* also in that it tested participants past the competition season and had no relation to safety.

⁷⁵ 543 U. S. ____ (2005) GINSBURG, J., dissenting Pgs 6-9 emphasis added.

The district court permitted the school to implement the program but the Tenth Circuit Court held it unconstitutional. Pottawatomie Schools did not “demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.”⁷⁶ In fact, the school district repeatedly reported to the federal government that drugs posed no serious problem; alcohol use did. This stood in stark contrast to Vernonia Schools that had a serious drug problem and noted athletes to be the leaders of the drug culture. This issue garnered wide debate in oral argument. Several Justices questioned the appropriateness of Pottawatomie’s policy while Justice Scalia repeatedly noted that the tests in *Von Raab* and *Skinner* were based on evidence of a national epidemic problem, not departmental problems.

Another issue debated in oral argument, was the appropriateness of using the Special Needs test. Justice Stevens questioned the use of Special Needs:

“So if we get to that point then the whole notion of Special Need has more or less evaporated. We don’t have the special safety need as in the railroad case, we don’t have the unusual temptation to crime need as in the immigration case and the Special Need is simply the need to deter drug use among all children in all schools across the United States. And if the theory is Special Need it seems to me that the concept of Special Need has gotten lost.”

Justice Souter also pushed amicus curae Deputy Solicitor General Clement further to analogize the program to previous Special Need cases *Treasury Employees v. Von Raab* and *Skinner v. Railway Employees*. Mr. Clement asserted that the relevant Special Need was ensuring a safe school setting and, like the customs employees in *Von Raab*, were on the front line of the drug problem. Petitioner also noted that there is an element of consent in participating in an activity that involves drug testing.

⁷⁶ 242 F. 3d 1264, 1278 (2001).

Respondent argued that there was no connection between the search policy and the problem. Furthermore, drug use is far more prevalent among students who do not participate in extracurricular activities, so testing participants is unreasonable. These arguments attack the second element of the *Brown* analysis. Respondent also noted that Pottawatomie implements many other traditional techniques to detect drug use, so the search program was not necessary to fight drug use.⁷⁷

Five Justices approved the constitutionality of this search. Justice Thomas wrote the majority opinion and used the Special Needs test coupled with a general reasonableness analysis. The Special Needs of the school environment made the warrant requirement unnecessary. Since the school district did not involve law enforcement, the Special Needs test applies. The Court held that the governmental interest was closely tied to the test because drug testing the large portion of the student body that participates in extra-curricular activities will deter drug use. The governmental interest promoted by the drug search was preventing and detecting drug use among students. The students have a limited expectation of privacy because they adhere to the regulations of their respective activities. This even includes the occasional communal undress mentioned in *Vernonia*. The collection procedure was very similar to that conducted in *Vernonia*, so it is likewise a negligible intrusion on privacy.

Justice O'Connor and Justice Souter filed a separate dissent emphasizing that they disagreed with *Vernonia* and disagree with its extension in this case. The four dissenting justices asserted that the lack of safety and health concerns inherent in athletics removed the Special Needs from the program. Extracurricular activities do not diminish

⁷⁷ Tactics included video hall monitors, drug dog searches, training teachers in detection, and mandatory reporting requirements.

participant's expectations of privacy in the same way athletics do. The minority held that the search program was inappropriate because Pottawatomie was not facing a significant drug problem. Citing *Chandler* and *Charleston*, the minority argued that the majority now understated the importance of the safety and well-tailored plan elements of *Vernonia*.⁷⁸ Another factor previously used to determine if a program was appropriate was who the information was available to. In *Pottawatomie*, the information was shared with coaches and advisors who did not carefully guard the privacy of their students: the choir teacher left the list of medications students were taking on her desk where other students could read the list. The majority brushed over this factor.

The majority in *Pottawatomie* extended not only the application of the Special Needs doctrine to new sorts of test, but also the nature of the need. Previous Special Needs cases approved testing designed to combat an identified, specific, and serious problem. The Pottawatomie test responded to a unique situation – the school setting. The Need mustn't be Special – a special situation is enough. In *Pottawatomie v. Earls* the Supreme Court ignored a traditional requirement of the Special Needs test: the governmental concern must be a serious concern.

2) Searching Occupants of a Bus: US v. Drayton (2002)

The Supreme Court also determined that a bus passenger consented to a search of his person in *United States v. Drayton*.⁷⁹ In this case, the Court correctly utilized a 'totality of the circumstances' analysis to determine if Mr. Drayton consented to be searched. In this search, two plain-clothes officers boarded a bus stopped at a station and

⁷⁸ The defining characteristics of the two programs, however, are entirely dissimilar. The Vernonia district sought to test a subpopulation of students distinguished by their reduced expectation of privacy, their special susceptibility to drug-related injury, and their heavy involvement with drug use. GINSBURG, J. Dissenting.

discretely approached each row of seats. One officer stood behind the seats, another stood near the door of the bus. Neither officer blocked the aisle. The first officer explained to the row of passengers that he wanted to search the passengers but never said the passengers were free to deny the request. Drayton and a companion were approached in this manner. After Drayton's companion consented to a search that immediately revealed drugs, Drayton submitted to a search that revealed more drugs. This search differed from precedent because the officer did not say Drayton could refuse to be searched and the search extended beyond a search of luggage to a pat-down search of the person.

