Terror and the T: A Constitutional Analysis of the MBTA's Stop-and-Search Policy

It is quite possible that both protesters and passersby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. . . . We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.[1]

I. INTRODUCTION

On June 8, 2004, the Massachusetts Bay Transportation Authority (MBTA) announced the development of a policy that would subject riders of the mass transit system to random searches of their bags, packages, and personal items.[2] The MBTA implemented the novel policy prior to commencement of the Democratic National Convention (DNC) and heightened execution of the policy during the convention.[3] While the DNC concluded on July 30, 2004, the

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1. Bourgeois v. Peters, 387 F.3d 1303, 1311-12 (11th Cir. 2004) (reasoning terrorism, although omnipresent, as improper basis for restricting Fourth Amendment's protections in large gatherings) (citation omitted).

2. *See* Press Release, MBTA, Security Statement (June 8, 2004) (analogizing bag search policy of MBTA to airport security searches), *at* http: //www.mbta.com/insidethet/press_releases_details.asp?ID=1015; *see also* Jonathan Finer, *Boston to Begin Random Baggage Checks on Trains*, WASH. POST, June 9, 2004, at A02 (noting bag checks scheduled to begin only weeks before Democratic National Convention). The DNC was the first national political convention held since the terrorist attacks of September 11, 2001, and, as such, the federal government designated it a National Special Security Event. Finer, *supra*, at A02. The MBTA's policy also came in the wake of the Madrid, Spain, train bombings that killed nearly 200 people in March of 2004. *Id.*; *see also* Anthony Flint, *All Bags on T Subject to Search During DNC*, BOSTON GLOBE, June 23, 2004 (observing approximately 200 subway and commuter rail stations accessible to each other through MBTA system), *available at* http: //boston.com/news/local/massachusetts/articles/2004/06/23/t_riders_face_more_random_checks; Raphael Lewis, *Boston Commuters: Wheels of Fortune*, BOSTON GLOBE, May 8, 2001, at B1 (citing 2001 statistical findings stating fifteen percent of Boston commuters use buses, trains, or subway). The article also notes that this percentage was the highest outside of New York, Chicago, and Washington, D.C. Lewis, *supra*, at B1; MBTA, *Schedules, Maps & Station Info* (noting 1.1 million riders utilize MBTA every day), *at* http: //www.mbta.com/traveling_t/schedules_index.asp (last visited March 17, 2006).

3. *See* Raphael Lewis, *T to Check Packages, Bags at Random*, BOSTON GLOBE, June 8, 2004, at A1

MBTA kept its stop-and-search policy on the books for possible future implementation, should the need arise.[4]

Before the Democrats arrived in Boston, the American-Arab Anti-Discrimination Committee and the National Lawyers Guild challenged the constitutionality of the MBTA's policy in federal district court.[5] In bringing the action against the MBTA, the plaintiffs argued that the policy of random searches did not satisfy Fourth Amendment requirements of reasonableness.[6] United States District Court Judge George A. O'Toole, however, disagreed with the contentions of the plaintiffs and denied their request for a preliminary injunction.[7] Although the court limited the scope and duration of the MBTA's searches to just one bus route and a single subway line during the week of the convention, it did not resolve the validity of the search policy for other MBTA stations, bus routes, or subway lines outside the proximity of Boston or the context of the DNC.[8]

(observing MBTA policy first of kind in nation); John J. Monahan, *Worcester Train Riders Face Search; DNC Security Widens*, TELEGRAM & GAZETTE (Worcester), July 13, 2004, at A1 (noting search procedure to commence pre-DNC and reach highest security levels during convention). MBTA Police Chief Joseph Carter claimed to have no problem being the first to implement such a policy because he did not want to be the first to discuss a serious incident with links to terrorism. Monahan, *supra*, at A1. Carter also indicated that the stop-and-search procedure would involve explosive-sniffing dogs and all 247 uniformed MBTA police officers. *Id.*

4. *See* Anthony Flint, *Judge Upholds T's Search of Bags Near Convention*, BOSTON GLOBE, July 29, 2004, at B1 (suggesting possible implementation of search procedure post-DNC). Michael Mulhern, general manager of the MBTA, cast doubt upon whether the MBTA would continue to implement the searches. *Id.* He observed, however, that the searches could be reintroduced if law enforcement officials raised threat levels or credible sources provided specific information about a potential attack. *Id.*; *see also* J.M. Lawrence, *Democratic National Convention; Beantown Blowout; MBTA Hints Bag Checks May Go On After DNC*, BOSTON HERALD, July 29, 2004, at C21 (noting less likelihood of policy implementation post-DNC but indicating policy still in place); Lewis, *supra* note 3, at A1 (citing MBTA as first in nation to institute permanent policy of randomly searching passengers' bags).

5. American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *1 (D. Mass. July 28, 2004) (citing additional individual plaintiffs). The plaintiffs sought a declaration that the MBTA's policy violated Fourth Amendment guarantees against unreasonable searches and seizures. *Id.* The plaintiffs additionally sought a preliminary injunction against the policy's enforcement. *Id.*

6. Memorandum in Support of Preliminary Injunction at 5, American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 2194224 (D. Mass. July 28, 2004) (elucidating Fourth Amendment requirement of reasonableness in all searches and seizures).

7. *American-Arab*, 2004 WL 1682859, at *4 (denying plaintiffs' preliminary injunction as narrowed by plaintiffs at hearing). Judge O'Toole reasoned that both urban mass transportation systems and airline transportation deserve the same constitutional analysis as exceptions to the requirement of a warrant or reasonable suspicion. *Id.* at *2. Applying a two-part analysis, the court first concluded that the security provisions of the MBTA served a substantial government need or public interest. *Id.* at *3. Secondly, the court reasoned that the privacy intrusion was "reasonable in its scope and effect, given the nature and dimension of the public interest to be served." *Id.* The court then correlated the intrusion of the MBTA search policy with searches conducted at airports and courthouses. *Id.* at *3.

8. *American-Arab*, 2004 WL 1682859, at *1 (noting focus of relief narrowed policy's implementation to single subway line and bus route). The court observed that the United States Secret Service issued directives restricting access to roadways surrounding the Fleet Center, the forum of the DNC, and that anyone who wished to penetrate specific territorial zones surrounding the Fleet Center had to yield to a security search. *Id.* The court reached its conclusion, in part, because of the strict limitation of the policy's scope and duration. *Id.* at *3. Moreover, with regard to the two lines of transportation involved in the injunction, there was no

While September 11, 2001, changed American societal norms and the global community in countless ways, courts must never overlook our nation's basic constitutional guarantees.[9] Lawyers and judges, students and teachers, subway riders and non-commuters, and society as a whole, must never abandon their responsibilities in preserving the foundation of American freedoms in favor of false senses of security.[10] While the federal district court's ruling in *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*[11] (*American-Arab*) was a noble gesture towards maintaining the safety of commuters who utilize the MBTA on a daily basis, the court failed to recognize that such security measures do not increase safety on the MBTA.[12]

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selectivity in the searches, as every passenger had to agree to an examination of their carry-on items. *Id.* at *1.

9. *See* Bourgeois v. Peters, 387 F.3d 1303, 1311-12 (11th Cir. 2004) (reasoning no basis for city to use September 11 as excuse to search protesters). In *Bourgeois*, the city of Columbus, Georgia, instituted a policy requiring anyone who wished to participate in a particular protest to succumb to a metal detector search. *Id.* at 1307. The city proposed that in a post-September 11th context, the court could determine the use of metal detectors at large gatherings to be constitutional as a matter of law. *Id.* at 1311. The court aptly observed, however, that the city's position would truly eradicate the meaning of the Fourth Amendment. *Id.* at 1311-12.

10. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (granting citizen's petition for writ of coram nobis). The court observed:

> As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Id.

