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Counterterrorism Roadblocks: Constitutional Under the Fourth Amendment?

MATT SALDAÑA*

I. INTRODUCTION

Following a four-day “manhunt” for the alleged terrorists behind the 2013 Boston Marathon bombings, culminating in a dramatic shootout that resulted in one suspect’s death and, nearly twenty-four hours later, a second suspect’s arrest,¹ several criminal procedure questions emerged in the popular press.² This article seeks to answer one question in particular, by approaching a hypothetical that could have materialized had the investigation taken a different turn. Had officials received intelligence that the Tsarnaev brothers were en route to New York, where they intended to commit another terrorist attack,³ could police officers have set up a

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1. See Michael S. Schmidt & Eric Schmitt, *Manhunt’s Turning Point Came in the Decision to Release Suspects’ Images*, N.Y. TIMES (Apr. 20, 2013), <http://www.nytimes.com/2013/04/21/us/manhunts-turning-point-came-in-images-release.html>; Shelley Murphy et al., *Bombing Suspect in Custody After Standoff in Watertown*, BOSTON GLOBE (Apr. 19, 2013), <http://www.bostonglobe.com/metro/2013/04/18/mit-police-officer-hit-gunfire-cambridge-police-dispatcher-says/4UeCCIOVeLr8PHLvDa99zK/story.html>.

2. See, e.g., Mark Sherman, *Legal Issues Surround Boston Suspect’s Questioning*, ASSOC. PRESS, (Apr. 25, 2013), <http://bigstory.ap.org/article/legal-issues-surround-boston-suspects-questioning> (raising issues about when the suspect was read his constitutional rights); Emily Bazelon, *Why Should I Care That No One’s Reading Dzhokhar Tsarnaev His Miranda Rights?*, SLATE (Apr. 19, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/dzhokhar_tsarnaev_and_miranda_rights_the_public_safety_exception_and_terrorism.html (also raising the issue of reading suspects their constitutional rights); Katy Waldman, *Can the Police Search My Home for a Bomber?*, SLATE (Apr. 19, 2013), http://www.slate.com/articles/news_and_politics/explainer/2013/04/boston_bomber_manhunt_is_the_watertown_door_to_door_search_by_police_for.html (raising the issue of whether police can search a home without a warrant).

3. Officials in the Boston Marathon case reportedly learned in the final 24 hours of the “manhunt” that the bombing suspects intended to drive to New York next, though whether they intended another attack was unclear. See Eric Moskowitz, *A Fearful, Surreal 90-Minute Ride; Carjacking Victim Tells of Enduring and Fleeing His Two Captors, Alerting Police*, BOSTON GLOBE, Apr. 26, 2013, at A1; Jonathan Dienst et al., *Boston Suspects Intended Second Attack in Times Square, New York Officials Say*, NBC NEWS (Apr. 25, 2013), http://usnews.nbcnews.com/_news/2013/14/25/17914667-boston-suspects-intended-second-attack-in-times-square-new-york-officials-say. If officials had particular information about what vehicles the Tsarnaev brothers were driving, then roadblocks would no longer be necessary. Instead, officers could examine all traffic at a particular point, perhaps while instructing vehicles to slow down, without having to “seize” all, or a random number of, vehicles. This article examines a different situation in which, for whatever reason, officials have determined that a random or 100% roadblock would be an effective tool for preventing an imminent terrorist attack.

counterterrorism roadblock⁴ to prevent the attack by stopping all vehicles, or a random sequence of vehicles, traveling on highways connecting Massachusetts and New York? One plausible example of such a roadblock might involve officers, after stopping a vehicle, (a) informing the driver about the nature of the roadblock and briefly asking if she has any information about the bombings;⁵ (b) conducting a visual inspection of the vehicle and its occupants;⁶ and (c) walking a bomb-sniffing dog around the perimeter of the vehicle⁷—all of which would constitute a “seizure” for Fourth Amendment purposes.⁸

In order to answer this question, this article explores the unique line of cases permitting “suspicionless,” warrantless seizures of vehicles and their occupants at highway checkpoints (*i.e.*, roadblocks) whose “primary purpose” is something other than “detect[ing] evidence of ordinary criminal wrongdoing.”⁹ Under this line of cases, the requirement, under the Fourth Amendment, that police officers develop probable cause—or, in limited

4. This article will refer to “roadblocks” and “highway checkpoints” interchangeably. Under either definition, police officers stop all traffic, or a random portion of all traffic, at a fixed point along a highway. For a survey of lower court cases considering the constitutionality of *non*-highway counterterrorism checkpoints in the wake of September 11, see Kyle P. Hanson, Note, *Suspicionless Terrorism Checkpoints Since 9/11: Searching for Uniformity*, 56 DRAKE L. REV. 171, 172-74 (2007); see also Ric Simmons, *Searching for Terrorists: Why Public Safety is not a Special Need*, 59 DUKE L.J. 843, 872-73 (2010).

