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“SACRIFICING THE END TO THE MEANS”:[†] THE CONSTITUTIONALITY OF SUSPICIONLESS SUBWAY SEARCHES

Katherine Lee Martin*

INTRODUCTION

The New York City subway system began transporting passengers in 1904.¹ Today the system operates 24 hours a day, carrying on average 4.9 million daily passengers across 26 subway routes to 468 stations.² Undoubtedly, the subway is an integral component of New York City’s culture and history, and an engine of its enormous economy.

It is also inherently difficult to secure. The subway transports a high volume of passengers in an enclosed space, has numerous access points, and does not require advance ticket purchase or passenger identification.³ In light of these vulnerabilities and because of its cultural and economic importance, it is patent that New York City’s subway is a prime terrorist target. In fact, police have already thwarted several plots to plant explosives in the subway system.⁴

† “‘To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.’” PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR*, at xi (2003) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810)).

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¹ MTA New York City Transit—Subways, <http://www.mta.info/nyc/facts/ffsubway.htm> (last visited Feb. 7, 2007) [hereinafter MTA Info].

² *Id.*; see also NYC & Company, *Getting Around NYC By Subway*, <http://www.nycvisit.com/content/index.cfm?pagePkey=530> (last visited Feb. 7, 2007). Every year, the New York City subway system transports more than 1.4 billion passengers over 352,784,000 miles. MTA Info, *supra* note 1.

³ BRIAN MICHAEL JENKINS, *PROTECTING PUBLIC SURFACE TRANSPORTATION AGAINST TERRORISM AND SERIOUS CRIME: AN EXECUTIVE OVERVIEW 1* (2001). Approximately one-third of terrorist attacks worldwide occur on transportation systems, and public transit is the mode most commonly targeted. CONG. RESEARCH SERV., *TRANSPORTATION ISSUES IN THE 107TH CONGRESS* 5–6 (2002).

⁴ In 1997, police uncovered a plot to bomb the Atlantic Avenue subway station in Brooklyn. Dan Barry, *Police Break up Suspected Bomb Plot in Brooklyn*, N.Y. TIMES, Aug. 1, 1997, at A1. In 2004, police discovered a plot to bomb the Herald Square subway station in midtown Manhattan. Michael R. Bloomberg, *Searches Might Save Lives*, USA TODAY, Aug. 3, 2005, at A10. And in 2005, federal authorities notified city officials of a plot to plant explosives in the subway using strollers, briefcases, and packages. William K. Rashbaum,

Thus far, New York City has protected its transit system from attack. Other cities, however, have not been so fortunate. In March 1995, religious extremists attacked the Tokyo subway system with nerve gas, killing 12 people and injuring 6,000.⁵ In 2004, terrorists detonated bombs aboard commuter trains in Moscow and Madrid, claiming approximately 230 lives and wounding more than 1,500.⁶ On July 7, 2005, bombs exploded on three subway trains and on a double-decker bus in London, killing 52 people and injuring more than 700.⁷ Two weeks later, a second series of four attempted detonations led to a partial evacuation of the London Underground.⁸ In that attack, the bombs' detonators failed to ignite the explosives and no one was injured.⁹ Most recently, in July 2006, terrorists detonated bombs aboard seven commuter trains in Mumbai, killing more than 200 people and wounding at least 800.¹⁰

After terrorists attempted a second attack on London's subway system, New York City Mayor Michael E. Bloomberg authorized the New York City Police Department (NYPD) to begin random searches of backpacks and packages brought into the New York City transit system.¹¹ Shortly after being implemented, the NYPD announced that it would enforce the container inspection program indefinitely.¹²

New York Named in Terror Threat Against Subways, N.Y. TIMES, Oct. 7, 2005, at A1. Although the intelligence community swiftly determined that this last threat was of "doubtful credibility," "[s]ecurity in and around New York City's subways was sharply increased" for several days. *Id.*

⁵ *Mass Transit Security After the London Bombings: Hearings Before the J. Comm. on Public Safety and Homeland Security*, 184th Gen. Court, Reg. Sess. 2 (Mass. 2005) (statement of Daniel B. Prieto, Research Director, Homeland Security Partnership Initiative).

⁶ *See id.*; Jill Dougherty, *Moscow Metro Blast Kills 39*, CNN.COM, Feb. 6, 2004, <http://www.cnn.com/2004/WORLD/europe/02/06/moscow.blast>.

⁷ Kevin Cullen & Charles M. Sennott, *Police Suspect Bombings Suicide Attacks by Britons Would Be First of Kind in W. Europe*, BOSTON GLOBE, July 13, 2005, at A1. Though suicide bombings have long been a popular tactic of Palestinian terrorists in Israel, the London subway attacks marked the migration of this tactic to Western Europe. *Id.* Responsibility for the London attack was claimed separately by the Secret Organization of Al Qaeda in Europe and later the Abu Hafs al-Masri Brigade, who also claimed responsibility for the 2004 attacks in Madrid. Evan Thomas & Stryker McGuire, *Terror at Rush Hour*, NEWSWEEK, July 18, 2005, at 24.

⁸ Alan Cowell, *Bombs Set at 4 London Sites, but Fail to Explode*, N.Y. TIMES, July 22, 2005, at A1.

⁹ *Id.*

¹⁰ Amelia Gentleman, *Suspects Are Arrested in India Commuter Rail Bombings*, N.Y. TIMES, July 22, 2006, at A3. Police suspect an Islamic militant group, Lashkar-e-Taiba, helped plan the attacks. *Id.*

¹¹ Patrick McGeehan, *How High, Mr. Bloomberg?*, N.Y. TIMES, July 31, 2005, at NJ5. The New Jersey Transit and Port Authority of New York and New Jersey instituted similar policies within twenty-four hours of the mayor's announcement. *Id.*

¹² Complaint at 1, *MacWade v. Kelly*, No. 05 Civ. 6921 (RMB/FM), 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005).

