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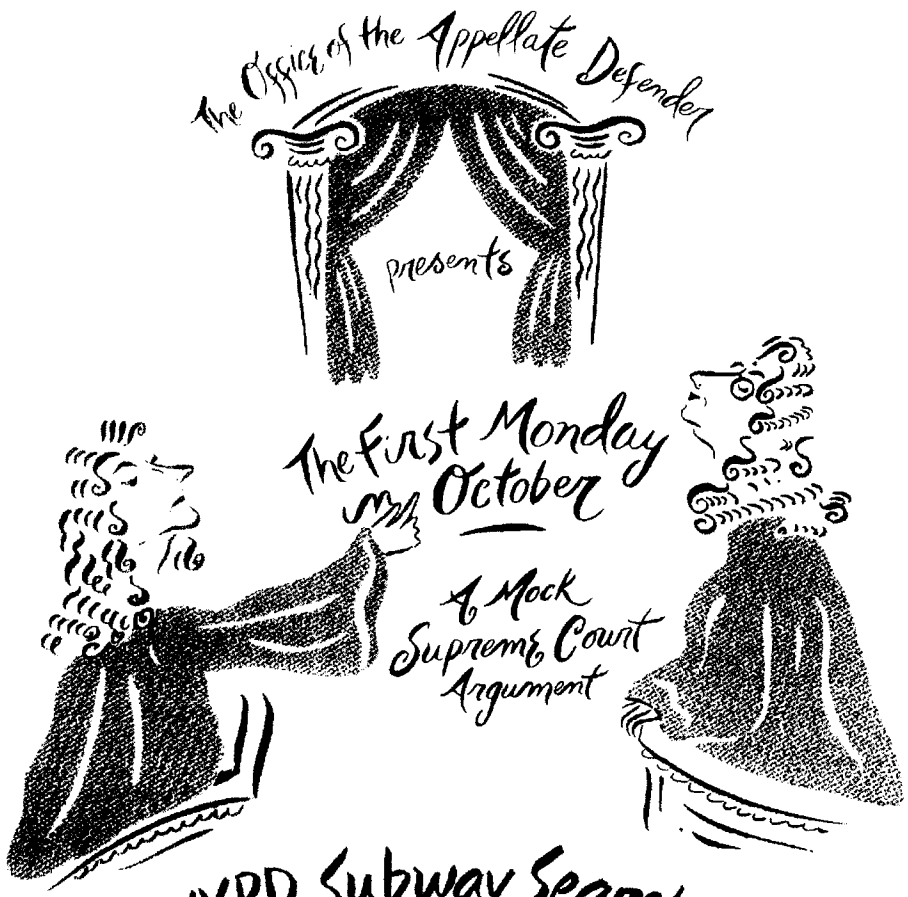

NYPD Subway Searches: Are They Constitutional?

Mac WADE V. KELLY

Bettina B. Plevan
as Counsel for Petitioner

Evan R. Chesler
as Corporation Counsel of the City of New York

Recipients of the Thirteenth Annual
Gould Awards for Outstanding Oral Advocacy

The Office of the Appellate Defender Presents:

THE FIRST MONDAY IN OCTOBER

A Mock Supreme Court Argument

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as Counsel for the Petitioner

Evan R. Chesler
as Corporation Counsel of the City of New York

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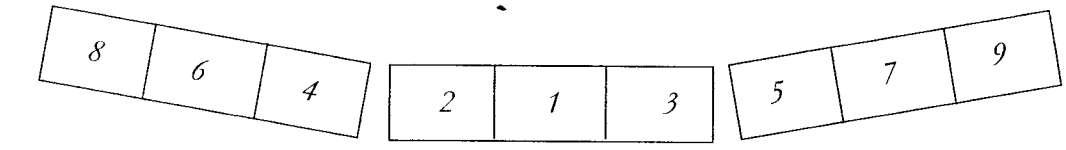

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1-Chief Justice Martin; 2-Justice Galeno; 3-Justice Goldsmith; 4-Justice Kuntz; 5-Justice McLaughlin; 6-Justice Reynolds; 7-Justice Sherburne; 8-Justice Torres; 9-Justice Vyskocil

Note: The Associate Justices' seniority was determined alphabetically.