The Eleventh Circuit Court found that Drayton did not agree to the search. Among the reasons the consent was coerced was that the officer's show of authority to each person indicated the passenger could not refuse the search. The Circuit Court found this no less coercive than a public display of authority that was a factor previously used to determine if consent was coerced.⁸⁰ The Circuit Court also noted that no one else on Drayton's bus refused the officers' request or left the bus to avoid search. This strengthens the respondent's position that officer's show of authority to the passengers did not alert them that they could refuse the search. Drayton did not know he could decline the search and so did not actually consent to the search: the officer's request was a demand. Although the majority directly contradicted the opinion of the Eleventh Circuit Court, the dissent argued that passengers might not know they were free to deny the search request because the officer did not say that was an acceptable option.

In overruling the Eleventh Circuit, the six-member majority announced that the Drayton search was not coerced. Less than one minute into oral argument, petitioner

⁷⁹ *United States v. Drayton* 536 US 194 (2002).

⁸⁰ *United States v. Guapi*, 144 F.3d 1393 at 1397 (11th Cir.1998).

reminded the Court what was at stake in this case: “These encounters are also important in today’s environment with respect to the protection of passengers in the Nation’s public transportation system.”⁸¹ Public transportation is a frequent target of terrorist attacks, whether it be airplane hijackings in the 1970s and 1980s, bus bombings in Israel, trains in Madrid, or the recent bus bombings in London. Airplanes address this concern by extensively screening passengers; buses have no standing security procedures.

The Court had previously endorsed a factor-based analysis to determine if an encounter with law enforcement was coercive, but in this case they rejected the factors highlighted by the Circuit Court in their ‘totality of the circumstances’ analysis.⁸² Instead, the Court used a balancing analysis and focused on the facts supporting their position: The officer was not threatening because he wore plain-clothes, announced his presence to each row individually, not to the whole bus, and did not announce that he carried a weapon. The majority also noted that passengers were free to terminate the discussion and could leave the bus entirely since neither officer blocked the path.

Again, the Supreme Court rejected a factor-based analysis in favor of a reasonableness analysis. The Court downplayed the factors highlighted by the Circuit Court: the passengers were not explicitly told that they could refuse search, the officer’s show of authority, the expansion of the search request from searching bags to searching persons, and the detention of the bus by the officers (since the bus driver left the bus to allow the search).

3) Investigatory Checkpoints

⁸¹ Oral argument occurred on April 16th, 2002. Transcript of oral argument.

⁸² Florida v. Bostick 501 US 429 at 437 (1991). Factors included if the officer had a weapon pointed or used threatening language towards citizens.

In *Illinois v. Lidster*, a Chicago suburb established a checkpoint to canvass drivers for information about a fatal hit and run accident.⁸³ These seizures are conducted without warrants, without probable cause, and without individualized suspicion that any of the drivers stopped have committed a crime. Attending officers distributed flyers with information about the hit and run to drivers. Officers arrested Mr. Lidster for drunk driving using evidence gathered from his interaction with them at the checkpoint.

The State of Illinois argued that this seizure was constitutional based on a *Brown v. Texas* balancing test. The State of Illinois tried to justify the roadblock because of a lesser expectation of privacy for drivers. This theory faced problems in oral argument as Justices noted that pedestrians can avoid seizure but this checkpoint does not allow drivers the same opportunity to avoid police interaction. Petitioner further tried to distinguish *Lidster* from *Indianapolis v. Edmond*.

Respondent argued that this checkpoint is indistinguishable from the general interest in crime control, and checkpoints merely forwarding the general interest in crime control are prohibited under *Indianapolis v. Edmond*.⁸⁴ Since this crime already occurred and the offender was unlikely to repeat it, it lacked exigency or a serious governmental concern. According to the respondent, the checkpoint could not be justified by a *Brown* analysis or Special Needs. *Brown* would fail because the governmental interest was not significant and the search program lacked notice to drivers of the checkpoint, opportunity for drivers to avoid police interaction, and neutral outlines on how to treat drivers with information, or who to bring to a secondary staging area.