5. In a case distinct from the line of suspicionless roadblock cases examined in this article, the Supreme Court unanimously upheld an “information-seeking” checkpoint designed to question witnesses to a hit-and-run accident, but not to detain, or investigate the crimes of, drivers passing through the checkpoint. See *Illinois v. Lidster*, 540 U.S. 419, 425-26, 428 (2004). The holding of *Lidster* is limited to purely “information-seeking” checkpoints, but it is instructive insofar as it recognized that the mere questioning of motorists, even at a suspicionless roadblock, to seek “the voluntary cooperation of members of the public in the investigation of a crime” is not *per se* illegal. See *id.* at 425.

6. See *infra* Part III.A.

7. See *infra* Part IV.A.

8. For an earlier hypothetical that explores the constitutional issues surrounding counterterrorism police activity including counterterrorism roadblocks, see Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1425, 1441-50 (2000). In Sievert’s hypothetical, police officers, upon receiving intelligence that “Middle Eastern terrorists” sought to transport a bomb in a U-Haul or Ryder truck into New York City, set up roadblocks to make suspicionless stops of all rental vehicles and, based in part on the race of the drivers, had discretion to conduct *searches* without probable cause. *Id.* at 1425. Sievert’s article predates the Supreme Court’s opinion in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), which forms the basis of this article. Nevertheless, Sievert predicted that prior case law “should authorize the roadblock and *search* described in the hypothetical.” Sievert, *supra*, at 1449-50 (emphasis added). This article does not examine whether officers may conduct searches with less than probable cause, or whether they may consider race in developing particularized suspicion or probable cause. However, the checkpoint scheme it examines, like Sievert’s, would necessarily remove officer discretion from the initial seizure.

9. *Edmond*, 531 U.S. 37-38.

situations, individualized suspicion¹⁰—prior to effecting a seizure, is abandoned, so long as the seizure is “reasonable.”¹¹

The reasoning behind this line of cases, which the Supreme Court articulated in the 2000 case *City of Indianapolis v. Edmond*,¹² is distinct from, though related to, the so-called “special needs” doctrine. Similar to the line of suspicionless roadblock seizure cases, as described in *Edmond*, the special needs doctrine dispenses with the standard Fourth Amendment requirement that police officers develop probable cause before conducting a search; instead, the Court determines whether a search is lawful according to its “reasonableness.”¹³ Note that the special needs doctrine applies to searches rather than seizures, the latter of which is the subject of the roadblock cases.¹⁴ It applies where ““special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.””¹⁵ The Court has applied the doctrine to drug and alcohol testing regimes, and to searches of students, probationers, and public employees.¹⁶ As one scholar has noted, however, “these cases do not form a coherent doctrine.”¹⁷

10. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

11. *Edmond*, 531 U.S. at 37-40, 44, 47; see also JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 304-12 (5th ed. 2010). Professor Wayne LaFave notes that the Court in *Edmond*, in describing the line of suspicionless roadblock seizure cases, effectively added the “primary purpose” language as an “additional requirement,” beyond reasonableness, “for seizures of motorists absent individualized suspicion.” 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.7(b), at 962 (5th ed. 2012). LaFave points to *Brown v. Texas*, 443 U.S. 47 (1979), a case holding that a seizure less intrusive than an arrest violated the Fourth Amendment because it was unreasonable, as containing a three-factor balancing test that the Court has relied upon in determining whether suspicionless roadblocks are “reasonable.” See LAFAVE, *supra*, § 9.7(b), at 962; see also *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (“[A]s this Court said in *Brown v. Texas*, in judging reasonableness, we look to ‘the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’” (quoting *Brown*, 443 U.S. at 51)). In *Lidster*, the Court cited *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 450-55 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-64 (1976), as examples of opinions that have relied upon *Brown* in determining reasonableness. See *Lidster*, 540 U.S. at 426-27. *Edmond* did not engage in a balancing test for reasonableness, because Indianapolis’s checkpoint program failed the “additional requirement” of not having general law enforcement as its “primary purpose.” LAFAVE, *supra*, § 9.7(b), at 962-63. Though the majority opinion in *Edmond* did not cite *Brown*, it implicitly recognized a test for reasonableness, to which suspicionless roadblock seizures would be subjected, that “balanc[es] . . . the competing interests at stake and the effectiveness of the program.” *Edmond*, 531 U.S. at 47 (citing *Sitz*, 496 U.S. at 450-55; *Martinez-Fuerte*, 428 U.S. at 446-64).

12. 531 U.S. 32 (2010).

13. For a survey of, and commentary on, the special needs doctrine, see Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 170-78 (2006).

14. See *id.* at 171-72.

15. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

16. See DRESSLER & MICHAELS, *supra* note 11, at 312-26.

17. Maclin, *supra* note 13, at 170.

There is disagreement among scholars over whether the suspicionless roadblock seizure cases, as described in *Edmond*, fit within the special needs doctrine.¹⁸ In a 2001 case, *Ferguson v. City of Charleston*,¹⁹ the Court explicitly distinguished “the handful of seizure cases in which we have applied a balancing test to determine Fourth Amendment reasonableness”—citing two suspicionless roadblock seizure cases in particular—from the special needs doctrine.²⁰ In *Edmond*, the Court referred to suspicionless search regimes upheld under the special needs doctrine separately from the line of suspicionless roadblock seizure cases that attracted the bulk of the Court’s attention.²¹ Therefore, this article will approach the Court’s articulation of suspicionless roadblock seizures as distinct from the special needs doctrine and, when possible, rely only upon roadblock cases.