11. No. 04-11652-GAO, 2004 WL 1682859 (D. Mass. July 28, 2004).

12. *See* Finer, *supra* note 2, at A02 (quoting Executive Director of Massachusetts ACLU saying MBTA-type searches serve as ruse for racial profiling). Executive Director Carol Rose also questioned the effectiveness of the program, even if truly random. *Id.*; *see also* Anthony Flint, *Suit Calls for Halt to Random Searches*, BOSTON GLOBE, June 29, 2004, at B3 (observing opponents view MBTA policy as draining resources and causing delays, but not stopping terrorists); Eileen McNamara, *The Price of Insecurity*, BOSTON GLOBE, June 27, 2004, at B1 (questioning where deterrent effect of massive security build up ends). The article continues:

> If encroachments on constitutional protections against unreasonable search and seizure are necessary for public safety while the Democrats are here, why won't they be needed when the delegates go home? Why confine baggage searches and carry-on restrictions on the city's transit system to the four days the Democrats are in town? Why limit random searches to public transit? . . . It is a false dichotomy to argue that we must choose between safety and liberty. Additional security measures are obviously a wise investment in these volatile times, but there is more than a hint of hysteria in the preparations for the Democratic Convention. There is an unwillingness to acknowledge how much we cannot control and how much we can lose if we surrender to fear.

McNamara, *supra*, at B1; *cf.* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding random stop scheme unconstitutional because no evidence linking stops to promotion of roadway safety). The Court also reasoned that the random stop scheme epitomizes the needle in the haystack quandary: not only is the percentage of unlicensed drivers minimal, but an abundance of licensed drivers will be stopped in order to find the few

Moreover, Judge O'Toole's sweeping comparison of mass transit systems to airports completely ignores the inherent distinctions between the two modes of transportation.[13] The court also attempted to justify the constitutionality of the searches with the ever-present threat of terrorism.[14] Whereas the War on Terror must be fought with the utmost intensity and vigor, courts should never use general, vague threats of terrorism as the underpinning for Fourth Amendment decision-making.[15]

This Note will seek to redress the lack of judicial foresight in the *American-Arab* decision by analyzing broad threats of terrorism in the context of search and seizure jurisprudence for what they are: additional pieces of information that must stay within the purview of the Constitution.[16] More importantly, this Note will also examine the constitutionality of the MBTA's policy in a post-DNC context.[17] Modern terrorism may compel America to adapt to new technologies or alter conventional crime fighting techniques, but it does not require law enforcement officials or courts to modify the Constitution to

unlicensed operators. *Prouse*, 440 U.S. at 659-60.

13. *See Arab-American*, 2004 WL 1682859, at *2 (finding no reason for separate constitutional analyses for urban mass transportation systems and airline transportation). The court also stressed the importance of notice given to passengers riding the MBTA, but acknowledged that notice was not wholly sufficient for lines of transportation at issue in the litigation. *Id.* at *3. *But see* United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (observing uniqueness of air travel). Quoting from his concurring opinion in *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1974), Judge Friendly remarked:

> [w]hen 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.

Id. (emphasis in original); *see also* Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002) (outlining how airport security screenings comply with Fourth Amendment standards of reasonableness).

14. *See American-Arab*, 2004 WL 1682859, at *2 (declaring national party nominating conventions as possible targets of terrorism). The court further reasoned that when cities with large mass transportation systems host conventions, it is not without merit to infer that terrorists would target both the convention and the transit system. *Id.*; *see also supra* notes 1, 9 and accompanying text (noting general threat of terrorism fails as sole justification of constitutional disregard).

15. *See* Stauber v. New York, No. 03 Civ. 9162(RWS), 2004 WL 1593870, at *31 (S.D.N.Y. July 16, 2004) (contrasting implementation of airport search policies to those used on New York protestors). In granting the plaintiffs' injunctive relief, the court reasoned that the defendants failed to show that the deprivation of personal liberty resulting from the bag search policy was warranted by the "general invocation of terrorist threats," without illustrating how the searches would diminish the threat. *Id.* *But see American-Arab*, 2004 WL 1682859, at *2 (finding general terrorist threat of disrupting democracy in America as sufficient to justify search policy). The Department of Homeland Security issued a warning that terrorists planned to disrupt the Nation's "democratic process." *Id.* The court found the threat specific enough to warrant invading the commuters' privacy and held that the threat was "real and not imagined." *Id.*

16. *See* Bourgeois v. Peters, 387 F.3d 1303, 1311 (11th Cir. 2004) (noting analysis changes if reasons existed to believe international terrorists would target or infiltrate protest).

17. *See infra* Part III (outlining unconstitutionality of MBTA search policy post-DNC).

support added security measures.[18] The MBTA's policy has no constitutional basis and represents a sheer violation of Fourth Amendment rights under existing case law.[19]

In order to expand on the aforementioned contentions, this Note will present a brief history of the Fourth Amendment's evolution into this age of global terrorism.[20] Further, this Note will examine and apply the various federal cases that have shaped Fourth Amendment search and seizure law to the policy of the MBTA.[21] This Note will also analyze the MBTA's stop-and-search procedure in relation to exceptions from traditional search and seizure requirements, such as searches conducted at airports, courthouses, and checkpoint stops.[22] Lastly, this Note will explore the future of mass transit search policies and what lies ahead for Fourth Amendment rights in America's perpetual battle against terrorism.[23]

II. HISTORY

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[24] The root of Fourth Amendment protection originated in America's colonial era, when the British government subjected colonists to pervasive intrusions on their privacy.[25] The so-called "writs of assistance" granted royal officers broad

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18. *See* M. Reed Martz, Comment, *A Constitutional Analysis of Random Vehicle Searches at Airports*, 73 MISS. L.J. 263, 287 (2003) (arguing implementation of random vehicle searches at airports unconstitutional). As the author illustrates, implementation of the vehicle searches only occurs at times of "Orange Alert." *Id.* at 286; *see also* Eric J. Miller, *The "Cost" of Securing Domestic Air Travel*, 21 J. MARSHALL J. COMPUTER & INFO. L. 405, 436-37 (2003) (describing best security measures as both effective and constitutional). Miller states:

> The Constitution has survived many extraordinary events, such as the Civil War and Great Depression, in its over 200 years of existence. The events of September 11 are another extraordinary event to add to that list, and when history looks back, people will say that the Constitution is still the supreme law of the land.

Miller, *supra*, at 437; *cf.* United States v. Taylor, 956 F.2d 572, 583 (6th Cir. 1992) (Keith, J., dissenting) (holding "War on Drugs" does not license government to arbitrarily impede civil liberties).

19. *See infra* Part III (asserting unconstitutionality of MBTA policy via existing case law on Fourth Amendment searches and seizures).

20. *See infra* Part II (setting forth federal case law regarding traditional constitutional parameters on search and seizure).

21. *See infra* Part III.A (outlining constitutional search and seizure requirements and MBTA policy's failure to satisfy requirements).

22. *See infra* Part III.B (detailing exceptions to search and seizure requirements and MBTA policy's failure to qualify as exception).

23. *See infra* Part III.C (analyzing future of Fourth Amendment in America's battle with War on Terror).

24. U.S. CONST. amend. IV.

25. *See* THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1992, S. DOC. NO. 103-6, at

discretion to implement searches and seizures in the homes of private citizens.[26] These early practices guided America's founders in recognizing the stress that unbridled government searching authority placed on individual liberty and privacy.[27]

In the wake of the disastrous events of September 11, 2001, however, Supreme Court Justice Sandra Day O'Connor predicted that Americans were likely to experience unparalleled limitations on individual liberty as part of the United States' response to terrorism.[28] Justice O'Connor added that the rule of law must be preserved in the face of terrorism, and offered a cautionary quote from Margaret Thatcher: "Where law ends, tyranny begins."[29] Even prior to the terrorist attacks of September 11, mounting concerns over crime and public safety in America compelled judicial balancing of constitutional privacy rights with the ever-increasing needs of law-enforcement officials to apprehend dangerous criminals.[30] It is within this concept of balancing individual privacy rights with the government's interest in safeguarding societal norms that courts analyze exceptions to Fourth Amendment guarantees.[31]

A. Search and Seizure

For well over a century, the Supreme Court has recognized the significance of personal security and liberty from government intrusion into the "privacies

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1199 (1st Sess. 1996) [hereinafter ANALYSIS AND INTERPRETATION OF THE CONSTITUTION] (detailing history of Fourth Amendment jurisprudence), *available at* http: //www.gpoaccess.gov/constitution/html/amdt4.html.

