

INDIANAPOLIS V. EDMOND: ROADBLOCK TO FOURTH AMENDMENT EROSION OF INDIVIDUAL SECURITY

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The text of the Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

Generally, under the guidance of the Fourth Amendment, every search or seizure by a government agent must be reasonable. The Supreme Court interpreted this requirement to mean that an arrest or search must be based on probable cause and executed pursuant to a warrant.² Courts have created a number of exceptions to the warrant and probable cause requirements of the Fourth Amendment, such as investigatory detentions, seizures of items in plain view, warrantless arrests, inventory searches, administrative searches, border patrol searches, vehicle searches, and special needs searches.³

However, in balancing these exceptions, the Court has traditionally required some level of individualized suspicion to justify government intrusion on an individual's privacy.⁴ In the absence of individualized suspicion or probable cause of wrongdoing, a search or seizure is ordinarily unreasonable.⁵ One area in which courts have upheld suspicionless searches is that of the roving police checkpoint.⁶ In the context of such roadblocks, the Court has tradition-

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¹ U.S. CONST. amend. IV.

² See *Katz v. United States*, 389 U.S. 347, 357 (1967); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

³ See *Terry v. Ohio*, 392 U.S. 1, 22-24 (1968) (held that a police officer may stop an individual reasonably suspected of criminal activity); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plain view justified the seizure of an object); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (held that inventory searches following the lawful seizures of automobiles were constitutional); *Michigan v. Clifford*, 464 U.S. 287 (1984) (warrantless entry justified to preserve evidence from destruction); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-62 (1976) (warrantless stop of vehicle at fixed checkpoint to question occupants about citizenship is constitutional); *Chambers v. Maroney*, 399 U.S. 42 (1970) (held that warrantless search of vehicle valid because police had probable cause); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (special needs of government can justify searches without warrant or probable cause).

⁴ See, e.g., *Terry*, 392 U.S. at 27; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (holding that a roving police unit could not stop a motorist without individualized suspicion of wrongdoing).

⁵ See *Chandler v. Miller*, 520 U.S. 305 (1997).

⁶ See *Martinez-Fuerte*, 428 U.S. 543; *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

ally used the *Brown v. Texas* balancing test.⁷ *Michigan Dept. of State Police v. Sitz*, a roadblock case in which the *Brown* test was utilized, is a recent example of the Court favoring the government's interests over the interests of the individual.⁸ The Court used the *Brown* test to uphold sobriety checkpoints in *Sitz* and border patrol checkpoints in *Martinez-Fuerte*, where the government's interests in protecting the United States border trumped the privacy rights of the individual.⁹ A recent case, *Indianapolis v. Edmond*, has finally eliminated questions as to the constitutionality of drug interdiction roadblocks.¹⁰

Prior to *Edmond*, state and federal courts were divided.¹¹ Many courts used the holding in *Sitz* to justify other types of checkpoint stops lacking reasonable, individualized suspicion.¹² In fact, Fourth Amendment jurisprudence in recent years has significantly reduced the public's Fourth Amendment rights in a number of search and seizure areas.¹³ In the area of drug interdiction roadblocks, however, the Court finally attempted to leave behind the old, all-inclusive reasonableness test for a different, more appropriate test. Under the new test, a preliminary inquiry into the program's purpose must be made before the court will apply an all-out balancing based on the *Brown* three-part test.¹⁴ The aforementioned test is nearly analogous to the standard special needs analysis, in which it is appropriate to decide first whether there is a "special need beyond law enforcement" before engaging in the three-part balancing test.¹⁵ The Court in *Edmond* recognized a need for guidance and standardization of the law pertaining not only to roadblock cases but Fourth Amendment cases in general.

⁷ See *Brown v. Texas*, 443 U.S. 47 (1979) (the *Brown* test weighs the state interests, the degree to which the program furthers that interest, and the intrusion on the individual privacy interests).

⁸ See *Sitz*, 496 U.S. at 450.

⁹ See *Martinez-Fuerte*, 428 U.S. 543.

¹⁰ *Indianapolis v. Edmond*, 531 U.S. 32 (2000) (held that because the checkpoint program's primary purpose was standard law enforcement and criminal activity detection, the checkpoints violated the Fourth Amendment).

¹¹ Compare *State v. Damask*, 936 S.W.2d 565, 567 (Mo. 1996) and *Merrett v. Moore*, 58 F.3d 1547, 1548 (11th Cir. 1995) (both upholding the constitutionality of a drug interdiction roadblock), with *United States v. Morales-Zamora*, 974 F.2d 149, 153 (10th Cir. 1992), and *United States v. Huguenin*, 154 F.3d 547, 549 (6th Cir. 1998) (holding that a drug interdiction roadblock violates the Fourth Amendment).

¹² See, e.g., *Romo v. Champion*, 46 F.3d 1013, 1020 (10th Cir. 1995) (individual suspicion not required to stop car at roadblock on public thoroughfare); *United States v. O'Mara*, 963 F.2d 1288, 1291 (9th Cir. 1992) (individual suspicion not required because police utilized highway roadblock to stop all cars leaving national park); *United States v. McFayden*, 865 F.2d 1306, 1310 (D.C. Cir. 1989) (individualized suspicion not required because conducted for principle purpose of traffic enforcement).

¹³ See Chris K. Visser, Comment: *Without A Warrant, Probable Cause, Or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?* 35 Hous. L. Rev. 1683 (1999); See generally, Douglas K. Yatter, David E. DePianto, Marisa L. Megur & Karin Scherner-Kim, *Twenty-Ninth Annual Review Of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: Warrantless Searches and Seizures*, 88 GEO. L.J. 912 (2000).

¹⁴ See *Edmond*, 531 U.S. 32.

¹⁵ *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997).

Section I addresses the facts and circumstances of the law leading up to *Indianapolis v. Edmond*. Section II explains the facts of *Edmond* and the holding of the Court. Lastly, Section III explains why the holding by Justice O'Connor was correct and just in time to stop or at least slow a continuing erosion of Fourth Amendment rights.

I. BACKGROUND

Probable cause has long been the standard for upholding searches and seizures without warrants. Although the Court, in some situations, has allowed certain searches or seizures to occur without individualized suspicion, it has consistently found that in those cases the primary purpose of the search and seizure was not one of standard criminal investigation.¹⁶ This line between criminal and non-criminal stops is critical. Since 1967, the Supreme Court has recognized limited exceptions based on this distinction.¹⁷ These exceptions are as follows:

A. Administrative and Regulatory Searches

Camara v. Municipal Court involved administrative inspections to enforce building codes.¹⁸ Courts have upheld such inspections based on administrative warrants not supported by individualized probable cause.¹⁹ The Court specifically found this type of search to be non-criminal in nature: "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety."²⁰

While administrative search warrants are generally required for fire, health, or safety inspections of residential or private commercial property,²¹ regulatory schemes and exigent circumstances may be used to do away with the warrant requirement.²² Often, specific evidence of an existing regulatory violation or a reasonable regulatory scheme will justify issuance of an administrative warrant,²³ however, the scope of the search must be reasonable in light of the

¹⁶ See *infra* text accompanying notes 18-71.