Writing for the Court in *Edmond*, Justice O’Connor suggested in dictum that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack, or to catch a dangerous criminal who is likely to flee by way of a particular route.”²² Justice O’Connor’s dictum, which is the closest the Court has come to deciding the constitutionality of counterterrorism roadblocks, forms the basis of this article.²³ Since its appearance more than a decade ago, several circuit courts and two Supreme Court justices have noted it favorably.²⁴ This article argues that Justice O’Connor’s phrase is a bellwether of the Supreme Court’s willingness to uphold an “appropriately tailored” counterterrorism roadblock if and when the issue comes before the Court. Moreover, this article disagrees with other authors’ suggestions that upholding counterterrorism roadblocks would expand police power.²⁵ Rather, this article contends that a ruling upholding an “appropriately

18. Compare *id.* (arguing that, although *Edmond* “share[s] significant characteristics with the special needs cases, . . . as a doctrinal matter, [it] do[es] not fall into the special needs category”), with DRESSLER & MICHAELS, *supra* note 11, at 312 (arguing “there is little or no reason for [the] distinction” between checkpoint cases and special needs cases because both groups “involve[] specific government interests . . . beyond ordinary criminal investigations” and “application of the ‘reasonableness’ balancing standard”).

19. 532 U.S. 67 (2001).

20. *Id.* at 83 n.21 (citing *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

21. See *Edmond*, 531 U.S. at 37-38.

22. *Id.* at 44.

23. In another dictum, the Supreme Court approved of suspicionless checkpoints in airports, which also have a counterterrorism purpose. See *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989); Simmons, *supra* note 4, at 860.

24. See *infra* Part IV; see also *United States v. Ramos*, 629 F.3d 60, 61, 66-67 (1st Cir. 2010) (quoting the dictum to support the distinct proposition that “[t]he degree of risk” of a potential danger being investigated—in that case, a suspected terrorist plot on a particular location—“may bear on the facts required to support a reasonable suspicion”).

25. See *infra* text accompanying notes 118-121, 131-141.

tailored” counterterrorism roadblock would fit neatly within an established line of suspicionless roadblock seizure cases. These cases—along with related exceptions to Fourth Amendment requirements, in other contexts, under the special needs doctrine—have already done the work of expanding the power of the police and other government officials to conduct suspicionless searches and seizures in service of public safety, and at the expense of individual liberties.²⁶

In addition to explaining the origins of Justice O’Connor’s dictum, this article examines how courts have applied it over the past fourteen years, in both terrorism and non-terrorism contexts.²⁷ For example, the Second Circuit in 2006 called Justice O’Connor’s suggestion “neither controversial nor constraining.”²⁸ Additionally, in two unpublished *per curiam* opinions, one from 2007 and another from 2008, the Fifth Circuit effectively applied Justice O’Connor’s dictum to a roadblock intended to capture armed bank robbers.²⁹ In 2013, the Eleventh Circuit also cited to Justice O’Connor’s dictum in an unpublished *per curiam* opinion upholding a roadblock set up to catch an armed bank robber.³⁰ Finally, Justice Ginsburg suggested in a 2005 dissent, which Justice Souter joined, that the use of a bomb-sniffing dog would not make an otherwise valid counterterrorism roadblock an unreasonable seizure, nor would it transform the seizure into an illegal search.³¹ Justice Ginsburg cited to Justice O’Connor’s dictum on counterterrorism roadblocks to make this point.³² Collectively, these developments suggest that courts are likely to uphold counterterrorism roadblocks.

Accordingly, the Supreme Court likely would hold that an “appropriately tailored” counterterrorism roadblock is a valid seizure, so

26. See *infra* note 58.

27. See *infra* Part IV.

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

29. See *United States v. Abbott*, 265 F. App’x 307, 309 (5th Cir. 2008) (*per curiam*) (holding that roadblock was “not unconstitutional *per se*” because it was “properly tailored to detect evidence of a particular criminal wrongdoing rather than for general crime control” and also not unreasonable under the circumstances (citing *Illinois v. Lidster*, 540 U.S. 419, 424 (2004); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000))); *United States v. Rogers*, 244 F. App’x 541, 542-43 (5th Cir. 2007) (*per curiam*) (same).

30. See *United States v. Rodger*, 521 F. App’x 824, 828-29 (11th Cir. 2013) (*per curiam*).

31. See *Illinois v. Caballes*, 543 U.S. 405, 424-25 (2005) (Ginsburg, J., dissenting).

32. See *id.*

The use of bomb-detection dogs to check vehicles for explosives without doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond*. As the Court observed in *Edmond*: “[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack”

Id. (quoting *Edmond*, 531 U.S. at 44).

long as the roadblock scheme is reasonable.³³ Under the circumstances of a particular roadblock scheme, the Court would thus weigh the interests of the government (and the roadblock's effectiveness in advancing those interests) against those of individual drivers.³⁴

A counterterrorism roadblock would effect a considerable intrusion upon drivers' liberty because it would delay their daily routines and likely cause fear and anxiety.³⁵ Yet, under the balancing test the Court has employed in suspicionless roadblock seizure cases, the strong government interest in stopping an imminent terrorist attack—and, if “appropriately tailored,” a roadblock's plausible effectiveness in stopping such an attack—is likely to prevail over individuals' liberty interests.³⁶ Drivers already have a lowered expectation of privacy³⁷ and could receive at least nominal notice of the stop (*e.g.*, with signage alerting them to an upcoming roadblock), which would make such a stop, though frightening, perhaps less so than a roving-patrol stop.³⁸ Further, the universal (or random) nature of the stop arguably would make it less frightening, in part because its programmatic

33. *Edmond*, 531 U.S. at 44.