THE PROGRAM

I
The Oral Argument

Setting: The Supreme Court of the United States Courtroom

Time: Tuesday, October 3, 2006, 10:00 a.m. sharp

II
The Awards

Presentation of the Gould Award for

Outstanding Oral Advocacy to Bettina B. Plevan and Evan R. Chesler

III
The Secret Deliberations

Setting: The Supreme Court of the United States

Chief Justice's Conference Room

Time: Wednesday, October 4, 2006, 3:00 p.m.

There will be no intermission.

Be Sure to Join Us for

the *First Monday in October* 2007

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A SPECTATOR'S PRIMER ON

Brendan MacWade, *Petitioner*
v.
Raymond Kelley and the City of New York, *Respondents*

Introduction

This is a hypothetical appeal to the Supreme Court of the United States, based upon a case recently decided by the United States Court of Appeals for the Second Circuit. The New York Civil Liberties Union sought (1) a declaratory judgment on behalf of five plaintiffs that New York City's program of suspicionless searches of subway passengers' belongings violates the Fourth and Fourteenth Amendments, and (2) permanent injunctive relief against further searches under the program. Judge Richard M. Berman of United States District Court, Southern District of New York, upheld the program as constitutional, and denied the application for a permanent injunction. *MacWade v. Kelly*, 2005 WL 3338573 (S.D.N.Y., Dec. 7, 2005). The NYCLU appealed and the Second Circuit affirmed. *MacWade v. Kelly*, 2006 WL 2328723 (2nd Cir. August 11, 2006). The Second Circuit also concluded that the search program was constitutional.

Factual Background

The New York City Subway System

New York City's subway system–with 26 interconnected lines and 468 passenger stations–is the largest, most heavily used subway system in the United States. It is the principal mode of transportation for millions of New Yorkers–with yearly ridership estimated at 1.4 billion. On an average weekday, people enter one of the system's 1,000 entrances some 4.7 million times. The system is open 24 hours a day, 365 days a year and every station has at least one entrance that is open around the clock. The system is entirely interconnected; once in the system, a person may reach any other station without having to leave the system. The system also is connected, via tunnels, to other major transportation hubs in the city, including the Port Authority Bus Terminal, Grand Central Station, Pennsylvania Station, and the PATH rapid transit system, which operates between New York and New Jersey.

The sole requirement for entering the system is payment of the fare. In order to accommodate the large numbers of people entering and leaving the system, subway stations typically have several banks of turnstiles. Once a person enters the system, they are permitted to remain there indefinitely.

The NYPD's Search Program

It is conventional wisdom in the law enforcement community that transportation systems, such as the New York City subway, are attractive targets for terrorists. An attack on a critical transportation system can produce high casualties and trigger widespread public fear, as well as cause major economic disruptions. Shortly after a coordinated series of bombings on the London Underground in July 2005, New York City officials began drafting a procedure for subway container inspections. On July 21, 2005, Mayor Michael Bloomberg announced that, effective immediately, the NYPD would begin a program of "random" searches of subway passengers' bags. Mayor Bloomberg stressed that the program was precautionary, and stated "there are still no threats to this city that have been explicitly made, or to our subway or bus system."

The program is designed to detect explosive devices in containers, such as those used in the London attack, and in bomb attacks on transit systems in 2004 in Madrid and Moscow, as well as to deter would-be attackers. On any given day, police checkpoints manned by uniformed officers are set up at an unspecified number of stations in the city's five boroughs. There is no advance notice of where the checkpoints will be set up, nor are checkpoints scheduled in any predicable manner.

