Congressional Research Service

Memorandum January 30, 2006

TO: Senate Select Committee on Intelligence
Attention: Mike Davidson

FROM: American Law Division

SUBJECT: Probable Cause, Reasonable Suspicion, and Reasonableness Standards in the Context of the Fourth Amendment and the Foreign Intelligence Surveillance Act

This is in response to your request for a brief description of the Fourth Amendment's probable cause, reasonable suspicion, and reasonableness standards. In over simplified terms, probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found," *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Under a similar gloss, reasonable suspicion is a standard, more than a hunch but considerably below preponderance of the evidence, which justifies an officer's investigative stop of an individual upon the articulable and particularized belief that criminal activity is afoot, *Ornelas v. United States*, 517 U.S. at 695; *Illinois v. Gates*, 462 U.S. at 235.

And Fourth Amendment reasonableness is that point at which the government's interest advanced by a particular search or seizure outweighs the loss of individual privacy or freedom of movement that attends the government's action, *Illinois v. Lidster*, 540 U.S. 419, 427 (2004)("in judging reasonableness, we look to 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").

Again in summary and to add further complication, the Supreme Court has speculated that in national security cases the "probable cause" may be less demanding or at least different than it is in the context of a traditional criminal investigation, *United States v. United States District Court*, 407 U.S. 297, 322 (1972)("the gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. . . . Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime"). FISA permits recourse to this reduced application of the probable cause standard in spy cases but not in terrorism cases, *In re Sealed Case*, 310 F.3d 717, 739 (F.I.S.Ct.Rev. 2002)("Congress allowed this lesser showing for clandestine intelligence activities – but not, notably, for other activities, including terrorism . . ."). Yet it is focus and not the standard that is different in FISA cases. The standard is the same; the

certainty of the predicate is different: probable cause to believe that evidence of a crime *will be* found versus probable cause to believe that spying *may* occur.

Each of the standards is a means of judging official conduct against the demands of the Fourth Amendment which provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. Amend. IV. The question of which standard applies and whether a particular search passes muster is fact driven.

On a number occasions, the Court has pointed out that probable cause is the description of a degree of probability that cannot be easily defined out of context:

> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)(citations omitted).

An earlier case had made the same point for both the probable cause and reasonable suspicion standards:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. As such, the standards are not really, or even usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not "finely-tuned standards" comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed. The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer amount to reasonable suspicion or to probable cause. *Ornelas v. United States*, 517 U.S. at 695-96 (citations omitted).

While *Ornelas* finds "probable cause where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found," *id.* at 695, *Pringle*, 540 U.S. at 371, 372 n,2, refers to the comparable but more detailed earlier treatment in *Brinegar v. United States*. *Brinegar* begins with Chief Justice Marshall's observation that probable cause "means less than evidence which would justify condemnation or conviction," *Brinegar v. United States*, 338 U.S. 160, 175 (1949), quoting, *Locke v. United States*, 7 Cranch (11 U.S.) 339, 348 (1813). *Brinegar* then adds, "[s]ince, Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within . . . the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed," 338 U.S. at 175-76 (citations omitted).

The Court has supplied illustrations of what constitutes probable cause and what does not. *Pringle* found probable cause to arrest the passenger in a small car on a charge of possessing the five "baggies" of cocaine found in the back seat of the car, 540 U.S. at 372. An officer had stopped the car for speeding at 3 in the morning. *Id.* at 371. Pringle was the front seat passenger and the officer saw a large roll of cash in the glove compartment when it was opened to retrieve the car's registration. *Id.* at 371-72. To these the Court added the inference that a trained, experienced officer might draw: "Here we think it was reasonable for the officer to infer a common enterprise among the three men [in the car]. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him," *id.* at 373.