At security checkpoints in New York subways, police use a numerical formula to determine the frequency of passengers subject to inspection, such as one in every five to ten passengers carrying a bag.¹³ Selected passengers are asked to open their bags and manipulate the contents for a visual inspection before they go through the turnstiles.¹⁴ Those that do not consent to the inspection are not permitted to enter the transit system, but are allowed to leave without further questioning.¹⁵

Police may not search “wallets, purses or other containers that are too small” to hold explosives.¹⁶ They also may not intentionally look for other contraband, read any written material, or request a passenger’s personal information.¹⁷ Inspections are typically accomplished in a matter of seconds.¹⁸

The public is notified of checkpoints by prominently displayed posters and announcements made at stations and on subway trains.¹⁹ Inspections take place daily, but given “available resources and the scope of the subway system, not all stations have inspections every day.”²⁰ To enhance the program’s deterrent effect, the NYPD does not publicly disclose the number and location of stations where inspections occur each day, or the numerical frequency of inspections.²¹

¹³ Sewell Chan & Kareem Fahim, *New York Starts to Inspect Bags on the Subways*, N.Y. TIMES, July 22, 2005, at A1. The NYPD maintains that this “systemized approach” ensures that passengers are not selected on the basis of race, ethnicity or religion. *Id.* Rather, the numerical formula they employ is “based upon such factors as the volume of passengers at the station, the police personnel available to perform inspections, and the flow of commuter traffic into the station.” *Macwade*, 2005 WL 3338573, at *5.

¹⁴ Chan & Fahim, *supra* note 13. Inspections are conducted in open view at a folding table near the turnstiles to avoid the appearance of singling out a selected passenger. *Macwade*, 2005 WL 3338573, at *7.

¹⁵ Chan & Fahim, *supra* note 13.

¹⁶ *Macwade*, 2005 WL 3338573, at *6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *7. A 20½-inch by 30-inch poster was displayed near the security checkpoint, reading “NYPD/BACKPACKS AND OTHER CONTAINERS SUBJECT TO INSPECTION.” *Id.* Announcements at stations and on subway trains informed passengers “that effective July 22, 2005, their backpacks and other large containers [were] subject to random search by police.” *Id.*

²⁰ *Id.* Although the subway system consists of 468 stations, the Transit Bureau of the Police Department only employs 2,200 officers and 500 supervisors. Chan & Fahim, *supra* note 13.

²¹ *MacWade*, 2005 WL 3338573, at *5. At a pre-trial hearing, the court granted the city’s request for a protective order to shield from discovery documents and information relating to the frequency and location of searches, finding that the efficacy of the program’s deterrent effect could be seriously undermined by disclosure. *MacWade v. Kelly*, 230 F.R.D. 379 (S.D.N.Y. 2005). At the close of trial, plaintiffs renewed their request that information concerning the frequency of searches be admitted into the record. *MacWade*, 2005 WL 3338573, at *3. After reviewing the information *in camera*, the District Court “admitted into the record under seal and for opposing counsel’s ‘eyes only,’ the data compiled by [the city] as to the number and location of subway inspection checkpoints conducted between July 22

On August 4, 2005, the New York Civil Liberties Union (NYCLU) filed a lawsuit against the City of New York and the Commissioner of the NYPD contending that suspicionless searches of subway riders violate the Fourth and Fourteenth Amendments.²² The NYCLU filed the lawsuit on behalf of five subway passengers, including the son of a retired police captain and a naturalized American citizen.²³ The plaintiffs sought both declaratory and injunctive relief.²⁴

In December 2005, after a two-day bench trial, U.S. District Court Judge Richard M. Berman found the container inspection program constitutional and dismissed the NYCLU's complaint with prejudice.²⁵ In August 2006, a three-judge panel of the U.S. Court of Appeals for the Second Circuit agreed that New York City's program satisfies the special needs exception to the Fourth Amendment's usual requirement of individualized suspicion.²⁶

This Note supports the result reached by both the District Court and the Second Circuit. To provide context, Part I briefly reviews the U.S. Supreme Court's Fourth Amendment jurisprudence, in particular the consent and special needs doctrines. Part II offers an overview of recent cases in which the government defended suspicionless searches by invoking the threat of terrorism. Part III critically examines the opinions of the District Court and the Second Circuit in *MacWade v. Kelly*. Part IV expands on their decisions by suggesting that the legal framework used to analyze suspicionless security searches should not vary by the mode of transportation. Finally, this Note concludes by considering the future of transit security and addressing concerns that the threat of terrorism increasingly will be used to justify encroachments on civil liberties.

I. THE FOURTH AMENDMENT

The Fourth Amendment protects individuals from unreasonable searches and seizures, and requires that search and arrest warrants be supported by probable cause.²⁷ These protections are not absolute; rather, they are limited by the text of the Constitution and by specific exceptions articulated by the Supreme Court.

and November 6, 2005." *Id.* The court concluded that the checkpoint data was neither "necessary or probative." *Id.* at *15.

²² Complaint, *supra* note 12, at 5.

²³ *Id.* at 2, 4, 5. Plaintiff Brendan MacWade testified, "While my bag was searched, I felt violated. I felt that the police did not need to be conducting searches, which I found intrusive." *MacWade*, 2005 WL 3338573, at *8 (citation omitted). Plaintiff Joseph Gehring testified, "I now find myself extremely anxious when I see police officers in the New York City subway system . . . because I fear that I will be stopped and searched by the police although I have done nothing wrong." *Id.* (citation omitted). Plaintiffs Gehring and Murphy were selected to be searched, but refused consent and left the subway. *Id.*

²⁴ Complaint, *supra* note 12, at 5-6.

²⁵ *MacWade*, 2005 WL 3338573, at *20.

²⁶ See *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

²⁷ U.S. CONST. amend. IV ("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 . . .").

The Fourth Amendment applies to “*unreasonable* searches and seizures.”²⁸ Accordingly, a Fourth Amendment search only takes place when an individual’s *reasonable* expectation of privacy is violated.²⁹ Furthermore, an individual is only “seized within the meaning of the Fourth Amendment if “a *reasonable* person would [not] feel free to decline the officers’ requests or otherwise terminate the encounter.”³⁰ If the Fourth Amendment is implicated, a search or seizure is ordinarily unconstitutional in the absence of individualized suspicion of wrongdoing.³¹ In exceptional circumstances, however, the Court has sanctioned suspicionless searches and seizures.

A. *The Consent Exception*

It is well established that police may approach individuals without reasonable suspicion on the street or in other public places.³² While most individuals respond to police requests, they need not answer any questions and may not be detained for refusing to cooperate.³³ As a result, police may conduct a suspicionless search or seizure of any person who voluntarily relinquishes his or her Fourth Amendment rights.³⁴ Police are not required to inform individuals of their right to refuse consent.³⁵ Moreover, consent need not be express; it may be implied by a person’s actions, such as silently handing a bag to a security screener.³⁶

B. *The Special Needs Exception*

The Supreme Court has also upheld suspicionless searches and seizures where they were designed to serve “special needs beyond the normal need for law enforcement.”³⁷ Preferring to develop the special needs doctrine on a case-by-case

²⁸ *Id.* (emphasis added).

²⁹ *Katz v. United States*, 389 U.S. 347, 351–52 (1967); *see also id.* at 360–62 (Harlan, J., concurring) (explaining that a search takes place when a person exhibits a subjective expectation of privacy and society recognizes that expectation as reasonable).