¹⁷ See *infra* text accompanying notes 18-71.

¹⁸ *Camara v. Municipal Court*, 387 U.S. 523 (1967)

¹⁹ See *id.* at 531-32.

²⁰ *Id.* (can uphold administrative searches where the search may turn up evidence of a criminal violation).

²¹ See, e.g., *Michigan v. Clifford*, 464 U.S. 287, 291-95 (1984) (warrant required for an administrative search of dwelling to investigate the cause of fire because owners had an expectation of privacy in partially destroyed home); *Irving v. United States*, 162 F.3d 154 (1st Cir. 1998) (warrant required for an administrative search of a business for occupational safety hazards); *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 577-80 (7th Cir. 1999) (warrant required for an administrative search to check for housing code violations). But see *Michigan v. Tyler*, 436 U.S. 499 (1978) (warrant not required to re-enter partially destroyed commercial property because the search was a continuation of the original authorized search which was stopped due to hazardous conditions).

²² See *Tyler*, 436 U.S. 499; *Clifford*, 464 U.S. 287.

²³ See, e.g., *See v. City of Seattle*, 387 U.S. 541 (1967) (warrant needed prior to health and safety inspections of dwellings and commercial premises); *Camara*, 387 U.S. 523 (same).

circumstances.²⁴ In *Michigan v. Tyler*, firefighters entered a building in an attempt to fight a fire without first obtaining a warrant.²⁵ Ultimately, the exigency associated with fighting fires and the need to stay after the fire is contained sufficed to dispense with the usual warrant requirement.²⁶ Notably, the Court stated that to stay after the fire was contained and investigate if the cause of the fire was arson would require a warrant.²⁷ The Court in *Clifford* reiterated the distinction between searching the premises of a fire for the cause versus having a criminal cause in mind such as arson.²⁸ The relevant difference, according to the Court in *Clifford*, is that one is a regulatory search – where an administrative warrant may not be necessary – and the other is a criminal investigatory search, requiring a warrant.

Administrative searches mark the first clear delineation of a difference between types of searches and the requirement of a warrant. The Court allows these types of warrantless searches on the presumption that the purpose of the search is other than criminal investigation.

B. Inventory Searches

Courts have generally found inventory searches to be constitutionally valid as long as they are not motivated by a criminal investigatory purpose.²⁹ Inventory searches are allowed to protect police against claims of misconduct, to give a general blanket of protection to police from potential dangers, and to protect the property while it is in the custody of the police.³⁰

In *South Carolina v. Opperman*, the Court held that an inventory search following the constitutional search and seizure of an automobile was constitutional regardless of whether the search was performed absent individualized suspicion.³¹ The Court commented on the lack of a necessity for probable cause, since the “probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions.”³² The Court found the search reasonable because the search was conducted pursuant to standard police procedures, which related to an inventory search, not a crimi-

²⁴ See, e.g., *Tyler*, 436 U.S. 499; *Clifford*, 464 U.S. 287. But see, e.g., *Trinity Indus. v. Occupational Safety & Health Review Comm’n*, 16 F.3d 1455 (6th Cir. 1994) (an OSHA inspection was not justified merely by an employee complaint that alleged limited violations).

²⁵ See *Tyler*, 436 U.S. at 512.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *Clifford*, 464 U.S. at 294

²⁹ See *infra* text accompanying notes 29-35.

³⁰ See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Lage*, 183 F.3d 374 (5th Cir. 1999) (an inventory search of a vehicle is valid to protect against danger and false claims for lost property); *United States v. Lewis*, 3 F.3d 252, 254 (8th Cir. 1993) (an inventory search of an engine compartment deemed valid because defendant had cocaine in his pocket when arrested); *United States v. Kornegay*, 885 F.2d 713 (10th Cir. 1989) (an inventory search valid because police required to secure vehicle’s contents).

³¹ See *Opperman*, 428 U.S. 364.

³² *Id.* at 370 n.5.

nal search.³³ Ultimately, the search must be conducted in good faith and only if it can be justified by a legitimate inventory purpose.³⁴

The distinction between criminal versus investigatory inventory searches was reinforced in *Colorado v. Bertine*, where police regulations allowed for but did not require the police to search the arrestee's backpack.³⁵ One might think this distinction could give police a license to rummage through one's property in an attempt to find incriminating evidence; however, the Court now requires that all inventory searches be undertaken according to either permissible or required standardized criteria.³⁶

Therefore, the purpose behind the inventory search must be investigatory in nature, not criminal, and must have a component of standardized care and procedure. Without these components, the inventory search becomes nothing more than a judicially rubber-stamped criminal investigation, violating the Fourth Amendment.

C. *Automobile Searches*

Generally, the warrant requirement of the Fourth Amendment does not apply to searches of automobiles so long as the probable cause requirement is satisfied.³⁷ The automobile exception eliminates the need for a warrant based on the impracticability of obtaining one, often due to exigent circumstances surrounding the use of an automobile and the reduced privacy involved in the regulation of automobiles.³⁸

The Court has deemed vehicle searches constitutional in some cases even when exigent circumstances have lapsed, as long as they existed at the time of

³³ See *id.* at 370.

³⁴ See, e.g., *United States v. Marshall*, 986 F.2d 1171 (8th Cir. 1993) (an inventory search deemed invalid since officers indicated the purpose of search was to find evidence of criminal activity); *United States v. Blaze*, 143 F.3d 585 (10th Cir. 1998) (same). *But see, e.g.*, *Colorado v. Bertine*, 479 U.S. 367 (inventory search deemed valid because government did not act in bad faith or for the purpose of investigation). See also *United States v. Castro*, 166 F.3d 728 (5th Cir. 1999) (inventory search by officer deemed valid when standard procedures were followed).

³⁵ See *Bertine*, 479 U.S. at 376 (police discretion should be "exercised according to standard criteria and on the basis of something other than suspicion of criminal activity").

³⁶ See *Florida v. Wells*, 495 U.S. 1, 5 (1990); *United States v. Lumpkin*, 159 F.3d 983, 987 (6th Cir. 1998) (inventory search did not violate Fourth Amendment because it was conducted pursuant to standard operating procedure); *United States v. Patterson*, 150 F.3d 382 (8th Cir. 1998) (same); *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998) (same). *But see, e.g.*, *Marshall*, 986 F.2d at 1175 (inventory search deemed invalid because no standardized procedure existed).

³⁷ See, e.g., *Maryland v. Dyson*, 527 U.S. 465 (1999) (probable cause only requirement for search); *Chambers v. Maroney*, 399 U.S. 42 (1970) (warrantless search of a vehicle valid because probable cause based on description of car involved in a robbery); *Carroll v. United States*, 267 U.S. 132 (1925) (warrantless search of vehicle valid because officers had probable cause to believe there was contraband or other evidence of criminal activity in the vehicle). *But see, e.g.*, *United States v. Best*, 135 F.3d 1223 (8th Cir. 1998) (warrantless search of vehicle invalid because no probable cause existed to substantiate search of a vehicle's door panels for drugs).