34. *See id.* at 37-40, 47 (discussing balancing test for reasonableness); *supra* note 11 (same); *see also Lidster*, 540 U.S. at 426 (“These considerations, taken together, convince us that an *Edmond*-type presumptive rule of unconstitutionality does not apply here. That does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.”). Several commentators have warned of the danger of such a reasonableness analysis, under the related special needs doctrine, in counterterrorism schemes. *See, e.g.*, Simmons, *supra* note 4, at 926 (arguing that suspicionless searches in a counterterrorism context have led to “an inconsistent tangle of case law, justified by a broad Fourth Amendment loophole whose premise—that detecting and preventing violent crime is not a law enforcement purpose—borders on the absurd”); *see also* Christopher Lee, Comment, *The Viability of Area Warrants in a Suspicionless Search Regime*, 11 U. PA. J. CONST. L. 1015, 1041-42 (2009) (arguing that applying suspicionless, special needs searches to counterterrorism efforts “present[s] serious challenges to the coherent and comprehensive regulation of the varied categories [of suspicionless searches] as a whole” and introduces a “correspondingly heightened concern over potential abuses”). Others think even the special needs doctrine does not go far enough, and that the Fourth Amendment is improperly constraining in a counterterrorism context. *See, e.g.*, Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 778 (2004) (arguing that, in the absence of individualized suspicion, “the government’s search for a weapon of mass destruction may be permissible if the Supreme Court’s ‘special needs’ exception to the probable-cause requirement is extended”).

35. *See, e.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 468-69 (1990) (Stevens, J., dissenting) (“In my opinion, unannounced investigatory seizures are, particularly when they take place at night, the hallmark of regimes far different from ours; the surprise intrusion upon individual liberty is not minimal.”).

36. *See supra* note 11 (discussing balancing test for reasonableness).

37. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 392 (1985) (“The public is fully aware that it is accorded less privacy in its automobiles because of [a] compelling governmental need for regulation.”). In *Illinois v. Lidster*, the Court reiterated that such a lowered expectation of privacy applies in determining the constitutionality of highway checkpoints. *See Lidster*, 540 U.S. at 424 (“The Fourth Amendment does not treat a motorist’s car as his castle. And special law enforcement concerns will sometimes justify highway stops without individualized suspicion.” (citations omitted)).

38. *See Sitz*, 496 U.S. at 452-53; *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976).

intentions would be so clearly discernable.³⁹ On the other end of the scale, the government interest in stopping an imminent terrorist attack, compared with the interests that have prevailed in other suspicionless roadblock regimes, is relatively great.⁴⁰ The Court has approved of suspicionless roadblocks for the purpose of detecting undocumented immigrants, ensuring that cars are properly inspected and registered, and preventing drunk driving—arguably far less pressing public safety concerns than preventing an imminent terrorist act.⁴¹ Moreover, the Court likely would view the effectiveness of an “appropriately tailored” counterterrorism roadblock as generously as it has that of prior roadblock regimes, particularly if it judges success as the prevention of a specific attack.⁴²

Thus, the initial seizure of all vehicles, or a random subset of vehicles, in the above circumstances likely would be reasonable—a sufficient metric to uphold a suspicionless roadblock whose “primary purpose” is something other than law enforcement.⁴³ Individualized suspicion (*e.g.*, visual similarities to surveillance photographs of the suspects) would be required to justify an elevated level of inspection.⁴⁴ The Court has approved of such a two-step process, which removes discretion from police officers in making the initial decision to stop vehicles, in roadblock cases, in part because it prevents officers from using the disruptive power to stop all traffic as a pretext to conduct ordinary police work.⁴⁵

Of course, the scope of such a roadblock has its constitutional limits, which the Court’s balancing test for reasonableness would explore.⁴⁶ For

39. *See Sitz*, 496 U.S. at 452-53. For an argument that randomized stops at checkpoints based upon a sufficient level of suspicion that attaches to a particular situation, rather than to the individual being seized (*i.e.*, “suspicion-sufficient” checkpoints), offer a greater level of protection against police abuse than searches and seizures based upon individualized suspicion, which has become a mere “placeholder for the conclusion that a search or seizure is constitutional,” see Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 816 (2011) (“[R]andomized stops at suspicion-sufficient checkpoints should be the focal point of Fourth Amendment reasonableness: randomized engagement of citizens offers a better constitutional model for controlling the exercise of police power against individuals.”).

40. *See infra* Part III.

41. *See infra* Part III.