Ybarra, in contrast, found no probable cause for officers to search a bar patron present when they executed a warrant authorizing the search of the bartender based upon probable cause to believe the bartender would be selling heroin at the time, *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). *Ybarra* listed a series of factors that might have but did not contribute to a finding of probable cause: "[T]he police did not recognize Ybarra and had no reason to believe that he had committed, was committing, or was about to commit any offense under state or federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers. In short, the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale. It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person," *id.*

Some years later, the *Royer* plurality opinion noted a list of arguably suspicious factors that nevertheless did not add up to probable cause: "[A] nervous young man with two American Tourister bags paid cash for an airline ticket to a 'target' city. These facts led to inquiry, which in turn revealed that the ticket had been bought under an assumed name. The proffered explanation did not satisfy the officers," *Florida v. Royer*, 460 U.S. 491, 507 (1983).

The reasonable suspicion standard is of relatively recent origins. Although never expressly mentioned there, it comes from *Terry*, which recognized that under certain exigencies of time and place police officers may conduct a limited seizure and search with less than probable cause, *Terry v. Ohio*, 392 U.S. 1 (1968).[1] Reasonable suspicion has been

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[1] "At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to

described as "something more than an inchoate and unparticularized suspicion or hunch. . . . [as a] level of suspicion . . . considerable less than proof of wrongdoing by a preponderance of the evidence. . . . [as a] . . . level of suspicion . . . obviously less demanding than that for probable cause. . . [but a level of] suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause," *United States v. Sokolow*, 490 U.S. 1, 7 (1989); as "a particularized and objective basis for suspecting legal wrongdoing,"*United States v. Arvizu*, 534 U.S. 266, 273 (2002); and as "a particularized and objective basis for suspecting the person stopped of criminal activity," *Ornelas v. United States*, 517 U.S. at 690, citing, *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

It is a standard that may be invoked for a warrantless search or seizure at less than probable cause when in the totality of the circumstances at hand substantial public interests outweigh the minimal loss of personal freedom of movement and privacy imposed in a manner limited in time and nature. For example, *Brignoni-Ponce* acknowledged the substantial public interest in preventing foreign nationals from entering this country illegally, yet it refused approve even a limited detention by roving patrols near but not at the border when officers' suspicions were aroused solely by the Mexican ancestry of the detainees, *United States v. Brignoni-Ponce*, 422 U.S. 873, 883-84 (1975). *Brignoni-Ponce* explained, however, that

> "[a]ny number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires are frequently used for transporting concealed aliens. The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide," *Id.* at 884-85.

Arvizu found reasonable suspicion in a border patrol case involving such circumstances:

> It was reasonable for [Agent] Stoddard to infer from his observations, his registration check [of the minivan registered to an address in an area of the border town of Douglas, notorious for smuggling], and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the [route] 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas . . . . Corroborating this inference is the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50 mile trip on unpaved and primitive roads [the minivan had taken]. The children's elevated knees [as they rode in the backseat of the van] suggested the existence of concealed cargo in the passenger compartment. Finally, for the reason we have given, Stoddard's assessment of respondent's reactions upon seeing him [slowing down dramatically, stiffening behind the wheel, and pretending to ignore

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conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken," 392 U.S. at 30-31.

> the officer], and the children's mechanical-like waving [as if under instructions to allay suspicions], which continued for a full four to five minutes, were entitled to some weight. *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

Sokolow and *Reid* illustrate the dividing line between facts that reflect reasonable suspicion and those that do not. *Sokolow* declared that

> Paying $2,100 in cash for two airplane tickets is out of the ordinary, and it is even more out of the ordinary to pay that sum from a roll of $20 bills containing nearly twice that amount of cash. We also think the agents had a reasonable ground to believe that respondent was traveling under an alias. . . . While a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July. Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 8-9 (1989).

This, *Sokolow* contrasted with the *Reid* conclusion under similar circumstances that no reasonable suspicion existed:

> In *Reid* [*v. Georgia*, 448 U.S. 438, 441 (1980)], the Court held that a DEA agent stopped the defendant without reasonable suspicion. At the time of the stop, the agent knew that (1) the defendant flew into Atlanta from Fort Lauderdale, a source city for cocaine; (2) he arrived early in the morning, when police activity was believed to be at a low ebb; (3) he did not check his luggage; and (4) the defendant and his companion appeared to be attempting to hide the fact that they were together. 490 U.S. at 9-10 n.5.

