

For Immediate Release

**FEDERAL APPELLATE COURT UPHOLDS
SUBWAY BAG INSPECTIONS AS CONSTITUTIONAL
AND FINDS IT IS A PROPER BALANCE
BETWEEN SECURITY AND CIVIL RIGHTS**

***THREE-JUDGE PANEL AGREES THAT CITY'S PROGRAM HELPS DETER TERRORISM;
MOVE CONFIRMS POLICE HAVE DISCRETION TO USE UNPREDICTABLE INSPECTIONS
TO HELP PREVENT SUBWAY TERROR ATTACKS***

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New York, Aug. 11, 2006 – The Second Circuit Court of Appeals has just unanimously upheld the City's subway container inspection program as a lawful counter-terrorism measure. Affirming the District Court for the Southern District of New York, the Second Circuit found that the random inspection program is a reasonably effective way to deter terrorists from bringing explosives into the transit system, and to detect terrorists who may nevertheless try. The program – whose constitutionality two federal courts have now recognized – enhances the safety of millions of New York City subway riders. The ruling follows news of a terrorist plot in Britain yesterday to bring down planes using bombs packed in sports drinks that could be detonated using normal household electronic devices, like “disposable” cameras or MP3 players.

Writing for the Court, Judge Chester J. Straub noted that, “We will not – and *may not* – second-guess the minutiae” of the considered decisions of counter-terrorism experts and politically accountable officials, who have “undertaken the delicate and esoteric task of deciding how best to marshal their available resources.” Judges Jon O. Newman and Charles L. Brieant also concurred with the ruling.

Later in the decision, Judge Straub wrote that Program checkpoints “might well stymie” a terrorist attack, “disrupt the synchronicity of multiple bombings, or at least reduce casualties by forcing the terrorist to detonate in a less populated location.”

“After carefully considering the evidence and the applicable law, the Second Circuit, like the District Court last December, properly balanced subway security and civil liberties. This critical affirmance will help the NYPD continue to keep the transit system safe. Last summer's terrorist attacks in London demonstrated the need to implement security inspections in the New York City subway system – and especially in light of ongoing and critical events like the airline threats yesterday, this ruling is critical,” noted Corporation Counsel Michael A. Cardozo, whose office litigated the case for the City.

“Common sense prevailed. Once again, and at a fitting moment, the court upheld the constitutionality of the bag inspection program, one of our key strategies for deterring a subway attack,” Police Commissioner Raymond W. Kelly said.

Scott Shorr, the Law Department lawyer who handled the case on appeal in the Second Circuit, added: “The Second Circuit carefully considered and rejected all of the plaintiffs' arguments – and, in so doing,

provided valuable guidance for using random container inspections to reduce the terrorism threat with which we now live. In finding that the subway inspection program is reasonable, the Court appropriately allowed the NYPD to decide how best to use its resources to enhance public safety.”

During the original bench trial in this case, the City presented expert testimony from three counter-terrorism experts, including Richard Clarke, a former senior White House advisor on issues of intelligence and counter-terrorism. All of the City’s experts testified that random bag inspections are an effective way to detect and deter terrorist attacks, even if people are allowed to walk away from stations where bag inspections are taking place. “The City’s experts testified that the random nature of the inspections adds an element of unpredictability that is likely to undermine a potential terrorist plot against the transit system,” Shorr noted.

In upholding the inspection program, the Second Circuit found that the NYPD’s new counter-terrorism strategy fits within the “special needs” exception to the usual Fourth Amendment rule requiring reasonable individual suspicion before performing an inspection. Applying that exception, the Second Circuit found that the bag inspections address a real and substantial threat to the transit system, implicate commuters’ privacy interests only minimally and are a reasonable method for detecting and deterring terror attacks.

In addition to Scott Shorr, the City’s legal team included the Law Department’s Special Counsel Gail Donoghue and, from the Special Federal Litigation Division, Peter Farrell, David Hazan and Jay Kranis.

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