42. Although not directly analogous to the “success” of stopping a particular terrorist attack (which, presumably, would require only one “successful” stop or a broader deterrent effect contributing to the failure of a planned attack), the Court has upheld suspicionless roadblock seizures with “success rate[s]” of 1.6% and 0.12%. *LAFAVE*, *supra* note 11, § 9.7(b), at 962 n.68; *see also Sitz*, 496 U.S. at 453 (noting that the effectiveness prong of the *Brown* test for reasonableness “was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger”).

43. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000).

44. *See Sitz*, 496 U.S. at 450-51.

45. *See, e.g., Martinez-Fuerte*, 428 U.S. at 558-59.

46. *See supra* note 11. In particular, a counterterrorism roadblock that is no longer “appropriately tailored,” per Justice O’Connor’s suggestion, *Edmond*, 531 U.S. at 44, would increase the “severity of the interference with individual liberty” while, presumably, minimizing the roadblock’s

example, stopping all traffic in every direction out of Massachusetts for an extended period of time, under the above circumstances, may be deemed unreasonable, particularly if officials had no intelligence that the suspects were fleeing the state. Asking drivers for information about the bombings probably rests on the most uncertain ground, as it inevitably would introduce an element of police discretion and may strike the most fear into drivers.⁴⁷ If officers were permitted to question occupants briefly, such lines of questioning would have to be carefully curtailed in order for the Court to find the roadblock to be reasonable.⁴⁸

II. *CITY OF INDIANAPOLIS V. EDMOND* AND JUSTICE O'CONNOR'S SUGGESTION FOR AN "APPROPRIATELY TAILORED ROADBLOCK SET UP TO THWART AN IMMINENT TERRORIST ATTACK"

In *City of Indianapolis v. Edmond*, the Supreme Court held that a suspicionless highway checkpoint program whose "primary purpose" was detecting and intercepting illegal drugs (*i.e.*, "uncover[ing] evidence of ordinary criminal wrongdoing") had violated the Fourth Amendment.⁴⁹ The Indianapolis Police Department carried out the checkpoint program according to "written directives," which called for suspicionless stops of "a predetermined number of vehicles" at highway checkpoints (which the Court referred to, interchangeably, as "roadblocks").⁵⁰ Roadblock locations were determined according to, *inter alia*, "crime statistics and traffic flow."⁵¹ In all, the program consisted of six roadblocks over the course of four months.⁵² Officers stopped 1,161 vehicles, resulting in 104 arrests, roughly half of which were for drug-related offenses.⁵³

At each roadblock, police officers were instructed to stop sets of vehicles in an identical manner, by approaching the vehicle to inform the driver about the checkpoint program and to ask the driver for a license and registration; looking for signs of intoxication; "conduct[ing] an open-view

effectiveness, both of which would counsel against its reasonableness under the *Brown* factors. *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) ("[A]s this Court said in *Brown v. Texas*, in judging reasonableness, we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" (quoting *Brown*, 443 U.S. at 51)); *see also Edmond*, 531 U.S. at 47 ("The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program." (citing *Sitz*, 496 U.S. at 450-55; *Martinez-Fuerte*, 428 U.S. at 556-64)).

47. *Cf. Lidster*, 540 U.S. at 425-26.

48. *See id.*

49. *Edmond*, 531 U.S. at 41-42. The vote of the justices was six-to-three, and Justice O'Connor wrote the opinion. *Id.* at 34, 48, 56.

50. *Id.* at 35.

51. *Id.*

52. *Id.* at 34.

53. *Id.* at 34-35. The Court observed that the resulting "hit rate" was roughly nine percent. *Id.* at 35.

examination of the vehicle from the outside”); and walking a drug-sniffing dog around the perimeter of the vehicle.⁵⁴ Highway signs gave drivers notice of the roadblocks, though it is unclear whether drivers had the opportunity, upon viewing the signs, to exit the highway to avoid inspection—the relatively high rate of arrest (9%) suggests that they did not.⁵⁵ Once the authorities had stopped a set of cars, other traffic continued “until all the stopped cars [had] been processed or diverted for further processing.”⁵⁶ Thus, the roadblocks did not stop 100% of vehicles, but instead stopped waves of cars in an apparently random fashion (to the extent that officers would start and complete the inspection of each set of cars in an unpredictable manner) until police had stopped the predetermined number of vehicles. Officers had “no discretion to stop any vehicle out of sequence.”⁵⁷ They were permitted to conduct a search “only by consent or based on the appropriate quantum of particularized suspicion.”⁵⁸

As an initial matter, the Court stated that “[i]t is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.”⁵⁹ The Court distinguished traditional search and seizure cases, where a police officer’s subjective intent is inapplicable to determining whether the search or seizure was objectively reasonable, from “general scheme[s] without individualized suspicion,” such as Indianapolis’s suspicionless highway checkpoint program, where “programmatically purposes may be relevant to the validity of Fourth Amendment intrusions.”⁶⁰ Where a checkpoint’s “primary” programmatic purpose is law enforcement (*i.e.*, gathering evidence for prosecution), rather than something else, such as removing drunk drivers from the highway, the

54. *Edmond*, 531 U.S. at 35.

