

SUSPICIONLESS TERRORISM CHECKPOINTS SINCE 9/11: SEARCHING FOR UNIFORMITY

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I. INTRODUCTION

Long lines, armed guards, metal detectors, x-ray machines, pat-downs, forced searches—Americans have become accustomed to submitting to all these elements of suspicionless checkpoints at border crossings, airports, and courthouses. And courts have routinely held that these measures are constitutional.¹ However, in the wake of the terrorist attacks on September 11, 2001, many law enforcement agencies have used the war on terror to justify establishing suspicionless checkpoints outside of their traditional realms. These new checkpoints have extended airport-like searches to a wide variety of places, potentially opening the door to a society in which all aspects of public life are subject to the scrutiny of suspicionless searches.

Several of these search programs have been challenged in court, either in motions to suppress evidence or, more commonly, in actions for injunctive relief to stop the search program. Attacks on search programs in mass transportation are most frequent. In *Commonwealth v. Carkhuff*, one of the first terrorism checkpoint cases after 9/11, the defendant alleged he was unconstitutionally stopped by police while he drove his car on a road near a major reservoir in Massachusetts.² During the 2004 election season, the case of *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority (MBTA)* was filed to prevent searches of passengers on public buses and trains designed to protect the Democratic National Convention in Boston.³ In the similar case of *MacWade v. Kelly*, passengers challenged checkpoint searches at New York City subway stations shortly after the London bombings in 2005.⁴ And most recently, in *Cassidy v. Chertoff*, the constitutionality of

1. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000) (“Our holding [that drug interdiction checkpoints are unconstitutional] also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (“[W]here 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.”).

2. *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 318 (Mass. 2004).

3. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *1 (D. Mass. July 28, 2004).

4. *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006).

suspicionless searches of Vermont ferry passengers was tested.⁵ Likewise, in a few cases, the government pointed to terrorism prevention as part of a laundry list of potential justifications for checkpoint stops and searches on highways.⁶

In addition, several cases have arisen outside the context of mass transportation. In *Bourgeois v. Peters*, activists confronted a city's program of suspicionless metal detector searches of people entering a designated protest area outside a military base in Georgia.⁷ Several other cases have dealt with constitutional challenges of checkpoints at entrances to sporting arenas.⁸ *Johnston v. Tampa Sports Authority* involved a season ticket holder's dispute over systematic pat-downs at the stadium housing a National Football League (NFL) team in Florida,⁹ and *State v. Seglen* sorted out the appeal of a conviction stemming from a pat-down at a college hockey game in North Dakota.¹⁰

These suspicionless checkpoint searches confront the tradition of

5. Cassidy v. Chertoff, 471 F.3d 67, 73 (2d Cir. 2006).

6. E.g., United States v. Gabriel, 405 F. Supp. 2d 50, 54 (D. Me. 2005) (noting that the purpose of the checkpoint at issue was to “‘apprehend terrorists and the weapons that illegally enter into the United States and also to deter any illegal entries . . . as well as contraband.’”); People v. White, 796 N.Y.S.2d 902, 905 (St. Lawrence County Ct. 2005) (“[T]he purpose of the checkpoint [was] ‘looking for terrorists, implements of terror, smugglers of aliens and contraband, and violators, persons violating immigration status.’”); People v. Velit, No. 2001QN027671, 2002 WL 334690, at *3 (N.Y. Crim. Ct. Feb. 21, 2002) (noting that the purpose of the checkpoint could have been “to apprehend drunk drivers, vehicles with faulty signals or indicator lights, unlicensed drivers, *terrorists*, taxicab robbers, narcotics dealers, or criminal miscreants in general” (emphasis added)).

7. Bourgeois v. Peters, 387 F.3d 1303, 1306–07 (11th Cir. 2004).

8. At least one recent case has challenged checkpoint searches at a sports stadium on non-constitutional grounds. In that case, two season ticket holders challenged a program of pat-down searches of everyone entering the stadium housing a professional football team. Sheehan v. San Francisco 49ers, LTD., 62 Cal. Rptr. 3d 803, 806 (Ct. App. 2007). The plaintiffs were not able to allege a constitutional violation because they could show no state action, which is a prerequisite for challenges under the Fourth Amendment. See *id.* (noting the claim was brought under a provision of the California Constitution).

9. Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257, 1259–60 (M.D. Fla. 2006), *rev'd on other grounds*, 490 F.3d 820 (11th Cir. 2007). Although it reversed the district court's ruling, the Eleventh Circuit did not address whether the search program itself was reasonable— instead, it completely avoided the real issue in the case by only considering whether the plaintiff consented to the pat-down searches. Johnston v. Tampa Sports Auth., 490 F.3d 820, 822 (11th Cir. 2007). Therefore, this Note will analyze the district court's decision rather than the Eleventh Circuit's opinion.

10. State v. Seglen, 700 N.W.2d 702, 705 (N.D. 2005).

protecting personal privacy that is embodied in the Fourth Amendment of the Constitution.¹¹ The war on terror has brought with it intrusions into privacy that have caused widespread criticism, especially concerning the expanded domestic intelligence gathering techniques allowed by the USA PATRIOT Act.¹² Congress, however, has barely touched the issue of terrorism checkpoint searches, leaving the courts to sort through their legality.¹³ With little guidance on this emerging issue, courts have reached varying and sometimes contradictory conclusions about the constitutionality of suspicionless terrorism checkpoints.¹⁴ In fact, courts cannot even agree on what effect the war on terror should have on the constitutional analysis of such searches.¹⁵

This Note will begin with a brief introduction to the constitutionality of suspicionless checkpoints in general.¹⁶ It will then explore several issues specifically related to the reasonableness of terrorism checkpoints in the context of the Fourth Amendment;¹⁷ however, related Fourth Amendment issues, such as the effect of consenting to a checkpoint search, are beyond the scope of this Note.¹⁸ Finally, this Note will highlight problems with the

11. U.S. CONST. amend. IV (protecting “[t]he right of the people to be secure . . . against unreasonable searches and seizures”).

12. See, e.g., Lisa Finnegan Abdolian & Harold Tokooshian, *The USA PATRIOT Act: Civil Liberties, the Media, and Public Opinion*, 30 FORDHAM URB. L.J. 1429, 1438–39 (2003) (highlighting criticism of the Patriot Act in the media).

13. Only one suspicionless terrorism search case decided since 9/11 has involved explicit legislative guidance. *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (summarizing and upholding the Maritime Transportation Safety Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (codified as 46 U.S.C. §§ 70101–70119 (2006))).

14. See *infra* Part IV.

15. See *infra* Part III.

16. See *infra* Part II.

17. See *infra* Parts III–IV. This Note will not address cases invoking constitutional protections outside of the Fourth Amendment. See, e.g., *Bourgeois v. Peters*, 387 F.3d 1303, 1316 (11th Cir. 2004) (finding a terrorism checkpoint search unconstitutional as a violation of First Amendment rights of free speech and free association). Likewise, this Note will not address the expanding scope of suspicionless searches in traditional places like airports, courthouses, or border crossings.

18. The issue of consent has arisen in several terrorism checkpoint cases because the reasonableness of a checkpoint becomes a moot issue if the government can prove that the individual voluntarily encountered the search. See, e.g., *Johnston v. Tampa Sports Auth.*, 490 F.3d 820, 825 (11th Cir. 2007) (finding that “Johnston voluntarily consented to pat-down searches” and ruling the lower court erred in issuing a preliminary injunction against the searches). However, the issue of consent should be distinguished from prior notice and the ability to avoid a search, both of which are factors that have been cited as reducing the intrusiveness of a checkpoint search. See *infra* Part IV.C. The consent doctrine will largely be beyond the scope of this Note.

current method of analysis and will propose that many of these problems can be alleviated by increased administrative involvement in the determination of whether a checkpoint should be established, allowing the government to fulfill its goal of fighting terrorism while still protecting the privacy rights enjoyed by Americans.¹⁹

II. THE CONSTITUTIONALITY OF CHECKPOINT SEARCHES: A BRIEF INTRODUCTION

The Fourth Amendment protects against unreasonable searches and seizures instituted by the government.²⁰ Generally, courts have interpreted the Amendment to require a warrant issued by a judicial magistrate based on some level of individualized suspicion of wrongdoing.²¹ However, the Supreme Court has held that neither “is an indispensable component of reasonableness in every circumstance.”²² Over the past several decades, courts have developed exceptions to the usual requirements of the Fourth Amendment and have developed doctrines that allow searches not based on individualized suspicion. Though not designed to provide a comprehensive analysis, this section of the Note will briefly discuss two exceptions that have allowed checkpoint searches in limited circumstances: special needs searches and administrative searches.

A. *The Special Needs Exception*

The Supreme Court has approved suspicionless searches for decades under what is now known as the special needs exception. Expressing approval for these type of searches, the Court has stated that “where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of

19. See *infra* Part V.

20. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

21. See, e.g., *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (“[A] search must be supported, as a general matter, by a warrant issued upon probable cause”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (“[S]ome quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.”).

22. *Von Raab*, 489 U.S. at 665.

individualized suspicion in the particular context.”²³ Additionally, the special needs search must be reasonably effective in advancing the government’s interest, though this burden is usually quite minimal.²⁴ The government has relied on the special needs exception in many circumstances, including suspicionless checkpoints.

In *United States v. Martinez-Fuerte*, the Court considered the constitutionality of a program of suspicionless stops and searches that led to the defendant’s conviction for transporting illegal aliens.²⁵ The Border Patrol had established a checkpoint on a highway in California near the Mexican border forcing all passing cars to slow down or stop for a visual inspection.²⁶ Agents then diverted some cars to a secondary inspection area where occupants were questioned about their immigration status.²⁷ The purpose of the checkpoint was to prevent illegal aliens from travelling to interior portions of the nation, though the government conceded that the stops at issue were not based on any articulable suspicion.²⁸

In deciding the constitutionality of the checkpoint, the Court first considered the governmental interest at stake. It noted that “[i]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems” and that, despite the many methods employed by the Border Patrol, “it remains relatively easy for individuals to enter the United States without detection.”²⁹ Further, if such checkpoints were not allowed, then highways would become a fast and easy path to the interior of the country because other methods of detection, such as roving patrols, would not be effective in high-traffic areas.³⁰ On the other hand, the Court found the intrusion posed by the checkpoint was relatively small, noting that it did not involve physical searches and interfered minimally with the normal flow of traffic.³¹ Given the high governmental need and the low level of intrusion into personal privacy, the Court ruled that the stops “may be made in the absence of any individualized suspicion at reasonably located

23. *Id.* at 665–66.

24. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990) (ruling that checkpoints with effectiveness ratings less than one percent are reasonably effective).

25. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

26. *Id.* at 545–47. The checkpoint was positioned away from the border crossing, meaning it could not fall under the border search exception. *Id.* at 545.

27. *Id.* at 546.

28. *Id.* at 547.

29. *Id.* at 552.

30. *Id.* at 556–57.