The Supreme Court's reasonable suspicion cases have generally involved situations like those in *Terry*, *Brignoni-Ponce*, *Ornelas*, *Arvizu*, *Sokolow*, and *Reid*, essentially stop and frisk or stop and question cases. *Knights* indicates that the classification is coincidental not required. Citing *Terry* and *Brignoni-Ponce*, *Knights* reasoned that

> Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term probable cause, a lesser degree satisfies the Constitution when the balance of governmental and private interest makes such a standard reasonable. . . . When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interest is reasonable. *United States v. Knights*, 534 U.S. 112, 121 (2001).

The utility company with whom Knights had a running dispute had experienced a rash of vandalism, *id*. at 114-15. The incidents occurred in close proximity to Knights' judicial appearances to answer company charges, *id.* at 115. In one instance, brass locks had been pried from a telecommunications vault and the contents burned using gasoline and ignited by a pipe bomb, *id*. Prior to the arson, officers had stopped Knights and an associate and observed pipes and gasoline in the truck in which they were riding, *id*. After the arson, officers approached the parked truck and saw a Molotov cocktail, gas can, and brass locks similar to those pried from the vandalized vault in the truck, *id.* Moreover, Knights was on probation hence might more reasonably be suspected of criminal involvement than an unconvicted individual, *id*. at 120. He had also agreed to warrantless, suspicionless searches as a condition of his probation thus supporting a reasonable inference that he would more readily and more quickly destroy incriminating evidence than might other offenders, *id*. This

created a reasonable suspicion that Knights had engaged in criminal activity and justified the warrantless search of his apartment, *id.* at 121.

As to the third standard, the Supreme Court has found certain "special needs" may render a search reasonable for Fourth Amendment purposes notwithstanding the want of a warrant or probable cause. The special needs standard has been invoked in drug testing cases and a comparable standard applied in highway check point cases. In such instances, "[w]hen special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical. . . the reasonableness of a search [is determined] by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests," *Board of Education v. Earls*, 536 U.S. 822, 829 (2002). *Earls* found the testing of high school participants in extracurricular activities a reasonable means of protecting school children from drug use given the children's reduced privacy interests as students and the negligible intrusion associated with the search procedures, *id.* at 830-38. *Acton* came to the same conclusion after applying the same standard to assess the reasonableness of a drug testing program for student athletes, *Vernonia School District v. Acton*, 515 U.S. 646, 653-65 (1995). Using the same standard – "balanc[ing] the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context" – *Skinner* found reasonable by Fourth Amendment standards the drug testing program for railroad employees given the public interest in railway safety, the reduced privacy interests reflected in the extensive safety regulation under which the railroad industry operates, and the minimally intrusive manner in which the searches were conducted, *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 619-33 (1989). Under the same standard, a drug testing program for Customs Service employees met Fourth Amendment reasonableness standards, given the public interest in the integrity as well as the unimpaired perception and judgment of those armed to enforce our drug laws balanced against the reduced privacy expectations of public employees occupying such positions and the minimally intrusive methods of search, *Treasury Employees v. Von Raab*, 489 U.S. 656, 670-72 (1989).

The availability of the special needs reasonableness standard is not boundless. *Chandler* rejected a drug testing program imposed as a qualification to run for elective state office on the grounds that the need was symbolic not special, *Chandler v. Miller*, 520 U.S. 305, 322 (1997). The state had failed to show a public interest sufficient to outweigh the privacy interests at issue or to justify departure from ordinarily applicable Fourth Amendment warrant and probable cause requirements, *id*. at 318-22. There was no evidence of drug use among the state's elected officials, *id.* at 318-19. Nor was the candidate arranged and controlled testing procedure likely to address the problem if any existed, *id*. at 319-20.