³⁸ See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991) (probable cause enough for search since expectation of privacy is lower in vehicle); *New York v. Class*, 475 U.S. 106 (1986) (same).

the initial stop.³⁹ Further, with regards to automobile mobility creating exigent circumstances, courts will not use their hindsight to invalidate a search just because exigent circumstances, in actuality, did not exist at the time of the stop.⁴⁰

In sum, a warrant is needed in vehicle search cases unless obtaining a warrant is impracticable. Since such impracticality usually exists, as long as individual suspicion and probable cause are present, in combination with exigent circumstances, a warrant is not required. However, in *Edmond*, there was no probable cause. The lack of probable cause in *Edmond* takes it out of the “automobile exception,” necessitating a warrant.

D. *Special Needs Searches*

Special needs cases follow in the same vein as the previous search types, in that a clear line has been drawn between criminal investigatory searches and seizures, requiring probable cause, and non-criminal searches and seizures, not requiring probable cause. In a growing number of situations, the Court has allowed the state to avoid the normal warrant and probable cause requirements of the Fourth Amendment when a “special need . . . beyond the normal need for law enforcement” exists that would be jeopardized if the normal individualized suspicion requirement were held applicable.⁴¹ Additionally, if the government interest addresses a vital problem that can be handled effectively through the proposed search, the requirements of probable cause or a warrant may be dismissed.⁴² Finally, the government’s interest is balanced against the individual’s privacy interests on a case-by-case basis, which is heavily fact-specific.⁴³

There exists some debate over the methodology used in the “special needs” arena. While the Court has traditionally begun the balancing test by first deciding whether the search was reasonable and applying the balancing

³⁹ See, e.g., *Michigan v. Thomas*, 458 U.S. 259 (1982) (drugs discovered during an inventory search of the glove compartment justified a more extensive warrantless search at later date); *United States v. Kimberlin*, 805 F.2d 210 (7th Cir. 1986) (same).

⁴⁰ See *Thomas*, 458 U.S. at 261; *United States v. Johns*, 469 U.S. 478, 484 (1985); (warrantless search of automobile valid because probable cause existed even though automobile was impounded); *United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993) (warrantless search of automobile valid because probable cause existed even if defendant was not likely to flee).

⁴¹ *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (The Court noted that “our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the government’s interests to determine whether it is impractical to require a warrant . . .”).

⁴² See *id.*

⁴³ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649-50 (1995) (special needs of the public school system in discouraging drug use by school children justifies suspicionless drug testing of students participating in athletics); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (special needs of state in operating probation system justify warrantless searches of probationers’ homes in accordance with terms of probation). But see, e.g., *Chandler v. Miller*, 520 U.S. 305 (1997) (special needs of state insufficient to allow suspicionless drug testing of candidates for public office; however, the Court found it was required to “undertake a context-specific inquiry” to determine whether special needs search is justified).

test, the *Edmond* Court⁴⁴ ruled that the appropriate approach is to first look to the purpose of the search or program.⁴⁵ If the court found the purpose of the search appropriate, then, and only then, would the court balance the interests of the parties involved.⁴⁶

The Court has found special needs searches permissible when there is drug testing in the employment context based on public safety concerns;⁴⁷ in the public school arena, where the students' privacy interests are diminished in favor of order and discipline;⁴⁸ in situations where individuals are under government control or supervision, eliminating the need for probable cause;⁴⁹ and in the area of public employment where the government's interest in an efficient workplace is great.⁵⁰

In *Skinner v. Railway Labor Executives Ass'n*, the Court allowed suspicionless drug tests when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."⁵¹ To do this, the Court used a test similar to the *Brown* test, which balanced the interests of the government against the privacy interests of the individual in connection with the nature of the overall intrusion.⁵² However, the drug tests could only be upheld if the government interest or "special need" was "beyond the normal need for law enforcement." The term "beyond law enforcement," suggests that the need at issue is not law enforcement at all; rather, an administrative, inventory, or other similar need.⁵³

E. Immigration Checkpoints

While certain government officials are statutorily obligated to conduct border searches and immigration checkpoints, the Fourth Amendment does not require a warrant to protect the United States from illegal immigration and ille-

⁴⁴ See *supra* note 8 and accompanying text.

⁴⁵ See Recent Cases, *Constitutional Law – Fourth Amendment – Seventh Circuit Holds That Drug Interdiction Roadblocks Violate the Fourth Amendment – Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), 113 HARV. L. REV. 828 (2000); See also Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258 (2000).

⁴⁶ See Dodson, *supra* note 45.

⁴⁷ See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (warrantless and suspicionless drug testing of railroad employees permitted so long as it is conducted pursuant to government regulations); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (warrantless and suspicionless drug testing of Customs Service employees permitted when applying for a promotion). But see *Chandler*, 520 U.S. 305 (statute requiring candidates for public office to pass drug test before being eligible to run for election deemed invalid).

⁴⁸ See *Vernonia*, 515 U.S. 646 (public school officials are permitted to exercise "a degree of supervision and control that could not be exercised over free adults"); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (warrantless search of student's purse by school authorities valid).

⁴⁹ See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (warrantless search of probationer's home valid if conducted pursuant to state regulation); *Portillo v. U.S. Dist. Court for Dist. of Ariz.*, 15 F.3d 819 (9th Cir. 1994) (probationers and parolees have a diminished expectation of privacy).

⁵⁰ See *Skinner*, 489 U.S. 602.

⁵¹ See *id.*

⁵² See *id.* at 617-22

⁵³ See generally Dodson *supra* note 45.

gal importation and exportation.⁵⁴ What can be searched without a warrant, probable cause or suspicion are persons, luggage, personal effects, and vehicles.⁵⁵ Immigration checkpoint stops are often routine and follow a certain regulatory scheme.⁵⁶ However, if the stop is not routine in nature, probable cause or individualized suspicion is again necessary.⁵⁷ The court should consider the intrusive nature of the stop and the surrounding circumstances when deciding whether probable cause is needed.⁵⁸

Interestingly, as in *Martinez-Fuerte* where the immigration checkpoint was operated some distance away from the border itself, the so-called "border search" exception can be construed to apply to an area that is the practical or "functional equivalent."⁵⁹ Government officials must look to a variety of criteria to determine what constitutes the "functional equivalent" of the border and when such a search can be conducted.⁶⁰

In *Martinez-Fuerte*, the Court balanced the individual's privacy interests against the government's interests in conducting the search.⁶¹ In the end, the Court allowed the roadblock, even without individualized suspicion, based on the government's interest in protecting its borders.⁶² After *Martinez-Fuerte*, immigration and border checkpoints could be operated for brief primary and secondary questioning without probable cause or individualized suspicion, but any detention beyond that point must be supported by probable cause.⁶³

⁵⁴ See, e.g., 8 U.S.C. § 1357(c) (1999) (immigration officials may conduct warrantless routine searches); 19 U.S.C. § 1496 (1994) (customs officials may inspect the luggage of persons arriving in United States). See also *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985) (executive branch has authority to conduct warrantless routine searches).