⁸³ *Illinois v. Lidster*, 540 U.S. 419 (2004)

⁸⁴ *Indianapolis v. Edmond* 531 U.S. 32

Ultimately, the Court determined that this investigatory checkpoint was sanctioned by *Brown v. Texas*. Justice Breyer, the author of the majority opinion, distinguished it from other checkpoint cases because the checkpoint in question was not conducted to further the general interest in crime control. The other checkpoints detected crimes that were being committed by the drivers and were justified due to the Special Needs of the government. The checkpoint in *Lidster* sought information and assistance from drivers about a different crime. This checkpoint paralleled police actions concerned with public safety or crowd control. After evaluating the checkpoint with the standard outlined in *Brown v. Texas* and applied to checkpoints in *Michigan v. Sitz*, the Court determined that the checkpoint was reasonable and hence constitutional. According to the analysis, the relevant public concern was grave because the police investigated a known crime. The checkpoint advanced this grave public concern to a significant degree. Most importantly, the stops interfered only minimally with liberty of the sort that the Fourth Amendment sought to protect.

In approving the checkpoint, the majority relied heavily on the fact that the interaction with the police was brief. Justice Breyer asserted that the investigatory checkpoint would not cause the anxiety caused by other interaction with law enforcement because it did not seek evidence of the crime; officers merely asked for assistance in an ongoing investigation. This makes the checkpoint less intrusive. The Court ultimately felt no constitutional limitation on these checkpoints was necessary to guard against their wide usage as a pretense for detecting other crimes; the limited resources of law enforcement would ensure investigatory checkpoints were used only when needed.

Three justices dissented over the results of the Brown test. Justice Stevens, the author of the dissent, questioned if the checkpoint would significantly advance the governmental concern since it was a random sampling of drivers being asked for assistance in solving a crime that occurred a week before the checkpoint. On the other side of the balancing test was a checkpoint established at midnight on a highway. Drivers might have to wait in line or might be alarmed by the unpublicized checkpoint. Since the Brown analysis did not clearly resolve the reasonableness issue, the minority voted to remand.

The majority drew an analogy between the checkpoint and crowd control activity. However, this overlooks important differences in the two tasks of law enforcement: crime prevention and crime solving. In public safety and crowd control cases, facility owners waive their expectation of privacy by asking officers for assistance; this was not the case here. Also, the governmental interest in public safety or crowd control, which may cause significant property damage or even injuries, is significantly greater than the governmental interest in solving a single crime. In *Illinois v. Lidster*, the Court approved a checkpoint under the *Brown v. Texas* test. While this is a proper test to use, it is unusual because most checkpoints are approved under the Special Needs Test. While using the Brown test, the Supreme Court also ignored factors traditionally used in the balancing test.⁸⁵

III) Interpretation

“It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all

⁸⁵ This checkpoint was unannounced (a crucial step to mitigate the intrusiveness of the checkpoint) and lacked neutral guidelines for operations at the secondary area where Mr. Lidster was sent after his interview at the primary stage

government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone.” Dissent, Vernonia v. Acton

As we have seen, the Supreme Court’s interpretation of the Fourth Amendment rights has undergone a doctrinal shift of major importance during the last five years. Moreover, the foregoing account suggests that the terrorist attacks of September 11th, 2001 were a significant factor in the Supreme Court’s recent turn to a general reasonableness analysis in Fourth Amendment cases. During these years, the Supreme Court rejected tests and factors normally relied upon in favor of a more lenient standard. No rationale is offered for this turn to the reasonableness analysis. The Supreme Court has tried to support their use of the reasonableness analysis with precedent, but, as discussed below, the precedents cited do not support the extension of the reasonableness test. However, there is important anecdotal and statistical evidence that the terrorist attacks have contributed to this change in Fourth Amendment law.

When using the reasonableness analysis to justify the newly approved searches in the past five years, the Supreme Court has cited both precedents outlining the elements of the reasonableness analysis and precedents differentiating the case from the tests and factors. Although the precedents cited do use a totality of the circumstances, reasonableness test, they differ significantly from many of the cases in which they are currently being used. As explained above, before the terrorist attacks of September 11th, 2001, the totality of the circumstances analysis applied only to two types of searches: those conducted with freely given consent and those conducted in the public space with

reasonable belief that the subject was involved in criminal activity.⁸⁶ Even in these instances, the totality analysis was a tool used to determine whether law enforcement action met enumerated exceptions to the warrant requirement: the reasonableness of a search or the voluntariness of consent would be determined with this analysis.⁸⁷ Since September 11th, 2001, the Supreme Court has bypassed the enumerated exceptions and previously established tests and used the totality of the circumstances analysis to determine whether searches or seizures are permissible under the Fourth Amendment.

In the decades prior to this change, the Court highlighted important elements contributing to the constitutionality of the search when applying the established tests to individual cases, in effect enumerating factors making a search constitutional or unconstitutional. The factors in particular have a great influence on law enforcement action by specifying permissible and impermissible action. The Circuit Courts, especially the Ninth, used the factors to create a checklist assisting the adjudication of specific cases. Since the terrorist attacks of September 11th, 2001, the examination of these factors by the Supreme Court has ended, to be replaced with an intense focus on the totality of the circumstances and review under a more general reasonableness analysis.