Under the NYPD policy, a supervisor establishes, in his/her activity log, the frequency of passengers subject to inspection (e.g., every fifth passenger, every twelfth passenger), based upon an assessment of the volume of passengers, the number of officers available to perform inspections, and the flow of foot traffic through the station. According to a July 21, 2005, NYPD policy memorandum, the frequency of inspections may be altered "based on commuter flow, either increasing or de-

creasing the number of inspections as appropriate." No further guidance is provided.

Checkpoints are set up near a station entrance, or adjacent to a bank of turnstiles. The physical set-up typically involves a folding table manned by at least two uniformed officers. In stations where a checkpoint has been set up, a 20 ½ inch by 30 inch poster displayed near the checkpoint (often on the table) states "NYPD/BACKPACKS AND OTHER CONTAINERS SUBJECT TO INSPECTION," and periodic announcements at stations and on subway trains state that: "Passengers are advised that effective July 22, 2005, their backpacks and other large containers are subject to random search by the police." At subway entrances where search checkpoints are set up, officers do not put in place any controls, such as ropes or barricades, to control the flow of passengers approaching the turnstiles or gates. Passenger traffic around the checkpoint is two-directional, with some passengers approaching the turnstiles for entry, and some passengers passing by as they exit. Entering and exiting passengers use the same turnstiles.

Persons who are selected for search may refuse inspection, and may elect not to enter the system. Refusal does not constitute probable cause for arrest or reasonable suspicion for a forcible stop, but persons who refuse to have their belongings searched are not permitted access with the un-inspected item. Under the policy, police must advise all persons refusing a search that "their entry into the [subway] system is subject to a search of their backpack, container or carry-on item." Persons who nonetheless try to enter the system through another entrance with the un-inspected item are subject to arrest. The guidelines do not specify for how long an individual is barred from entering the subway with a package or luggage they have refused to have searched.

The NYPD has emphasized that the searches are limited to what is minimally necessary to determine whether an explosive device is in the bag or package. Officials have said that the searches typically take seconds, and that the preferred method of inspection is to ask an individual to show the officer what is in the luggage or container, and to allow the individual to manipulate their own belongings. Officers are, however, permitted to manipulate the contents of bags and packages as part of the inspections. In an NYPD policy memo, officers are specifically directed not to inspect "wallets, purses or other containers" that are too small to hold an explosive device. Likewise, officers also are directed not to intentionally look for other contraband or to read, or attempt to read, any written or printed material. NYPD policy does not specify the size of container subject to inspection, but states that "[a] police officer's discretion in conducting a search is limited to determining whether a container is large enough to contain an explosive device based upon the officer's 'common sense,' as informed by his or her experience and training."

Trial Testimony

The Plaintiffs

In this hypothetical, the NYCLU is representing five individuals who regularly ride New York City's subway and were selected for search; four submitted to the searches, one refused and left the subway rather than be searched. *

Plaintiff Brendan MacWade is a clerk in the rare books room at the main branch of the New York Public Library. He commutes daily on the subway from his home in the Bronx to his job in midtown Manhattan. Mr. MacWade was selected for search at the 149 Street-Grand Concourse stop near his home, and subsequently complied. Mr. MacWade testified that, "while my bag was searched, I felt violated. I felt the police did not need to be conducting searches, which I found intrusive."

Plaintiff Jack Vincennes is a professor in the Political Science Department at Columbia University, and an adjunct professor in the Security Policy graduate program at George Washington University. He currently is researching Islamic fundamentalists' use of the Internet for propaganda and instructive purposes. He testified that he regularly carries a briefcase filled with copies of Web pages containing graphic images of Jihadist terrorist activity and statements calling for attacks in the United States. Professor Vincennes also often prints out copies of email exchanges between himself and persons affiliated with groups considered to be terrorist organizations by the United States. Professor Vincennes said he has cultivated contacts with these groups in an effort to understand their methods and to gain insight into their operational structures. Professor Vincennes testified that after being selected for search at the station at 116th Street and Broadway, he declined to enter the subway system, fearing that someone not familiar with his research would "get the wrong idea."