⁵⁵ See, e.g., *Montoya De Hernandez*, 473 U.S. 531; *United States v. Charleus*, 871 F.2d 265 (2d Cir. 1989) (probable cause not required for customs officials to conduct routine searches of personal effects); *United States v. Ezeiruaku*, 936 F.2d 136 (3d Cir. 1991) (no probable cause required for search of luggage at border); *United States v. Machuca-Barrera, Jr.*, 261 F.3d 425 (5th Cir. 2001).

⁵⁶ See *United States v. Martinez Fuerte*, 428 U.S. 543 (1976).

⁵⁷ See *Charleus*, 871 F.2d 265 (probable cause required for nonroutine border search); *Saffell v. Crews*, 183 F.3d 655 (7th Cir. 1999) (same).

⁵⁸ See *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998).

⁵⁹ See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (border search exception applies to search at functional equivalent of border); *Rivas*, 157 F.3d at 367 (same).

⁶⁰ See *Yatter, DePianto, Megur & Scherner-Kim*, *supra* note 13

To determine whether a search occurs at the functional equivalent of a border: 1) a reasonable certainty that the person or thing crossed the border, 2) a reasonable certainty that there was no change in the object of the search since it crossed the border, and 3) that the search was conducted as soon as practicable after the border crossing The search may be conducted if 1) the officials have "reasonable certainty" or a "high degree of probability" that a border was crossed; 2) they also have "reasonable certainty" that no change in the object of the search has occurred between the time of the border crossing and the search; and 3) they have "reasonable suspicion" that criminal activity was occurring.

See *id.* at 971.

⁶¹ See *Martinez-Fuerte*, 428 U.S. at 562.

⁶² See *id.*

⁶³ See *id.* at 556-63 (warrantless stop of a vehicle at a checkpoint to question occupants valid and the vehicle may be referred to secondary inspection even without probable cause as long as no pretext); see also *Norwood v. Bain*, 166 F.3d 243, 251 n.6 (4th Cir. 1999) (further questioning requires probable cause).

The Court distinguished regulatory searches from criminal searches, in that criminal prosecution is not the principal or ultimate goal of the regulatory search. Even though those who violate border controls were subject to arrest and prosecution, the primary purpose of the checkpoint was to decrease illegal immigration and increase the deportation of such individuals. In fact, *Martinez-Fuerte* focused on the purpose behind the roadblock and plainly called it "legitimate and in the public interest."⁶⁴

Even before *Martinez-Fuerte*, the Court noted that immigration checkpoints were "undertaken primarily for administrative rather than prosecutorial purposes."⁶⁵ The Court stressed the difference between searches designed to gain evidence of criminal wrongdoing and the United States' authority to conduct a search was based "on its inherent sovereign authority to protect its territorial integrity."⁶⁶ A court, having before it an immigration related search, should balance interests only after the true purpose of the program is ascertained and adjudged not to be investigatory in nature.

F. Traffic Safety Checkpoints and Drunk Driving Roadblocks

The Supreme Court has implied that states could stop vehicles absent individualized suspicion in a programmatic manner, if designed for the non-investigatory purpose of insuring traffic safety based on driver compliance with licensing, registration, and inspection requirements.⁶⁷ However, the plan or program must be neutral when dealing with privacy concerns and individual officer discretion.⁶⁸ The *Brown* balancing test was constructed for just these situations,⁶⁹ because again, generally speaking, some degree of cause is necessary for a search and seizure under the Fourth Amendment to take place.⁷⁰

The court deemed the brief sobriety checkpoint as operated in *Sitz v. Michigan Department of Police* constitutional, based on the State's interest "in

⁶⁴ See *Martinez-Fuerte*, 428 U.S. at 562.

⁶⁵ *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973).

⁶⁶ *Id.*

⁶⁷ See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (All these requirements "are essential elements in a highway safety program.").

⁶⁸ See *id.* Holding that:

[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

Id.

⁶⁹ See *Brown v. Texas*, 443 U.S. 47, 50-51 (1979) ("Consideration of the constitutionality of such seizures involves a weighting of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interests, and the severity and interference with individual liberty.").

⁷⁰ See *Dunaway v. New York*, 442 U.S. 200 (1979) (arrest and confession were found unconstitutional because the defendant had been arrested without probable cause); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (lawful pat down based on reasonable suspicion); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Court reversed a conviction because the defendant was wrongfully stopped).

preventing drunken driving.”⁷¹ Like *Sitz*, the Court has found license and registration stops constitutional, which are primarily instituted for public safety, not for criminal investigation.⁷² It is important to note that even though the *Brown* balancing test was used in this case, the Court implicitly applied a primary purpose inquiry as well.⁷³

In the end, the Court has not instituted a sobriety or traffic safety “checkpoint exception” to the warrant requirement. Instead, the Court has first looked for probable cause and individualized suspicion. Then in their absence, the Court focused on the purpose of the program, and only after that balanced the various interests involved. In fact, the Supreme Court has acknowledged that searches conducted without probable cause have been upheld only “in certain limited circumstances.”⁷⁴

Importantly, the “vehicle” or “automobile” exception only dispenses with the warrant requirement of the Fourth Amendment in cases where probable cause exists.⁷⁵ A driver maintains his or her privacy interests unless he or she encounters a sobriety or traffic safety checkpoint where the purpose is not investigative in nature and where the seizure is “carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of officers.”⁷⁶

In conclusion, before a balancing test can be applied – before the Court can look at the government’s interest, the effectiveness of the program, or the interests of the motorist, be they diminished or fully intact – the Court must ask if it is appropriate to use the balancing test based on the nature or purpose of the investigation.

II. CITY OF INDIANAPOLIS v. EDMOND

While the Supreme Court has intimated that certain roadblocks initiated to check for licenses and registration or general traffic safety could be considered constitutionally valid, provided they adhere to some basic principles (such as non-discretionary action by government officers),⁷⁷ the Court has implicitly stated that these roadblocks cannot exist for the purpose of standard crime control.⁷⁸ In 1998, the City of Indianapolis had a different idea. They began to operate random roadblocks or checkpoints in an effort to halt the influx of illegal drugs.⁷⁹ Approximately thirty officers were stationed at the checkpoints, which were located throughout the city, and operated at six different times.⁸⁰ Approximately 1,161 cars were stopped and asked to render their licenses and registration.⁸¹ The drivers were told the nature of the stop, while a

⁷¹ *Sitz v. Mich. Dep’t of Police*, 496 U.S. 444, 455 (1990).