26. *Id.* at 1200 (observing writ's intrusiveness on colonist's privacy); *see also* JOSEPH A. GRASSO, JR. & CHRISTINE M. MCEVOY, SUPPRESSION MATTERS UNDER MASSACHUSETTS LAW § 1.3(a)(1), at 1: 3-1: 4 (2004-2005) (noting colonists' hatred of writs of assistance served to advance Revolutionary War). A Boston lawyer named James Otis, who represented sixty-three Boston merchants contesting the writs, allegedly referred to the writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of the constitution, that ever was found in an English law book." *Id.*

27. ANALYSIS AND INTERPRETATION OF THE CONSTITUTION, *supra* note 25, at 1199 (articulating motivation underlying Fourth Amendment). "Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the utilization of the 'writs of assistance.'" *Id.*

28. *See* Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5 (delineating effect of September 11 on constitutional liberties).

29. *Id.* (noting law must hold firm against threats of terrorism). Justice O'Connor also stated that, "[l]awyers and academics will help define how to maintain a fair and a just society with a strong rule of law at a time when many are more concerned with safety and a measure of vengeance." *Id.*

30. *See* Florida v. J.L., 529 U.S. 266, 273-74 (2000) (indicating special circumstances where danger to society may outweigh constitutional jurisprudence). In dicta, Justice Ginsburg reasoned that the indicia of reliability necessary for an anonymous tip may be diminished, or even eradicated, if the report concerned someone carrying a bomb instead of a firearm. *Id.*

31. *See* Collier v. Miller, 414 F. Supp. 1357, 1361 (S.D. Tex. 1976) (basing creation or recognition of exception to obtaining a warrant on probable cause requirement). Courts generally find exceptions to the warrant requirement on a "tripartite weighing" of public necessity, effectiveness of the search, and the level of intrusion involved. *Id.*

of life."[32] The Court has also acknowledged the role of the courts to keep a watchful eye on constitutional rights and protect individuals against unwarranted infringements.[33] The right of personal security belongs not only to those individuals within the privacy of their homes, but also to those exposed on the streets of our nation.[34] In protecting society's reasonable privacy interests, the Supreme Court has held that what a person deliberately exposes to the public, even in her own home, is not under the protection of the Fourth Amendment; but what she intends to maintain as private, even in publicly-accessible areas, may be worthy of constitutional protection.[35]

In determining whether government intrusions amount to a search or seizure, the Supreme Court has remained loyal to the two-part test originally authored by Justice Harlan in *Katz v. United States*.[36] The test first asks whether the person has demonstrated a genuine expectation of privacy.[37] The test then seeks to determine whether such an expectation of privacy is one that society is willing to acknowledge as reasonable.[38] Judicial balancing of the public's interest against the degree of government intrusion aids the court in determining whether the Fourth Amendment is applicable.[39]

1. Individualized Suspicion

Once there has been government action and a search or seizure under the

32. *See* Boyd v. United States, 116 U.S. 616, 630, 635 (1886) (holding compulsory extortion of testimony or private papers outside purview of Fourth and Fifth Amendments).

33. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (delineating importance of Fourth Amendment). The Court added, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.*

34. *See* Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (establishing "stop" based on reasonable suspicion).

35. *See* Katz v. United States, 389 U.S. 347, 351-52 (1967) (holding Fourth Amendment only protects people, not places).

36. *See id.* at 361 (Harlan, J., concurring) (establishing two-part test).

37. *See* Bond v. United States, 529 U.S. 334, 338 (2000) (describing first prong of reasonableness test); *Katz*, 389 U.S. at 361 (reasoning first prong of test relates to subjective expectation of privacy); United States v. Cooper, 203 F.3d 1279, 1283-84 (11th Cir. 2000) (reaffirming Fourth Amendment analysis of privacy delineated in *Katz*). In *Cooper*, the court expressed that the Fourth Amendment protects individuals in places where a reasonable expectation of privacy from government intrusion can be demonstrated. *Cooper*, 203 F.3d at 1283-84.

38. *See Bond*, 529 U.S. at 338 (explaining second prong of reasonableness test); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) (reasoning second prong of test involves objective justification of individual's expectation under circumstances).

39. *See* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (noting balance split between individual's legitimate privacy expectations and government's need to effectively stop crime); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (explaining court weighs public interest against individual's Fourth Amendment interest in defining constitutional safeguards); Camara v. Mun. Court of City and County of San Francisco, 387 U.S. 523, 536-37 (1967) (clarifying reasonableness determined by balancing need to search against resulting invasion). The Court in *Camara* noted that a balancing test weighing the need for the search versus the invasion of privacy caused by the search is the only test for determining reasonableness. *Camara*, 387 U.S. at 536-37.

two-part balancing test, the constitutionality of the search or seizure hinges upon a court's determination of reasonableness.[40] Generally, courts presume that warrantless searches and seizures conducted in the absence of individualized suspicion of wrongdoing are unreasonable.[41] The Supreme Court, however, has carved out limited exceptions to the general rule in recognizing that the government's interest in conducting warrantless searches or seizures may outweigh individual privacy interests.[42] Exceptions to the warrant requirement include brief investigatory stops based on reasonable suspicion, vehicle checkpoint stops, and the administrative-like searches conducted at airports and courthouses.[43]

a. Stop and Frisk

One of the more prevalent exceptions to the warrant requirement involves investigatory stops based on reasonable suspicion—a stop and frisk.[44] As the

40. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (holding Fourth Amendment requires reasonable searches and seizures); Coolidge v. New Hampshire, 403 U.S. 443, 509-10 (1971) (Black, J., concurring in part and dissenting in part) (adding reasonableness test precludes per se rules, but merits factual determination). In *Coolidge*, Justice Black noted that warrants are not required for every search, but rather the Fourth Amendment only prohibits *unreasonable* searches and seizures. *Coolidge*, 403 U.S. at 509-10.

41. Chandler v. Miller, 520 U.S. 305, 308 (1997) (explaining search generally requires individualized suspicion of wrongdoing); *see also* Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (describing seizures outside judicial process as per se unreasonable and subject to specific exceptions); United States v. Anderson, 154 F.3d 1225, 1228-29 (10th Cir. 1998) (conditioning unreasonableness of warrantless search on individual's legitimate privacy expectation); United States v. Paige, 136 F.3d 1012, 1018 (5th Cir. 1998) (characterizing search as unconstitutional when government activity significantly intrudes upon reasonable expectation of privacy).

42. *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 330 (2001) (delineating reasons for recognizing exceptions to warrant requirement); *Edmond*, 531 U.S. at 37 (observing exceptions to general rule only apply in limited circumstances); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (recognizing government interest in promoting safety invokes exception to general rule). Generally, the Court has been willing to recognize exceptions to the warrant requirement "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like . . . ." *McArthur*, 531 U.S. at 330; *see also* United States v. Gordon, 231 F.3d 750, 754 (11th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (delineating exceptions to warrant requirement).

43. *See, e.g.*, Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 447 (1990) (holding sobriety checkpoint constitutional); *Martinez-Fuerte*, 428 U.S. at 545 (holding brief vehicle stops at fixed Border Patrol checkpoint constitutional without reasonable suspicion); Terry v. Ohio, 392 U.S. 1, 22 (1968) (recognizing police ability to stop individual to investigate criminal activity); United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (holding airport searches reasonable in light of danger associated with hijacking threat); Downing v. Kunzig, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (finding limited search at entrance to government building in light of imminent dangers reasonable); *see also Chandler*, 520 U.S. at 313 (recognizing exceptions to the warrant requirement under "special needs" category). The Court in *Chandler* observed that "[w]hen such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314; *see also* Skinner v. Ry. Labor Executives' Assn., 489 U.S. 602, 619 (1989) (observing "special needs" exception to warrant requirement). *Skinner* made clear that in limited circumstances, a minimally intrusive search may be reasonable absent an individualized suspicion. *Skinner*, 489 U.S. at 624.