31. *Id.* at 557–59.

checkpoints.”³²

The Supreme Court has also approved checkpoints designed to interdict drunk drivers. In *Michigan Department of State Police v. Sitz*, law enforcement officials established a sobriety checkpoint that resulted in the arrests of two people for driving while intoxicated.³³ At the checkpoint, an officer directed all passing cars to stop and “briefly examined [each driver] for signs of intoxication.”³⁴ If alcohol was detected, the driver was referred to another location for further investigation, and any drivers found to be intoxicated were arrested.³⁵ Other drivers were allowed to leave after a brief delay.³⁶

In assessing the governmental need for sobriety checkpoints, the Court declared that “[n]o one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it” and cited statistics indicating the damage caused by drunk driving, including deaths, injuries, and property destruction.³⁷ At the same time, “the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight.”³⁸ After finding that the checkpoints reasonably advanced the government’s interests, the Court ruled that the balance of the government’s interest and the nature of the intrusion weighed in favor of allowing the searches; therefore, the checkpoints did not violate the Fourth Amendment.³⁹

However, the special needs exception is not without limits, and in *City of Indianapolis v. Edmond*, the Court made one of those limits clear.⁴⁰ In that case, the police instituted a series of checkpoints specifically designed to interdict illegal drugs.⁴¹ At each checkpoint officers stopped a predetermined number of cars and conducted a brief “open-view examination” of the interior while a drug detection dog walked around the exterior.⁴² Police then diverted some cars for further inspection and made complete searches of vehicles for which probable cause had been

32. *Id.* at 562.

33. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 448 (1990).

34. *Id.* at 447.

35. *Id.*

36. *Id.* at 448.

37. *Id.* at 451.

38. *Id.*

39. *Id.* at 455.

40. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

41. *Id.* at 34.

42. *Id.* at 35.

developed; other cars were released from the checkpoint in as little as two or three minutes.⁴³ Two motorists who had been stopped at a checkpoint filed a class action suit seeking injunctive and declaratory relief.⁴⁴

Rather than invoking the balancing test, the Court found the drug checkpoints unconstitutional simply by analyzing their purpose. It stated: "We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."⁴⁵ According to the Court, the special needs checkpoints it had upheld in the past were "closely related to the problems of policing the border or the necessity of ensuring roadway safety," while drug checkpoints have the primary purpose of ordinary law enforcement.⁴⁶ The Court noted that the checkpoints in *Martinez-Fuerte* and *Sitz* did result in the arrests of people suspected of committing crimes.⁴⁷ However, "[w]ithout 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."⁴⁸ Because their primary purpose was indistinguishable from normal law enforcement activities, the drug checkpoints were unconstitutional.⁴⁹

B. *The Administrative Search Exception*

The administrative search exception, like the special needs exception, excuses the normal Fourth Amendment requirement of a judicial warrant based on individualized suspicion.⁵⁰ According to the Supreme Court, the exception, which most often applies to inspections of commercial entities in highly regulated industries, requires a finding of three criteria.⁵¹ "First, there must be a 'substantial' government interest"⁵² "Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.'"⁵³ Third, the regulatory statute authorizing administrative

43. *Id.* at 35–36.

44. *Id.*

45. *Id.* at 41.

46. *Id.* at 41–42.

47. *Id.* at 42.

48. *Id.* (emphasis added).

49. *Id.* at 48.

50. *New York v. Burger*, 482 U.S. 691, 702 (1987).

51. *Id.*

52. *Id.* (citing *Donovan v. Dewey*, 452 U.S. 594, 602 (1981); *United States v. Biswell*, 406 U.S. 311, 315 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72, 75 (1970)).

53. *Id.* (citing *Dewey*, 452 U.S. at 600).

inspections “must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.”⁵⁴ Furthermore, the Court has recognized that while “an administrative scheme may have the same ultimate purpose as penal laws,”⁵⁵ it cannot be invalidated simply because the government has chosen to “address a major social problem *both* by way of an administrative scheme *and* through penal sanctions.”⁵⁶

The administrative search exception has been applied to a limited extent outside the context of inspections of highly-regulated industries. One of the best-known applications of the administrative search exception has allowed the government to protect the nation’s air travelers. In the late 1960s, the hijacking problem intensified, causing the federal government to take preventative steps that included suspicionless magnetometer searches and container inspections at airports.⁵⁷ In addition to deterring hijackers and terrorists, these searches uncovered contraband in the possession of some passengers. In order to justify screenings at the nation’s airports, the courts turned to the administrative search exception: “The appropriate standards for evaluating the airport search program under the Fourth Amendment are found in a series of Supreme Court cases relating to ‘administrative’ searches”⁵⁸

Courts determined the constitutionality of airport searches “‘by balancing the need to search against the invasion which the search entails.’”⁵⁹ Given the high potential for harm to people and property, airport searches were found to be reasonable as long as people could avoid the searches by choosing not to fly, thus reducing the intrusion of the

54. *Id.* at 703 (citing *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 323 (1978)).

55. *Id.* at 713.

56. *Id.* at 712.

57. *United States v. Davis*, 482 F.2d 893, 898 (9th Cir. 1973).

58. *Id.* at 908.

59. *Id.* at 910 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967)); *accord* *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (“The reasonableness of a warrantless search depends . . . on balancing the need for a search against the offensiveness of the intrusion.”); *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973) (“Reasonableness requires that the courts must weigh more than the necessity of the search in terms of possible harm to the public. The equation must also take into account the likelihood that the search procedure will be effective in averting the potential harm. On the opposite balance we must evaluate the degree and nature of intrusion into the privacy of the person and effects of the citizen which the search entails.”).

screenings to a minimal level.⁶⁰ The Supreme Court has never directly decided an airport search case, but it has suggested that airport screenings are a constitutionally reasonable application of the administrative search exception.⁶¹ Recent decisions in the courts of appeals have reaffirmed the validity of airport searches using the same balancing test.⁶²

III. DOES 9/11 CHANGE THE CONSTITUTIONALITY OF SUSPICIONLESS SEARCHES?

Courts deciding terrorism checkpoint cases have reached different conclusions about how the 9/11 attacks should influence the constitutional analysis. How a court views the effect of 9/11 can influence its perception of the need for security measures to prevent future terrorist attacks—measures such as mass suspicionless searches. Similar to critics of provisions in the Patriot Act, some courts are reluctant to sacrifice civil rights in exchange for safety from the omnipresent threat of another attack. Others have found it necessary to revise the constitutional analysis in the midst of the war on terror.

Several courts have expressly rejected the idea that the attacks of 9/11 should change the constitutional analysis of suspicionless searches. In *Bourgeois*, the court examined the legality of a city's policy of suspicionless metal detector searches of all protestors wishing to enter the designated protest area outside of a military base.⁶³ The city contended that mass suspicionless searches at large gatherings could be found constitutional as a matter of law in the aftermath of 9/11.⁶⁴ The court disagreed, finding the argument to be "troubling" and stating such an interpretation would "eviscerate the Fourth Amendment."⁶⁵ The court went on to proclaim: "September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country"—a statement that has become the

60. *Davis*, 482 F.2d at 910–11.

61. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (favorably discussing decisions of lower courts that upheld airport searches under the administrative search exception).

62. *E.g.*, *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005) ("Airport screenings of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment. . . . To judge reasonableness, it is necessary to balance the right to be free of intrusion with 'society's interest in safe air travel.'" (quoting *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986))).

63. *Bourgeois v. Peters*, 387 F.3d 1303, 1306–07 (11th Cir. 2004).

64. *Id.* at 1311.

65. *Id.*

cornerstone of other decisions rejecting the notion that constitutional protections should change in light of the 9/11 attacks.⁶⁶

The court in *Johnston*, relying in part on *Bourgeois*, reached a similar conclusion about suspicionless pat-down searches of fans entering an NFL stadium in Tampa, Florida.⁶⁷ The court noted that since 9/11, “[m]any Americans have become more tolerant of protective measures . . . rationalizing that the inconvenience is worth the added protection.”⁶⁸ However, the court ruled that “the constitutionality of mass suspicionless searches does not turn on popular opinion,” concluding that the 9/11 attacks did not justify changing the constitutional analysis of suspicionless searches.⁶⁹

In a case arising just weeks after the 9/11 attacks, another court reached a similar conclusion.⁷⁰ Even though the search happened shortly after the 9/11 tragedy, the court was unwilling to allow the search program to escape the same constitutional scrutiny as any other case:

We recognize that this particular stop occurred in the immediate aftermath of the terrorist attacks of September 11, 2001, and that the State police were responding to warnings concerning further threatened attacks. While we accept the fact that ongoing attempts by terrorists to inflict further death and devastation on our population may increase the number and nature of facilities and locations that must be protected by heightened security screenings, that does not affect the requirement that suspicionless stops and searches at those facilities and locations must still be conducted in a manner that minimizes the intrusion experienced by the many ordinary, law-abiding persons being screened.⁷¹

Thus, the court was unwilling to alter the normal constitutional test in favor of a system that would grant the police more leniency in conducting terrorism checkpoints.

66. *Id.* at 1312. This language was quoted in two other major terrorism checkpoint cases. *Johnson v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1273 (M.D. Fla. 2006), *rev'd on other grounds*, 490 F.3d 820 (11th Cir. 2007); *State v. Seglen*, 700 N.W.2d 702, 708 (N.D. 2005).

67. *Johnston*, 442 F. Supp. 2d at 1272–73.

68. *Id.*

69. *Id.* at 1273 (“We cannot simply suspend or restrict civil liberties until the War on Terror is over . . .”) (quoting *Bourgeois*, 387 F.3d at 1312)).

70. *Commonwealth v. Carkhuff*, 804 N.E.2d 317 (Mass. 2004) (invalidating a checkpoint search near a major reservoir that occurred on October 15, 2001).

71. *Id.* at 323 (citation omitted).

Other courts have not agreed with this conclusion and have found it necessary to rethink the constitutional analysis in light of the war on terror. While these cases involved suspicionless searches other than checkpoints, they still illustrate how various courts may rule in a case concerning a terrorism checkpoint. For example, one such court found it necessary to “reprise what has been written” about the constitutionality of suspicionless border searches “in light of the tragedy of September 11th and the anti-terrorism efforts being made in its aftermath.”⁷² Another court considered whether “September 11, 2001 changes the scope or nature of the exceptions that permit warrantless searches of automobiles.”⁷³ The court ruled that “[w]ith respect to the facts and circumstances of this case,” 9/11 alone did not expand warrantless search exceptions; thus, the court seemed to leave open the possibility of doing so in future cases involving different facts.⁷⁴

At least one court has expressly ruled that the attacks of 9/11 should change the constitutional analysis of suspicionless searches. In *State v. Pineiro*, the court considered the constitutionality of a suspicionless search of a vehicle parked about fifty to one hundred feet from the property boundary of an international airport.⁷⁵ In ruling that the search was reasonable, the court remarked: “We live in a new era and constitutional guarantees against unlawful search and seizure must be adapted to the realities of a post-September 11, 2001 environment”⁷⁶ This court, unlike others, clearly was not concerned with the possible infringements of liberty that may accompany suspicionless searches to uncover terrorist threats.⁷⁷

Overall, most courts are weary to completely abandon the protections of the Fourth Amendment simply because the nation experienced a horrific terrorist attack. This, however, does not mean that suspicionless checkpoint searches designed to detect and deter terrorist plots are necessarily unconstitutional. As discussed above, several exceptions to the warrant and probable cause requirements of the Fourth Amendment have been accepted by the Supreme Court.⁷⁸ But in adapting those exceptions

72. Bradley v. United States, 299 F.3d 197, 200 (3d Cir. 2002).

73. People v. Elio, 750 N.Y.S.2d 738, 739 (Mount Vernon City Ct. 2002).

74. *Id.*

75. State v. Pineiro, 2005 WL 3710956, at *1 (N.J. Super. Ct. App. Div. Jan. 30, 2006).

76. *Id.* at *3.