* The names and/or identities and testimony of the plaintiffs in this hypothetical have been changed from the original parties.

Plaintiff Saad Aziz is a securities trader with Morgan Stanley. An avid tennis player, Mr. Aziz often carries a large gym bag with him containing clothing and equipment for after-work matches. Mr. Aziz testified that he has been singled out for search five times over the past six months when he enters the Chambers Street subway station to return home to his Brooklyn apartment. Mr. Aziz said he has not been informed of his right not to submit to a search on any occasion. While he has complied with every search request, Mr. Aziz, a U.S. citizen of Iraqi heritage, said he believes he has been singled out because of his appearance. He said he has rarely seen any other persons being searched, and that the frequency of being selected has caused him much embarrassment. On more than one occasion, work colleagues have observed him being searched. "It's become a bit of a joke in my department," Mr. Aziz testified.

Plaintiff Evelyn Mulwray is a real estate agent whose compensation is derived solely from commission. Much of her day is spent escorting clients around the city to view properties available for purchase. Last March, she arranged to meet a client at his office building near Rockefeller Center. Unable to get a cab in the midday traffic, the two decided to take the subway downtown to see an apartment. Ms. Mulwray said she was singled out for search at the Rockefeller Center station, and an officer requested that she open her large handbag. Ms. Mulwray testified that she was informed that she could refuse the search, but she did not feel comfortable doing so in front of a client. In her bag was a large container (Ms. Mulwray's insurance requires insureds to purchase their medications in bulk through a mail-order pharmaceutical wholesaler) of a prescription drug commonly used to treat herpes that she had had delivered to her office. A police officer asked Ms. Mulwray why she was in the possession of such a large number of pills, and their intended use. Ms. Mulwray testified that she was humiliated at having to divulge her condition in front of a client, who later requested to work with another agent.

Plaintiff Joo-Yung Soo Kim is a resident of Manhattan. A native of South Korea, she moved to New York City with her husband, a U.S. citizen, two years ago. Since her arrival in the United States, Ms. Kim has been studying English, but says she is not entirely comfortable speaking the language, and has negligible reading skills. Ms. Kim was selected for search at Grand Central Station. Confused because no other people had been singled out, Ms. Kim said she did not understand what the police officers were asking and was quite frightened at being pulled aside by the authorities. She said she complied only after an officer did a pantomime of opening a bag. She said an officer pointed to a sign, but that she did not understand it and, in fact, was unaware of what exactly had happened until she later described the experience to her husband. She testified that it never occurred to her that she could have refused the search.

*Expert Testimony**

Petitioners' Experts

Three experts testified for petitioners. The first, Gene Russianoff, is a staff attorney for the New York Public Interest Research Group's Straphangers Campaign. Russianoff said he believes that, based upon the features of the subway system, the advance notice of the checkpoint given to people entering a station, and the ability of people to walk away from a checkpoint, "a person wishing to can easily evade the NYPD checkpoints and enter the system at entrances without checkpoints." He also noted that many stations are within blocks of each other and someone who wished to evade a checkpoint could, in many cases, simply walk to another station.

The second expert, Charles Pena, is a former CATO Institute specialist in domestic terrorism preparedness, criminal procedure and national security law who now works for a consulting company that advises cities on preventing terrorism. Pena opined that the deterrent effect of the program was "close to zero" because it allowed persons selected for search to walk away. Pena further testified that because of the layouts of most subway stations, and the large volume of people who use them each day, he did not believe that it was possible for police officers to select riders for search in a nondiscretionary manner by using a numerical formula.

Instead, Pena testified, people are being selected for search in an arbitrary manner, and generally are submitting to search because they do not know or understand their right to refuse. He noted that the sign advising individuals of their right to refuse a search was often located next to or behind the checkpoint, and opined that when confronted by a police officer, most people are immediately deferential and would not think to read the sign. He said the refusal policy would be more effective if it were posted outside the station, or at a point further away from

* The testimony and bona fides of the expert witnesses have been altered for the purposes of this hypothetical.

the checkpoint. Pena also noted that many people who ride the New York City subway do not use English as their primary language. These people are particularly vulnerable to not knowing their right to refuse a search, he said.