⁷² *See Prouse*, 440 U.S. at 663.

⁷³ *See id.*

⁷⁴ *See Sitz*, 496 U.S. at 455.

⁷⁵ *See Maryland v. Dyson*, 527 U.S. 465 (1999); *California v. Carney*, 471 U.S. 386 (1985).

⁷⁶ *See Brown v. Texas*, 443 U.S. 47, 51 (1979).

⁷⁷ *See supra* notes 67-73 and accompanying text.

⁷⁸ *See supra* notes 67-73 and accompanying text.

⁷⁹ *See Indianapolis v. Edmond*, 531 U.S. 32 (2000).

⁸⁰ *See id.*

⁸¹ *See id.*

drug-sniffing dog was walked around the automobile.⁸² The officer looked for signs of impairment and conducted a "plain view" inquiry of the contents of the vehicle.⁸³ If the dog detected narcotics in the car, the police would then search the vehicle.⁸⁴ The dog provided the officers with the requisite probable cause needed to search the car.⁸⁵

The checkpoints were operated with little discretion on the part of the police officers.⁸⁶ Officers were to stop a particular number of drivers through a pre-determined sequence.⁸⁷ Also, the locations of the stops were determined based on crime statistics and traffic flow, and ultimately, the stops were to be kept to five minutes or less.⁸⁸

The program resulted in fifty-five drug-related arrests and forty-nine arrests for unrelated offenses.⁸⁹ The hit rate for drug-related arrests was five percent and the total hit rate, including the remainder of the arrests, resulted in a total of nine percent.⁹⁰

After James Edmond and Joell Palmer were stopped at one of these roadblocks, they filed a lawsuit on behalf of themselves and all other motorists similarly stopped. The lawsuit had the support of the Indiana Civil Liberties Union and challenged the searches on Fourth Amendment grounds.⁹¹

The United States District Court ruled that the roadblock program was constitutional and that the City of Indianapolis did not have to discontinue the program.⁹² In a 2-1 vote, a divided Seventh Circuit Appeals Court panel reversed the decision on grounds that the purpose of the roadblock was criminal in nature, violating motorists' Fourth Amendment rights to be free from unreasonable search and seizure.⁹³

Judge Posner wrote, "Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. . . . Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime."⁹⁴ While the majority was "not enthusiastic about the use of the Constitution to squelch experiments in dealing with serious social problems," Posner wrote that, "[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend . . . the Constitution is not a suicide pact. But no such urgency has been shown here."⁹⁵

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See* Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999).

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See id.* at 664.

⁹⁵ *See id.* at 663, 666.

Judge Posner explicitly stated what the Supreme Court had been implicitly stating for some time: the purpose of the program or search must be realized and passed on before any balancing can be done.⁹⁶ He went further to identify four situations in which the purpose of the search was constitutional.⁹⁷ First, a roadblock may be instituted to catch a fleeing criminal, since these stops would necessarily have to be made absent individualized suspicion.⁹⁸ The stops would not include an attempt to infiltrate criminal activity on the part of motorists; rather, its only purpose would be to identify the fleeing criminal.⁹⁹ A second constitutional roadblock would be one designed around an urgent consideration of public safety. The example used by Judge Posner would be a tip to police that a car carrying a substantial amount of dynamite was entering the city with sinister motives.¹⁰⁰ Thirdly, an administrative search, not centered on detection of criminal activity, could be constitutional.¹⁰¹ Lastly, the overall prevention of illegal importation of either people or goods, the purpose of which would not be for criminal prosecution, would be constitutional.¹⁰² The Indianapolis checkpoint, as the majority found, failed to fall into any of these categories.

In Judge Easterbrook's dissent, he focused on the effects of the roadblock rather than the purpose, stating, "[o]ver and over, the Supreme Court says that the reasonableness inquiry under the Fourth Amendment is objective; it depends on what the police do, not on what they want or think."¹⁰³ Judge Easterbrook conceded the law in this area is at best inconsistent, but insisted that the only check on such roadblocks is the political process and the ability to "throw the bums out" if they become too tyrannical.¹⁰⁴

On November 28, 2000, the Supreme Court decided this case in favor of the respondents.¹⁰⁵ Writing for the majority, Justice O'Connor agreed that the Court has never approved a checkpoint program whose primary purpose was detection of standard criminal activity.¹⁰⁶ The majority's decision rests primarily on two points: 1) an interpretation of the primary purpose of the roadblocks as investigatory in nature; and 2) the urgent nature of addressing issues directly related to *traffic safety* and border control such as curbing drunken driving, checking for licenses and registration, and indicting illegal aliens and goods within purview of the border.¹⁰⁷

The petitioners suggested that since, in the cases of sobriety stops and border stops, individuals could be, and were subject to criminal charges and prosecution, that those cases primarily involved curbing criminal wrongdoing

⁹⁶ See *id.*

⁹⁷ See *id.* at 665.

⁹⁸ See *id.* at 666.

⁹⁹ See *id.*; see, e.g., *United States v. Davis*, 143 F. Supp. 2d 1302 (E.D. Ala. 2001).

¹⁰⁰ See *Edmond*, 183 F.3d at 663.

¹⁰¹ See *id.* at 666.

¹⁰² See *id.*

¹⁰³ *Id.* at 667.

¹⁰⁴ See *id.* at 668, 671 ("If this [Indianapolis' roadblock scheme] strikes the wrong balance, the people may throw out of office those who adopted it.").

¹⁰⁵ See *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

¹⁰⁶ See *id.* at 41.

¹⁰⁷ See *id.*

and were indistinguishable from *Edmond's* checkpoint scheme.¹⁰⁸ However, the majority dismissed this argument, stating:

If we were to rest this case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.¹⁰⁹

Next, Justice O'Connor used roadway safety concerns to distinguished the roadblocks both in the present case along with the former border patrol cases, from the sobriety checkpoint and license and registration checkpoints in *Sitz* and *Prouse*.¹¹⁰ She stated that the connection in *Martinez-Fuerte*, "is very different from the close connection to roadway safety that was present in *Sitz* and *Prouse*."¹¹¹ She also distinguished the border patrol case of *Martinez-Fuerte* stating that "[w]hile the difficulty of examining each passing car was an important factor in validating the law enforcement technique employed in *Martinez-Fuerte*, this factor alone cannot justify a regime of suspicionless searches or seizures."¹¹²

The majority did not let the problem of illegal drugs affect its decision nor would it analogize the case to the immediate traffic safety problems existing in *Sitz*, or the difficulties presented in *Martinez-Fuerte*.¹¹³ Additionally, petitioners' argument that including a secondary constitutional purpose to the search, such as checking for license and registration, would thus convert the illegal search to a constitutional one was soundly rejected by the Court on the grounds that "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."¹¹⁴

Chief Justice Rehnquist's dissent suggested that checkpoint programs can be instituted "if they are 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.'"¹¹⁵ He also believed that the majority took a new and unprecedented approach to dealing with roadblock and checkpoint problems, by looking first at the primary purpose of the program before balancing the reasonableness of the program.¹¹⁶

However, the majority's approach is not unprecedented, and instead puts Fourth Amendment jurisprudence back on track, lending some badly needed substance to search and seizure protections.