77. Compare *id.* (ruling that constitutional guarantees must be adapted after 9/11), with *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004) (ruling that civil liberties cannot be restricted in the War on Terror).

78. See *supra* Part II.

to the context of terrorism, courts have reached widely varying conclusions.⁷⁹

IV. APPLYING THE CONSTITUTIONAL ANALYSIS TO TERRORISM CHECKPOINTS

While a majority of courts analyzing terrorism checkpoint searches have chosen not to adopt a new constitutional test, there is still no widespread agreement on all issues relating to whether a checkpoint should be allowed. In fact, courts have not reached total agreement on one of the most fundamental issues of whether terrorism prevention falls under one of the Supreme Court's exceptions to individualized suspicion— some courts have ruled terrorism prevention to be a “special need” in the constitutional sense, some courts have analogized terrorism checkpoints to airport searches, and some have found that neither category is valid for this type of search.⁸⁰ But even among the courts that agree that terrorism checkpoints fit into established exceptions, there remains disagreement.

It is no surprise that some courts have found terrorism checkpoint programs constitutional while other courts have condemned them— the reasonableness of such a search program is highly dependent on the unique facts of the case given that the constitutional test looks at the totality of the circumstances.⁸¹ Even so, these cases are complicated by disagreement between the courts on the many factors involved. Generally, courts deciding suspicionless search cases apply a reasonableness test that weighs the gravity of the governmental need for the search against the intrusiveness of the search on the individual.⁸² But courts differ on which

79. *See infra* Part IV.

80. *See infra* Part IV.A.

81. *See, e.g.,* Chandler v. Miller, 520 U.S. 305, 314 (1997) (noting that, in special needs cases, “courts must undertake a context-specific inquiry”); Ohio v. Robinette, 519 U.S. 33, 34 (1996) (“We have long held that the ‘touchstone of the Fourth Amendment is reasonableness,’ which “is measured in objective terms by examining the totality of the circumstances.” (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))).

82. *See supra* Part II (summarizing the constitutional tests applied to suspicionless searches). Some courts have also ruled that the efficacy of the search program must also be weighed. *E.g.,* MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citing Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002)). However, the issue of effectiveness of a search program has not been a source of significant disagreement in courts deciding terrorism checkpoint cases. Consequently, the discussion in this Note focuses on the more controversial issue of balancing the governmental interest against the nature of the intrusion.

factors should be considered in assigning weight to these competing interests.⁸³ This disparity creates a confusing body of case law that can contribute to problems in administering terrorism checkpoints.

This Part of the Note will begin with a discussion of whether terrorism checkpoint searches conform to the doctrines of special needs searches or airport administrative searches. The remainder of this section will highlight disagreements between courts on several important factors contributing to the assessment of the gravity of the governmental interest and the intrusiveness of the search program.

A. *Fitting Terrorism Checkpoints Under a Traditional Exception*

The first step for a court analyzing a terrorism checkpoint case is to determine whether it falls under an exception to the Fourth Amendment's normal requirement for individualized suspicion. Most often, courts look to the special needs exception or the administrative/airport search exception.⁸⁴ A court's determination that a checkpoint search does not fit into one of these categories can be fatal for the government's case because the search can be ruled unreasonable per se without weighing the interests involved.⁸⁵ Therefore, this issue can be a central point of contention in terrorism checkpoint cases.

1. *Terrorism Prevention as a Special Need*

The Supreme Court has expressed approval for suspicionless searches that advance a special need for the government.⁸⁶ It has, however, limited the use of such searches to special needs other than normal law enforcement.⁸⁷ In addition, the Court has suggested that a checkpoint established for terrorism prevention would be constitutional: "[T]he Fourth Amendment would almost certainly permit an appropriately

83. See *infra* Parts IV.B–C.

84. For a discussion of the traditional application of these exceptions, see *supra* Part II.

85. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 46–47 (2000) (finding that the purpose behind a special needs checkpoint search or seizure is relevant to the constitutional analysis and can render a search program unconstitutional).

86. See *supra* Part II.

87. See *Edmond*, 531 U.S. at 41–42 (“Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.”).

tailored roadblock set up to thwart an imminent terrorist attack”⁸⁸

In *MacWade*, the court applied the Supreme Court’s logic and ruled that preventing a terrorist bombing in the New York subway system served an appropriate special need.⁸⁹ The court noted that a special need has traditionally been found when the government seeks to “‘prevent’ and ‘discover . . . latent or hidden’ hazards” and that there was “no doubt that concealed explosives are a hidden hazard”⁹⁰ Additionally, the court rejected the allegation that terrorism prevention presents a special need only when faced with an imminent attack.⁹¹ Instead, a much broader definition of a special need was adopted: “Where, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need.”⁹²

Not all courts have been so willing to accept terrorism prevention as a special need distinct from normal law enforcement. In *Bourgeois*, the city defended its program of suspicionless magnetometer searches of protestors by asserting there was a special need to ensure public safety.⁹³ The city claimed the purpose of the checkpoints was to protect participants and police by detecting dangerous weapons at the protest rather than furthering its interest in law enforcement.⁹⁴ The court, however, found this purpose to be too closely related to the intention behind existing criminal laws against possession of dangerous weapons:

In a case such as this, where the very purpose of a particular law (such as the law banning the possession of certain dangerous items) is to protect the public, and the government protects the public by enforcing that law, it is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined.⁹⁵

Given this “inability to tease out a rationale totally independent of the City’s interest in law enforcement,” the court ruled that the case did not fall

88. *Id.* at 44.

89. *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006).

90. *Id.* at 270–71 (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989)).

91. *Id.* at 271.

92. *Id.*

93. *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004).

94. *Id.*

95. *Id.* at 1312–13.

under the special needs doctrine because its purpose was not sufficiently distinct from the normal interests in crime control.⁹⁶

Surely the prevention of terrorist attacks is a high priority, and generally that task falls upon the shoulders of law enforcement officials. Suspicionless checkpoint searches have been found to deter terrorists,⁹⁷ but according to some courts, such searches violate Fourth Amendment rights if the government chooses to also have criminal sanctions for terrorist acts.⁹⁸ Such rulings force the government to make a choice: use search programs that have proven to be effective or prosecute individuals who have engaged in a terrorist act. This result is especially vexing considering the Supreme Court has approved checkpoint searches conducted by police officials that may lead to criminal charges in addition to fulfilling a special need other than normal law enforcement, such as sobriety checkpoints designed to deter drunk driving that end in the arrest of drunk drivers.⁹⁹

2. Analogizing Terrorism Checkpoints to Airport Searches

Suspicionless searches in airports have been common for decades and have consistently received approval from the courts.¹⁰⁰ But in the years since 9/11, suspicionless search programs have left the airport and have shown up in many areas of public life.¹⁰¹ Some courts have greeted these expansions with the same approval they afford to airport searches, while others have refused to allow airport-like searches outside the airport.¹⁰²

96. *Id.* at 1313.

97. *Cf. Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (stating that when a search program is designed to deter highly hazardous conduct like air piracy, a low incidence of that conduct is "logically viewed as a hallmark of success").

98. *See, e.g., Bourgeois*, 387 F.3d at 1312–13 (finding terrorism prevention is not a constitutional special need when similar criminal sanctions already exist).

99. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (approving a sobriety checkpoint aimed at detecting drunk drivers, even when stops could escalate to arrests for driving while intoxicated).

100. *See supra* note 1.

101. *See supra* notes 2–10 and accompanying text.

102. *Compare American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004) (relying on an analogy to airport searches to justify suspicionless searches of personal items of Boston public transit passengers), *and Commonwealth v. Carkhuff*, 804 N.E.2d 317, 320–21 (Mass. 2004) (implementing the same logic to uphold suspicionless searches near a municipal water reservoir), *with State v. Seglen*, 700 N.W.2d 702, 708 (N.D. 2005) (rejecting an analogy between suspicionless pat-downs at a collegiate hockey event and airport security searches).

Many courts have used the framework of airport search cases to analyze suspicionless search programs in other areas. For example, in *Carkhuff* the state defended its program of suspicionless stops and searches around a reservoir by stressing similarities to the airport environment.¹⁰³ This required comparing the dangers of contamination and sabotage at the reservoir to risks like air piracy and plane bombings.¹⁰⁴ The court accepted that there may be some similarities: “At least in concept, the screening of all persons approaching the reservoir is similar to the screening of persons and property entering other vulnerable facilities.”¹⁰⁵ But the court did not automatically expand the airport search justification to the search program at issue; instead, the court ruled that “it provides a framework for analyzing the Commonwealth’s claim that the stopping of motorists along the reservoir constituted a permissible screening procedure.”¹⁰⁶

Similarly, the court in *MBTA* adopted an analogy to airport searches in deciding the constitutionality of Boston subway checkpoints.¹⁰⁷ The court ruled that a threat against a specific subway system was not required for the search to be constitutional— the opinion compared this idea to the notion that when there is a threat to one flight, then all flights must be protected.¹⁰⁸ The court went on to rule that the same constitutional test should be used wherever the search occurs:

There is . . . no reason to have separate constitutional analyses for urban mass transportation systems and for airline transportation. There may be differences in the security methods that are used or in their manner of implementation, but the fundamental issues should not be substantially affected by the mode of transportation involved.¹⁰⁹

In ruling this way, the court essentially subjected subway passengers to the same sort of situation they would experience if they had flown instead.

However, not all courts have been willing to accept the airport search analogy. In *Seglen*, the state attempted to justify a suspicionless search at a college hockey game by arguing that the arena was much like an airport or courthouse.¹¹⁰ The court did not find the analogy persuasive and instead

103. *Carkhuff*, 804 N.E.2d at 320.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2.

108. *Id.*

109. *Id.*

110. *State v. Seglen*, 700 N.W.2d 702, 707 (N.D. 2005).

relied on two cases, each over twenty years old, in which the respective courts refused to compare rock concert venues to airports.¹¹¹ Furthermore, the court rejected the state's argument that recent security concerns following 9/11 mean that suspicionless searches everywhere are now much more like airport searches than when previous cases were decided.¹¹² The court stated that there needed to be more history of violence at the arena in order to compare it to an airport.¹¹³

The airport analogy has not even been accepted in all cases involving mass transportation—unlike the *MBTA* court, the *Cassidy* court refused to equate air travel with the daily commute.¹¹⁴ In attempting to justify a program of suspicionless searches on ferries, the government argued that privacy interests of the passengers were similar to the privacy interests held by air passengers.¹¹⁵ But the court did not agree: “[A]irplanes are very different creatures from the more quotidian commuting methods at issue in . . . the instant case . . . and we are wary of extending [an airport search case] analysis to a markedly different factual context.”¹¹⁶

These cases highlight the disagreement between courts over whether suspicionless searches can be analogized to airport searches no matter where they occur. It seems that the primary difference between the locations in the cases is that terrorists have successfully attacked subways and reservoirs in the past, while no such violence has happened in places like sporting arenas.¹¹⁷ But given the preventative purpose of suspicionless searches, law enforcement should not have to wait until an attack occurs. Areas like sporting arenas create a desirable target for terrorists due to the tight gathering of large numbers of civilians and the vast media coverage

111. *Id.* at 707–08 (citing *Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976); *Jacobsen v. City of Seattle*, 658 P.2d 653 (Wash. 1983)).

112. *Id.* at 708 (citing *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004)).