The plaintiffs' final witness was Ed Exley, who holds a PhD in organic chemistry and is a former research scientist for Sandia National Labs, a research facility specializing in national security technologies. Now a private consultant, Dr. Exley testified about the type of explosive devices that could be brought aboard a subway train. Dr. Exley explained that conventional explosives, such as those used in the London bombings, can easily be detected in a backpack or large container. He further testified that plastic explosives, such as Semtex and C-4, are virtually impossible to detect without sophisticated equipment. He noted that 12 ounces of Semtex concealed in a cassette recorder brought down Pan Am Flight 103 over Lockerbie, Scotland, in 1988. He also noted the case of Richard Reid, who pleaded guilty in 2003 to trying to blow up a jetliner by igniting plastic explosives in his shoe. Plastic explosives, Dr. Exley explained, can be easily concealed in the smallest containers, and can do far more damage than a larger, more-conventional device. He said that Interpol and other police agencies around the world are increasingly concerned about the proliferation of plastic explosives, such as Semtex and C-4, on the black market.

Respondents' Experts

Respondents presented testimony from three experts. David Cohen, the NYPD's Deputy Commissioner for Intelligence, was employed by the CIA in its analysis and operations divisions for 35 years. Commissioner Cohen testified that the program has a deterrent effect "embedded in the uncertainty regarding where and when an inspection will occur." He stressed that the program could not guarantee that an attack would not happen, but that it "adds an important and additional level to existing security which makes the subway system safer."

NYPD Deputy Commissioner for Counter-Terrorism Michael Sheehan, who prior to joining the NYPD had nearly 30 years of experience in counter-terrorism–including service in the Special Forces of the United States Army, and on the National Security Council–testified that the program "dramatically improves the security posture" of the City's subway system. Commissioner Sheehan stressed that the program "reinforces the awareness of police officers, transit workers and the public of the need to be alert. That alertness is an important component of a counter-terrorism program." He dismissed criticism that the program was easy to evade, stressing that the randomness of the checkpoints created "the risk of detection and failure that terrorists avoid and in that way, creates a deterrent effect."

Richard A. Clarke, a former senior White House advisor on intelligence and counter-terrorism who has published several books on U.S. counter-terrorism efforts, testified that the program achieves "a desirable level of deterrence." He explained that the program is an effective deterrent even if the NYPD operates checkpoints at only a "de minimus" number of entrances, provided the terrorists "don't have access to the number." While increasing the number of checkpoints does create more deterrence, Clarke said, "the precise number of checkpoints is of less value and importance than the fact that terrorists know it's random and routine, not just occurring during national security special events." Clarke emphasized that the program indicates that New York City takes subway security seriously, and terrorists prefer targets "where the operator is not taking security seriously, so that they can have high confidence in the success of their attack." Clarke also noted that individuals' ability to walk away from checkpoints "does not make a great deal of difference."

The Special Needs Doctrine

Under the Fourth Amendment, searches and seizures of protected interests (which include bags and personal items carried by passengers) must be reasonable. Ordinarily, this means that a governmental entity cannot make a search or seizure in the absence of individualized suspicion of wrongdoing. However, the Supreme Court recognizes certain narrow exceptions to the requirement of individualized suspicion of wrongdoing for "special needs, beyond the normal need for law enforcement," and where the warrant and probable cause requirements are impracticable. Under the "special needs" doctrine, the reasonableness of a search or seizure is determined by weighing the governmental interest served by the program, the efficacy of the program, and the magnitude of the intrusion on the individuals searched.