¹⁰⁸ *See id.* at 42.

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 42-43.

¹¹¹ *Id.* at 43.

¹¹² *Id.*

¹¹³ *See id.* at 42. Stating that:

Petitioners also emphasize the severe and intractable nature of the drug problem as justification for the checkpoint program. There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude. The law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spin-off crime that it spawns.

Id. (citations omitted).

¹¹⁴ *Id.* at 46.

¹¹⁵ *Id.* at 49 (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

¹¹⁶ *See id.* at 52-56.

III. ANALYSIS

It is well established that “[a]n unconstitutional seizure may render an otherwise constitutional search invalid under the Fourth Amendment if the search resulted from the illegal seizure or detention.”¹¹⁷ It is also “well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.”¹¹⁸ If a government official performs a warrantless search or seizure without probable cause and it does not fall within one of the specified exceptions, the court will likely find the search or seizure invalid. While “[t]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment,”¹¹⁹ this principle only applies to individual police conduct based on legitimate probable cause. It does not apply to programs designed and operated by law enforcement for suspicionless criminal investigation.¹²⁰ Obviously, if the suspicionless search characterized as non-investigatory is nothing more than a pretext for criminal investigation, it cannot stand. To conclude whether a search is a pre-text, a court must engage in a purpose-inquiry before any other analysis.

As discussed in Part II, the Court’s own precedent suggests that a “purpose inquiry” must be made. In *Colorado v. Bertine*, an inventory search that disclosed narcotics was upheld because “there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation.”¹²¹ In *South Dakota v. Opperman*, marijuana was found after a routine inventory search was conducted and the search was deemed proper because “there [was] no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.”¹²² In *Michigan v. Clifford*, an administrative search, conducted after a fire, was allowed; however, the Court had to determine, “whether the object of the search [was] to determine the cause of the fire or to gather evidence of criminal activity.”¹²³ Again, the Court suggested the necessity for a purpose in *New York v. Burger*. In *Burger*, a statute authorizing searches of auto junkyards was deemed constitutional since the statute was not a “‘pretext’ to enable law enforcement authorities to gather evidence of penal law violations.”¹²⁴ Even in the context of the “plain view” doctrine, the Court was careful. In *Texas v. Brown*, after a motorist was

¹¹⁷ *United States v. Arreola-Delgado*, 137 F. Supp. 2d 1240, 1245 (D. Kan. 2001).

¹¹⁸ *Edmond*, 531 U.S. at 40.

¹¹⁹ *Bond v. United States*, 529 U.S. 334, 339 n.2 (2000).

¹²⁰ *See Whren v. United States*, 517 U.S. 806, 811-12 (1996) (“[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes.”).

¹²¹ *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

¹²² *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976).

¹²³ *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (“The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined.”).

¹²⁴ *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987).

stopped and the officer asked for the motorist's license, the officer noticed narcotics in the car.¹²⁵ Chief Justice Rehnquist noted there was "no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses."¹²⁶

While none of these cases explicitly instructed lower courts in how to conduct an appropriate analysis, they did recognize the necessity for courts to look first to the purpose of the roadblock and determine if the program itself was a pretext to discover evidence of criminal law violations.

Thus, the Court created a blueprint to help lower courts determine the legality of a search and/or seizure. First, other than the standard exceptions, all other searches and seizures must be supported by probable cause or individualized suspicion. Secondly, and intrinsically connected to the first, the Court must determine the purpose of the search or seizure in light of the type of search and/or seizure in question. In doing this, the overall government program must be examined to decide if probable cause is necessary.

The Supreme Court in *City of Indianapolis v. Edmond* did precisely this. Chief Justice Rehnquist's dissent accused the Court of "lifting" a "non-law-enforcement primary purpose test" from another area of Fourth Amendment jurisprudence, namely searches of homes and businesses, which are afforded more protection.¹²⁷ Of the three dissenters, Justice Scalia did not join in this part of the dissent's opinion.¹²⁸ It seemed that the dissent was particularly rankled by the majority's decision not to apply the *Brown* balancing test, which as the dissent suggested, was used in *Sitz* and *Martinez-Fuerte*.¹²⁹ The dissent's admonishment to follow stare decisis, however, is a bit over-the-top, as jurisprudence in this area is random and arbitrary in nature.¹³⁰ In an attempt to lend force to its argument, the dissent suggested the Court already "rejected an invitation to apply the non-law-enforcement primary purpose test" in *Treasury Employees v. Von Raab*.¹³¹ However, in *Chandler v. Miller*, the majority noted that *Von Raab* should be read narrowly and "in its unique context."¹³² These types of inconsistencies can be found in a variety of areas, especially in the area of "special needs."¹³³

¹²⁵ See *Texas v. Brown*, 460 U.S. 730, 743 (1983).

¹²⁶ *Id.*

¹²⁷ *Indianapolis v. Edmond*, 531 U.S. 32, 53 (2000).

¹²⁸ See *id.* at 48.

¹²⁹ See *id.* at 52-53. ("These stops effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they only minimally intrude upon the privacy of the motorists.").

¹³⁰ See generally Dodson, *supra* note 45; Michael S. Vaughn & Rolando v. del Carmen, "Special Needs" in *Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L.J. 203 (1993).

¹³¹ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (In Rehnquist's dissent, he states that this case cites with approval *Martinez-Fuerte* and further states that it was "in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways.").

¹³² *Chandler v. Miller*, 520 U.S. 305, 321 (1997).

¹³³ See Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991) (suggesting special needs has been utilized in an inconsistent manner).

Prior to the publication of the Supreme Court decision in *Edmond*, a number of articles were written on the circuit court's opinion. One scholar suggested that a purpose inquiry would be difficult to manage and would open the door to further confusion and erosion of Fourth Amendment rights.¹³⁴ Additionally, that scholar argued that an important governmental interest, such as the interest existing in *Chandler*, was to be the basis of the analysis, not the overall purpose of the program.¹³⁵

Another publication suggested the majority's analysis showed a relation to "special needs" analysis, where the "special need" or purpose must be "beyond the normal need for law enforcement."¹³⁶ Of the two theories, the latter is the most useful; however, it is interesting that nowhere in Justice O'Connor's analysis of the present case does she elude to special needs.¹³⁷ Instead Justice O'Connor engages in a step-by-step analysis of case law in the search and seizure arena, alluding to various aspects and highlights, but never lumping all areas such as administrative, inventory, and the like together in one category.¹³⁸ After noting these areas and their relevance in Fourth Amendment jurisprudence, she suggests there is a theme running throughout the precedent case law: primary purpose.¹³⁹