55. *Id.* These signs read, “NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP.” *Id.* at 35-36.

56. *Id.* at 36.

57. *Id.* at 35.

58. *Id.* The Court did not examine the search aspect to the checkpoint program, instead focusing on the initial, suspicionless stop (*i.e.*, seizure). *See generally id.* Nevertheless, it is worth noting that the Court characterized the program’s directives as allowing a search upon consent or “the appropriate quantum of particularized suspicion.” *Id.* Respondents, who challenged the program, conceded that searches were conducted upon consent or probable cause. *See* Brief for Respondents, *Edmond*, 531 U.S. 32 (No. 99-1030), 2000 WL 929653, at *1. The Court’s implicit recognition of a lower standard for the “appropriate[ness]” of a search represents a general shift in its cause requirements for searches and seizures, from probable cause (accompanied, in some cases, with a warrant) to the lesser standard of reasonable suspicion, a full analysis of which is beyond the scope of this article. *See, e.g.*, DRESSLER & MICHAELS, *supra* note 11, at 60, 103, 297 & n.3. The roadblock seizures examined in this article fall within a particular line of cases that—together with related doctrines such as the special needs doctrine—represent a further shift away from *both* probable cause *and* individualized suspicion, to suspicionless, warrantless searches and seizures that are “ostensibly conducted (at least primarily) for non-penal purposes.” *See id.* at 297, 304-12.

59. *Edmond*, 531 U.S. at 40.

60. *Id.* at 45-46.

checkpoint violates the Fourth Amendment.⁶¹ Because its primary programmatic purpose was to detect and intercept drugs—“ordinary criminal wrongdoing”—the checkpoint in *Edmond* violated the Fourth Amendment.⁶²

In dictum, the Court suggested other circumstances where a checkpoint, though nominally related to “ordinary crime control,” would be permitted under the Fourth Amendment because of emergency circumstances “far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction”—the everyday law enforcement purpose that made the Indianapolis checkpoint program invalid.⁶³ These emergency circumstances include “an appropriately tailored roadblock set up to thwart an *imminent terrorist attack*, or to catch a dangerous criminal who is likely to flee by way of a particular route.”⁶⁴ Justice O’Connor, writing for the Court, opined that “the Fourth Amendment would almost certainly permit” such a counterterrorism roadblock.⁶⁵

III. PRE-*EDMOND* ROADBLOCK CASES: *SITZ*, *MARTINEZ-FUERTE*, AND *PROUSE*

The Court in *Edmond* contrasted Indianapolis’s narcotics checkpoint program with three cases involving (or proposing) “brief, suspicionless seizures of motorists” at highway checkpoints (*i.e.*, roadblocks) in order to bolster its holding that Indianapolis’s program violated the Fourth Amendment.⁶⁶ *Michigan Department of State Police v. Sitz*,⁶⁷ *United States v. Martinez-Fuerte*,⁶⁸ and *Delaware v. Prouse*.⁶⁹ Thus, understanding the Court’s reasoning in these three cases is critical to understanding the implications of Justice O’Connor’s dictum in *Edmond* that the Fourth Amendment would “almost certainly permit” a counterterrorism roadblock.⁷⁰

61. *Id.* at 37-38, 44. Other permissible examples the Court cited include ensuring vehicles are registered and detecting undocumented immigrants near the border. *Id.* at 37-38.

62. *Id.* at 41-42.

63. *Id.* at 44.

64. *Id.* (emphasis added).

65. *Id.*

66. *Id.* at 41-43 (contrasting the suspicionless stops implemented or suggested in *Sitz*, *Martinez-Fuerte*, and *Prouse*, which were “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety,” with Indianapolis’s checkpoint program, for which the “primary purpose . . . [was] to uncover evidence of ordinary criminal wrongdoing”).

67. 496 U.S. 444 (1990).

68. 428 U.S. 543 (1976).

69. 440 U.S. 648 (1979).

70. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2001).

The Court in *Edmond* confirmed that these three cases—each involving suspicionless roadblock seizures—established valid exceptions to the general rule that “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”⁷¹ According to the Court, the “primary purpose” of each of the roadblocks was something beyond searching for evidence for prosecution—the everyday law enforcement purpose that made the Indianapolis checkpoint program invalid in *Edmond*.⁷² In *Martinez-Fuerte*, that purpose was detecting undocumented immigrants near the border.⁷³ In *Sitz*, the valid primary purpose was keeping drunk drivers off highways.⁷⁴ Finally, the Court in *Prouse* proposed a roadblock with the purpose of verifying that drivers had valid licenses and registrations in order to address highway safety, rather than to search for evidence of crimes.⁷⁵

A. *Michigan Department of State Police v. Sitz*

In *Sitz*, the Court held that the initial, suspicionless stop of vehicles—a “seizure” under the Fourth Amendment—pursuant to a “highway sobriety checkpoint program,” did not violate the Fourth Amendment.⁷⁶ The Michigan Department of State Police developed guidelines for the program, which called for 100% checkpoints along state roads in order to reduce driving under the influence.⁷⁷ In the initial stop—the only portion of the program under review—“[a]ll vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication.”⁷⁸

71. *Id.* at 37-39 (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997) for the general rule). For a brief discussion on how the “individualized suspicion” standard itself represents a lowered standard from the historical requirement of probable cause, see *supra* note 58.