44. *See Terry*, 392 U.S. at 30-31 (establishing reasonableness of stop and frisk).

Court held in *Terry v. Ohio*,[45] an officer must base investigatory stops of an individual on reasonable suspicion of criminal activity.[46] Requiring reasonable or individualized suspicion is a critical aspect of constitutional protections of privacy and personal security.[47] Observing that not every personal encounter between individuals and police officers involves a seizure, the Court stated that seizures occur only when an officer restrains an individual's liberty.[48] For example, the Court recognized that when a police officer confronts an individual on the street and hampers his freedom to walk away, that person is seized within the meaning of the Fourth Amendment.[49]

b. Random Motorist Stops

In *Delaware v. Prouse*,[50] the Court drew on the gravity of the requirement of individualized suspicion and held that a program of random motorist stops to

45. 392 U.S. 1 (1968).

46. *Id.* at 30 (observing suspicion of criminal activity serves as basis for investigatory detention). The Court would uphold investigatory detentions only upon a showing of reasonable suspicion by the police officer that the individual has committed, is committing, or is about to commit a crime. *Id.* at 20-21. The Court further reasoned that such stops are permissible to investigate possible criminal behavior, even though an officer does not have probable cause to make an arrest. *Id.* at 22. With regard to the criminal activity alleged, the officer must be able to convey more than an "inchoate and unparticularized suspicion or 'hunch.'" *Id.* at 27; *see also* Illinois v. Wardlow, 528 U.S. 119, 123-24 (2000) (reasoning *Terry* stop constitutional when based on "reasonable, articulable suspicion" of criminal activity occurring). Moreover, the *Wardlow* court stated that "[w]hile 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Wardlow*, 528 U.S. at 123; *see also* Brown v. Texas, 443 U.S. 47, 50 (1979) (reasoning absence of particularized suspicion favors freedom from police interference); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (extending *Terry* stop based on reasonable suspicion to automobiles).

47. *See* Reid v. Georgia, 448 U.S. 438, 440 (1980) (holding any restriction on personal liberty by police needs support based on reasonable suspicion); Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990) (highlighting significance of reasonable suspicion). The *Duran* court stated:

> If there is one irreducible minimum in our Fourth Amendment jurisprudence, it is that a police officer may not detain an individual simply on the basis of suspicion in the air. No matter how peculiar, abrasive, unruly or distasteful a person's conduct may be, it cannot justify a police stop unless it suggests that some specific crime has been, or is about to be, committed, or that there is an imminent danger to persons or property. Were the law any different-were police free to detain and question people based only on their hunch that something may be amiss-we would hardly have a need for the hundreds of founded suspicion cases the federal courts decide every year, for we would be living in a police state where law enforcement officers, not the courts, would determine who gets stopped and when.

Duran, 904 F.2d at 1378.

48. *Terry*, 392 U.S. at 19 n.16 (describing restraint of liberty as use of physical force or show of authority).

49. Terry v. Ohio, 392 U.S. 1, 17 (1968) (stating Fourth Amendment governs seizures of persons beyond arrest and prosecution for crime). The Court also held that the detaining officer may conduct a carefully limited search of the outer clothing of the seized individual to discover weapons. *Id.* at 30.

50. 440 U.S. 648 (1979).

check drivers' licenses and registration violated the Fourth Amendment.[51] The Court reasoned that such a program, absent an articulable and reasonable suspicion of violation of law, would subject every occupant of every vehicle on the road to a seizure "at the unbridled discretion of law enforcement officials."[52] While the government may subject automobiles and their use to extensive regulation to preserve roadway safety, the government may not exercise its authority to relinquish all reasonable expectations of privacy.[53] The Court recognized that individuals are not stripped of Fourth Amendment protections when they progress from their homes to the public sidewalk, or from the public sidewalk into their automobile.[54]

More recently, in *Indianapolis v. Edmond*,[55] the Supreme Court struck down a roadblock scheme employed by the Indianapolis police that stopped a predetermined number of automobiles at a given location.[56] The Court premised its ruling on the program's purpose to detect evidence of ordinary criminal wrongdoing, specifically drug possession.[57] In pursuing a program aimed at general crime control, the Court reasoned that stopping motor vehicles can only be justified on the basis of individualized suspicion.[58] Nonetheless,

51. *Id.* at 661 (holding motorist stop to check drivers' licenses unconstitutional). *But see* Carroll v. United States, 267 U.S. 132, 153 (1925) (upholding warrantless stop of automobile). Emerging from the Prohibition era, the Court approved warrantless searches of automobiles when probable cause indicated that the vehicle contained illegal alcoholic beverages. *Id.* at 153. The Court reasoned that the transitory nature of moving automobiles on the open road prevents the procurement of a warrant. *Id.*

52. Delaware v. Prouse, 440 U.S. 648, 661 (1979) (observing unfettered discretion of police officers opens door to intrusion into individual rights).

53. *Id.* at 662 (reasoning danger of abuse of discretion does not disappear because automobile subject to state regulation). The Court also noted that when the government encroaches on privacy rights, the privacy interest suffers whether the motivation to intrude stems from criminal violations or regulatory violations. *Id.*

54. *Id.* at 663 (reasoning Fourth Amendment seriously circumscribed if government exercises unfettered discretion to intrude into car). The Court tipped the balance of reasonableness in favor of individual privacy because Delaware's program contributed only marginally to roadway safety. *Id.* at 661. The Court nevertheless maintained that their holding did not preclude the implementation of a less intrusive spot check program without unconstrained exercises of discretion, such as a roadblock-type stop to check drivers' licenses and registration. *Id.* at 663.

55. 531 U.S. 32 (2000).

56. *Id.* at 36 (holding roadblock scheme unconstitutional). *But see* Illinois v. Lidster, 540 U.S. 419, 427-28 (2004) (upholding vehicles stops for information in area where deadly hit-and-run previously occurred).

57. City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (reasoning checkpoint's primary purpose indistinguishable from general criminal investigations). The Court observed that allowing roadblocks to be set up for general purposes of crime control would be incompatible with the Fourth Amendment. *Id.* at 42. "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." *Id.*

58. *Id.* at 47 (declining to suspend usual requirement of individualized suspicion). In rationalizing their ruling in the face of the ever-present problem of illegal narcotics trafficking, the Court also reasoned that the severity of the threat alone cannot be dispositive of what methods police officers may utilize to pursue a specific agenda. *Id.* at 42. In determining whether individualized suspicion is required, the Court "must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Id.* at 42-43. When the government pursues a course of action resembling general crime control, the Court is reluctant to dispense with the requirement of individualized suspicion. *Id.* at 43.

the Court remarked that their holding did not affect the validity of other constitutionally recognized checkpoints and searches "where the need for such measures to ensure public safety can be particularly acute."[59]

c. *Personal Luggage*

Just as the Fourth Amendment protects a person's privacy interest in the contents of personal luggage, the requirement of reasonable suspicion to seize an individual's person or automobile also extends to personal property.[60] Thus, in order to seize an item of personal property, such as packages, luggage, or bags, authorities must harbor a reasonable suspicion based on specific, articulable facts that the item of personal property contains contraband or evidence of a crime.[61] Additionally, the Supreme Court has held that a manual inspection of a passenger's bag constitutes a search and must comport with Fourth Amendment standards of reasonableness.[62] In *Bond v. United States*,[63] the Court noted that travelers have an acute concern for their carry-on baggage because they are often used to transport private and personal items.[64] The Court held that the physical manipulation of the traveler's personal luggage amounted to an unconstitutional violation of his privacy rights, even though the inspector did not open the bag and the inspection consisted only of a "probing tactile examination" of the bag's exterior.[65]

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59. *Edmond*, 531 U.S. at 47-48 (observing inherent distinctions between roadblock scheme implemented in case and other valid warrantless searches). In dicta, the Court also went on to note that the Fourth Amendment would allow "appropriately tailored" roadblocks, such as a roadblock adapted to impede "an imminent terrorist attack." *Id.* at 44; *see also* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding fixed sobriety checkpoint aimed at removing drunk drivers from road constitutional); United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (holding brief questioning routinely conducted at permanent checkpoints consistent with Fourth Amendment).