In the search and seizure cases since 2001, a striking 100% of the cases upholding searches overturned the decision of the lower court. These lower courts had applied the traditional tests and carefully enumerated the factors previously deemed important by the Supreme Court. But when reviewed by the Court, these decisions were overturned. In theory and to a large degree also in practice, lower courts (both Circuit and state Supreme

⁸⁶ Determining Consent: *Schneckloth v. Bustamonte* (1972), *United States v. Sokolow* (1989). Determining Reasonable Suspicion for a Search: *Traffic Stop: Carroll v. United States* (1925), *Stop and Frisk: Terry v. Ohio* (1968). *Border Stop: United States v. Brignoni-Ponce* (1975), *United States v. Cortez* (1981).

⁸⁷ Since 2001, the Supreme Court has deemed public space searches conducted with reasonable suspicion to

Courts) are bound by the decisions and methodology of the U.S. Supreme Court, yet neither utilized the reasonableness analysis because the precedents established before the terrorist attacks demanded different methods of review. This is compelling support for the substitution starting in 2001 of a new judicial standard substantially affecting adjudication of search and seizure cases. (Interestingly, the lower courts heard most of these cases before the terrorist attacks.)

Beyond that, in many of the cases the Supreme Court introduced the reasonableness analysis in their opinion; neither advocate had argued for review under a reasonableness analysis. Appellants study the relevant law closely before arguing in front of the Supreme Court. Yet none of the appellants examined above tailored their arguments to a general reasonableness inquiry.⁸⁸ Instead, the cases were argued under the established tests and factors that were the basis of review in the lower Courts.

When hearing these cases, members of the Court often express their concern with the implications of their decisions. A frequent opinion leader on the court, Justice O'Connor has perhaps been the most explicit of the justices in voicing national security concerns at oral argument. Many of the other justices have also mentioned national security in their opinions. Justices frequently express wariness of stifling law enforcement actions, double guessing officers' judgment, and permitting broad search programs because budgetary concerns are a natural constraint against their use. Seen in light of the September 11th terrorist attacks, these concerns are about ensuring that law enforcement has all the tools required to fight all crimes.

be constitutional.

⁸⁸ The consent case *US v. Drayton* and the knock and announce case *US v. Banks* argued the totality of the circumstances because consent and individual police action cases are adjudicated under that standard.

Statistical evidence also places the drastic change in adjudication at October 1st, 2001, the start of the 2001 term. Ten of the fifteen cases decided since the terrorist attacks of September 11th have utilized the reasonableness analysis.⁸⁹ In eight of the fifteen cases the Court unanimously supported the search or seizure. The first pure search and seizure case where the Court did not approve the search was heard in fall of 2005. The Court held 13 consecutive searches and seizure constitutional. Search and seizure cases heard in 2001, 2003, and 2004 all validated police action that had been held unconstitutional by the lower court. There have not been three consecutive years where all the searches and seizures were upheld in over 35 years.⁹⁰

The Court has also been approving searches at a substantially higher rate. Before the terrorist attacks the Rehnquist Court approved 66.7% of searches and seizures; since the attacks it has approved 93.33%.⁹¹ From 1994 to 2005, the Court had no membership changes. The Roberts Court has issued only two opinions dealing with search and seizure as of May 18th, 2006; one of these cases was the first case since 2001 to find a search unconstitutional. The very same people who upheld every search since the terrorist attacks of September 11th, 2001 upheld less than two thirds of search and seizure cases from 1994 to 2000. The changing state of search and seizure law is due to a change in doctrine, not a change in personnel.

Perhaps even more surprising, the Supreme Court has offered no explicit rationale for this change in their recent application of tests and factors. Instead, in support of their application of the reasonableness analysis, the Court cites precedents employing the

⁸⁹ See Appendix B. Many of these cases dealt with individual police action, so totality of the circumstances might be the proper standard to utilize.

⁹⁰ Data not available before 1969, see Appendix A

⁹¹ See Appendix C.

totality of the circumstances analysis. The cases cited are proper applications of the totality analysis (consent and police action in public space) but in these cases the Court used them to support searches of homes and detentions and questioning of people in their homes.⁹²

There are many other possible explanations for this change that are not sufficient to explain the adoption of the reasonableness test. Some might think that law enforcement agencies created search programs better suited to pass the tests previously utilized by the Supreme Court.⁹³ But this is not true since the programs failed the previously established tests at the lower court levels. All of these programs exceeded the scope of permissible searches and seizures established in previous decisions of the Court. Although the advocates of these search programs tried to justify their programs in terms of the old tests, each Supreme Court decision ignored the factors traditionally used to apply these tests. The searches of individuals were similarly extensions of the previous doctrines that met with difficulty at the lower court only to be rescued by a reasonableness analysis in the nation's highest court.

Others might suggest that during this period states and municipalities developed better arguments supporting these searches. In reviewing the oral arguments, it is clear that advocates relied on the same arguments: they claim that the factors established by the relevant test permit this search. Only in cases where the relevant standard was the totality of the circumstances analysis did advocates turn to a reasonableness analysis. Other advocates found the reasonableness analysis thrust on them by the Court. In oral argument in *Illinois v. Lidster*, Justice Breyer, who went on to write the majority opinion,

⁹² *Knights v. United States and Muehler v. Mena* 544 US ____ (2005).