The dissent counters that the primary purpose inquiry is common place for home and business intrusions but not automobiles, because of the reduced privacy interests while driving.¹⁴⁰ The dissent's distinction is irrelevant and one that Justice Thomas astutely questions in his separate dissent, stating his "doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."¹⁴¹

The fact of the matter is that the "non-law-enforcement primary purpose" test is the only test that should be used in special needs and roadblock contexts. The Court has contoured the "reasonableness" test over time, expanded it in the late 1980s with *National Treasury Employees Union* and *Skinner*.¹⁴² Strangely enough, the results of this "reasonableness" test have almost always been in the state's favor.¹⁴³ This phenomenon would seem to suggest that privacy interests

¹³⁴ See Shannon S. Schultz, Note, *Edmond v. Goldsmith: Are Roadblocks Used to Catch Drug Offenders Constitutional?*, 84 MARQ. L. REV. 571, 583-84 (2000) (arguing that while Fourth Amendment rights should not be eroded further, the Circuit Court, "in an unprecedented move," failed to use the *Brown* reasonable test, thus "opening itself up to a more subjective analysis . . . opening the door for abuse").

¹³⁵ See *id.* at 582.

¹³⁶ See Recent Cases, *supra* note 45, at 831-33 (suggesting that the Circuit Court's analysis poses a "threshold inquiry" into the "special need" for the program with the "purpose" of the program).

¹³⁷ See *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

¹³⁸ See *id.*

¹³⁹ See *id.* at 39-40. ("[W]hat principally distinguishes these checkpoints from those we have previously approved is their primary purpose.")

¹⁴⁰ See *id.* at 53.

¹⁴¹ *Id.* at 56.

¹⁴² See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

¹⁴³ See, e.g., *Am. Fed'n of Gov't Employees v. Roberts*, 9 F.3d 1464 (9th Cir. 1993) (upheld drug testing of federal prison guards); *Int'l Bhd. of Teamsters v. Dep't of Transp.*,

in this country, are not particularly important to the Court when weighed against the government's interests. In fact, other than *Chandler v. Miller*, where political candidates were forced to submit to drug testing, the Court has never invalidated a search program under the special needs balancing test prior to *Edmond*. Interestingly and perhaps clairvoyantly, the *Chandler* Court, refrained from using the balancing test until a preliminary showing of a "special need" was made.¹⁴⁴ Nonetheless, the "special needs" test should be scrapped and replaced with a primary purpose test. By employing a "primary purpose" test, the Court can provide some predictability to what formerly existed as "special needs" and roadblock searches.

Since the Court has not defined what a "special need" is, the Court has allowed lower courts to arbitrarily weigh governmental interests against virtually non-existent private interests, essentially condoning continued violations of the Fourth Amendment.¹⁴⁵ Usually, the government interest is the publicly supported and popular "war on drugs."¹⁴⁶ In fact, Justice Marshall's dissent in *Skinner*, argued against the "special needs" balancing test and pointed out that courts have allowed, "basic constitutional rights to fall prey to momentary emergencies."¹⁴⁷ The Court adopted Justice Marshall's view in the case of *Ferguson v. City of Charleston*,¹⁴⁸ where the Court struck down a South Carolina hospital's policy of turning over urine samples showing cocaine use in pregnant women to the authorities. While the lower court attempted to rationalize the Fourth Amendment violations away as nothing more than special needs, the Supreme Court did not.¹⁴⁹ Not only did the majority dismiss the so-called urgency of the drug problem, it also followed *Edmond's* test and other precedent, ultimately deciphering the program's purpose and finding an unconstitutional investigatory purpose.¹⁵⁰

Like with drugs and "special needs," the Court has used public safety as an excuse to disregard Fourth Amendment protections, specifically in the context of roadblock cases.¹⁵¹ Courts have upheld "special needs" searches based on public safety in some circumstances; however, there is nothing particularly "special" about public safety laws.¹⁵² In fact, the "special needs" doctrine developed from public education cases, where the Court considered school discipline a "special need." Public education cases, however, did not deal with the kinds of public safety laws that subsequent cases have, such as criminal laws, traffic laws, and others.¹⁵³ Using public safety as an inroad to destroy Fourth

932 F.2d 1292 (9th Cir. 1991) (upheld drug testing of commercial truck drivers); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (upheld drug testing of airline employees).

¹⁴⁴ See *Chandler v. Miller*, 520 U.S. 305 (1997).

¹⁴⁵ See *Dodson*, *supra* note 45.

¹⁴⁶ See *id.*

¹⁴⁷ See *Skinner*, 489 U.S. at 635.

¹⁴⁸ 532 U.S. 67 (2001).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *Delaware v. Prouse*, 440 U.S. 648 (1979) (roadblock stops would be lawful in terms of highway safety); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint constitutional since it was aimed at reducing traffic hazards created by drunk drivers).

¹⁵² *Dodson*, *supra* note 45, at 272.

¹⁵³ See *id.* at 271-72.

Amendment rights will result in legislatures passing laws allowing warrantless searches and seizures, and will require courts to uphold these laws based on public safety needs.¹⁵⁴ This slippery slope argument is particularly strong in the “special needs” arena because it has, for the most part, come true. “Special needs” has become a complete authorization of judicial tolerance towards government entities violating Fourth Amendment protections.

If public safety concerns always override Fourth Amendment requirements in the Court’s collective view, it is worth questioning, as Justice Thomas did in his dissent,¹⁵⁵ whether *Sitz* was decided correctly given the only difference between *Sitz* and *Edmond* is the distinction between traffic safety and criminal investigation.

Justice Thomas rightly questioned the border cases such as *Martinez-Fuerte*,¹⁵⁶ where the primary purpose behind the search in *Martinez-Fuerte* was a criminal investigation using immigration laws against the transporters of undocumented immigrants and the immigrants themselves.¹⁵⁷ It is true that individuals who violated the border controls were subject to arrest and prosecution, just as those who violated other regulatory schemes were subject to arrest and prosecution. In fact, the Court has said that as long as there is a legitimate non-investigatory purpose, and evidence of a crime is found in the process of the so-called legitimate search, then that evidence can be used against the individuals for criminal prosecution.¹⁵⁸

This result demonstrates the Court’s willingness to manipulate the “reasonableness” test in order to obtain the outcome it wants, and is why “special needs” tests should be abandoned entirely and replaced with a primary purpose test. Some might argue that the primary purpose of the programs in *Sitz*, *Prouse*, and *Martinez-Fuerte*, was not criminal law-enforcement. However, if government officials collect evidence of criminal wrongdoing, and that evidence can be used in a criminal proceeding, then the Fourth Amendment requirements of warrant and/or probable cause should be followed unmercilessly.

Roadblocks are conducted largely for the purpose of investigating criminal activity, and courts have readily followed that premise in their decisions.¹⁵⁹ As previously noted, it is not inconsistent with precedent to look at the purpose of the program before conducting a reasonableness analysis.¹⁶⁰

¹⁵⁴ See *id.* at 274.