60. *See* Bond v. United States, 529 U.S. 334, 336 (2000) (holding traveler's personal luggage "effect" protected by Fourth Amendment); United States v. Chadwick, 433 U.S. 1, 13 (1977) (reasoning individual's expectation of privacy in personal luggage substantially greater than in automobile). In *Bond*, the Court held that taking bags onto a train or bus does not forfeit Fourth Amendment protections. *Bond*, 529 U.S. at 336-37; *cf.* United States v. Place, 462 U.S. 696, 708-09 (1983) (reasoning limitations applicable to investigative detentions of person also applicable to personal luggage). The Court added that because property seizures entail varying degrees of intrusiveness, some limited "detentions of personal effects may be so minimally intrusive . . . that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime." *Place*, 462 U.S. at 706.

61. *See Place*, 462 U.S. at 706 (articulating necessity of reasonable suspicion); United States v. Vasquez, 213 F.3d 425, 426 (8th Cir. 2000) (noting authorities need reasonable suspicion before detaining package).

62. *See Bond*, 529 U.S. at 338-39 (holding unreasonable search of bus passenger's bag when handled in exploratory manner).

63. 529 U.S. 334 (2000).

64. *See id.* at 337-38 (reasoning physical invasive inspection more intrusive than purely visual inspection).

65. *Id.* at 337-38 (holding physical, manipulative exploration of bag's exterior unconstitutional); *see also* United States v. Gwinn, 191 F.3d 874, 879 (8th Cir. 1999) (reasoning feeling and manipulating bag's exterior involves intrusive and prolonged contact). The court in *Gwinn* observed that the traveling public would not expect their luggage to be subject to a "calculated and thorough squeezing and manipulation of their exteriors." *Gwinn*, 191 F.3d at 879; *cf.* United States v. Va Lerie, No. 8: 03CR23, 2003 WL 21956437, at *6 (D. Neb.

2. *Limited Exceptions to Requirement of Individualized Suspicion*

In the absence of individualized suspicion, courts have held seizures and searches as constitutional only in a limited number of cases.[66] Of particular importance are the limited exceptions the courts have fashioned for administrative-like searches at airports, courthouses, and fixed checkpoints.[67]

a. Airports, Courthouses, and Other Government Buildings

Warrantless searches extend to airports, courthouses, and other government buildings when the public interest in safety outweighs individual privacy interests.[68] The routine nature of searches at airports and government buildings yield an administrative-like aura, yet they are dissimilar to the warrantless administrative searches upheld by the Supreme Court.[69] Airport security

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Aug. 14, 2003) (invalidating removal and sequestration of defendant's bag absent consent, reasonable suspicion, probable cause, or warrant). The Court noted that "since the Fourth Amendment has not yet been officially suspended for bus and train travel," searching all passengers' bags to find drugs cannot be carried out. *Va Lerie*, 2003 WL 21956437, at *6. In the absence of particularized suspicion or an exception thereto, bag seizures and searches are unconstitutional "until Congress or a higher court determines that bus and train travelers no longer have any expectation of privacy with regard to their luggage or personal property." *Id. But see* United States v. Va Lerie, 424 F.3d 694, 696 (8th Cir. 2005) (en banc) (reversing decision of district court in granting defendant's motion to suppress evidence). In the context of a passenger's checked luggage, the Eighth Circuit held that removing the passenger's luggage to an area outside of the bus "did not constitute a seizure, because the removal of the luggage did not (1) delay [the defendant]'s travel or significantly impact [his] freedom of movement, (2) delay the timely delivery of the checked luggage, or (3) deprive [the bus carrier] of its custody of the checked luggage." *Id.*

66. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (noting Court only recognizes suspicionless searches in limited cases); *see, e.g.*, Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 651-54 (1995) (upholding random drug testing of student-athletes as "special needs" search); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 662-67 (1989) (holding drug tests for United States Customs Service employees constitutional under "special needs" exception); Skinner v. Ry. Labor Executives' Assn., 489 U.S. 602, 613-18 (1989) (upholding drug and alcohol tests for railway employees in certain circumstances as "special needs"); New York v. Burger, 482 U.S. 691, 702-04 (1987) (holding constitutional warrantless inspection of "closely regulated" business premises under administrative search); Michigan v. Tyler, 436 U.S. 499, 507-09 (1978) (upholding inspection of fire-damaged premises to determine cause of blaze as administrative search); Camara v. Mun. Court of City and County of San Francisco, 387 U.S. 523, 534-39 (1967) (upholding inspection to ensure compliance with city housing code under exception for administrative searches).

67. *See* Chandler v. Miller, 520 U.S. 305, 323 (1997) (observing routine nature of airport and government building searches).

68. *See* Burgess v. Lowery, 201 F.3d 942, 947 (7th Cir. 2000) (expounding government right to require warrantless searches at airports). The court also stated, "[c]learly it is reasonable . . . for the government to require airline passengers to step through a metal detector even though there is no reasonable suspicion that a given passenger is carrying a weapon." *Id.* Because of the minimal intrusiveness of the procedure and the extreme danger weapons pose on airplanes, the court regards this condition on flying as reasonable. *Id.* (citing Edmond v. Goldsmith, 183 F.3d 659, 664 (7th Cir. 1999)).

69. *See Chandler*, 520 U.S. at 323 (noting commonplace quality of airport and government building searches). The Court observed, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings." *Id.*; *cf.* United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting) (noting commonplace nature of airport security). Justice Souter observed that searches conducted at airports are "necessary to hedge against risks that, nowadays, even small children understand."

screening must be reasonable to comply with the Fourth Amendment.[70] Courts, however, have deemed routine security checks at airports reasonable because the compelling societal interest in thwarting air piracy outweighs its limited intrusiveness on individual privacy.[71] While the Supreme Court has yet to reach the issue of airport screening on the merits, the federal circuit courts are in accord with favoring society's interest in implementing reasonable security measures over giving the government carte blanche in regulating airport security.[72] Lower federal courts similarly agree on the reasonableness of searches conducted prior to entering government buildings.[73] The constitutionality of searching those entering government buildings stems from the nature and purpose of the buildings, such as courts, and the government's obligation to protect against explicit threats of violence.[74]

Drayton, 536 U.S. at 208. He also remarked that "[t]he commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses." *Id.* *But see* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 473-74 (1990) (Stevens, J., dissenting) (pondering constitutional validity of mass transit security measures). Justice Stevens remarked that "all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search." *Id.*

70. *See* Unites States v. Davis, 482 F.2d 893, 904, 910 (9th Cir. 1973) (outlining test to determine reasonable airport screening search). The Ninth Circuit observed that, first, a search must not be more extensive or intrusive than necessary, "in light of current technology," to detect weapons or explosives. *Id.* at 913. Second, a search must be "confined in good faith to that purpose." *Id.* Lastly, passengers may avoid a search altogether "by electing not to fly." *Id.*

71. *See* United States v. Bell, 464 F.2d 667, 674-75 (2d Cir. 1974) (Friendly, J., concurring) (observing inherent danger in air travel).