113. *Id.*

114. *Compare Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2 (ruling that suspicionless searches in all types of mass transportation should be subjected to the same constitutional analysis as airport searches), *with Cassidy v. Chertoff*, 471 F.3d 67, 76 (2d Cir. 2006) (rejecting the argument that airport search cases altered the “privacy interest calculus” for passengers on a ferry).

115. *Cassidy*, 471 F.3d at 76.

116. *Id.* at 76–77.

117. *Compare Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2 (discussing recent attacks on subway systems around the world), *and Commonwealth v. Carkhuff*, 804 N.E.2d 317, 321 n.5 (Mass. 2004) (noting the government's claim that enemies have historically targeted water supplies), *with Seglen*, 700 N.W.2d at 708 (ruling that a history of violence at sporting arenas was absent but required).

already present at such locations.¹¹⁸ Therefore, there is a strong argument that suspicionless searches in all public areas should be subjected to the same constitutional analysis used for airport searches.

B. *Assessing the Gravity of the Governmental Interest*

The extent of the government's interest in preserving safety and preventing terrorist attacks must be established in order to justify the intrusion of suspicionless searches.¹¹⁹ This interest is usually manifested by the imminence and severity of the terrorist threat.¹²⁰ Given the nature of the constitutional balancing test, it should be expected that as the severity of the threat increases, a court will be more likely to accept increasingly intrusive search programs. Several factors for measuring the governmental interest have emerged in recent terrorism checkpoint cases, but courts disagree on how they should be applied.

1. *The General Threat of Terrorism*

Even though courts have disagreed about what effect the attacks of 9/11 should have on the constitutional test, it is clear that courts cannot ignore the possibility of future acts of terrorism in the United States.¹²¹ However, cases decided in the wake of 9/11 reveal that little agreement exists between courts on the issue of whether a sufficient governmental interest can be demonstrated by a general threat of terrorism that does not identify a specific target or time but instead relies on the increased possibility of an attack on the United States as a whole. Some courts have expressly rejected the notion that a general threat can establish a sufficiently compelling governmental interest to weigh against an intrusion into privacy.¹²² Other courts have not been so restrictive about the use of threats that lack specificity.¹²³

118. See Benjamin T. Clark, *Why the Airport and Courthouse Exceptions to the Search Warrant Requirement Should Be Extended to Sporting Events*, 40 VAL. U. L. REV. 707, 709 (2006) (arguing that sporting events are "in the crosshairs of terrorists").

119. See *supra* Part II.

120. See *supra* Part II.

121. See *supra* Part III (explaining how some courts have adapted their interpretation of reasonableness under the Fourth Amendment, while others have refused to restrict personal rights in exchange for prophylactic safety measures).

122. See, e.g., *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004) (ruling that a yellow— that is, elevated— threat advisory level does not justify suspicionless searches).

123. See, e.g., *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 323 (Mass. 2004) (recognizing that general threats of terrorism "may increase the number and nature of

The Eleventh Circuit decided one of the first post-9/11 suspicionless search cases and specifically rejected using the general threat of terrorism to justify suspicionless searches.¹²⁴ In *Bourgeois*, the court considered the constitutionality of a city's suspicionless metal detector searches of participants in a protest outside a military base.¹²⁵ It rejected the city's proposition that the general threat of terrorism in light of the 9/11 attacks could justify suspicionless magnetometer searches at large gatherings, stating:

While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people. In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors.¹²⁶

The court noted that if it had upheld the city's proposition, then mass suspicionless searches could be used at any large gathering, including "a high school graduation, a church picnic, a public concert in the park, an art festival, a Fourth of July parade, sporting events . . . , and fund-raising events"¹²⁷

Even the argument that suspicionless searches would ensure safety of the general public did not sway the court.¹²⁸ Recognizing that although such searches may create safety, the court stated: "[T]he 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. It establishes searches based on evidence— rather than potentially effective, broad, prophylactic dragnets— as the constitutional norm."¹²⁹

The court eliminated all hope of using a general threat of terrorism to allow suspicionless searches by rejecting the notion that the threat advisory level established by the Department of Homeland Security (DHS) justifies

facilities and locations that must be protected by heightened security screenings").

124. *Bourgeois*, 387 F.3d at 1312.

125. *Id.* at 1306–07.

126. *Id.* at 1311.

127. *Id.* (quoting Reply Brief of Appellants at 4, *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004) (No. 02-16886-CC), 2003 WL 23960108).

128. *Id.* at 1311–12.

129. *Id.* at 1312.

intrusions into privacy.¹³⁰ The threat advisory level at the time of the suspicionless search program at issue was yellow, signifying an “elevated” threat level, but the court noted that the threat advisory level had been yellow for over two and a half years.¹³¹ In ruling that the elevated threat level did not amount to justification for the searches, the court stated that “[w]e 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.”¹³² Without more, the elevated alert level for the nation did not sway the court’s decision in favor of the government.

The court in *Johnston* reached a similar conclusion about using a general threat of terrorism to allow suspicionless pat-down searches at an NFL stadium in Florida.¹³³ Finding there was no credible evidence of a specific threat against the stadium, the court noted: “One cannot seriously dispute the magnitude of the threat of terrorism to this country or the Government’s interest in eradicating it.”¹³⁴ Although “any reasonable person appreciates the potential harm that would result from a terrorist attack at the Stadium,” the court ruled that “the gravity of the threat cannot alone justify the intrusiveness of a suspicionless search of [a] person”¹³⁵ and that “[a] generalized threat of a terrorist attack will not suffice.”¹³⁶ Instead, the threat needed to be a “concrete danger, real, and not hypothetical.”¹³⁷ The *Johnston* court, like the *Bourgeois* court, emphasized that justifying suspicionless searches with “only a general fear of terrorist attacks would essentially condone mass suspicionless searches of every person attending any large event”¹³⁸ In the end, the court prevented personal privacy rights from being consumed by the slippery slope of general terrorism threats when it ruled that the checkpoint searches of all football fans entering the stadium were unreasonable.¹³⁹

Likewise, the court in *Seglen* held that an elevated but unspecified threat of terrorism did not justify suspicionless pat-downs of fans entering a

130. *Id.*

131. *Id.*

132. *Id.*

133. *Johnston v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1266 (M.D. Fla. 2006), *rev’d on other grounds*, 490 F.3d 820 (11th Cir. 2007).

134. *Id.*

135. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 42–43 (2000)).

136. *Id.* (citing *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004)).

137. *Id.* (internal quotations omitted).

138. *Id.* at 1269; *accord supra* note 127 and accompanying text.

139. *Johnston*, 442 F. Supp. 2d at 1268–69.

college hockey arena.¹⁴⁰ The court noted that suspicionless search programs have usually been accepted at airports and courthouses; however, it pointed to several cases finding that pat-down searches at rock concerts do not meet the Fourth Amendment's requirement of reasonableness.¹⁴¹ The state argued that the nation's security needs have changed since those cases were decided over twenty years ago, alluding to the general threat of terrorism following 9/11.¹⁴² Relying on *Bourgeois*, the court rejected this argument, stating that the general threat of terrorism could not be used to restrict the scope of the Fourth Amendment at large gatherings of people.¹⁴³ Instead, a showing of past history of violence was required to allow suspicionless searches at the hockey arena.¹⁴⁴

In *MacWade*, the case challenging New York City's program of suspicionless searches at subway stations, the court ruled that the threat of terrorism presented a special need—no showing of an imminent terrorist threat was needed.¹⁴⁵ However, finding a special need did not mean the searches were automatically reasonable—it only allowed the court to balance the government need against the intrusiveness to find whether the search program was acceptable under the Fourth Amendment.¹⁴⁶ The court went on to rule that a general threat of terrorism would not justify the search program; instead, the court ruled that the threat to public safety must be “substantial and real” rather than “merely ‘symbolic.’”¹⁴⁷

Not all courts analyzing suspicionless terror searches have concluded that a general threat of terrorism will never constitute a governmental interest sufficient to condone a privacy intrusion. In *Carkhuff*, a case involving a suspicionless terror search that occurred about a month after 9/11, the court seemed willing to concede that no specific threat was

140. State v. Seglen, 700 N.W.2d 702, 708 (N.D. 2005).

141. *Id.* at 707–08 (citing Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976); Jacobsen v. City of Seattle, 658 P.2d 653 (Wash. 1983)).

142. *Id.* at 708.

143. *Id.* (quoting *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004)).

144. *Id.*

145. *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006). In seeking an injunction to stop the search program, the plaintiffs alleged that the government needed to show that a terrorist attack was imminent, relying on *Edmond*. *Id.* The court noted that while the Supreme Court had mentioned that an imminent terrorist attack would constitute a special need, it was only an example, and the plaintiffs had used the language to advocate an “extraordinarily broad legal principle.” *Id.* Thus, the court refused to accept the plaintiffs' argument. *Id.*

146. *Id.* (“Having concluded that the Program serves a special need, we next balance . . . to determine whether the search is reasonable and thus constitutional.”).

147. *Id.* at 272 (quoting *Chandler v. Miller*, 520 U.S. 305, 322–23 (1997)).

needed.¹⁴⁸ Following 9/11, the federal government issued a written advisory directed at state law enforcement warning of an impending terrorist attack, though it did not specify a target or location.¹⁴⁹ In response to this threat, the State Police instituted a program that included stopping all vehicles traveling on roads near a major reservoir and searching all passing trucks.¹⁵⁰

In reviewing the constitutionality of the program, the court stated that the purpose of the program was to “prevent[] potential terrorist saboteurs from contaminating or interrupting the water supply by keeping them away from the reservoir in the first place.”¹⁵¹ The court noted that there was no need to demonstrate a specific threat directed at any target in particular—past experience with terrorism or violence may suffice.¹⁵² However, the court declined to pass judgment on this issue and decided the case on other grounds.¹⁵³ But given the extensive discussion of the threat assessment, the court appeared ready to find the threat sufficient to justify the suspicionless search program had the stop-and-search method used by police been less intrusive.¹⁵⁴

Another court was much more explicit about accepting a general threat of terrorism to justify a suspicionless search. The *MBTA* court approved a program of suspicionless searches of passengers on trains and buses in Boston.¹⁵⁵ In an effort to protect the Democratic National Convention, the police restricted access to areas around the stadium hosting the event, including checkpoint searches of anyone riding a bus or train that passed near the restricted area.¹⁵⁶ The court declined to issue an injunction to stop the searches based, in part, on a general threat of

148. *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 319 (Mass. 2004) (involving an incident that occurred on October 15, 2001).

149. *Id.* at 318.

150. *Id.* at 318–19. This case arose after police stopped a man driving near the reservoir, questioned the driver about his presence on the road, and determined that he was intoxicated, leading to an arrest for drunk driving. *Id.* at 319.

151. *Id.* at 321.

152. *Id.* at 321 n.5 (citing 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 10.7(a) (3d ed. 1996)).

153. *Id.* (“Because we conclude that the security measures implemented here fail other requirements for a lawful administrative search, we will assume, without deciding, that the State police had an adequate basis for implementing some form of administrative search procedure to protect the reservoir.”).

154. *See id.* at 319–22.

155. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *4 (D. Mass. July 28, 2004).