³⁰ *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (emphasis added). Circumstances affecting whether a reasonable person would feel free to decline the officers’ request include whether officers displayed any weapons; whether they conveyed any type of threat; whether they suggested in any way that compliance was required; whether they advised the individual of his right to refuse cooperation; as well as the location of the encounter. *Id.* at 432, 437.

³¹ *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

³² *Florida v. Rodriguez*, 469 U.S. 1, 5–6 (1984) (per curiam); *Florida v. Royer*, 460 U.S. 491, 497 (1983); *United States v. Mendenhall*, 446 U.S. 544, 557 (1980).

³³ *Royer*, 460 U.S. at 498 (citing *Mendenhall*, 446 U.S. at 556; *Terry v. Ohio*, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring); *id.* at 34 (White, J., concurring)).

³⁴ *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (“Voluntariness is a question of fact to be determined from all the circumstances.”).

³⁵ *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

³⁶ *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973).

³⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (coining the

basis,³⁸ the Court has expressly allowed the use of police checkpoints to intercept illegal immigrants,³⁹ combat drunk driving,⁴⁰ and obtain information about fatal hit-and-run accidents.⁴¹ Alternatively, the Court has invalidated checkpoints when police exercised “unconstrained discretion”⁴² or when the primary purpose of a stop was crime detection.⁴³ To determine whether a special needs search is reasonable, the Court balances “the gravity of the public concern[,],” “the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”⁴⁴

II. THE CONVENTION CASES

Prior to *MacWade v. Kelly*,⁴⁵ federal courts had begun to grapple with suspicionless search programs initiated after the September 11th terrorist attacks.⁴⁶ In particular,

term “special needs”); *see, e.g.*, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995) (upholding the random drug testing of student athletes); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (upholding drug tests for U.S. Customs Service employees seeking transfer or promotion to certain positions); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 633–34 (1989) (upholding drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations); *New York v. Burger*, 482 U.S. 691, 702–04 (1987) (allowing the warrantless administrative inspection of premises of “closely regulated businesses”); *Michigan v. Tyler*, 436 U.S. 499, 507–09 (1978) (allowing the administrative inspection of fire-damaged premises to determine the cause of the blaze); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534–39 (1967) (allowing an administrative inspection to ensure compliance with city housing code).

³⁸ *Robinette*, 519 U.S. at 39.

³⁹ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

⁴⁰ *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

⁴¹ *Illinois v. Lidster*, 540 U.S. 419 (2004).

⁴² *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

⁴³ *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000). The Court made clear, however, that its decision in *Edmond* did not affect searches at places like airports and government buildings, “where the need for such measures to ensure public safety can be particularly acute.” *Id.* at 47–48.

⁴⁴ *Brown v. Texas*, 443 U.S. 47, 51 (1979); *see also Sitz*, 496 U.S. at 450–55 (balancing these factors in determining the reasonableness of a checkpoint stop).

⁴⁵ No. 05 Civ. 6921 (RMB/FM), 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005).

⁴⁶ *See, e.g.*, *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005) (upholding random selection of airline passengers for additional screening procedures); *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004) (finding blanket searches of demonstrators unconstitutional); *United States v. Green*, 293 F.3d 855 (5th Cir. 2002) (upholding inspections on highways inside military installations), *cert. denied*, 537 U.S. 966 (2002); *Cassidy v. Ridge*, No. 1:04CV258, slip op. at 8 (D. Vt. Feb. 16, 2005) (upholding random inspections on ferries), *aff’d sub nom. Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006); *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 U.S. Dist. LEXIS 14345, at *2–3 (D. Mass. July 28, 2004) (permitting random searches on subways and buses); *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004) (finding blanket searches of demonstrators unconstitutional), *amended by* 2004 WL 1663600 (S.D.N.Y.

two cases decided in anticipation of the 2004 Democratic and Republican National Conventions represent the divergent approaches emerging between jurisdictions.

In *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*,⁴⁷ a Massachusetts district court allowed police to search the bags of all subway and bus riders passing by the Fleet Center in Boston during the Democratic Convention.⁴⁸ The court found the intrusion on individual privacy justified given the nature of the public interest in security.⁴⁹ In particular, it cited three factors that mitigated the intrusion. First, riders were notified that they would be subject to a search.⁵⁰ Second, the search program was limited in scope and duration.⁵¹ Only riders that passed through the designated security zone were searched, and the program was limited to the four days of the Convention.⁵² Finally, the program curbed the discretion of police by subjecting all riders to searches.⁵³

Conversely, in *Stauber v. City of New York*,⁵⁴ a New York district court enjoined police from conducting blanket searches of demonstrators at the Republican Convention.⁵⁵ It ruled that bag searches are not minimally intrusive⁵⁶ because demonstrators have an increased expectation of privacy in a bag kept on their person.⁵⁷ The court was primarily concerned that the city's evidence of a threat to public safety was overly vague and that there was no evidence to suggest that bag searches would reduce the perceived threat.⁵⁸

July 27, 2004), and order entered by 2004 WL 1683166 (S.D.N.Y. July 27, 2004).

⁴⁷ 2004 U.S. Dist. LEXIS 14345.

⁴⁸ *Id.* at *10.

⁴⁹ *Id.*

⁵⁰ *Id.* at *7.

⁵¹ *Id.* at *9.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ No. 03 Civ. 9162 (RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004), amended by 2004 WL 1663600 (S.D.N.Y. July 27, 2004), and order entered by 2004 WL 1683166 (S.D.N.Y. July 27, 2004).

⁵⁵ *Id.* at *89; see also Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L. L. REV. 327 (2005) (detailing the author's involvement in the *Stauber* litigation as the associate legal director of the NYCLU).

⁵⁶ The City suggested that bag searches were more analogous to magnetometer searches at the airport than to pat-down searches. *Stauber*, 2004 WL 1593870, at *30.