72. *See* United States v. Doe, 61 F.3d 107, 110 (1st Cir. 1995) (holding Fourth Amendment not offended when carry-on luggage subjected to x-ray screening or hand search); United States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984) (reasoning airport security checkpoints and loading gates as sui generis under Fourth Amendment); *see also* Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089-90 (9th Cir. 2002) (clarifying *Pulido-Baquerizo* in validating implementation of random post-x-ray search when x-ray yields no suspicious objects); United States v. Pulido-Baquerizo, 800 F.2d 899, 901-02 (9th Cir. 1986) (upholding visual inspection or hand search in detecting weapons or explosives only); United States v. Lopez-Pages, 767 F.2d 776, 778 (11th Cir. 1985) (reasoning voluntary presence at airport security area precludes requirement of probable cause or reasonable suspicion); United States v. DeAngelo, 584 F.2d 46, 48 (4th Cir. 1978) (holding voluntary entrance upon screening process signals acquiescence to full scope, including physical inspection).

73. *See* Downing v. Kunzig, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (holding entrance to government building predicated on search constitutional). The court also noted that the searches were cursory and conducted for the limited purpose of detecting explosives or dangerous weapons. *Id.* at 1232; *see also* McMorris v. Alioto, 567 F.2d 897, 900-01 (9th Cir. 1978) (extending search validity to state courts on basis of serious threats of violence); Barrett v. Kunzig, 331 F. Supp. 266, 274 (M.D. Tenn. 1971) (holding government's substantial interest in conducting cursory inspection outweighs any personal inconvenience suffered by individual). The court noted that judicial diligence is necessary to prevent exceptions to the warrant requirement from becoming unjustifiably extended. *McMorris*, 567 F.2d at 899. Subjecting warrant requirement exceptions to strict scrutiny, the court reasoned that the search must be necessary to secure an imperative government interest, "limited and no more intrusive than necessary to protect against the danger to be avoided," and conducted for a purpose other than general crime detection. *Id.* at 899; *see also supra* note 69 (observing reasonableness of routine airport and court entrance searches espoused in *Chandler* dicta).

74. *See Downing*, 454 F.2d at 1232 (asserting dangers to federal property and personnel as imminent). The court observed that the impending threat to federal property and personnel was "likely to materialize into acts of violence and destruction in any part of the nation." *Id.* Moreover, the court reasoned that the

b. Fixed Checkpoints

In addition to airport and government building searches, searches or seizures conducted at fixed checkpoints qualify for consideration under the exception to the general rule that searches or seizures be made with particularized suspicion.[75] In *United States v. Martinez-Fuerte*,[76] the Supreme Court upheld a border patrol checkpoint, explaining that the reasonableness of the procedures followed in conducting the border checkpoint made the ensuing intrusion on motorists' interests negligible.[77] The Court further reasoned that the purpose of the border stops was legitimate, in the public's interest, and that the documented problem of illegal immigrants demonstrated the need for such an enforcement technique.[78] The Court also distinguished the border patrol checkpoint in *Martinez-Fuerte* from the "roving patrols" implemented in *Almeida-Sanchez v. United States*[79] and *United States v. Brignoni-Ponce*.[80] In those cases, the Court recognized the severity of the illegal immigration problem in the United States, but held that "roving patrol" searches and seizures, unaccompanied by individualized suspicion, invaded on Fourth Amendment privacy interests too extensively.[81]

Similar to *Martinez-Fuerte*, in *Michigan Department of State Police v. Sitz*,[82] the Court upheld the constitutionality of a fixed sobriety checkpoint for drivers.[83] In holding that the checkpoint was within the purview of the Fourth Amendment, the Court utilized the three-part balancing test set forth in *Brown*

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responsible government agency's failure to act on such threats could have greatly interrupted governmental processes. *Id.*; *see also Barrett*, 331 F. Supp. at 269 (observing protective procedures implemented to counteract bomb threats, bombings, forced entry, and disturbances at courthouses).

75. *See* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding fixed checkpoint or roadblock to detect drunk drivers constitutional); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (holding border checkpoint to apprehend illegal aliens constitutional).

76. 428 U.S. 543 (1976).

77. *Martinez-Fuerte*, 428 U.S. at 562 (observing constitutional balance tips in favor of government based on checkpoint's implementation and minimal intrusiveness).

78. *See id.*, 428 U.S. at 562 (applying balancing test developed in *Brown*).

79. 413 U.S. 266 (1973).

80. 422 U.S. 873 (1975); *see also Martinez-Fuerte*, 428 U.S. at 555-56 (distinguishing holdings of *Almeida-Sanchez* and *Brignoni-Ponce*).

81. *See Almeida-Sanchez*, 413 U.S. at 273 (holding search in absence of probable cause or consent violated Fourth Amendment right to privacy). The Court indicated that the *Carroll* doctrine "does not declare a field day for the police in searching automobiles . . . . Automobile or no automobile, there must be probable cause for the search." *Id.* at 269; *see also Brignoni-Ponce*, 422 U.S. at 883 (concluding random stops of vehicles to check citizenship and immigration status violated Fourth Amendment). In *Brignoni-Ponce*, the Court held that roving patrols were far more intrusive than fixed checkpoints. *Brignoni-Ponce*, 422 U.S. at 882. The Court added that stopping vehicles in the absence of reasonable suspicion was intolerable. *Id.* at 882-83. The Court reasoned that roving patrols would subject individuals residing in border areas to potentially limitless interference with their use of the highways based on the unbridled discretion of the Border Patrol officers. *Id.*

82. 496 U.S. 444 (1990).

83. *See id.* at 455 (holding sobriety checkpoint consistent with Fourth Amendment).

v. Texas.[84] The test weighs: (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.[85] In *Sitz*, the Court held that the checkpoint satisfied the *Brown* test because of the state's interest in curbing drunk driving, the effectiveness of the sobriety checkpoints in achieving that goal, and the minimal level of intrusion on an individual's privacy.[86] In both *Martinez-Fuerte* and *Sitz*, the Court held the checkpoint systems constitutional because the checkpoints involved no more than an initial stop and inquiry by checkpoint officers.[87]

B. Search, Seizure and the Modern Day Threat of Terrorism

Government attempts to restrict civil liberties in times of national crises are not a foreign concept to this country.[88] Nevertheless, the terrorist attacks of September 11, 2001, prompted the federal government to respond quickly and sternly, leaving the courts to strike the constitutional balance between the omnipresent threat of terrorism and personal liberty.[89] Recently, the Eleventh Circuit Court of Appeals held that a protest search policy whereby every protestor was subject to passing through a metal detector violated the Fourth Amendment.[90]

In *Bourgeois v. Peters*,[91] the city government alleged that the appellate court, following the events of September 11th, should determine metal detector

84. 443 U.S. 47 (1979); *see id.* at 50-51 (reasoning constitutionality depends on balance of public interest and individual's right to personal security).

85. *See Brown*, 443 U.S. at 50-51 (outlining three-part balancing test).

86. *See* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 449-54 (1990) (outlining factors to consider in balancing test); *see also* Indianapolis v. Edmond, 531 U.S. 32, 47 (2000) (holding checkpoint's constitutionality still determined by balancing competing interests and effectiveness of program). *But see Sitz*, 496 U.S. at 457 (Brennan, J., dissenting) (explaining under balancing test only significantly less intrusive seizures circumvent general rule). Justice Brennan questioned the Majority's decision by noting that its holding may subject ordinary drivers to "arbitrary or harassing" police conduct. *Sitz*, 496 U.S. at 458. Justice Brennan recognized the "immense social cost caused by drunk drivers" and applauded the government's effort to curb its tragic effects. *Id.* at 459. In predicting a positive response to the Court's decision due to the public's general disdain for drunk driving, Justice Brennan, nevertheless, astutely recognized that "consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis." *Id.*

87. *Sitz*, 496 U.S. at 450-51 (delineating reasonableness of search); *see also* Delaware v. Prouse, 440 U.S. 648, 661 (1979) (observing random stops at issue involve unconstrained discretion). The Court recognized unconstrained discretion as "evil" when circumscribing official discretion in the field. *Id.*

88. *See* Michael F. Linz & Sarah E. Meltzer, *Constitutional Issues After 9/11: Trading Liberty For Safety*, 50 JAN FED. LAW. 30, 30-31 (2003) (outlining history of restrictions on civil liberties). The Alien and Sedition Acts of 1798 and the internment of Japanese-Americans following the attack on Pearl Harbor are among the past confinements on civil liberties. *Id.*

89. *See id.* at 31-35 (describing governmental techniques and responses to terrorist attacks, including USA Patriot Act).