⁹³ Programs examined since the terrorist attacks are the drug testing of students in *Pottawatomie v. Earls*,

asked Lidster's attorney "why isn't this the most reasonable thing in the world?" Since the case was adjudicated under Special Needs and *Brown* tests, none of the attorneys argued under this new standard.

Perhaps the most convincing alternate hypothesis is that the use of the reasonableness analysis is a growing trend in Fourth Amendment adjudication and the Court often ignores factors to manipulate the outcome. Many law review articles date this trend back to the 1968 case of *Terry v. Ohio*.⁹⁴ While it is true that the reasonableness analysis was used prior to the terrorist attacks, it was constrained and these restraints have eroded since 2001. The use of balancing was limited to determining whether law enforcement action created a coercive environment that nullified a consent-based search, or whether law enforcement had met the standard of suspicion necessary to uphold a search or seizure in public space. *Terry* created the latter use of the reasonableness analysis, but it was constrained to public spaces and clarified by the factors outlined in *Brown v. Texas* which governs stops of the same nature. *Terry* states that a search must be justified at its inception and limited in scope, while *Maryland v. Pringle*, decided in 2003, states that the scope of a search can include all occupants of a vehicle. The Court also rejected the place restriction on the application of the reasonableness test. For example, reasonableness approved the search of a home in *Knights*; previously, warrantless searches of homes required warrants.

Furthermore, the nature of the balancing test has changed significantly since 2001. During that period, the Supreme Court has held that the governmental interest

bus search programs in *US v. Drayton*, and investigatory checkpoints in *Illinois v. Lidster*.

⁹⁴ For example Clancy, Thomas K.. "The Fourth Amendment's Concept of Reasonableness." *Utah Law Review* (2004): 977- 1044. and Urbonya, Kathryn R.. "Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths." *American Criminal Law Review* 40 (2003): 1397- 1442.

element of the test is met when an officer has reasonable suspicion that a person is engaged in criminal activity, the previous level having been probable cause.⁹⁵ Reasonableness has justified searching homes, searching associates in a vehicle, and lowering the degree of privacy intrusion in the Special Needs analysis. Kathryn Urbonya argues that the 1996 case *Whren v. United States* established a balancing test to be applied only in extraordinary circumstances. Urbonya then finds that extraordinary circumstances are no longer necessary.⁹⁶ While this is certainly a reasonable way to describe the phenomenon, what the Court has effectively done is create a new balancing test – the reasonableness test—that is applied in a growing number of circumstances to justify warrantless searches and seizures.

There is strong reason to conclude, therefore, that the increased focus on security after the terrorist attacks on the World Trade Center has substantially affected Supreme Court adjudication. For search and seizure cases, the Court has increasingly turned since the terrorist attacks of September 11th, 2001, to a reasonableness analysis, ignoring factors elucidated in prior cases and manipulating tests to approve questionable warrantless searches and seizures. Some of these changes have been due to increasing acceptance of law enforcement in daily life caused by the terrorist attacks of September 11th, 2001. Citizens have grudgingly accepted more extensive and frequent searches in airports, government buildings, and schools. These changing expectations have affected the application of the previously used tests because one factor in these tests is a person's expectation of privacy. Since the terrorist attacks, citizens have accepted a lesser expectation of privacy in many areas of life. The weakening of procedural civil rights

⁹⁵ See *US v. Knights, Muehler v. Mena*, MORE

⁹⁶ *Urbonya, Kathryn R.* at 1419.

commitments among Democrats and traditional liberals may have also contributed to a greater acceptance of law enforcement in the public sphere. Increased support for law enforcement departments at all levels in the 1990s contributed to the acceptance of police actions.

The September 11th 2001 terrorist attacks have affected Fourth Amendment adjudication by raising concerns on the Court about stifling law enforcement which previously did not seem to hold the same urgency. The Court has been placing extra emphasis on deferring to the experience of law enforcement agencies in establishing search programs, and to officials in determining the appropriateness of a search. This leaves the law less clear and more difficult to apply. Finally, many of the search and seizure cases heard by the Supreme Court deal directly with national security. Some argue that border stops and searches on mass transportation are important tools to detecting and preventing terrorist activity in the United States. The use of drug dogs to search vehicles parallels the use of dogs trained to detect explosives. These concerns gained greater prominence after the terrorist attacks of September 11th, 2001 and have provided the most important rationale for these sweeping changes in the Court's search and seizure law.