⁵⁷ *Id.*

⁵⁸ *Id.* at *31. The order issued by Judge Robert Sweet enjoined bag searches "without the showing of both the probability of a threat to public safety and a determination that blanket searches could reduce that threat." *Stauber*, 2004 WL 1683166, at *1. The NYCLU proposed that the order require "specific" information regarding a threat to public safety before the city could conduct bag searches. *Stauber*, 2004 WL 1663600, at *1. The City proposed the use of the modifier "credible" in the order. *Id.* Instead, Judge Sweet imposed a probable cause standard. *Id.*

While the Massachusetts and New York courts seemingly reached different conclusions, the *Staubert* court was careful to distinguish its opinion.⁵⁹ It acknowledged that “[a] bag search in the context of the exercise of constitutionally protected speech calls for a different analysis.”⁶⁰ This distinction is significant. Of the six recently decided special needs cases, the two cases that resulted in plaintiffs’ verdicts dealt with searches at demonstrations.⁶¹ The four remaining cases involved searches conducted as part of transit security programs.⁶²

III. *MACWADE V. KELLY*

The District Court and the Circuit Court of Appeals correctly concluded that New York City’s container inspection program fits squarely within the special needs exception to the Fourth Amendment.⁶³ As a threshold matter, both courts found that the program does not advance a more general interest in law enforcement because searches are voluntary and aimed only at discovering explosives.⁶⁴ Having established that the program serves the special need of preventing a terrorist attack on the subway, both courts determined that the program is reasonable because it serves a paramount government interest, is sufficiently effective, and narrowly tailored.⁶⁵

In doing so, both courts heavily credited the testimony of three defense expert witnesses: David Cohen, NYPD Deputy Commissioner for Intelligence; Michael Sheehan, NYPD Deputy Commissioner for Counter-Terrorism; and Richard Clarke, former Chair of the Counter-Terrorism Security Group on the National Security Council.⁶⁶ Their expert testimony established that once terrorists marshal their resources, they want a target that will ensure a certainty of success.⁶⁷ The witnesses

⁵⁹ *Id.* The District Court specifically referred to “[t]he circumstances of the Madrid [train] bombings.” *Id.*

⁶⁰ *Id.* In *Staubert*, bag searches burdened demonstrators’ First Amendment rights by barring those that refused consent from attending protests. *Staubert*, 2004 WL 1593870, at *29–31.

⁶¹ *See supra* note 46.

⁶² *See supra* note 46.

⁶³ *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006); *MacWade v. Kelly*, No. 05 Civ. 6921 (RMB/FM), 2005 WL 3338573, at *20 (S.D.N.Y. Dec. 7, 2005).

⁶⁴ *MacWade*, 460 F.3d at 270; *MacWade*, 2005 WL 3338573, at *17.

⁶⁵ *MacWade*, 460 F.3d at 271–75; *MacWade*, 2005 WL 3338753, at *17–20.

⁶⁶ *MacWade*, 460 F.3d at 265–67; *MacWade*, 2005 WL 3338573, at *10–12. All three defense experts have extensive counter-terrorism experience: Commissioner Cohen served in the CIA’s analysis and operations divisions for thirty-five years; Commissioner Sheehan garnered nearly thirty years of counter-terrorism experience as a member of Army Special Forces, Deputy Assistant Secretary at the State Department, and Assistant Secretary General of the United Nations; and Mr. Clarke served as a senior White House Advisor to Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush on issues of intelligence and counter-terrorism. *MacWade*, 2005 WL 3338573, at *10–11.

⁶⁷ *MacWade*, 460 F.3d at 266–67.

maintained that terrorists prefer predictability and that random searches add unpredictability to the planning and implementation of an attack, which increases the risk of failure and ultimately encourages terrorists “to choose . . . an easier target.”⁶⁸

A. *The Gravity of the Public Concern*

The District Court acknowledged that preventing a terrorist attack “is a governmental interest of the very highest order.”⁶⁹ In light of several failed plots to bomb the City’s system⁷⁰ and increasingly frequent attacks on foreign transit systems,⁷¹ New York City’s interest in securing its subway is substantial.⁷² Moreover, the absence of a *specific* threat directed at the City’s subway does not undermine the reasonableness of its container inspection program.⁷³ As the *American-Arab* court argued:

[T]here is . . . no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack, so its absence cannot be taken to indicate that the facilities are

⁶⁸ *Id.* The element of randomness is also being discussed in other search contexts. See Eric Lipton, *Significant Changes in Air Passenger Screening Lie Ahead*, N.Y. TIMES, Dec. 1, 2005, at A28; see also *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) (holding that the random selection of airline passengers for additional screening procedures furthers the goal of deterring and detecting terrorism aimed at commercial aviation); *United States v. Green*, 293 F.3d 855, 862 (5th Cir. 2002) (holding that random searches “provide[] a gauntlet, random as it is, that persons bent on mischief must traverse”), *cert. denied*, 537 U.S. 966 (2002).

⁶⁹ *MacWade*, 2005 WL 3338573, at *17; see also *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449 (1990) (finding that the State had “a grave and legitimate” interest in preventing drunk-driving through sobriety checkpoints); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (finding reasonable a U.S. Customs Service employee drug-screening policy “[i]n light of the extraordinary safety and national security” concerns involved (emphasis added)); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (noting “the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints” (emphasis added)); *Mollica v. Volker*, 229 F.3d 366, 370 (2d Cir. 2000) (relying on *Sitz* and *Martinez-Fuerte*, in which “the government’s interests were extremely weighty” (emphasis added)); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (“When the risk is the jeopardy to hundreds of human lives and millions of dollars of property . . . , the danger alone meets the test of reasonableness.” (citation omitted)).

⁷⁰ See *supra* note 4 and accompanying text.

⁷¹ See *supra* notes 5–10 and accompanying text.

⁷² Arguably, the nature of the threat to New York City’s subway system would even satisfy the *Staubert* court. See *supra* note 58.

⁷³ Compare *Illinois v. Caballes*, 543 U.S. 405, 417 n.7 (2005) (Souter, J., dissenting) (“All of us are concerned not to prejudice a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion.”), with *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004) (“While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people.”).

not likely targets. With respect to airport security measures, the absence of specific threat information about a particular flight or even a particular airport does not vitiate either the authority or the wisdom of conducting security screenings generally for *all* flights.⁷⁴

Judge O'Toole's reasoning is not revolutionary. Indeed, the Supreme Court first articulated this argument in *National Treasury Employees Union v. Von Raab*, when it determined that a nationwide drug problem justified drug testing of Customs employees with no personal history of drug abuse.⁷⁵ The Court stated, "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context."⁷⁶ More recently, in *Board of Education v. Earls*, the Court again employed this argument when it held that a school district need not await a "particularized or pervasive drug problem before . . . conduct[ing] suspicionless drug testing."⁷⁷

Similarly, the government should not await an immediate threat to a particular mode of transportation before adopting a reasonable transit security program. New York City's approach is instructive. City officials did not act hastily or haphazardly in the immediate aftermath of September 11.⁷⁸ Nor did they await a specific threat to the City's subway. Instead, the NYPD implemented the container inspection program after the London Underground attacks, because "(i) '[those attacks] reaffirmed the shift to transportation systems as targets;' (ii) 'they were carried out by individuals . . . with links to similar groups operating in New York;' and (iii) 'they were carried out notwithstanding a substantial security system which includes extensive video surveillance.'"⁷⁹

B. The Degree to Which the Intrusion Advances the Public Interest

The NYCLU maintained that the City's container inspection program is not a meaningful deterrent because searches are not conducted at most subway entrances

⁷⁴ *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 U.S. Dist. LEXIS 14345, at *5-6 (D. Mass. July 28, 2004).