72. *Edmond*, 531 U.S. at 37-38.

73. *See id.* at 37. For more on searches and seizures at and near the U.S. border, see DRESSLER & MICHAELS, *supra* note 11, at 301-03.

74. *See Edmond*, 531 U.S. at 37.

75. *See id.* at 37-38. Presumably, however, officers would discover evidence—such as evidence in plain view of the officer—while administering such a regime. For an argument that drawing a line between “searches and seizures conducted in criminal investigation and ones that are performed for non-criminal law purposes” is difficult, see DRESSLER & MICHAELS, *supra* note 11, at 308.

This line . . . is hard to draw, as the *Sitz* sobriety-checkpoint case demonstrates: Although the purpose of such checkpoints is to enhance roadway safety, police officers are the agents for promoting that safety, *and they do so by stopping and arresting intoxicated drivers*. So, sobriety checkpoints have a criminal law enforcement aspect to them.

Id.; *see also Edmond*, 531 U.S. at 42 (observing, with regard to the checkpoint programs approved in *Martinez-Fuerte* and *Sitz*, that “[s]ecuring the border and apprehending drunk drivers are, of course, law enforcement activities, and law enforcement officers employ arrests and criminal prosecutions in pursuit of these goals”).

76. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450-51, 455 (1990).

77. *Id.* at 447.

78. *Id.*

Drivers exhibiting signs of intoxication would be “directed to a location out of the traffic flow,” where officers would ask for a license and registration and, if necessary, “conduct further sobriety tests.”⁷⁹ The Court noted that this second level of intrusion “may require satisfaction of an individualized suspicion standard.”⁸⁰

The Court applied a balancing test between the government’s interest in “eradicating” drunken driving—a problem the Court suggested was of great “magnitude”—and the “slight” intrusion on drivers’ liberty interests at highway checkpoints, concluding that the balance weighed “in favor of the state program.”⁸¹ Quoting *Martinez-Fuerte*, the Court held that, for purposes of the Fourth Amendment, sobriety checkpoints were indistinguishable from the fixed border checkpoints in that case.⁸² Both were less intrusive than “roving-patrol stop[s]” on the highway because, at highway checkpoints, “the motorist can see that other vehicles are being stopped, he can see visible signs of the officer’s authority, and he is much less likely to be frightened or annoyed by the situation.”⁸³

Moreover, the Court distinguished Michigan’s checkpoints from the roving stops in *Prouse* that were designed to detect unregistered and “unsafe” vehicles, on the grounds that Michigan possessed more than “a complete absence of empirical data” that its program promoted highway safety.⁸⁴ The data Michigan produced was slim, yet the Court deemed it sufficient. The program resulted in two arrests for intoxication out of 126 stops, a hit rate of 1.6%, compared to a rate of approximately 1% in other states with checkpoints.⁸⁵ Finally, the Court held that, so long as the sobriety checkpoint represented one “choice among . . . reasonable alternatives” to deal with a public danger, the checkpoint reasonably advanced that interest, for the purposes of weighing the government’s interest.⁸⁶

79. *Id.*

80. *Id.* at 451.

81. *Sitz*, 496 U.S. at 451, 455. The Court examined “the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped. . . .” *Id.* at 455.

82. *See id.* at 452-53.

83. *Id.* at 453 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)).

84. *Id.* at 454-55.

85. *Id.*

86. *Id.* at 453-55. Here, the Court interpreted language from *Brown*, which, in considering the reasonableness of seizures “less intrusive than a traditional arrest,” weighed “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *See Brown v. Texas*, 443 U.S. 47, 50-51 (1979) (emphasis added). The Court in *Sitz* clarified that *Brown*’s second prong, related to effectiveness, “was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.” *Sitz*, 496 U.S. at 453.

B. United States v. Martinez-Fuerte

In *Martinez-Fuerte*, the Court held that permanent checkpoints set up inside the interior of the country but located on highways “leading away from the border” are constitutional “in the absence of any individualized suspicion.”⁸⁷ Though the Court did not employ the “programmatic purpose” language that it would later adopt in *Edmond*,⁸⁸ its opinion made clear that the purpose of these checkpoints was detecting “deportable aliens.”⁸⁹ In weighing the government’s interest in detecting undocumented immigrants against drivers’ liberty interests, the Court observed that, without such strategically located checkpoints, highways leading from the border “would offer illegal aliens a quick and safe route into the interior” of the country.⁹⁰ It held that a reasonable suspicion requirement for checkpoints would be “impractical” because traffic on these particular highways “tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.”⁹¹ In addition, it noted that, out of 146,000 vehicles passing through one checkpoint during an eight-day period, officers “found . . . deportable aliens” in 171 vehicles⁹²—a “success rate” of 0.12%.⁹³

On the other end of the scale, the Court held that “the consequent intrusion on Fourth Amendment interests is quite limited.”⁹⁴ As in *Sitz*, the Court observed that the brief seizure of vehicles at checkpoints—during which “[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search”—was less intrusive than that of roving-patrol stops.⁹⁵ The Court found, as it did in *Sitz*, that fixed checkpoints would be less likely to surprise drivers.⁹⁶ It also made the persuasive argument that checkpoints were less intrusive than roving-patrol stops because they necessarily remove police discretion (and thus, at least in the initial seizure, do not involve pretextual motivations):

87. *United States v. Martinez-Fuerte*, 428 U.S. 543, 552-53, 562 (1976).