90. Bourgeois v. Peters, 387 F.3d 1303, 1310 (11th Cir. 2004) (holding large scale warrantless magnetometer searches without suspicion violates Fourth Amendment).

91. 387 F.3d 1303 (11th Cir. 2004).

searches at large gatherings to be constitutional as a matter of law.[92] Alarmed by the nature of such an argument, the court reasoned that while the threat of terrorism is ubiquitous, it cannot be used as a basis for intruding upon Fourth Amendment protections in large gatherings.[93] Respecting the requirement of reasonable suspicion in the Fourth Amendment, the court declared that absent specific threats of terrorism against a protest, September 11th cannot be used as a justification for searching protestors.[94] Additionally, the court could not justify suspending civil liberties in spite of the Department of Homeland Security's threat advisory levels.[95] The court also declined to allow the search policy on "special needs" grounds.[96]

Likewise, in *Stauber v. City of New York*,[97] the court enjoined the City of New York from enforcing its "bag search policy" at demonstrations during the Republican National Convention.[98] Pursuant to the policy, the police would have required demonstration attendees to consent to a search of their possessions prior to entering a demonstration site.[99] Although the city presented evidence that the inability to search demonstrators' bags increased the risk of violence and threatened public safety, the court found the evidence to be overly vague.[100] The court also concluded that the city brought forth no evidence suggesting the bag search policy would address the types of threats the New York City Police Department might face at the demonstrations.[101]

92. *See id.* at 1311 (citing appellees' brief).

93. *Id.* (reasoning size of gathering does not serve to justify stripping away of Fourth Amendment liberties).

94. *Bourgeois*, 387 F.3d at 1311 (reasoning threats of terrorism must be specific and articulable to yield restrictions on personal freedoms). The court referred to the city's reference to September 11th as "ill-advised" and "groundless." *Id.* The Fourth Amendment establishes searches based on evidence as the constitutional norm and not as "potentially effective, broad, prophylactic dragnets . . . . " *Id.* at 1312.

95. *See Bourgeois*, 387 F.3d at 1311-12 (resolving battle between civil liberties and War on Terror). The Court also noted that granting the federal government the power to determine the range of constitutionally permissible searches on the basis of raising or lowering the nation's threat advisory system would undoubtedly circumscribe Fourth Amendment protections. *Id.* at 1312.

96. Bourgeois v. Peters, 387 F.3d 1303, 1312-13 (11th Cir. 2004) (observing difficulty in separating public safety as governmental interest independent of law enforcement); *see also* Graves v. City of Coeur D'Alene, 339 F.3d 828, 845 n.22 (9th Cir. 2003) (holding suspicionless bag search unjustified under "special needs" jurisprudence). The court also observed that officers possessed unguided discretion and that there was no specified criteria in conducting such suspicionless bag searches. *Graves*, 339 F.3d at 845 n.22. The court could not justify the search of a parade attendee's backpack because the officers had no organized method for systematically checking all attendees. *Id.*

97. No. 03 Civ. 9162(RWS), 03 Civ. 9163(RWS), 03 Civ. 9164(RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004).

98. *See id.* at *33 (granting plaintiff injunctive relief with respect to bag search policy).

99. *See id.* at *31 (observing demonstrators faced with choosing between having bags searched or not attending demonstration).

100. *Stauber*, 2004 WL 1593870, at *31 (reasoning no showing by city that bag search will reduce risks). The city argued that the United States government considered the convention to be a potential terrorism target and the court noted that newspaper reports confirmed those concerns. *Id.* at 11.

101. *Id.* (observing deficiencies of bag search policy).

III. ANALYSIS

A. The Stop-and-Search Procedure of the MBTA Fails to Comport with Constitutional Standards

The MBTA's random search policy during the DNC failed to comply with the Fourth Amendment requirement of reasonableness.[102] While MBTA passengers were free to avoid the stop-and-search policy by traveling via other modes of transportation, there can be little doubt that once inside an MBTA station, a seizure occurred when MBTA police officers detained them and inspected their personal belongings.[103] Beyond the initial seizure, the officers' manual inspection of passengers' bags undeniably constituted a search.[104] When officers conducted searches and seizures in the absence of individualized suspicion of criminal activity, as the MBTA's search policy allowed, it fell short of meeting the reasonableness mandate of the Fourth Amendment.[105] As such, searches performed pursuant to the MBTA's policy were presumptively unconstitutional.[106] Absent individualized suspicion, the MBTA deprived its passengers constitutionally protected privacy because such a deprivation was based solely on unfounded terrorist threats.[107]

Individuals possess a Fourth Amendment privacy interest in the contents of personal luggage, and they do not forfeit this interest when carrying luggage onto the MBTA's trains or buses.[108] The MBTA's stop-and-search policy was more intrusive than other physical manipulations that violate the constitutional right to privacy because officers actually examined and shifted the contents of bags and packages, as opposed to simply examining the contents visually.[109] MBTA passengers had an expectation of privacy in the personal belongings they chose to bring aboard the train or bus, and society should be willing to recognize such an expectation of privacy as reasonable.[110] Judicial balancing

102. *See supra* notes 2, 40-41 and accompanying text (outlining random nature of MBTA searches and constitutional requirement of reasonableness for searches and seizures).

103. *See supra* notes 48-49 and accompanying text (observing restricting freedom of movement yields a seizure).

104. *See supra* notes 62, 64-65 and accompanying text (explaining physical manipulation of bag's outer surface constituted search within meaning of Fourth Amendment).

105. *See supra* notes 46-47 and accompanying text (noting significance and necessity of particularized suspicion).

106. *See supra* note 46 and accompanying text (outlining *Terry*-stop requirements).

107. *See supra* notes 1, 47 and accompanying text (observing significance of reasonable suspicion and futility of circumventing Fourth Amendment via terrorist threats).

108. *See supra* note 60 and accompanying text (delineating protected privacy interest in personal luggage).

109. *See supra* notes 2, 65 and accompanying text (likening bag-and-search policy to airport screening where searches involve more than physical observation). Not only is probing through one's personal belongings absurdly intrusive, but shifting items in a purse will not aid in the detection of explosives. *Id.* The MBTA could be just as effective and less intrusive by using metal detectors. *Id.*

110. *See supra* notes 34-39, 65 and accompanying text (outlining reasonableness test and noting Fourth Amendment not "officially" purged for modes of ground transportation).

tips the scales of reasonableness in favor of MBTA passengers: their interest in retaining the right to be secure from unreasonable searches and seizures outweighed the substantial government intrusion based on vague threats of terrorism.[111]

Future implementation of the MBTA's search policy outside the context of the DNC would fail under existing Supreme Court precedent.[112] Since police are generally not permitted to utilize unbridled discretion in determining which passengers to search, the MBTA employed a more objective approach to stopping passengers entering the station.[113] Seizing and searching passengers in a predetermined sequence, however, does not salvage the MBTA's search policy from constitutional collapse because it still fails to meet the constitutional prerequisite of individualized suspicion.[114]

B. The Stop-and-Search Policy of the MBTA Fails to Qualify As an Exception to the Warrant Requirement

Courts have upheld searches and seizures conducted in the absence of individualized suspicion of wrongdoing only in a limited, "jealously guarded" category of cases.[115] The MBTA's procedure does not merit consideration as an exception to the general requirement of reasonable suspicion.[116] Public transportation via train or bus is inherently dissimilar from air travel, and the stop-and-search procedure also deviates from the constitutionally permissible checkpoint systems upheld by the Supreme Court.[117]

By permitting the MBTA to search all passengers within the context of the preliminary injunction sought in *American-Arab*, the court essentially analogized the MBTA's stop-and-search policy with airport security.[118] The

111. *See supra* notes 15, 39 and accompanying text (reasoning need to search must outweigh invasion of personal privacy to validate search procedure). Threatening to disrupt our democratic process is a completely unsubstantiated threat. *Id.* Americans are threatened by terrorists on a routine basis, but the presence of threats does not permit violations of constitutional rights. *Id.* *But see* American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004) (holding threat to disrupt democratic process as specific enough to warrant invasions of privacy).