⁷⁵ 489 U.S. 656 (1989); *see also* *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (relying on nationwide drunk-driving problem in upholding Michigan's use of sobriety checkpoints).

⁷⁶ *Von Raab*, 489 U.S. at 675 n.3.

⁷⁷ 536 U.S. 822, 835-36 (2002).

⁷⁸ The City's restraint contradicts assertions that the container inspection program is part of a larger movement of city officials to drastically expand police powers under the guise of combating terrorism.

⁷⁹ *MacWade v. Kelly*, No. 05 Civ. 6921 (RMB/FM), 2005 WL 3338573, at *4 (S.D.N.Y. Dec. 7, 2005) (citations omitted).

and because they are consensual⁸⁰—seemingly taking the incongruous position that the program would be more effective if it were more intrusive.⁸¹ Of course, the container inspection program would be more effective if passengers were not provided advance notice or if police searched all passengers at every subway station.⁸² The program might also be more effective if police targeted passengers who fit a particular terrorist profile.⁸³ Requiring maximum effectiveness,⁸⁴ however, would surely lead to less narrowly tailored counter-terrorism programs. The city's decision, then, to employ flexible and shifting security checkpoints remains reasonable even if other more intrusive methods would prove more effective.⁸⁵

⁸⁰ Complaint, *supra* note 12, at 2. At trial, the NYCLU offered the testimony of two experts to support this argument: Gene Russianoff, a staff attorney for the New York Public Interest Research Group's Straphangers Campaign, and Charles Pena, a consultant working with the Departments of Defense and Homeland Security. *MacWade*, 2005 WL 3338573, at *8–9. Russianoff argued that “a person wishing to [could] easily evade the NYPD checkpoints and enter the [subway] system at entrances without checkpoints.” *Id.* at *8 (citation omitted). Additionally, Pena testified that the deterrent effect of the program was “close to zero” because passengers could walk away from an inspection. *Id.* at *9 (citation omitted). However, the District Court concluded, as a matter of fact, that the defense experts were more credible, persuasive, and reasonable in their analysis and conclusions. *Id.*

⁸¹ See *Von Raab*, 489 U.S. at 676 n.4 (“[Plaintiffs’] objection is based on those features of the [government’s] program . . . that contribute significantly to diminish the program’s intrusion on privacy. Thus, under [plaintiffs’] view, ‘the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.’” (internal citations omitted)).

⁸² Yet, a program with a 100% inspection rate would undoubtedly paralyze the subway system. For example, “more than 1,500 people per minute would have to be screened [at New York’s Penn Station] to maintain current levels of mobility and access.” *The London Attacks: Training to Respond in a Mass Transit Environment: Hearing Before the Subcomm. on Emergency Preparedness, Science, and Technology of the H. Comm. of Homeland Security*, 109th Cong. 15 (2005) (statement of Robert D. Jamison, Deputy Administrator, Federal Transit Administration), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28022.pdf.

⁸³ The constitutionality of racial profiling in the context of counter-terrorism programs is beyond the scope of this Note. See Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003) (arguing that racial profiling is ineffective); Milton Hirsch & David Oscar Markus, *Fourth Amendment Forum*, THE CHAMPION, Dec. 2005, at 54, 54–57 (debating whether random searches of subway passengers or profiling is less offensive to the Fourth Amendment).

⁸⁴ In *United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004), the Second Circuit stated that there must be “a minimum of intrusiveness coupled with maximal effectiveness so that the searches ‘bear a close and substantial relationship’ to the government’s ‘special needs.’” *Id.* at 186. This restatement of the special needs analysis does not, as the NYCLU suggests, require that suspicionless searches be maximally effective to comply with the Fourth Amendment. See *Mollica v. Volker*, 229 F.3d 366, 370 (2d Cir. 2000) (“[T]he effectiveness inquiry involves only the question whether the [search] is a ‘reasonable method of deterring the prohibited conduct;’ the test does not require that the [search] be ‘the most effective measure.’” (quoting *Maxwell v. City of New York*, 102 F.3d 664, 667 (2d Cir. 1996))).

⁸⁵ “Common sense tells us that ‘more is better than some, some is better than none, none

In the absence of a strict effectiveness requirement, the NYCLU contended that suspicionless search programs must at least have a “measurable deterrent effect.”⁸⁶ But, the Supreme Court has repeatedly refused to scrutinize the effectiveness of special needs searches. In *Michigan Department of State Police v. Sitz*, the Court upheld a sobriety checkpoint program where only 1.6% of drivers stopped were arrested for alcohol impairment.⁸⁷ In *United States v. Martinez-Fuerte*, the Court upheld a border patrol program where only 0.12% of vehicles stopped contained illegal aliens.⁸⁸ And in *Earls*, the Court upheld a school district’s random drug-testing of students involved in extra-curricular activities without citing any evidence of effectiveness.⁸⁹ A methodical review of effectiveness is even less practical in the context of counter-terrorism programs.⁹⁰ Accordingly, courts should rely on sound reasoning, rather than quantifiable data (which is usually unavailable anyway), to evaluate transit security checkpoints.⁹¹

Furthermore, courts ought not second-guess the judgment of law enforcement and other public officials. In *Sitz*, the Supreme Court explained that the effectiveness prong of the special needs doctrine:

was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable [sic] as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.⁹²

helps [terrorists].’ . . . ‘[A]s long as there is some checking, there is going to be somewhat of a deterrence. The more checking, the more deterrence.’” *MacWade*, 2005 WL 3338573, at *12 n.21 (citations omitted).

⁸⁶ *Id.* at *13; see also *MacWade v. Kelly*, 460 F.3d 260, 269 (2d Cir. 2006).

⁸⁷ 496 U.S. 444, 448–49, 454–55 (1990).

⁸⁸ 428 U.S. 543, 554 (1976).

⁸⁹ *Bd. of Educ. v. Earls*, 536 U.S. 822, 836–38 (2002).

⁹⁰ *Contra Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *31 (S.D.N.Y. July 16, 2004) (finding that the City did not provide any information to suggest that its bag search policy would address the kinds of threats that the NYPD faced at demonstrations), *amended by* 2004 WL 1663600 (S.D.N.Y. July 27, 2004), *and order entered by* 2004 WL 1683166 (S.D.N.Y. July 27, 2004).