156. *Id.* at *1.

terrorism embodied in a DHS warning that indicated that “terrorists continue to plan for a large-scale attack within the United States aimed at disrupting the Nation’s democratic process.”¹⁵⁷

The court offered an explanation for allowing this seemingly general threat to justify the searches. It noted that a court cannot easily quantify the threat: “[I]t is . . . difficult, if not impossible, to try to assess either the likelihood or the imminence of [a terrorist] attack.”¹⁵⁸ The court went on to reason that, while there was no evidence of a specific threat against the MBTA or the convention, “there is also no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack, so its absence cannot be taken to indicate that the facilities are *not* likely targets.”¹⁵⁹

Overall, it is very unlikely that a court would ever approve a terrorism checkpoint based on a mere guess that it may be a target of terrorists. As the *Bourgeois* court stated, the courts must not allow 9/11 to become the day that Americans lost their liberty to be free of suspicionless searches.¹⁶⁰ However, the requirement of specific threat information is sometimes insurmountable given the secretive nature of terrorists, as noted by the *MBTA* court.¹⁶¹ Consequently, courts must be careful—while mere unsubstantiated blanket threats of terrorism should not suffice to allow law enforcement to infringe on personal privacy rights, some latitude is needed in order to effectively fight terrorism when specific information of a terrorist threat is lacking.¹⁶²

2. Foreign Terrorism

Some law enforcement agencies have pointed to foreign terrorist acts to justify terrorism checkpoint search programs in the United States. Given the global nature of some terrorist organizations, it certainly seems logical that attacks in foreign nations should prompt authorities in the United States to prevent similar attacks within its territory. However, courts have not always agreed with this logic, finding foreign terrorist

157. *Id.* at *2.

158. *Id.*

159. *Id.*

160. *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004) (“September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.”).

161. *See Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2.

162. *See infra* Part V.A.3 (discussing the need to allow checkpoint searches when specific information is lacking).

attacks unpersuasive when determining the gravity of the government's interest in protecting local targets.

The *MBTA* court relied heavily on foreign terrorism when analyzing the constitutionality of checkpoint searches on trains and buses in Boston during the Democratic National Convention, which took place in the summer of 2004.¹⁶³ The court pointed to two train bombings that occurred earlier that year: the February 6, 2004 attack in Moscow and the March 11, 2004 attack in Madrid.¹⁶⁴ In addition to the loss of life stemming from the attacks on mass transportation systems similar to Boston's, the opinion also considered the intention to interrupt the democratic process.¹⁶⁵ Because the Madrid attacks were likely timed to disrupt the Spanish elections, the court was even more willing to find a governmental interest sufficient to justify the searches in order to protect the convention and the U.S. election process.¹⁶⁶ In the end, the suspicionless search program was found reasonable, and the request for an injunction against the searches was denied.¹⁶⁷

In *MacWade*, the court considered the constitutionality of similar checkpoint searches in the New York City subway system, which the court described as a "prime target" for terrorists.¹⁶⁸ To substantiate this conclusion, the court relied on past plots against the subway system as well as a series of attacks in the preceding two years, including the bombings of commuter trains in Madrid and Moscow in 2004 and subway trains and buses in London on July 7, 2005.¹⁶⁹ In fact, the NYPD instituted its subway search program just days after the London attacks in order to deter similar attacks, even though officials did not seem to have any indication of a possible attack in the United States.¹⁷⁰ Despite lacking any indication of an impending attack against the New York subways, the court found the search program constitutional based in large part on the attacks in Madrid, Moscow, and London.¹⁷¹

163. *Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at *4.

168. *MacWade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006).

169. *Id.*

170. *Id.* A secondary goal of the New York program was to uncover terrorist plots against the subway system, indicating that the NYPD did not have knowledge of a possible impending attack. *Id.*

171. *Id.* at 272.

However, not all courts find foreign terrorism threats persuasive when determining the gravity of the governmental interest in establishing a suspicionless search program. Like the courts ruling on the New York and Boston mass transit searches, the court in *Johnston* considered the effect of foreign terrorist attacks on the constitutionality of suspicionless pat-downs of football fans.¹⁷² The opinion cited a 2005 terrorism report issued by the U.S. State Department containing a summary of the Madrid attacks as well as intelligence information concerning the locations of planned attacks by the same terrorist group that carried out the subway bombings, which included, among other places, Madrid's largest soccer stadium.¹⁷³ However, this seemingly credible threat against a similar target abroad was insufficient to persuade the court to allow the checkpoint searches in the Florida stadium.¹⁷⁴

The different rulings in these cases raise significant questions about whether foreign terrorism should be used to measure the magnitude of the governmental interest in preventing terrorist attacks in the United States. First, it is uncertain what level of foreign threat is sufficient to warrant a local response. The recent cases relying on foreign terrorism suggest that a completed attack in another nation creates a high enough interest to justify suspicionless searches while a mere threat does not.¹⁷⁵ However, the fight against terrorism is about prevention, meaning authorities should act on planned terrorist activities rather than waiting for attacks to materialize. Acting before the terrorists act is the very essence of a suspicionless search program, but so far it seems as if only completed foreign attacks will persuade U.S. judges to allow police to infringe on privacy rights in order to prevent local attacks.

Second, relying on foreign terrorism could open the door for endless search programs given the extensive nature of terrorism around the world. Most cases addressing the probative value of foreign terrorism have looked to attacks and threats in western nations like Spain and the United

172. *Johnston v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1267 (M.D. Fla. 2006), *rev'd on other grounds*, 490 F.3d 820 (11th Cir. 2007).

173. *Id.*

174. *Id.* at 1273 (issuing an injunction against further suspicionless pat-down searches at the stadium).

175. Compare *MacWade*, 460 F.3d at 272 (discussing foreign subway attacks as a factor in finding local subway search programs reasonable), and *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004) (same), with *Johnston*, 442 F. Supp. 2d at 1267-68 (finding a search program at a local football stadium unreasonable despite information of planned attacks against a foreign soccer stadium).

Kingdom.¹⁷⁶ This makes sense because the same terrorist organizations that have attacked those nations also routinely threaten to attack the United States. But some have suggested that terrorism in other parts of the world should be considered. For example, one judge on the Eighth Circuit suggested that attacks on buses in Israel may have an effect on the reasonableness of one's Fourth Amendment expectation of privacy for luggage on buses in the United States.¹⁷⁷ But if U.S. courts begin to justify searches based on foreign terrorist attacks in any area of the world, then virtually no aspect of public life would be free from searches because terrorists have targeted nearly every type of public target at some point. Therefore, courts must walk a fine line between relying too heavily on foreign terrorism and allowing American law enforcement to take the steps necessary to prevent attacks in this country.

3. *Following Congressional Assessments of Risk*

In addition to law enforcement efforts taken by the Executive branch, Congress has taken steps to protect the nation from terrorist attacks. Because the federal government has limited constitutional authority to pass legislation, statutes at issue in recent terrorism checkpoint cases have tended to focus on terrorist threats to interstate commerce, an area firmly within the regulatory grasp of Congress.¹⁷⁸ But even when Congress has determined that a certain target needs to be protected from terrorists, not all courts are willing to follow its assessment of the danger.

In *Cassidy*, the post-9/11 terrorism checkpoint case with the most explicit legislative guidance, the court considered the constitutionality of

176. See *MacWade*, 460 F.3d at 264 (discussing attacks in Madrid, Moscow, and London); *Johnston*, 442 F. Supp. 2d at 1267 (discussing attacks and threats in Madrid); *Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2 (discussing attacks in Moscow and Madrid).

177. *United States v. Va Lerie*, 385 F.3d 1141, 1157 n.10 (8th Cir. 2004) (Riley, J., dissenting), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005). The district court had ruled that air passengers do not have a reasonable expectation of privacy in their luggage following 9/11 but that passengers on trains and buses possibly retained some reasonable expectation of privacy, stating that national security concerns on trains and buses were lower than for airplanes. *Id.* However, Judge Riley noted that after the district court's ruling the world witnessed the Madrid bombings and numerous bus bombings in Israel and other nations. *Id.* While not specifically expressing an opinion on the issue, this footnote indicated that an attack in Israel may be significant in assessing the constitutionality of a suspicionless search program in the United States. *See id.*

178. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate commerce with foreign nations, and among the several States . . .").

suspicionless searches of passengers and cars on a ferry.¹⁷⁹ The checkpoint program was started in an effort to implement the Maritime Transportation Security Act of 2002 (MTSA), which was passed by Congress shortly after 9/11 to protect the nation from a potential “transportation security incident.”¹⁸⁰ The MTSA requires operators of certain vessels to prepare a security plan to prevent a terrorist incident,¹⁸¹ which the U.S. Coast Guard interpreted as requiring screenings of passengers, baggage, and vehicles for dangerous items.¹⁸² In determining whether the search program was constitutional, the court stated: “Expert determinations . . . based on an explicit Congressional delegation of legislative authority are entitled to significant deference.”¹⁸³ The court went on to rule “that the government has proffered an important, even compelling, special need here, having determined that ferries . . . are at a high risk of terrorist attack.”¹⁸⁴ This demonstrates that the *Cassidy* court was quick to follow Congress’s (and, in turn, the Coast Guard’s) determination that certain vessels are likely targets of terrorists.

The court in *Johnston*, however, was much less willing to defer to Congress’s assessment of the risk posed to the Florida stadium where authorities instituted random pat-down searches. In that case, the parties defending the checkpoint program’s constitutionality “contend[ed] that the ‘Federal Government, including Congress, considers sports stadiums at risk of terrorist attack’”¹⁸⁵ This argument stemmed from the fact that the Federal Aviation Administration (FAA), pursuant to its authority granted by Congress, issued no-fly zones over all professional sporting events.¹⁸⁶ While the court recognized the logic of Congress’s threat assessment, it declined to follow its guidance:

One cannot question, particularly in the aftermath of September 11, 2001, the wisdom of implementing a no-fly zone over NFL stadiums. All of the experts agree that NFL stadiums and large public venues are attractive targets. That is not to say, however, that Congress’

179. *Cassidy v. Chertoff*, 471 F.3d 67, 70 (2d Cir. 2006).

180. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2068 (codified as 46 U.S.C. §§ 70101–70119 (2006)); *Cassidy*, 471 F.3d at 70.

181. 46 U.S.C. § 70103(c)(1)–(2).

182. 33 C.F.R. § 104.265(e)(1) (2006).

183. *Cassidy*, 471 F.3d at 84 (citations omitted).

184. *Id.* at 85.

185. *Johnston v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1268 n.16 (M.D. Fla. 2006), *rev’d on other grounds*, 490 F.3d 820 (11th Cir. 2007).

186. *Id.*

recognition of NFL stadiums as potential terrorist targets demonstrates a “special need” to conduct mass suspicionless pat-downs of NFL patrons.¹⁸⁷

Instead of following Congress’s lead, the court made its own determination of the threat posed to the stadium and ruled the searches unconstitutional.¹⁸⁸

It is firmly established that courts have the power, even the duty, to ensure that Congress adheres to the Constitution. But that does not mean they should completely ignore Congress’s judgments— Congress has a national perspective on the extent of terrorist threats, something that is generally lacking in local courts deciding cases on strictly confined sets of facts. Terrorism is a national problem requiring a national plan of prevention. Congress, as a national institution, could potentially supply the guidance necessary to attack terrorism. As displayed in *Johnston*, however, this view is not always very persuasive to the courts.