Chandler makes it clear that the reasonableness standard, available "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical" is inappropriate when the government's needs are not "special." *Ferguson* suggests that the reasonableness standard is inappropriate when the need is not beyond the normal need for law enforcement, *Ferguson v. City of Charleston*, 532 U.S. 67, (2001). The standard is inappropriate when the purpose for the challenged search is one not "divorced from the state's general interest in law enforcement. . . [but] ultimately indistinguishable from the general interest in crime control," that is, when "the immediate

objective of the searches was to generate evidence for law enforcement purposes," *id*. at 80-81, 83.[2]

In highway checkpoint cases, *Martinez-Fuerte* and *Sitz* apply a Fourth Amendment reasonable balancing test similar to that used in special needs cases. *Martinez-Fuerte* balanced the substantial public interest served in terms of smuggling and illegal entry by permanent highway checkpoints located proximate to the border against the reduced expectation of privacy associated with automobile use and the "quite limited" and "minimal" intrusion upon private interests, *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-62 (1976). *Sitz* uses a similar standard for highway drunk-driving checkpoints – "balanc[ing] the state's interest in preventing drunken driving, the extent to which this system [of highway checkpoints] can reasonably be said to advance that interest, [against] the degree of intrusion upon individual motorists who are briefly stopped," *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

Faced with a drug interdiction highway checkpoint in which motorists were stopped while drug sniffing dogs circled their vehicles, *Edmond* distinguished *Martinez-Fuerte* as a "border" case and refused to abandon the probable cause or reasonable suspicion standards in favor of a reasonableness test:

> [T]he Indianapolis checkpoints are far removed from the border context that was crucial in *Martinez-Fuerte* . . . . The primary purpose of the Indianapolis narcotics checkpoint is in the end to advance the general interest in crime control. We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crime. *Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000).

Lidster appears to limit the force of *Edmond* and perhaps of *Ferguson*. *Lidster* applied a balancing test to a highway checkpoint maintained for ordinary law enforcement, evidence gathering purposes, albeit probably not in anticipation that the evidence would be used against any of the motorists stopped:

> [A]n *Edmond*-type presumptive rule of unconstitutionality does not apply here. That does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of individual circumstances. . . . [I]n judging reasonableness, we look to 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.
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> We now consider the reasonableness of the checkpoint stop before us in light of the factors just mentioned . . . . We hold that the stop was constitutional. The relevant public concern was grave. Police were investigating a crime that had resulted in a human death. . . .And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort. The stop advanced this grave public concern to a significant degree [by asking motorist if they had any relevant information and distributing a flyer]. . . . The stop took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And the police

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[2] *Ferguson* involved a law enforcement initiated hospital drug testing program for pregnant patients under which those who tested positive were given the option of drug treatment or prosecution, *id*. at 71-73. It may appear from *Lidster,* discussed *infra*, which applies a special needs analysis to a highway checkpoint designed to secure evidence for law enforcement purposes, that *Ferguson* should be to understood to apply only when the evidence is to be used against the person searched.

> used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred. Most importantly, the stops interfered only minimally with the liberty of the sort the Fourth Amendment seeks to protect. *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004)(citations and accompanying parentheticals omitted).

Probable cause is bit different under FISA. Ordinarily, probable cause speaks to the probability of the existence of a certain fact, *e.g.*, probable cause to believe a crime has been, is, or is about to be committed and that the search will result in the discovery of evidence or contraband. FISA authorizes issuance of a surveillance or search order predicated upon the probability of a possibility; the probability to believe that the foreign target of the order *may* engage in spying, or the probability to believe that the American target of the order *may* engage in criminal spying activities, 50 U.S.C. 1805(a)(3)(A), 1824(a)(3)(A), 1801(b)(1)(B), (b)(2)(A).[3] But it is the predicate not the standard that is changed. The probable cause *standard* is the same in FISA as in a criminal context: would a prudent individual believe that a fact is probably true. It is the focus that is different. Would a prudent individual believe that spying may occur.

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[3] FISA permits recourse to this reduced application of the probable cause standard in spy cases but not in terrorism cases, *In re Sealed Case*, 310 F.3d 717, 739 (F.I.S.Ct.Rev. 2002)("Congress allowed this lesser showing for clandestine intelligence activities – but not, notably, for other activities, including terrorism . . .").