⁹¹ *Cf. Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (“When the Government’s interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success.”).

⁹² *Sitz*, 496 U.S. at 453–54.

Surely there may be other reasonable means of securing New York City's subway system, but judges are not equipped to make such esoteric decisions.⁹³ As made clear in *Sitz*, courts should defer to those with expertise in law enforcement (in *MacWade*, the judgment of Commissioners Cohen and Sheehan, with a combined seventy years of counter-terrorism experience)⁹⁴ and those whom the public can hold "politically accountable" (in *MacWade*, the Mayor of New York, who was re-elected after implementing the container inspection program)⁹⁵ when determining whether counter-terrorism programs effectively deter an attack.

C. *The Severity of the Interference with Individual Liberty*

In November 2005, the NYPD implemented a pilot project to determine the feasibility of using explosive detection technology in subway inspections.⁹⁶ The experimental technology would allow police to test for the presence of chemicals like ammonium nitrate or hydrogen peroxide (ingredients used in the London bombs) with hand-held mechanized devices.⁹⁷ Only after an exterior sweep resulted in a positive identification would passengers be required to open their bags for a visual inspection.⁹⁸

The District Court reopened the record in *MacWade* to consider whether this pilot project altered its legal analysis.⁹⁹ It determined that the technology did not undermine the reasonableness of visual inspections because it was not capable of detecting all types of explosive material.¹⁰⁰

Nevertheless, the existence of less intrusive means does not render otherwise permissible searches unconstitutional. In *Earls*, the Supreme Court stated, "[R]easonableness under the Fourth Amendment does not require employing the least intrusive means, because '[t]he logic of such elaborate less-restrictive-alternative arguments

⁹³ Commissioner Sheehan explained that the development of counter-terrorism strategies is "as much art as it is science." Sewell Chan, *Testimony Completed in Suit over Searches in Subways*, N.Y. TIMES, Nov. 2, 2005, at B3.

⁹⁴ *MacWade v. Kelly*, No. 05 Civ. 6921 (RMB/FM), 2005 WL 3338573, at *10–11 (S.D.N.Y. Dec. 7, 2005).

⁹⁵ On November 8, 2005, Michael R. Bloomberg was re-elected Mayor of New York by a historic 20-point margin of victory. Patrick D. Healy, *Bloomberg Cruises to Re-Election Victory; Corzine Is Winner in Costly New Jersey Race*, N.Y. TIMES, Nov. 9, 2005, at A1.

⁹⁶ Al Baker & Sewell Chan, *New Devices Will Search for Explosives in Subways*, N.Y. TIMES, Nov. 12, 2005, at B3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *MacWade*, 2005 WL 3338573, at *7–8.

¹⁰⁰ *Id.* at *7 ("[T]he equipment 'may . . . be effective in detecting some explosives, but not others,' and it 'cannot replace visual inspections . . . because given its present technological limitations, visual inspections may be the only means for detecting a particular type of explosive.'" (citations omitted)); *id.* at *8. ("The use of the explosive detection technology by the NYPD is experimental, not operational.' The NYPD has purchased relatively few explosive detection devices and is employing them in a limited fashion." (citation omitted)).

could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.”¹⁰¹ As even the NYCLU acknowledges, narrow tailoring can conversely correlate to less effective transit security programs.¹⁰² In achieving the delicate balance, then, between intrusiveness and effectiveness, the NYPD need not replace visual inspections with the less intrusive use of explosive detection canines,¹⁰³ magnetometers,¹⁰⁴ or even searches based on individualized suspicion.¹⁰⁵

IV. A CONSISTENT APPROACH TO TRANSIT SECURITY

Americans routinely submit to intrusive searches of their person and luggage as a condition of air travel. But Justice Souter, dissenting in *United States v. Drayton*, observed that “[t]he commonplace precautions of air travel have not, thus far, been justified for ground transportation, . . . and no such conditions have been placed on passengers getting on trains or buses.”¹⁰⁶ Steven Shapiro, national legal director of the ACLU, recently suggested that this distinction between air and ground travel “could be as important as the court’s decision.”¹⁰⁷ Indeed, critics of New York City’s container inspection program are hopeful that Justice Souter’s dissenting opinion signals an emerging trend, where the legal analysis employed could depend on the mode of transportation at issue.

At the core of the NYCLU’s case in *MacWade* is the supposition that subways are inherently different from airplanes. Instead, the NYCLU claims that the subway

¹⁰¹ *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 n.12 (1976)); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (“We have repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.” (citation omitted)); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 629 n.9 (1989) (“We have repeatedly stated . . . that ‘[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.’” (citation omitted)).

¹⁰² See *supra* note 80 and accompanying text.

¹⁰³ “Canine performance has . . . been shown to ‘fall off exponentially’ . . . because of distractions like gusts of air, noise, food, and people—all realities, of course, of mass transit.” Amanda Schaffer, *Sorry, Dogs Don’t Do Subways*, SLATE, Jan. 17, 2006, <http://www.slate.com/id/2134394>.

¹⁰⁴ Magnetometers do not detect plastic or chemical explosives. What’s Next in Science & Technology, Airport Security Machines Will Sniff Terrorists Out, Literally, <http://www.whatsnextnetwork.com/technology/index.php/2005/05/15> (last visited Apr. 24, 2007).

¹⁰⁵ Police can always stop subway passengers if they have reasonable suspicion that they are involved in criminal activity, see *Terry v. Ohio*, 392 U.S. 1 (1968), but recent attacks demonstrate that terrorists are sophisticated enough to avoid attracting undue attention with their appearance or demeanor. See *Image of Bomber’s Deadly Journey*, BBC NEWS, July 17, 2005, http://news.bbc.co.uk/1/hi/uk_politics/4689739.stm (reporting on a video showing that while four London bombers each carried bags when they entered the subway, none acted in a suspicious manner).

¹⁰⁶ 536 U.S. 194, 208 (2002) (Souter, J., dissenting).

¹⁰⁷ Jan Crawford Greenburg, *Justices Strengthen Police Search Power*, CHI. TRIB., June 18, 2002, at N1.

system is “a direct, physical extension” of the city’s sidewalks, and that like pedestrians on the street, subway passengers have an undiminished expectation of privacy in their bags.¹⁰⁸

Although the Second Circuit agreed that subway passengers enjoy a full privacy expectation, the court held that New York City’s container inspection program is reasonable because it only minimally intrudes upon privacy interests.¹⁰⁹ The nature of passengers’ privacy interests, then, did not tip the balance against the government. Still, the Second Circuit’s nomenclature is not of “little analytical significance.”¹¹⁰ It indicates that the court does in fact differentiate between airplane and subway passengers, which could be decisive in future special needs cases.