The reasonableness analysis has been adopted, in large part, to permit more intrusive searches by law enforcement conducted under a lower standard of suspicion.⁹⁷ An individual's interest in their phone records, taking an extremely topical example, seems negligible when compared with the governmental interest in detecting terrorism at its borders. Too little is known about the NSA domestic data collection program to

⁹⁷ Of the fifteen cases heard since 2001, in only 3 cases did law enforcement need probable cause for their actions; all three of these were arrests. Seven cases approved suspicionless searches, and three cases

determine if this is an appropriate standard for adjudication, the Telecommunications Act of 1934 and PATRIOT Act may introduce other concerns. However, the line of cases examined above lay the groundwork for the adjudication of many Fourth Amendment cases under the more lenient reasonableness analysis.

Search and seizure law is a major factor shaping the everyday actions of law enforcement officials across the country. Knowing the current state of search and seizure law allows law enforcement officials to act accordingly, permits attorneys to note inappropriate deviations, and guides judges in arbitrating between the two. For this reason, it is imperative that expanding police powers be thoroughly examined to ensure no individual rights are violated. Since the terrorist attacks of September 11th, 2001, the Supreme Court has abandoned the established tests and factor-based analysis that had safeguarded individual rights against governmental intrusion. Instead the Court has adopted a much more lenient reasonableness analysis which permits many searches and seizures previously prohibited by the Fourth Amendment.

permitted searches based on reasonable suspicion, a standard the Supreme Court has difficulty defining.

Appendix A: Search and Seizure Cases Supreme Court Terms 1996-2005

Data from Released Opinions,

2005 data compiled from released opinions as of May 18th, 2006.

Bolding indicates that case was added to the Supreme Court Database Information

Term	Case	Issue	Circumstances	Result	Margin	Rationale
1996	Ohio v. Robinette	Consent and the Scope of Traffic Stops	Man stopped, asked to leave car, given ticket, then consents to search	Search Upheld Lower Court Reversed	Eight - One	Totality of the Circumstances -- Consent Case
1996	Maryland v. Wilson	Suspicion for Ordering Passengers to exit vehicle	Officer stops car for traffic violation, notices odd behavior, orders passenger to exit vehicle	Search Upheld Lower Court Reversed	Seven - Two	Reasonableness balancing test to determine probable cause, officer safety, stopped vehicle
1996	Chandler v. Miller	Drug testing candidates for state office	candidates for state office must pass drug test	Search Denied Lower Court Reversed	Eight - One	No Special Need, targeted class unlikely to use drugs
1996	Richards v. Wisconsin	No knock warrant service and felony drug charges	Force used for to enter hotel room after occupant denies entry	Search Upheld Lower Court Affirmed	Unanimous	No per se rule permitting no knock warrants, need reasonable suspicion, may enter once denied
1997	United States v Ramirez	No knock warrant service and destruction of property	Officers break into home to apprehend dangerous criminal reasonably believed to be in home	Search Upheld Lower Court Reversed	Unanimous	Exigent circumstances justified use of force, reasonable basis for belief in anonymous tip
1997	Pennsylvania Probation and Parole v. Scott	Scope of Federal Exclusionary Rule and Parole Hearings	Parole Officer obtains evidence of parole violation	Search Upheld Lower Court Reversed	Five - Four	Exclusionary Rule applies only to criminal trials, parole non-adversarial
1998	Minnesota v. Carter	Standing for Fourth Amendment challenge	Officer looks through gap in blinds and observes illegal activity	Search Upheld Lower Court Reversed	Six - Three	Person must establish expectation of privacy to have standing
1998	Knowles v. Iowa	Search incident to citation and search incident to arrest	Officer issues citation for traffic stop, searches without further suspicion	Search Denied Lower Court Reversed	Unanimous	Must have safety of officer or maintenance of evidence concerns
1998	Wyoming v. Houghton	Scope of Search in vehicle -- closed containers	Vehicle stopped, officer sees drug paraphenelia, searches passenger's bag	Search Upheld Lower Court Reversed	Six - Three	Common Law then Reasonableness Inquiry
1998	Wilson v. Layne	Qualified Immunity and media ridealongs	Media ride along with officers to execute warrant	Search Upheld Lower Court Affirmed	Unanimous	Ridealongs violate 4th Amendment, unclear at time of event, immunity