¹⁵⁵ See *Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000).

¹⁵⁶ See *id.*

¹⁵⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁵⁸ See *id.*; *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

¹⁵⁹ See, e.g., *Wrigley v. State*, 546 S.E.2d 794 (Ga. Ct. App. 2001) (roadblock held constitutional because its primary purpose was not to interdict illegal drugs); *United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (evidence seized at roadblock unconstitutional because the primary purpose of the program was to interdict illegal drugs); *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992) (seizure of drugs unconstitutional regardless of the fact that the stop checked licenses as well). *But see State v. Damask*, 936 S.W.2d 565 (Mo. 1996) (roadblock designed to interdict drugs upheld); *United States v. Yousif*, 2000 WL 1916534 (E.D. Mo. 2000).

¹⁶⁰ See *Chandler v. Miller*, 520 U.S. 305 (1997).

Moreover, there is no confusion about whether a program can have a valid secondary purpose, overriding its invalid primary purpose as some have worried the circuit court left open.¹⁶¹ The City of Indianapolis unsuccessfully argued that the checkpoints in this case had a valid secondary purpose, checking licenses and registrations. This regulatory purpose, possibly valid under *Prouse*, would then validate the roadblock program and invoke the *Brown* balancing test. The Circuit Court left this question open, suggesting that only one of the purposes need be constitutional;¹⁶² however, both parties in *Edmond* stipulated that the purpose of the primary program was to interdict drugs.¹⁶³ There is further objective evidence referred to in the opinion by Justice O'Connor, dispelling any doubt about the primary purpose of the roadblocks.¹⁶⁴ Use of a drug-sniffing dog would hardly be helpful in identifying unlicensed and unregistered drivers.

Even if the City had a valid secondary purpose, checking licenses and registration – which could pass the *Brown*-balancing test – the majority answered the question as to whether a valid secondary purpose is enough to deem the entire program constitutional. If secondary purposes could justify illegal primary purposes, the Court noted that “law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety checkpoint.”¹⁶⁵ Therefore, the only way to combat such a situation would be to first evaluate the primary purpose of the program. While the majority, “recognize[d] the challenges inherent in a purpose inquiry,” they also suggested that, “courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful.”¹⁶⁶ Therefore, a secondary purpose that is valid after balancing the governmental interests against the private interests, simply will not override the primary and unconstitutional purpose of conducting drug-interdiction roadblocks.

Since Indianapolis' purpose is clearly to catch drug traffickers, a standard criminal investigation, continuing the analysis to the *Brown* balancing test is not appropriate. Thankfully, in *Edmond*, determining the purpose was not particularly difficult. The dissent suggested that looking into the subjective inten-

¹⁶¹ See Schultz, *supra* note 134, at 583-84.

¹⁶² See *Edmond v. Goldsmith*, 183 F.3d 659, 665 (7th Cir. 1999). Stating that:

If the purpose of the roadblock program were to discover such violations, and if a program having such a purpose could be justified under the cases that allow searches and seizures without individualized suspicion of wrongdoing, then the seizure, in the course of such searches, of drugs that were in plain view would be lawful.

Id.

¹⁶³ See *Indianapolis v. Edmond*, 531 U.S. 32, 39-40 (2000).

¹⁶⁴ See *id.*

In their stipulation of facts, the parties repeatedly refer to the checkpoints as “drug checkpoints” and describe them as “being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis.” In addition, the first document attached to the parties' stipulation is entitled “DRUG CHECKPOINT CONTACT OFFICER DIRECTIVES BY ORDER OF THE CHIEF OF POLICE.”

Id. (citations omitted).

¹⁶⁵ See *id.* at 46.

¹⁶⁶ See *id.* at 46-47.

tions of personnel is impracticable and not warranted based on case law.¹⁶⁷ However, looking into the mental state of those establishing the program is certainly no more impracticable than balancing undefined state interests against apparently non-existent individual privacy interests.

At the end of the day, while drugs are of serious concern in today's environment, a checkpoint exception to the Fourth Amendment must not be created, nor should any other exceptions. Prior cases have made the argument that the urgency of the drug problem should produce some leeway in the requirements of the Fourth Amendment,¹⁶⁸ but the Court has been leery to explicitly state such a proposition.¹⁶⁹ The Court should also be mindful that "'the reasons for creating an exception in one category can, relatively easily, be applied to others,' thus, allowing the exception to swallow the rule."¹⁷⁰ While the Court may be ready to create a "traffic safety exception," it should be cognizant of the fact that the drug problem does not directly relate to traffic safety in the same way that sobriety checkpoints and license and registration checkpoints do. If, at the dissent's insistence, the *Brown* balancing test were to be the start of the analysis, the balancing test could continue to be used as a weapon against individual rights, and would most certainly, in the case of drugs, weigh in favor of the government. On the other hand, if the program's primary purpose is the starting point, the Court would acknowledge the illegality of schemes such as Indianapolis' roadblocks, irrespective of the societal problems that substance abuse creates.

IV. CONCLUSION

With the Court's inclination to balance factors in favor of the government in a substantial amount of Fourth Amendment cases, and with the "war on drugs" supplanted firmly in the minds of several of the Justices, the majority in *Edmond* reached a prudent decision. Realizing the inconsistency in prior decisions, the Court has set forth a roadmap which lower courts are able to follow and has taken a step forward in re-establishing the Fourth Amendment.

Fourth Amendment jurisprudence has become nothing more than a hodge-podge of policies, rules, and exceptions, rarely working in a cooperative fashion. Further, readers of the Fourth Amendment who suggest that reasonableness be the standard, fail to realize that with few exceptions, the government's

¹⁶⁷ See *id.* at 50-51.

¹⁶⁸ See generally *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

¹⁶⁹ See *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 474 (1979). Stating that:

Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizure simply because of a generalized urgency of law enforcement.

Id.; *Richards v. Wisconsin*, 520 U.S. 385, 392 (1997) ("It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment.").

¹⁷⁰ See *Florida v. J.L.*, 529 U.S. 266, 273 (2000) (quoting *Richards*, 520 U.S. at 393).

interest outweighs that of the individual especially when the warrantless search and seizure occurs outside the home or inside the car.

In *Indianapolis v. Edmond*, the Court explicitly stated what for years had been the obvious underlying theme of many cases involving search and seizures: that the underlying purpose cannot be one of a criminal investigation. If that purpose were the case, it is unreasonable in this context to seize motorists without individualized suspicion and search their automobiles through the use of plain view tactics and drug-sniffing dogs, to look for drugs and drug paraphernalia. Not only is the conduct unreasonable, for those who read the warrant requirement of the Fourth Amendment as controlling, it is even more unreasonable because no warrant was obtained for any stop. One might argue that it is impracticable for the police to secure warrants for all cars being stopped in what is a random roadblock. And since the automobile exception cannot be extended without probable cause, the only option is to develop a "checkpoint exception" or deem these stops constitutional. The Court chose the latter.