Whether an expectation of privacy exists for Fourth Amendment purposes requires a two-pronged analysis: (1) “whether the individual, by his conduct, has exhibited an actual expectation of privacy;”¹¹¹ and (2) “whether the individual’s expectation of privacy is ‘one that society is prepared to recognize as reasonable.’”¹¹² Certainly, a subway passenger carrying a closed, opaque bag on her person has manifested a subjective expectation of privacy. Yet, contrary to the Second Circuit’s conclusion in *MacWade*, that expectation is not objectively reasonable given the routine nature of subway searches and the severity of the threat to public safety and the nation’s transportation infrastructure.

Law enforcement and security personnel perform consensual searches daily at airports, museums, stadiums, federal buildings, and courthouses across the country.¹¹³ Nowhere are these searches more commonplace than New York City, where residents are acutely aware of the danger posed by terrorism. Approximately 20,000 subway passengers voluntarily submitted to bag searches in just the first week of the City’s container inspection program.¹¹⁴ Since then, hundreds of thousands more have consented to subway searches, suggesting public acceptance of limited privacy reductions in exchange for enhanced security.¹¹⁵

¹⁰⁸ Plaintiff’s Post-Trial Memorandum of Law in Support of Request for Declaratory and Injunctive Relief, *MacWade v. Kelly*, No. 05 Civ. 6921 (RMB/FM), 2005 WL 3338573, at *4–5 (S.D.N.Y. Dec. 7, 2005) [hereinafter Post-Trial Memorandum].

¹⁰⁹ *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

¹¹⁰ *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) (“It has been suggested that those who seek to travel on a common carrier have a lower ‘expectation of privacy’ regarding their person and the bags they carry Such a suggestion has little analytical significance”).

¹¹¹ *Bond v. United States*, 529 U.S. 334, 338 (2000).

¹¹² *Id.*

¹¹³ See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (“[W]here the risk to public safety is substantial and real, blanket suspicionless searches . . . may rank as ‘reasonable’—for example, searches now routine at airports and at entrances to courts and other official buildings.”); accord *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000); *Florida v. J.L.*, 529 U.S. 266, 274 (2000).

¹¹⁴ Patrick McGeehan, *A Week of Random Backpack Searches Yields Little Drama*, N.Y. TIMES, July 30, 2005, at B1.

¹¹⁵ Alan Feuer, *Appeals Court Upholds Random Police Searches of Passengers’ Bags on*

Over thirty years ago, the Second Circuit recognized this trade-off as reasonable when it concluded that,

[If] the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.¹¹⁶

Like airplanes, subway systems accord terrorists the opportunity to destroy “hundreds [perhaps thousands] of human lives and millions of dollars of property.”¹¹⁷ And, like the wave of hijackings that precipitated airport searches in the 1960s,¹¹⁸ the succession of bombings on foreign transit systems evinces a need for a new approach to transit security.¹¹⁹

While commercial aviation and public transit demand unique security programs,¹²⁰ “the fundamental [legal] issues should not be substantially affected by the

Subways, N.Y. TIMES, Aug. 12, 2006, at B5.

¹¹⁶ *United States v. Bell*, 464 F.2d 667, 675 (1972) (Friendly, C.J., concurring), *cert. denied*, 409 U.S. 991 (1972).

¹¹⁷ *Id.* Terrorist attacks on transit systems typically produce higher fatalities than other terrorist attacks. *Keeping America’s Mass Transportation System Safe: Is the Law Adequate?: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 3 (2004) (statement of Brian Michael Jenkins, Director, National Transportation Security Center), available at http://judiciary.senate.gov/testimony.cfm?id=11238&wit_id=3276 [hereinafter Jenkins Statement]. For example, analysis of approximately 1,000 terrorist attacks on transit systems revealed that two-thirds of these attacks clearly were intended to kill passengers, seventy-four percent of the fatal attacks involved multiple fatalities, and twenty-eight percent involved ten or more fatalities. *Id.* Beyond the human toll, transit attacks can have devastating economic consequences. For example, the New York City Comptroller estimated that a three-day transit strike in December 2005 cost the city approximately \$1 billion. Richard Pérez-Peña, *Businesses Tally Losses from Strike*, N.Y. TIMES, Dec. 24, 2005, at B6. If, instead, an attack disabled a portion of the system for several weeks or months, the costs would be enormous.

¹¹⁸ See *United States v. Albarado*, 495 F.2d 799, 803–06 (2d Cir. 1974) (recognizing the need to deter those “for whom death holds no fear and little consequence,” from using weapons to hijack airplanes and transform them into “weapon[s] of mass destruction”).

¹¹⁹ See *supra* notes 5–10 and accompanying text.

¹²⁰ Approximately 60,000 security personnel inspect 2 million daily airplane passengers. Jenkins Statement, *supra* note 117, at 4. A comparable screening system for the 26 million daily transit passengers “would require hundreds of thousands of screeners and . . . cost tens of billions of dollars.” *Id.* Further, the use of x-ray machines, magnetometers, and explosive detection canines, which are used extensively in airport terminals, cannot be easily replicated in subway stations. *Id.*; see also *supra* notes 103–04.

mode of transportation involved.”¹²¹ The principle purpose of security in both airports and subways is to deter a terrorist attack.¹²² To do so, both security programs require passengers to submit to suspicionless searches.¹²³ These searches are reasonable in part because the need to deter an attack reduces airplane and subway passengers’ privacy interests.

Furthermore, airport terminals are far more similar to subway stations than city sidewalks. Subway passengers must pay a fee, enter the system through a turnstile, and board subway cars traveling across subway tracks operated and maintained by the city. Subway passengers also do not have the same freedom of movement as pedestrians on the sidewalk. Applying consistent constitutional standards to modes of public transport makes clearer the distinction between subways and sidewalks and ensures that suspicionless search policies cannot be easily extended to pedestrians on the street.

CONCLUSION

The Metropolitan Transportation Authority (MTA) recently unveiled the high-tech future of transit security in New York City.¹²⁴ The centerpiece of the MTA’s transit security plan is a sizeable network of 1,000 video cameras that can zoom, pivot, and rotate to capture distances up to 300 feet.¹²⁵ The MTA will also deploy 3,000 motion sensors, and for the first time, enable cell phone service in 277 underground

¹²¹ American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 U.S. Dist. LEXIS 14345, at *6 (D. Mass. July 28, 2004).