Perhaps the most glaring difference in the legislative guidance at issue in these two cases is that in *Cassidy* the court dealt with an explicit statute allowing screenings, while in *Johnston* the government attempted to justify its pat-down searches of football fans by using a law dealing with airplanes. But the *Johnston* court was too restrictive in its perception of the congressional judgment that stadiums were at a high risk of terrorist attack. When determining that there should be no-fly zones around stadiums, the FAA (through Congress’s grant of authority) must have thought they were attractive targets for terrorists, regardless of the source of the attack. Consequently, the FAA took the only action it could: regulating threats to stadiums from air attacks— it did not have the authority to look beyond threats from airplanes. But that does not mean its threat assessment should have been completely ignored; instead, the court should have taken heed to it rather than dismiss it in a footnote. Luckily for proponents of unwavering judicial oversight, Congress’s power is limited, thus preventing it from taking a very active role in terrorism prevention methods outside areas of traditional control, such as interstate commerce. Therefore, congressional determinations will likely continue to have a limited effect on terrorism checkpoint searches.

187. *Id.*

188. *See id.* at 1268.

C. Assessing the Intrusiveness of Terrorism Checkpoints

Another important factor in the constitutional analysis of suspicionless terrorism checkpoint searches is the intrusiveness of the invasion of privacy.¹⁸⁹ Most courts weigh the intrusiveness against the gravity of the government's interest in conducting the search—when the need for the search is less intense, the government must use less intrusive means to conduct the screening.¹⁹⁰ Most courts agree on several factors that contribute to the intrusiveness of the search. For example, many courts have found pat-down searches to be much more intrusive than magnetometer or container searches.¹⁹¹ However, there is a lack of agreement between courts on a couple of important factors.

1. Prior Notice of the Search

Providing prior notice of a search reduces its intrusiveness in significant ways. First, it gives the person the ability to avoid the search by choosing not to enter the area.¹⁹² Notice also reduces the fright and alarm a person may experience upon being subjected to an unexpected search.¹⁹³ Additionally, it serves to eliminate any stigma associated with being searched.¹⁹⁴ Signs providing prior notice are very often cited by courts determining the intrusiveness of a suspicionless search, causing one court to compare them to the sign warning “All hope abandon ye who enter here” at the entrance of hell in *Dante's Inferno*.¹⁹⁵

189. See *supra* Part II (discussing the general form of analysis most courts use when determining the constitutionality of the suspicionless search programs).

190. See *supra* Part II.

191. See, e.g., *Johnston*, 442 F. Supp. 2d at 1270 (“Pat-downs or searches of an individual’s person have been regarded as far more intrusive than container searches, sniff searches performed by canines, and magnetometer searches applied to the public at large.”); *State v. Seglen*, 700 N.W.2d 702, 709 (N.D. 2005) (finding a pat-down search to be “very intrusive” and that “[a] physical pat-down search by a guard is more intrusive than a limited visual search.” (quoting *Jensen v. City of Pontiac*, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982))). *Contra* Brief for the United States as Amicus Curiae Supporting Defendants-Appellants at 24, *Johnston v. Tampa Sports Auth.*, 490 F.3d 820 (11th Cir. 2007) (No. 06-14666-DD), 2006 WL 3522638 (arguing on appeal that the pat-downs at issue in *Johnston* were “far less intrusive” than normal police pat-downs).

192. For a more detailed discussion of this topic, see *infra* Part IV.C.2.

193. See *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006) (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989)); *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 322 (Mass. 2004).

194. See *Cassidy*, 471 F.3d at 80 (citing *United States v. Edwards*, 498 F.2d 496, 499–500 (2d Cir. 1974)).

195. *United States v. Gaddis*, No. CR-S-05-00380, 2005 WL 3081234, at *4 n.4

Several recent terrorism checkpoint cases, including the New York and Boston subway search cases, have discussed the importance of prior notice in assessing intrusiveness.¹⁹⁶ And in *Carkhuff*, the outcome turned on the lack of notice.¹⁹⁷ In that case, the court relied on several airport search cases to establish that the prior notice provided by signs and the obvious presence of the checkpoints minimizes the level of intrusion caused by a screening procedure.¹⁹⁸ However, no such notice was afforded to drivers who were stopped while using the road around the protected reservoir.¹⁹⁹ While signs along the road advised not to trespass or stop along the road, nothing warned drivers that they would be subjected to suspicionless stops.²⁰⁰ Also, there was no established checkpoint that would give similar notice to an approaching motorist— instead drivers were confronted with a complete surprise when officers activated their flashing lights and ordered them to stop.²⁰¹ Based on these deficiencies in notice, the suspicionless stops failed the constitutional test:

[I]n the absence of any prior notice or warning to motorists, the State police failed to minimize the intrusiveness of the stop and search procedures at the reservoir. On that basis alone, the suspicionless stop of vehicles along [the road around the reservoir] fails to meet the standards required of a constitutionally permissible administrative search.²⁰²

Consequently, the search was ruled to be unreasonable, and the evidence against the defendant was suppressed.²⁰³

But not all courts have followed a similar analysis. In *Seglen*, there was no complete lack of notice as there was in *Carkhuff*— signs in the arena warned fans attending a hockey game that they would be subject to a search.²⁰⁴ However, the *Seglen* court did not rule that notice reduced the

(E.D. Cal. Nov. 17, 2005).

196. *MacWade v. Kelly*, 460 F.3d 260, 273 (2d Cir. 2006); *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *3 (D. Mass. July 28, 2004).

197. *Carkhuff*, 804 N.E.2d at 323 (Mass. 2004).

198. *Id.* at 322.

199. *Id.*

200. *Id.* at 322–23.

201. *Id.* at 323.

202. *Id.*

203. *Id.*

204. *Compare State v. Seglen*, 700 N.W.2d 702, 708 (N.D. 2005) (“[S]igns are posted inside the arena notifying patrons they will be ‘Subject to Search’ ‘For [Their]

intrusiveness of the searches; instead, it addressed the presence of the signs while considering whether the patrons consented to the searches.²⁰⁵ In the end, the court ruled that the defendant did not consent to suspicionless searches simply by remaining in a stadium with posted notice warning of random searches.²⁰⁶

The approach taken by the *Seglen* court differs significantly from the normal analysis of special needs and administrative searches. While most courts would consider prior notice of a suspicionless search to be a significant factor in determining its intrusiveness, the *Seglen* court placed a much higher burden of proof on the government, requiring it to prove affirmative consent. Hence, there is a lower chance that a checkpoint search would pass constitutional muster in a court following *Seglen*'s logic.²⁰⁷ According to the *Seglen* court, it seems that no matter how much notice the person had, the search would be unconstitutional unless the government could show an affirmative act consistent with granting consent, and the lack of action in the face of notice is not sufficient to show affirmative action.²⁰⁸

2. Ability to Avoid the Search

One of the primary advantages of sufficient notice prior to a search is that it affords the public the opportunity to avoid being subjected to an invasion of privacy.²⁰⁹ Certainly people cannot complain that a search is overly intrusive if they are never subjected to the search, so several courts have identified the opportunity to avoid a checkpoint as a significant factor to measure its intrusiveness.²¹⁰ This factor is particularly attractive because

Safety.'"), with *Carkhuff*, 804 N.E.2d at 322 (no signs warned of random stops).

205. *Seglen*, 700 N.W.2d at 708–09.

206. *Id.* at 709.

207. The only exception to this is if the court finds that consent did exist— in such a case, the search would be justified even if the checkpoint standing alone would be unreasonable. This is apparent in *Johnston*, in which the lower court found the pat-down searches of football fans to be unreasonable, but the court of appeals reversed after ruling the plaintiff had consented to the searches. *Johnston v. Tampa Sports Auth.*, 490 F.3d 820, 825–26 (11th Cir. 2007).

208. See *Seglen*, 700 N.W.2d at 709 (“The State must show ‘affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, rather than merely showing that the person took no affirmative actions’ to prevent the search.” (quoting *State v. Avila*, 566 N.W.2d 410, 413 (N.D. 1997))).

209. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *3 (D. Mass. July 28, 2004); *Carkhuff*, 804 N.E.2d at 322.

210. See, e.g., *MacWade v. Kelly*, 460 F.3d 260, 273 (2d Cir. 2006); *Mass. Bay*

even if the prospective terrorist does not submit to a search, the governmental interest in preventing an attack is still accomplished— by turning away from a search in order to not be detected, a terrorist never enters a target area and thus is not able to complete an attack on that target.²¹¹ Thus, both interests involved in the constitutional analysis are advanced— the government gets to fulfill its counterterrorist interest while the individual's privacy remains intact.²¹²

In *MacWade*, New York City subway passengers had the ability to avoid random searches at station entrances.²¹³ Signs and announcements at the checkpoint warned all passengers that their backpacks and other containers would be subject to search inside the station.²¹⁴ People not wishing to submit to the searches could leave the station, which would not lead to their arrest unless they attempted to reenter the station without allowing the search.²¹⁵ The court relied on the passenger's ability to avoid the search by leaving the station as a significant factor in finding the program to be a minimal invasion of privacy.²¹⁶ In the parallel Boston subway search case the court ruled similarly, finding that the intrusion was mitigated by the passenger's ability to avoid a container inspection by choosing not to travel on designated train and bus lines.²¹⁷ These courts reached this conclusion despite the fact that passengers who had no access to an alternative form of transportation essentially had no ability to avoid the search— using public transportation and encountering the random searches was a practical necessity for them, so they had no choice but to submit to suspicionless searches.

A comparable conclusion was reached in *Cassidy* regarding searches of cars and passengers on a ferry crossing a lake into New York.²¹⁸ Two passengers challenging the search program complained that riding the ferry was a practical necessity in order to commute to work.²¹⁹ While there were other routes to the same destination via a bridge, they complained that

Transp. Auth., 2004 WL 1682859, at *3; *Carkhuff*, 804 N.E.2d at 322.

211. *Carkhuff*, 804 N.E.2d at 323.

212. *See id.*

213. *MacWade*, 460 F.3d at 264–65.

214. *Id.*

215. *Id.* at 265.

216. *Id.* at 273.

217. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *3 (D. Mass. July 28, 2004).

218. *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006).

219. *Id.* at 73.

using the bridge would greatly increase commute time.²²⁰ In fact, one passenger complained that if forced to use the bridge in order to avoid the searches on the ferry his commute time would increase to four hours each way.²²¹ Nevertheless, the court found the ability to avoid the search reduced its intrusiveness.²²²

The opportunity to avoid a search has also been applied outside the mass transit environment. In *Carkhuff*, the court found the suspicionless stop program at a major reservoir to be overly intrusive in part because drivers who did not want to encounter the police had no chance “to turn back and use an alternative route away from the reservoir.”²²³ Presumably the court would have ruled differently had there been enough notice to drivers to give them a chance to take a detour around the reservoir, even if that meant a longer and less-direct route.²²⁴

Not all courts have completely agreed that the intrusiveness of a search can be mitigated by allowing a chance to avoid the search. In *Johnston*, fans could avoid pat-down searches at the entrances of the stadium by choosing not to attend the football game.²²⁵ While the authorities originally voted to offer refunds to people refusing to submit to the searches, season ticket holders were told that they would not get refunds of ticket prices or other related expenses.²²⁶ Even though ticket holders had the opportunity to prevent an invasion of privacy by choosing not to attend the game, the court refused to accept such a decision as a mitigation of the intrusion of the search, ruling: “Plaintiff’s property interest in his season tickets and his right to attend the games and assemble with other Buccaneers fans constitute benefits or privileges that cannot be conditioned on relinquishment of his Fourth Amendment rights.”²²⁷ Thus,

220. *Id.*

221. *Id.*

222. *Id.* at 79.

223. *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 323 (Mass. 2004).

224. *See id.*

225. *See Johnston v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1260 (M.D. Fla. 2006), *rev’d on other grounds*, 490 F.3d 820 (11th Cir. 2007) (noting that anyone refusing to be patted down was denied entry into the stadium).