Appendix A: Search and Seizure Cases Supreme Court Terms 1996-2005

Term	Case	Issue	Circumstances	S/S Upheld	Margin	Rationale
1998	Hanlon v. Berger	Qualified Immunity and media ridealongs	Media ride along with officers to execute warrant	Search Upheld Lower Court Reversed	per curiam	Ridealongs violate 4th Amendment, unclear at time of event, immunity
1999	Illinois v. Wardlow	Appropriate Elements of Articulable Suspicion	Man runs from police in high crime area, police stop and frisk	Search Upheld Lower Court Reversed	Five - Four	Suspicion through location and flight
1999	Florida v. JL	Standard of Suspicion for Stop and Frisk	Person searched after anonymous tip that he had a weapon	Search Denied Lower Court Affirmed	Unanimous	Reliable evidence needed to meet reasonable suspicion
1999	Bond v. United States	Definition of Search of object in plain view	Officer squeezed bag of bus passenger	Search Denied Lower Court Reversed	Seven - Two	Manipulation of bag is a search, privacy interest in bag
2000	Indianapolis v. Edmond	drug dog checkpoints	Checkpoint where drug dog investigates while officers verified license and registration of driver	Seizure Denied Lower Court Reversed	Six - Three	checkpoints indistinguishable from general interest in crime control
2000	Ferguson v. City of Charleston	Special Needs Drug testing of pregnant women	Women tested for drug use, results given to local law enforcement	Search Denied Lower Court Reversed	Six - Three	Close connection with law enforcement prohibits Special Needs
2000	Illinois v. McArthur	seizure to prevent evidence destruction while obtaining warrant	Occupant prevented from entering his home while officers obtain warrant to search the house	Seizure Upheld Lower Court Reversed	Eight - One	Temporary seizure supported by probable cause, safety of officers and evidence
2000	Atwater v. Lago Vista	Arrests for Minor Criminal Offenses	Person arrested instead of cited for minor traffic violation	Search Upheld Lower Court Affirmed	Five - Four	Arrest authorized by statute, not conducted in extraordinary manner
2000	Arkansas v. Sullivan	Arrests with probable cause as pretexts for searches	Person arrested for traffic violations so officer could search the car	Seizure Upheld Lower Court Reversed	per curiam	Subjective intentions not relevant, arrest must be justified
2000	Kyllo v. United States	Thermal Heat Searches, non-intrusive searches	Heat search reveals evidence of lamps used to grow marijuana	Search Denied Lower Court Reversed	Five - Four	Search revealed intimate details, impinged on privacy

Appendix A: Search and Seizure Cases Supreme Court Terms 1996-2005
 Search and Seizure Cases Supreme Court Terms 2001-2005

Term	Case	Issue	Circumstances	S/S Upheld	Margin	Rationale
2001	United States v. Knights	Investigatory searches of probationers	Law enforcement officer searches a probationer without probable cause or a warrant	Search Upheld Lower Court Reversed	Unanimous	Reasonableness analysis permits search, probation enhances concern and diminishes privacy
2001	United States v. Arvizu	Probable cause for searching a car	After observing odd behavior, minivan stopped and searched	Search Upheld Lower Court Reversed	Unanimous	totality of the circumstances, not 9th Circuit's factor analysis
2001	Pottawatomie v. Earls, Lindsay, et al.	Drug testing in school	Drug testing program for students participating in all extracurricular activities	Search Upheld Lower Court Reversed	Five - Four	Special Circumstances: Drug use, in loco parentis, less intrusive collection
2001	United States v. Drayton	Consent and Searches	Officers board bus stopped at the station and ask passengers to search	Search Upheld Lower Court Reversed	Six - Three	Totality of the Circumstances: ignored factors
2003	United States v. Banks	Knock and Announce Searches	Force used to enter apartment after knocking, waiting 20 seconds.	Search Upheld Lower Court Reversed	Unanimous	totality of the circumstances, abandoned 9th Circuit's factor-based analysis
2003	Maryland v. Pringle	Scope of search based on probable cause	All occupants arrested after cocaine was found in vehicle	Search Upheld Lower Court Reversed	Unanimous	Reasonableness analysis: Criminals work together to hide evidence
2003	Illinois v. Lidster, Robert	Investigatory Checkpoints	Checkpoint at site of a crime 1 week later to gather information	Seizure Upheld Lower Court Reversed	Six - Three	Brown v. Texas Balancing Test, Reject Special Needs analysis
2003	Hiibel v. Humboldt County	Compulsory Self-Identification	A suspect wouldn't identify himself so he was arrested Nevada state law.	Seizure Upheld Lower Court Affirmed	Five - Four	Reasonableness Analysis
2003	United States v. Flores Montano	Seize a car to search the gas tank for drugs	Gas tank removed, disassembled and searched at border	Search Upheld Lower Court Reversed	Unanimous	Concerns of protecting the border justify searches.
2003	Thornton v. United States	Scope of Searches incident to arrest	After arresting a man, the officer searched the car he vacated before speaking to the officer.	Search Upheld Lower Court Affirmed	Seven - Two	Police may search arrestee and space immediately around him -- Totality of the Circumstances
2004	Devenpeck v. Alford	Closely related offense doctrine	Arrested without probable cause for one crime, with probable for another	Search Upheld Lower Court Reversed	Eight - Zero	Officers are not required to inform person of reason for arrest

Appendix A: Search and Seizure Cases Supreme Court Terms 1996-2005
 Search and Seizure Cases Supreme Court Terms 2001-2005