Decisions of the District Court and the Second Circuit

After a bench trial, United States District Judge Richard M. Berman held that the NYPD's subway search program addresses a "governmental interest of the very highest order," preventing a bomb attack on the subway system, and was reasonably effective, narrowly tailored and minimally intrusive. The

court specifically found that "[t]he special need addressed by the [subway search program] is the need to reduce (deter and detect) the risk of a terrorist attack on the subways. It is not 'to detect evidence of ordinary criminal wrongdoing.'" With respect to"effectiveness," the court determined that the program was a "reasonable method of deterring (and detecting) a terrorist bombing of the New York City subway system." Finally, the court explained that it was persuaded by several factors that the searches are not unduly intrusive: that passengers are given notice of the program through signs and announcements; that passengers may refuse inspection; that the inspections were at "openly viewable, fixed checkpoints relatively close to subway entrances;" that passengers are selected for search pursuant to a selection formula "the ratio for which is determined by a supervisor based upon neutral factors;" that officers have "little or no discretion in selecting individuals for inspection;" and lastly, that the searches are "limited in scope and duration." The court denied the NYCLU's application for a permanent injunction.

On appeal, the Second Circuit affirmed the lower court's decision. Judge Chester J. Straub, writing for a unanimous panel, concluded that the subway search program satisfies the special needs exception to the Fourth Amendment's requirement of individualized suspicion, specifically rejecting the claim that the exception applies only where those subject to search have a diminished expectation of privacy. Applying the balancing test required under the special needs doctrine, the court determined that the subway searches are reasonable and, therefore, constitutional. Notwithstanding the absence of a specific terrorist threat to the subway system, the court concluded that the government interest in preventing such attacks was "immediate and substantial." Similarly, although recognizing subway riders' "full privacy expectation" in their baggage, the court held that the searches were conducted in such as way as to "minimally intrude[] upon that interest." Finally, with regard to effectiveness, the circuit court, like the district court, relied on the testimony of Respondents' experts, noting:

Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how best to marshal their available resources in light of the conditions prevailing on any given day. We will not – and may not – second guess the minutiae of their considered decisions.

Conclusion

In this case, the Mock Supreme Court is called upon to determine the constitutionality of New York City's program of random, suspicionless searches of subway passengers' belongings. In doing so, the Court must consider the applicability of the special needs doctrine to a law enforcement program designed to detect and deter terrorism. It requires the Court to determine whether, in the absence of a specific threat, the general specter of an attack on the City's subway system justifies not just a stop, but a search of individuals' personal effects. The Court will need to balance the protections of the Fourth Amendment against the City's heavy responsibility to protect its inhabitants from harm. If protecting against a general, unspecific bomb attack on the subway falls into the narrow "special needs" exception to the Fourth Amendment, does it then follow that searches of persons wishing to walk through Times Square or across the Brooklyn Bridge would be constitutional, so long as there exists a general concern that one of those areas is a terrorist target?

The Court also must consider the intrusiveness of the search program. Critical to this inquiry is whether the searches are being carried out in a non-arbitrary manner. Do the realities of the subway system, especially with its heavy passenger volume and labyrinthine station layouts, allow for a truly random search program to operate? Or, is it more likely that individual officers exercise arbitrary discretion in determining whom to search? If the search criteria are not truly random, can the program be constitutional? Are individuals given adequate notice of their rights, and are the searches carried out in a minimally invasive manner? Lastly, the Court must weigh this intrusiveness against the asserted efficacy of the search program–a variable that both Petitioners and Respondents acknowledge is difficult to quantify.

The September 11 attacks fundamentally changed the way many, if not most, Americans feel about government intrusions aimed at increasing security. Every day, millions of people willingly show their identifications, open their bags, walk through metal detectors and answer questions of law enforcement officers in the hope that it will make them safer. Petitioners contend that, despite its laudable objective, government intrusions such as the subway search program do little, if anything, to stop terrorism, and instead chip away at the important protections afforded by the Constitution. For their part, Respondents contend that the program strikes an appropriate balance between individual rights and collective security–that, in the post 9/11 world, a quick peek into a handbag, regardless of any potential, tangential embarrassment, is a small price to pay for increased safety from a terrorist attack.