226. *Id.* at 1260–61.

227. *Id.* at 1271. The court of appeals, however, did not seem to agree that the season tickets represented a property interest that could not be predicated on consenting to searches, though it did not explicitly rule on the issue. *Johnston v. Tampa Sports Auth.*, 490 F.3d 820, 824 n.5 (11th Cir. 2007). Instead, in a footnote, it suggested that a ticket was a revocable license that could be withdrawn at any time by the grantor, so it did not represent a right to enter the game and did not rise to the level of other rights that cannot be infringed by forcing people to give up their

the *Johnston* court found the ability to avoid a random checkpoint search to be much less important in the constitutional analysis than other courts have found.²²⁸

The discrepancies in these decisions highlight an interesting conundrum. While members of the public wishing to avoid searches can be prevented from using public transportation²²⁹ or even forced to take long detours on public roads,²³⁰ the government cannot expect those people to give up a seat at a football game.²³¹ Transportation has often been cited as an important right,²³² yet in the area of terrorism checkpoint searches, it seems to get less protection than football tickets. This uneven treatment by courts, like all the other discrepancies discussed earlier, could lead to problems with government agencies attempting to institute suspicionless searches to protect against terrorist attacks.

V. THE SEARCH FOR A NEW SYSTEM OF ASSESSING THE CONSTITUTIONALITY OF TERRORISM CHECKPOINTS

The many discrepancies between courts on the various issues involved in suspicionless terror searches indicate the need for improvement. Courts that have passed judgment on terrorism checkpoints cannot agree on fundamental issues such as whether terrorism prevention is a special need that could justify suspicionless searches,²³³ and there has been even less agreement on specific factors relevant to constitutionality of

protected privacy interests. *Id.*

228. Compare *Johnston*, 442 F. Supp. 2d at 1272 (noting that a ticket holder should not be “faced with the choice of either subjecting himself to the pat-down searches or losing the value of his tickets, parking pass, seat deposit and the opportunity to attend the Buccaneers games”), with *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006) (finding the ability to avoid a suspicionless search reduces intrusiveness, even if that eliminates access to normal modes of transportation), *MacWade v. Kelly*, 460 F.3d 260, 273 (2d Cir. 2006) (same), *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, at *3 (D. Mass. July 28, 2004) (same), and *Carkhuff*, 804 N.E.2d at 323 (same).

229. See *MacWade*, 460 F.3d at 273; *Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *3.

230. See *Cassidy*, 471 F.3d at 79; *Carkhuff*, 804 N.E.2d at 323.

231. See *Johnston*, 442 F. Supp. 2d at 1272.

232. See, e.g., *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973) (“[I]t is firmly settled that freedom to travel at home and abroad without unreasonable governmental restriction is a fundamental constitutional right of every American citizen.”).

233. See *supra* Part IV.A.

suspicionless searches.²³⁴ In addition to this hodgepodge of conflicting opinions, the nature of the war on terror presents several issues unique to terrorism prevention. This Part highlights what is needed in an improved system to analyze suspicionless terror searches and proposes that increased administrative involvement could solve many of these problems.

A. *Why a New Analysis of Suspicionless Terror Searches Is Needed*

Terrorism poses unique challenges to the government authorities charged with preventing attacks. Consequently, the constitutional test used for suspicionless terror searches should be adapted accordingly. The Supreme Court has recognized that the traditional preference for individualized suspicion and judicial warrants is not always well suited for every purpose, spawning certain exceptions to these requirements.²³⁵ Clearly terrorism prevention falls in this category in which warrants based on individualized suspicion cannot be the standard, but the unique challenges involved in preventing terrorism can be more effectively handled in a system that departs from the normal exceptions accepted by the Supreme Court.²³⁶ Therefore, certain changes should be made to the special needs analysis when applying it to terrorism checkpoint searches.

1. *Providing Uniformity and Predictability*

Recent cases analyzing the constitutionality of various terror search cases indicate that there is widespread disagreement about what constitutes a valid search program.²³⁷ These discrepancies create a problem for governmental authorities seeking to prevent an attack by instituting a

234. See *supra* Part IV.B–C.

235. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (“[W]e have permitted exceptions when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’” (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)); see also *supra* Part II (summarizing the Court’s acceptance of search models that do not rest on individualized suspicion and judicial warrants).

236. Given that all courts considering terrorism checkpoints have applied some form of the special needs or administrative search exceptions to the Fourth Amendment’s individualized suspicion requirement, it seems unlikely that a court would establish a completely novel exception specifically for such checkpoints. For a discussion of the possibility of a “*sui generis* exception” for terrorism checkpoints in mass transportation systems, see Charles J. Keeley III, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 *FORDHAM L. REV.* 3231, 3287–91 (2006).

237. See *supra* Part IV.

search program: officials planning the searches cannot predict how a court will rule on the program's constitutionality. While unpredictability accompanies other types of suspicionless search programs like sobriety checkpoints or employee drug tests, the stakes are much higher in the context of terrorism. A successful terrorist attack in the United States, as seen by the attacks on 9/11, not only can result in massive loss of life but also can cost billions of dollars in property damage and create havoc across the nation.

In deciding whether to institute a terrorism checkpoint, especially one that could go either way in a later court challenge, a law enforcement official might hesitate fearing the repercussions that follow an unconstitutional search.²³⁸ While it is important for government authorities to establish checkpoints only when reasonable, their actions should not be tied down too much by speculations of how a court might view the search months later. Essentially, law enforcement may be forced to decide between going ahead with a questionable search program—risking negative consequences— or refusing to proceed with the search program—risking the possibility of a terrorist attack. Therefore, a search program that could survive the muster of subsequent judicial scrutiny may never happen simply because law enforcement officials miscalculated the balance that a court later adopts. An especially disturbing consequence of this problem would be if one of the search programs the government chose to forgo would have deterred a terrorist attack that occurred in the absence of such measures.

In order to solve this problem, the traditional system of analyzing the constitutionality of suspicionless terror searches must allow law enforcement and national security authorities to rely more on their own assessment of the need for a search program without worrying about the result of a post hoc judicial determination.²³⁹ However, sufficient independent oversight must remain in place to prevent law enforcement from improperly instituting terrorism checkpoints on an invented or

238. A search program that is later deemed unconstitutional would presumably be subject to normal consequences like evidentiary suppression in the criminal context or even civil suits for civil rights violations.

239. *Cf. Terry v. Ohio*, 392 U.S. 1, 12 (1968). In approving stop and frisks based on less than probable cause, the Supreme Court noted the “limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street.” *Id.* Likewise, the “judicial function” in testing the validity of suspicionless terror searches should be relaxed because authorities sometimes must act in haste when working to secure potential targets from terrorist attacks.

completely unfounded threat. Security experts need to be able to implement a consistent approach to terrorism checkpoints, which includes nationally uniform standards that are easy to predict beforehand. After all, terrorism is a national problem that requires a national response.

2. *Keeping Sensitive Intelligence Data Secret*

Facts relevant to the likelihood and severity of a terrorist threat must be balanced against the intrusiveness of the search,²⁴⁰ but that information may come from sensitive sources that require secrecy. This problem has been recognized in recent terror search cases. In *Johnston*, the court recognized that there was possibly additional information that might have justified the choice to initiate suspicionless searches at NFL stadiums.²⁴¹ This information, however, was not considered by the court because it was never presented at trial given its “sensitive law enforcement” nature.²⁴² Likewise, in *Cassidy*, the court was never presented with a threat analysis report concerning the security of a ferry transport vessel because of its sensitive status.²⁴³ Instead, the court was forced to assume the contents of the report while analyzing the search program.²⁴⁴

In each of these cases the government chose not to present sensitive information even though it may have helped establish the need for suspicionless searches.²⁴⁵ In other words, the government found it more valuable to preserve the confidentiality of its information rather than use it to justify a suspicionless search program, thereby opening it to public record. If a court follows *Johnston*’s lead, then a search program that would otherwise be constitutional might never happen, even though it potentially could prevent a horrendous terrorist attack. The government should not be forced to choose between instituting preventative searches and revealing sensitive information to the public. Terrorists operate covertly, and the government should not be hobbled by requiring it to surrender its covert information to the public and, in turn, to the terrorists.

240. *See supra* Part IV.

241. *Johnston v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1267 nn.14–15 (M.D. Fla. 2006), *rev’d on other grounds*, 490 F.3d 820 (11th Cir. 2007).

242. *Id.*

243. *Cassidy v. Chertoff*, 471 F.3d 67, 72 (2d Cir. 2006).

244. *Id.*

245. *Id.*; *Johnston*, 442 F. Supp. 2d at 1267 n.14.

3. *Allowing Searches When Specific Information Is Lacking*

Terrorists operate under a veil of secrecy— the success of an attack depends on the public and government not suspecting the details. Consequently, it can be much more difficult for the government to gain intelligence relevant to the threat of terrorism than it is to gather information for other types of suspicionless searches. For example, statistics on drunk driving that could justify a sobriety checkpoint are much more easily obtained than Al-Qaeda’s next American target. The *MBTA* court recently acknowledged this problem when it approved suspicionless subway and bus searches.²⁴⁶ It noted that there is “no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack”²⁴⁷

The solution to the relative unavailability of specific information about terrorist threats is to allow terrorism checkpoint searches to proceed despite a relatively low amount of specific information. While it seems unreasonable to allow the intrusion of suspicionless searches on little or no specific information about a threat, the concept has been embraced to some degree in the context of airport searches. When determining the validity of suspicionless airport searches, one judge argued that, given the risk to hundreds of lives and millions of dollars in property, the danger alone makes airport searches reasonable,²⁴⁸ a view that has been cited somewhat favorably in other airport search cases²⁴⁹ and in the Supreme Court.²⁵⁰ Additionally, airport searches are allowed at any airport despite a complete lack of a specific threat against that particular airport.²⁵¹ Applying this logic to the context of terrorism checkpoint searches, the

246. American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004).

247. *Id.*

248. United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (quoting United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, J., concurring)).

249. *E.g.*, United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973) (citing *Bell*, 464 F.2d at 675 (Friendly, J., concurring)).

250. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (citing *Bell*, 464 F.2d at 675 (Friendly, J., concurring)).

251. See *Mass. Bay Transp. Auth.*, 2004 WL 1682859, at *2 (“With respect to airport security measures, the absence of specific threat information about a particular flight or even a particular airport does not vitiate either the authority or the wisdom of conducting security screenings generally for *all* flights.”); Commonwealth v. Carkhuff, 804 N.E.2d 317, 321 n.5 (Mass. 2004) (noting that administrative searches at places like airports and courthouses “are not justified by reference to a specific threat directed at a particular facility”).

presence of attacks or threats of attacks in certain locales could lessen the quantum of specific information needed to justify searches in other areas. But again, there must be safeguards to make sure law enforcement officials do not implement checkpoints based on mere unsubstantiated conjecture.

B. *An Administrative Solution*

The interests of establishing uniformity and predictability, preserving the confidential nature of intelligence information, and allowing searches without a showing of specific threats, as well as protecting personal privacy rights, would be advanced better in a system in which part of the determination of the reasonableness of a terrorism checkpoint search falls on the shoulders of independent administrative officials. In most terrorism checkpoint cases decided since 9/11, law enforcement officials decided when and where to hold random searches in addition to actually carrying out the searches.²⁵² However, courts are more skeptical of suspicionless search programs when the police have unchecked discretion, fearing that law enforcement may go too far and infringe unreasonably on personal privacy rights.²⁵³ A system in which an independent administrative agency reviews each proposed search program would remove an important element from the discretion of the police officials that run checkpoint search programs, thus reducing the possibility of law enforcement overstepping its authority.