Term	Case	Issue	Circumstances	S/S Upheld	Margin	Rationale
2004	Illinois v. Caballes	Articulate suspicion and drug dog searches	Drug dog searches car while stopped for traffic violation, no suspicion	Search Upheld Lower Court Reversed	Six - Two	Drug dog isn't a search, no violation if stop is reasonable
2004	Muehler v. Mena	temporary seizure of person	While the police search a home, the occupants are held in handcuffs.	Seizure Upheld Lower Court Reversed	Unanimous	Safety interest outweighed the marginal intrusion.
2005	Georgia v. Randolph	Disputed Consent	A wife allowed the search of her home; husband refused	Search Denied Lower Court Affirmed	Six - Three	Refusal nullified consent, police need another justification
2005	United States v. Grubbs	Anticipatory Warrants	Warrant to search a package upon delivery based on probable cause package contained contraband	Search Upheld Lower Court Reversed	Eight - Zero	Anticipatory Warrants are the same as normal warrants

Appendix B: Search and Seizure Cases 1969-2004

Data from Supreme Court Database

Conservative Decisions Upheld the Search or Seizure, Liberal Decisions Overturned the Search or Seizure

			direction of decision		Total
			conservative	liberal	
term of the Court	1969	Count	2	2	4
		% within term of the Court	50.0%	50.0%	100.0%
	1970	Count	3	2	5
		% within term of the Court	60.0%	40.0%	100.0%
	1971	Count	3	3	6
		% within term of the Court	50.0%	50.0%	100.0%
	1972	Count	6	1	7
		% within term of the Court	85.7%	14.3%	100.0%
	1973	Count	11	1	12
		% within term of the Court	91.7%	8.3%	100.0%
	1974	Count	0	3	3
		% within term of the Court	.0%	100.0%	100.0%
	1975	Count	6	0	6
		% within term of the Court	100.0%	.0%	100.0%
	1976	Count	2	2	4
		% within term of the Court	50.0%	50.0%	100.0%
	1977	Count	4	4	8
		% within term of the Court	50.0%	50.0%	100.0%
	1978	Count	6	5	11
		% within term of the Court	54.5%	45.5%	100.0%
	1979	Count	4	3	7
		% within term of the Court	57.1%	42.9%	100.0%
	1980	Count	4	2	6
		% within term of the Court	66.7%	33.3%	100.0%
	1981	Count	2	0	2
		% within term of the Court	100.0%	.0%	100.0%
	1982	Count	7	2	9
		% within term of the Court	77.8%	22.2%	100.0%
	1983	Count	10	2	12
		% within term of the Court	83.3%	16.7%	100.0%
	1984	Count	7	3	10
		% within term of the Court	70.0%	30.0%	100.0%
	1985	Count	3	0	3
		% within term of the Court	100.0%	.0%	100.0%
	1986	Count	7	2	9
		% within term of the Court	77.8%	22.2%	100.0%
	1987	Count	3	0	3
		% within term of the Court	100.0%	.0%	100.0%
	1988	Count	4	1	5
		% within term of the Court	80.0%	20.0%	100.0%
	1989	Count	8	3	11
		% within term of the Court	72.7%	27.3%	100.0%
	1990	Count	5	0	5
		% within term of the Court	100.0%	.0%	100.0%
	1992	Count	2	1	3
		% within term of the Court	66.7%	33.3%	100.0%

Appendix B: Search and Seizure Cases 1969-2004

			direction of decision		Total
			conservative	liberal	
term of the Court	1994	Count	1	1	2
		% within term of the Court	50.0%	50.0%	100.0%
	1995	Count	1	1	2
		% within term of the Court	50.0%	50.0%	100.0%
	1996	Count	3	0	3
		% within term of the Court	100.0%	.0%	100.0%
	1997	Count	2	0	2
		% within term of the Court	100.0%	.0%	100.0%
	1998	Count	5	1	6
		% within term of the Court	83.3%	16.7%	100.0%
	1999	Count	1	2	3
		% within term of the Court	33.3%	66.7%	100.0%
	2000	Count	2	3	5
		% within term of the Court	40.0%	60.0%	100.0%
	2001	Count	3	0	3
		% within term of the Court	100.0%	.0%	100.0%
	2003	Count	6	0	6
		% within term of the Court	100.0%	.0%	100.0%
	2004	Count	3	0	3
		% within term of the Court	100.0%	.0%	100.0%
Total		Count	136	50	186
		% within term of the Court	73.1%	26.9%	100.0%

Appendix C: Rehnquist Court and Search and Seizure Cases

Data from Supreme Court Database

2005 data compiled from released opinions as of May 18th, 2006.

* Case added to the original data

Number of Searches		
Year	Upheld	Denied
1994	1	1
1995	1	1
1996	3	0
1997	2	0
1998	5	1
1999	1	2
2000*	3	3
Total	16	8

24 Total Search and Seizure Cases 1994-2000

B) 16 Searches and Seizures Upheld = .66666

24 Total Search and Seizure Cases

%66.7 Searches and Seizures Upheld

Number of Searches		
Year	Upheld	Denied
2001*	4	0
2003	6	0
2004	3	0
2005	1	1
Total	14	1

14 Total Search and Seizure Cases 2001-2006

C) 14 Searches and Seizures Upheld = .93333

15 Total Search and Seizure Cases

%93.3 Searches and Seizures Upheld