¹²² Compare *MacWade v. Kelly*, No.05 Civ. 6921 (RMB/FM), 2005 WL 3338573, at *5 (S.D.N.Y. Dec. 7, 2005) (affirming that the purpose of the container inspection program “is primarily deterrent”), with *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973) (“The essential purpose of [airport security] is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.”).

¹²³ Airplane and subway passengers regularly consent to suspicionless searches as a condition of traveling on each mode of transportation. The NYCLU argues that consent to subway searches is actually not voluntary because the subway is the primary source of transportation for many New Yorkers. Post-Trial Memorandum, *supra* note 108, at *2. But subway passengers, like airline passengers, have a choice in their transportation. Although the alternatives are not attractive, there is no constitutional right to convenient travel. Additionally, subway passengers may opt not to carry bags large enough to trigger an inspection.

¹²⁴ Sewell Chan, *M.T.A. to Keep Electronic Eye on the Subway*, N.Y. TIMES, Aug. 24, 2005, at A1. The MTA awarded Lockheed Martin a three-year, \$212 million contract to implement the transit security plan. *Id.* The mayor urged the MTA to “move forward immediately with installing more cameras in subway stations, as they are an important deterrent and will be an invaluable investigative tool for the N.Y.P.D.” *Id.*

¹²⁵ *Id.* The executive director of the NYCLU cautioned that, “[t]here are questions about both the value and the privacy implications of massive video surveillance in subways.” *Id.* The constitutionality of video surveillance, however, is beyond the scope of this Note. See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349 (2004).

stations.¹²⁶ This new technology should allow transit workers to detect, in real-time, passengers entering unauthorized areas or unattended bags left on station platforms.¹²⁷

Though the MTA's transit security plan is unlikely to soon replace the container inspection program,¹²⁸ technological advances could eventually enable New York City to secure the subway without performing visual searches of passengers' bags. In the meantime, the Massachusetts Bay Transportation Authority (MBTA) became the second transit system in the United States to implement a suspicionless search policy when it began searching Boston subway passengers in October 2006.¹²⁹ Public officials in cities including Washington, D.C., and San Francisco are also contemplating transit security proposals modeled after New York City's container inspection program.¹³⁰

These programs are all a legitimate and necessary response to a terrorist stragem directed at transit systems. A successful attack on a transit system in the United States could result in mass casualties, disable a city's system, disrupt commerce, and demoralize the entire nation. Moreover, the potential for a catastrophic attack involving nuclear, biological, chemical or radiological weapons alarmingly is not far-fetched.¹³¹ In light of these extreme risks, the minimal intrusion occasioned by suspicionless subway searches is reasonable.

¹²⁶ Chan, *supra* note 124. The MTA abandoned its objections to cell phone service, concluding that "the benefits of enabling 911 and other calls during emergencies outweighed . . . the risk of a phone-detonated bomb." *Id.* Cell phone service will still not be available on moving trains. *Id.*

¹²⁷ *Id.*

¹²⁸ The United Kingdom began using security cameras in the 1990s. Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 ARIZ. L. REV. 607, 609 (2004). Today there are over 4.2 million cameras throughout the country and the average British citizen is supposedly photographed 300 times a day. *Id.* Yet, ubiquitous security cameras did not deter or detect the attack on London's transit system. *Id.*

¹²⁹ Mac Daniel, *T's Searches Turn up Only False Alarms but Officials Say Antiterror Effort Is a Deterrent*, BOSTON GLOBE, Jan. 31, 2007, at A1.

¹³⁰ Chan & Fahim, *supra* note 13. Additionally, Richard Clarke recently advised legislators from thirty-six states on specific measures they could take to enhance homeland security, including instituting random passenger searches on any subway or light rail system. Larry Neumeister, *Clarke Urges More Subway Searches*, WASH. POST, Nov. 7, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700294.html>.

¹³¹ According to the Director of National Intelligence, John Negroponte:

Although an attack using conventional explosives continues to be the most probable scenario, al-Qa'ida remains interested in acquiring chemical, biological, radiological, and nuclear materials or weapons to attack the United States In fact, intelligence reporting indicates that nearly 40 terrorist organizations, insurgencies, or cults have used, possessed, or expressed an interest in chemical, biological, radiological, or nuclear agents or weapons.

World Wide Threat: Hearing Before the S. Select Comm. on Intelligence, 109th Cong. (2006) (statement of John D. Negroponte, Director of National Intelligence).

Admittedly, the threat to public safety could easily be exploited to excuse unnecessary intrusions upon civil liberties.¹³² As the late Chief Justice Rehnquist cautioned in his last book, “[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power either dubious or nonexistent.”¹³³ Indeed, our nation’s history intimates that civil liberties often suffer from the expansion of executive power in wartime.¹³⁴ And that possibility is even greater when the conflict, like this one, has no foreseeable end.¹³⁵

Nevertheless, in the war on terror, some adjustments of the subtle balance between liberty and security are appropriate. Fortunately, the Constitution, and in this case, the Fourth Amendment, are nimble enough to accommodate such a balancing of interests. Moreover, vigilance by the courts, the legislature, and the public will surely curb any potential imbalance. Indeed, in *MacWade*, the District Court acknowledged that the NYCLU’s complaint fulfilled an important oversight function by ensuring that New York City’s container inspection program received adequate scrutiny.¹³⁶

¹³² See *United States v. Edwards*, 498 F.2d 496, 502 (2d Cir. 1974) (Oakes, J., concurring) (“It is all too easy to permit encroachments upon personal liberty whenever there surfaces ‘a barbarism hidden behind the superficial amenities of life.’ Airplane hijacking is not the only ‘barbarism’ which may result in calls for new means of investigation and detection ‘applied to everyone.’”); *United States v. Bell*, 464 F.2d 667, 675–76 (2d Cir. 1972) (Mansfield, J., concurring) (“If the danger to the public posed by the current wave of [airplane] hijackings were held to constitute adequate ground for such a broad expansion of police power, the sharp increase in the rate of serious crimes in our major cities could equally be used to justify similar searches of persons or homes in high crime areas based solely upon the ‘trained intuition’ of the police.”), *cert. denied*, 409 U.S. 991 (1972).

¹³³ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224 (1998).

¹³⁴ See Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 667–70 (2004) (summarizing the historic use of executive power during times of war).

¹³⁵ The Supreme Court acknowledged this problem of open-endedness in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (“If the Government does not consider this unconventional war won for two generations . . . Hamdi’s detention could last for the rest of his life.”).

¹³⁶ *MacWade v. Kelly*, No.05 Civ. 6921 (RMB/FM), 2005 WL 3338573, at *1 (S.D.N.Y. Dec. 7, 2005).