112. *Supra* notes 51-54, 56-59 and accompanying text (outlining holding and reasoning of *Prouse* and *Edmond*).

113. *See supra* notes 2, 56 and accompanying text (noting random nature of stop-and-frisk procedure and objective approach utilized in *Edmond*); *see also supra* notes 8, 52, 54 and accompanying text (observing unfettered discretion in law enforcement produces violation of Fourth Amendment).

114. *Supra* notes 56-59 and accompanying text (delineating unconstitutionality of roadblock scheme implemented in *Edmond*).

115. *See supra* notes 66-68 and accompanying text (summarizing exceptions to warrant requirement and general necessity of particularized suspicion of wrongdoing).

116. *See supra* note 69 and accompanying text (arguing passenger searches at airports as non-commonplace for train and bus passengers). *But see supra* note 13 and accompanying text (analogizing public transportation to air travel).

117. *See supra* notes 13, 68, 72, 75, 77 and accompanying text (observing history and reasonableness of airport security and constitutional validity of fixed checkpoint systems).

118. American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004

MBTA's policy cannot be rendered constitutional by an expansive analogy to airport security.[119] Subjecting all commuters riding through the designated security zone to the search policy is unjustified because of the innate disparities between urban mass transportation systems and airline travel, or by reasoning that they are both deserving of the same constitutional analysis.[120]

In contrast to the MBTA's search policy, airport security has a history dating back to the 1960s, to which the general public has become accustomed.[121] It would be preposterous and impracticable for the MBTA to subject daily commuters on public transportation to similar security measures imposed at airports, especially since the daily use of public transportation is a greater necessity to a larger number of people.[122] While explosives pose an inherent danger in any urban setting, the threat posed by hijacking a massive airplane is not comparable with the concerns of the MBTA.[123] Unlike airlines, federal buildings, and courthouses, the MBTA does not have a documented history of disastrous events or threats of violence.[124]

The MBTA's stop-and-search policy also fails under the fixed checkpoint exception to particularized suspicion.[125] Given the vast number of MBTA stations and commuters, it would be difficult, if not impossible, for the MBTA to set up a fixed checkpoint system.[126] The checkpoint systems that passed constitutional scrutiny in *Sitz* and *Martinez-Fuerte* involved no more than an initial stop and did not involve searches.[127] Thus, the MBTA search policy went well beyond the permissible scope of a lawful checkpoint system.[128]

C. How to Deal with Terrorism and Comply with the Fourth Amendment

In order for the MBTA to effectuate security measures that stay within constitutional reach as an exception to the requirement of particularized

WL 1682859, at *1 (D. Mass. July 28, 2004) (noting all passengers utilizing bus and subway at issue in preliminary injunction subject to search).

119. *See supra* notes 13, 70-71 (outlining reasonableness of airport screening measures). Bombs and other forms of terrorist violence threaten citizens everywhere on all forms of transportation. The threat posed to airplanes, namely hijacking, however, does not extend to mass transit systems. *Id.*

120. *See supra* notes 7, 13 and accompanying text (outlining innate dangers presented with traveling by air); *see also supra* notes 68-70 (describing disparities between mass transit systems and airplanes).

121. *See supra* notes 13, 72 and accompanying text (observing distinctiveness of air travel and importance of notice).

122. *See supra* notes 70, 72 and accompanying text (outlining airport security procedures); *see also supra* note 2 (noting high volume of daily commuters).

123. *Supra* note 13 and accompanying text (observing inherent risk of travel by air).

124. *See supra* notes 13, 73 and accompanying text (explaining unambiguous and present threats)

125. *See supra* notes 75, 77, 81, 83, 85-87 and accompanying text (delineating constitutionality of fixed checkpoint system).

126. *See supra* note 2 (estimating quantity of daily commuters and large number of interconnected stations).

127. *Supra* note 87 and accompanying text (delineating checkpoint's constitutional procedure).

128. *See supra* notes 2 (explaining tactics employed by MBTA police).

suspicion, those security measures must pass the three-part balancing test articulated in *Brown*.[129] Under the current search policy, the government asserts an interest in preventing terrorism on an urban mass transportation system.[130] It is unfeasible, however, to assess the government's interest without knowing the likelihood of a terrorist attack at a particular location.[131] If the MBTA had credible information that terrorists planned to target a certain station or the mass transit system as a whole, the analysis would differ.[132] The MBTA's principal difficulty is establishing a procedure that reasonably advances their interest and does not intrude too deeply on the constitutionally-protected privacy rights of commuters.[133] The MBTA presented no evidence that searching every passenger or a predetermined number of passengers would actually reduce the threat of terrorism.[134] In today's society, the threat of terrorism is omnipresent and cannot be used as an excuse to invade constitutionally-protected privacy interests.[135]

IV. CONCLUSION

The MBTA should remain steadfast in providing a more secure mass transit system for commuters. Nevertheless, the MBTA must stay within the ambit of the Fourth Amendment when implementing future security measures. In an age of global terrorism, it is difficult to strike a perfect balance between individual liberties and the government's interest in advancing public safety. The Constitution and applicable case law must nevertheless be given due deference in recognition of the limited exceptions to the requirement of reasonable suspicion.

History illustrates that reasonableness remains the bedrock of the Fourth Amendment. Seizing MBTA passengers and searching their personal belongings without any particularized suspicion of wrongdoing is a blatant violation of this principle. The MBTA has a substantial interest in making public transportation as secure as possible. Basing a far-reaching stop-and-search policy on airborne terrorism policy, however, is not a sound foundation from which to build a constitutional course of action.

129. *Supra* note 84-85 and accompanying text (outlining balancing test set forth in *Brown*).

130. *See supra* notes 7 and accompanying text (observing government interest in preventing loss of life and disruption of democratic process).

131. *See supra* note 12 and accompanying text (noting ineffectiveness of search policy). *But see supra* note 7 (explaining district court's holding of stop-and-search procedure as reasonable).

132. *See supra* notes 46, 94 and accompanying text (reasoning particularized suspicion necessary for investigatory detention).

133. *See generally* note 84 and accompanying text (noting requirements of balancing test when weighing government interest against individual liberty interest).

134. *See supra* notes 12 and 100 and accompanying text (declaring lack of empirical evidence to justify searches).

135. *See supra* notes 1 and 94 and accompanying text (observing terrorism cannot be used as sole justification to curtail constitutional rights).

Most importantly, the MBTA mass transit system is not analogous to an airport with regard to implementation of security measures. Public modes of transportation, such as trains or buses, are not analogous to airplanes. While air travelers have assorted transportation options, this is not necessarily true for public transportation commuters. As such, denying access to public transportation to those who refuse to consent to a search would require commuters to seek impractical alternate means of transportation.

In order for the MBTA to base invasive security measures on terrorist threats, the threats should be specific and directed at the MBTA. Rummaging through commuters' bags and personal items is a severe interference with personal liberty. The gravity of the threat must outweigh that liberty, and there must be a logical nexus between the search and the advancement of the public interest. Only under these limited circumstances would the current, yet dormant, MBTA security measures survive constitutional scrutiny. In the absence of such limited circumstances, implementation of the current MBTA stop-and-search policy truly allows terrorists to succeed in disrupting our democratic processes without using explosives or chemical warfare; but instead by depriving citizens of their constitutional right to be secure in their persons and effects.

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