A process through which an administrative agency determines whether a terrorism checkpoint should be established would mirror the process police normally encounter when applying for a traditional search warrant from a court. However, courts cannot be relied upon to issue search warrants for terrorism checkpoints because they cannot advance the interests explained above as effectively as an administrative agency. Additionally, courts would most likely be reluctant to issue a search warrant for a checkpoint not based on individualized suspicion amounting to probable cause— in fact, Justice Scalia found that such a judicial warrant based on less than probable cause “runs up against the constitutional

252. See, e.g., *MacWade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006) (noting that the NYPD selected where checkpoints would be located and conducted checkpoint searches at those locations).

253. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (noting that field officers exercised little or no discretion in choosing who to stop at a border control checkpoint, a fact that weighed in favor of approving the constitutionality of the checkpoint stop and search program).

provision that ‘no Warrants shall issue, but upon probable cause.’”²⁵⁴ Also, a judicial warrant requirement is not well suited for terrorism checkpoints and could interfere with the interests of such a search because of the unpredictable and ever-changing nature of terrorists.²⁵⁵

Instead of judicial warrants, police agencies should be allowed to seek pre-checkpoint approval from an administrative agency based on an independent determination of the checkpoint’s reasonableness, which would then be granted significant deference by courts in a later challenge. When determining whether to issue administrative approval, the independent agency would follow the same structure provided by special needs or administrative/airport search cases. The agency, like a court engaging in a traditional post hoc challenge of a terrorism checkpoint, would balance the interests at stake and allow a terrorism checkpoint only when the governmental interest in preventing a terrorist attack outweighs personal privacy interests. Presumably, judicial oversight would not be completely eliminated—courts would almost certainly still entertain challenges of checkpoints. But a court deferring to an administrative decision would still advance the complex issues involved in terrorism checkpoints without the interference created by overly invasive judicial review.

The administrative agency that is in the best position to assume the duty of approving or denying checkpoint searches is the Department of Homeland Security (DHS). It is particularly well suited for this task because it already gathers intelligence concerning the risk of terrorist attacks and issues warnings to that effect—perhaps the best known example of this DHS function is the production of the rainbow-colored threat advisory.²⁵⁶ Also, deferring to the administrative approval of DHS would allow important national security issues to be decided by people who possess specialized knowledge of the extent of the terrorism problem in the United States. This conforms with the Supreme Court’s recognition that national security decisions made by executive agencies are entitled to deference from the courts.²⁵⁷

254. *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987) (quoting U.S. CONST. amend. IV).

255. *Cf. id.* at 876 (noting that a judicial “warrant requirement would interfere to an appreciable degree with the probation system”).

256. *See* U.S. Dep’t of Homeland Security, Homeland Security Advisory System, http://www.dhs.gov/xinfoshare/programs/Copy_of_press_release_0046.shtm (last visited Sept. 23, 2007).

257. *See* *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting that “courts traditionally have been reluctant to intrude upon the authority of the Executive

A system in which courts defer to decisions made by an administrative agency like DHS would more effectively fulfill the needs of terrorism checkpoint search programs than the post hoc judicial determinations in the current system. First, increased administrative involvement by a federal agency would increase the uniformity and predictability that is needed for terrorism checkpoints.²⁵⁸ A single agency could make determinations for the entire nation, which would naturally be an improvement over the current system in which judges from many courts all over the country are making decisions. In fact, deferring to a national agency like DHS may even reduce the number of suspicionless search programs nationwide— instead of every local authority working on its own to start a local search program, DHS could evaluate which areas face the highest threat and refuse to issue administrative approval to programs in areas with lower threat levels even though a local court may have approved the search. An agency like DHS could also introduce more predictability by publishing advisory guidelines that describe a threat sufficient to allow terrorism checkpoints and the level of intrusion permitted with the corresponding threat.

Additionally, when considering whether to approve a terrorism checkpoint, DHS would be in the best position to keep sensitive information out of the public domain.²⁵⁹ DHS could be presented with covert information, make a determination of reasonableness of a proposed search program, and reduce the need to present sensitive facts and sources to a court. Therefore, authorities would not be faced with the potential of opening top-secret files to the public in a challenge in open court in order to combat challenges to a terrorism checkpoint. Consequently, a checkpoint would not be deemed unconstitutional simply because the supporting police agency made the choice to keep important intelligence secret— a problem illustrated in cases like *Johnston*, in which evidence was not presented to the court because it was “sensitive law enforcement” information.²⁶⁰ Had there been an option of submitting this sensitive information to an agency like DHS, through which confidentiality could be retained, then the potentially relevant evidence could have been properly weighed rather than completely ignored.

Finally, a system of administrative approval could properly allow

in military and national security affairs”).

258. See *supra* Part V.A.1.

259. See *supra* Part V.A.2.

260. *Johnston v. Tampa Sports Auth.*, 442 F. Supp. 2d 1257, 1267 n.14 (M.D. Fla. 2006), *rev'd on other grounds*, 490 F.3d 820 (11th Cir. 2007).

terrorism checkpoints even when specific attack information is lacking.²⁶¹ DHS has a national perspective, which is necessary for effective control of a national problem like terrorism. The agency could take in all relevant information about the threat and act accordingly, rather than being constrained to the inherently limited viewpoint of a local court determining the constitutionality of a local terrorism checkpoint. Also, as experts in the field of terrorism, DHS officials could be relied upon to make judgment calls about when it is most appropriate to approve a checkpoint despite a lack of a specific threat because they are in the best position to undertake extensive threat analysis investigations based on the intelligence they already gather.

At the same time administrative approval of terrorism checkpoints reduces the discretion of local law enforcement officials, it also reduces the amount of judicial oversight in an area that has traditionally been closely monitored by the courts. In order for such a system to work most effectively, courts would have to defer a great deal to an administrative agency, and in turn that agency would have to use its new power sparingly in order to retain it. DHS would have to walk a fine line, approving searches only when they are in fact likely to be found reasonable by a court— if DHS granted approval for too many checkpoints, then courts would almost certainly not be willing to relinquish such power to the agency. Two recent terrorism checkpoint cases represent the forging of this balance and indicate that there remains significant disagreement among courts as to the role DHS should play in determining the constitutionality of terrorism checkpoints.

One recent case indicates that an administrative solution may succeed in the area of terrorism checkpoint searches. In *Cassidy*, the court considered the constitutionality of random searches of passengers and cars traveling on a ferry.²⁶² The searches were instituted pursuant to a congressional directive, known as the Maritime Transportation Safety Act (MTSA), designed “to detect and deter a potential ‘transportation security incident.’”²⁶³ The MTSA requires the DHS Secretary to assess which vessels pose a high risk of being involved in a security incident, to prepare a vulnerability report, and to compel owners of such vessels to take appropriate security measures.²⁶⁴ As a result, the U.S. Coast Guard

261. *See supra* Part V.A.3.

262. *Cassidy v. Chertoff*, 471 F.3d 67, 70 (2d Cir. 2006).

263. *Id.* (quoting 46 U.S.C. § 70101(6) (2006)).

264. *Id.* at 70–71 (summarizing relevant provisions of 46 U.S.C. §§ 70102(a)–(b), 70103(c)(1)–(2)).

conducted the required assessment and determined that ferries carrying over 150 passengers posed a high security risk.²⁶⁵ The Coast Guard then required operators of ferries like the one at issue in the case to develop a security plan, which included suspicionless searches.²⁶⁶

In ruling on the constitutionality of the search program, the court found that the Coast Guard's determinations of risk "are entitled to significant deference."²⁶⁷ Yet the court emphasized that it had not deferred entirely to the administrative process and had instead conducted a *de novo* review of "the constitutional privacy interests involved as well as the nature of the government's intrusion."²⁶⁸ Therefore, the constitutional analysis was effectively split between the judiciary (deciding intrusiveness) and administrative officials (deciding governmental need), a departure from earlier cases in which the judiciary resolved both parts of the constitutional test.²⁶⁹ This new method of analysis opens the doors for administrative agencies to become more involved in determining the reasonableness of suspicionless terrorism checkpoints.

Some courts, however, have been extremely reluctant to defer to administrative agencies to determine the need to institute a search program. In *Bourgeois*, for example, city officials began a search program based on DHS's threat advisory level being yellow, indicating an "elevated" alert status.²⁷⁰ But the court explicitly rejected the notion that DHS could be involved in any determination affecting the constitutionality of the suspicionless search program:

[A] system that gave the federal government the power to determine the range of constitutionally permissible searches simply by raising or lowering the nation's threat advisory system would allow the restrictions of the Fourth Amendment to be circumvented too easily. Consequently, the "elevated" alert status does not aid the City's case.²⁷¹

265. *Id.* at 71. This determination is codified in 33 C.F.R. § 104.105(6) (2006).

266. *Cassidy*, 471 F.3d at 71 (citing 33 C.F.R. § 104.265(3)(1) (2006)).

267. *Id.* at 84 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

268. *Id.* at 85.

269. *Compare id.* at 82–84 (deferring the assessment of governmental need to the Coast Guard), *with MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006) (ruling on issues relating to both the governmental need and intrusiveness).

270. *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004).

271. *Id.*

The court went on to rule that the random searches at issue were unreasonable and, therefore, unconstitutional.²⁷²

But perhaps the *Bourgeois* court's decision does not completely eliminate all hope for establishing a system of increased deference to an administrative agency like DHS. The color-coded DHS advisory in *Bourgeois* was based entirely on a blanket threat of terrorism to the nation as a whole, while the threat analysis by the Coast Guard in *Cassidy* was based on more specific factual findings concerning maritime safety.²⁷³ A system of administrative approval of terrorism checkpoints would be based on specific facts rather than general assertions lacking any form of specificity, making it more like *Cassidy*. Therefore, a system of administrative approval may pass muster with courts, providing the opportunity for an increased administrative approval to solve the lack of uniformity that has plagued terrorism checkpoint cases since 9/11.

VI. CONCLUSION

Suspicionless searches pose a threat to the personal privacy that Americans enjoy, but terrorism poses an equally compelling threat that the nation must confront. Since 9/11, numerous law enforcement agencies have introduced terrorism checkpoint search programs that create a clash between the governmental interest in preventing attacks and individual privacy interests. In the cases that have arisen as a result of this clash, courts around the nation have been put in the position of deciding this controversial issue. And often their conclusions differ from other courts deciding similar cases in other parts of the nation. The resulting lack of uniformity, combined with the unique needs presented by terrorism prevention, can have dire consequences, obviating the need for a new system in which to test the constitutionality of terrorism checkpoint search programs. While an administrative approach could solve these issues, some courts seem reluctant to surrender their traditional reign over the Fourth Amendment, a choice that will result in continued problems for terrorism checkpoints. In order to allow the police to successfully fight terrorism without undue distraction caused by litigation, judicial entities must yield some of their control over terrorism checkpoints to administrative agencies like DHS. Until they do, law enforcement officials

272. *Id.* at 1325.

273. *Compare id.* at 1312 (involving a DHS threat advisory level applying to the entire nation), *with Cassidy*, 471 F.3d at 71 (noting the extensive threat determinations made by the Coast Guard).

wanting to protect the nation from the threat of terrorism by using a checkpoint will be left searching court decisions for uniformity.

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