88. *Compare generally id. with Edmond*, 531 U.S. at 45-47.

89. *See Martinez-Fuerte*, 428 U.S. at 552-54 (describing permanent checkpoints as one of three types of “inland traffic-checking operations” the Border Patrol conducted “in an effort to minimize illegal immigration,” and listing the numbers of “deportable aliens” that Border Patrol agents discovered via the checkpoint program).

90. *Id.* at 556-57.

91. *Id.* at 557.

92. *Id.* at 554.

93. LAFAVE, *supra* note 11, § 9.7(b), at 962 n.68.

94. *Id.*

95. *Id.* at 558.

96. *See id.* at 559.

The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.⁹⁷

Unlike in *Sitz*, the Court reached the broader—and disturbing—holding that officers could refer drivers to a second level of inspection “on the basis of criteria that would not sustain a roving-patrol stop,” implying that officers did not even need individualized suspicion for such referrals.⁹⁸ Specifically, the Court held that race could be the predominant factor for this secondary seizure.⁹⁹ The Court held that either consent or probable cause was required for “[a]ny further detention” beyond a referral to a secondary inspection.¹⁰⁰

C. *Delaware v. Prouse*

Finally, the Court in *Prouse* held that a roving-patrol stop, without reasonable suspicion, for the purpose of checking for a license and registration, was an unreasonable seizure under the Fourth Amendment.¹⁰¹ The Court, however, also suggested in dictum that a roadblock, established for the same purpose, would be constitutional.¹⁰² “Questioning of all oncoming traffic at roadblock-type stops,” the Court stated, was “one

97. *Id.*

98. *Id.* at 563. The Court has noted that “[a] routine traffic stop . . . is a relatively brief encounter and ‘is more analogous to a so-called ‘Terry stop’ . . . than to a formal arrest.’” *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). A *Terry* stop requires only reasonable suspicion that an individual “may be armed and presently dangerous” and that “criminal activity may be afoot”—a lower threshold than probable cause that a crime has occurred, the typical requirement for a search or seizure under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

99. *See Martinez-Fuerte*, 428 U.S. at 563 (“Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.”).

100. *Id.* at 567 (emphasis added) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)).

101. *See Delaware v. Prouse*, 440 U.S. 648, 650, 663 (1979).

102. *See id.* at 663 (“This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.”).

possible alternative” to the “unconstrained exercise of discretion” that stopping cars on the highway to check for licenses and registrations would entail.¹⁰³ As in *Sitz* and *Martinez-Fuerte*, the Court evidenced a concern for “unbridled discretion” in roving-patrol stops, stating that “[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed.”¹⁰⁴

IV. POST-*EDMOND* DEVELOPMENTS RELATED TO COUNTERTERRORISM ROADBLOCKS

No court, it appears, has considered the validity a counterterrorism roadblock under the line of suspicionless roadblock seizure cases recognized in *Edmond*.¹⁰⁵ Yet in the decade and a half following that decision, several lower courts and two Supreme Court justices have considered Justice O’Connor’s dictum as it applies to counterterrorism roadblocks.¹⁰⁶ These cases, though not directly on point, illuminate how

103. *Id.*

104. *Id.* at 661.

105. This statement is based upon a search of electronic databases keyed to the relevant dictum in *Edmond* regarding counterterrorism roadblocks, the only statement the Supreme Court has made directly on this point. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). In 2010, Professor Ric Simmons surveyed courts’ responses to a “sweeping expansion of antiterrorism suspicionless searches” following the attacks on September 11, 2011. Simmons, *supra* note 4, at 873 (emphasis added). The only such measure in Simmons’s article that approximates a highway checkpoint was a suspicionless seizure near a reservoir in Massachusetts, which Simmons describes as “[t]he opening act in this second stage of antiterrorism searches.” See *id.* at 875-84 (describing the “first wave of antiterrorism suspicionless searches,” which occurred prior to September 11, as searches in airports and public buildings, and including in the “second wave” of searches, searches at large gatherings and searches involving public transportation). The Supreme Judicial Court of Massachusetts held the suspicionless seizure of a driver along a road near a reservoir in order to prevent a terrorist attack “fail[ed] to meet the standards required of a constitutionally permissible *administrative search*.” *Massachusetts v. Carkhuff*, 804 N.E.2d 317, 323 (Mass. 2004) (emphasis added). Notably, the court did not discuss *Edmond*, likely because the Commonwealth of Massachusetts conceded that the suspicionless seizure “would not satisfy the requirements of a constitutionally permissible *roadblock*” because “there was no roadblock plan.” *Id.* at 319 (emphasis added). Instead, the Commonwealth analogized to administrative searches in airports and public buildings. See *id.* Though the court’s discussion of administrative searches is outside the scope of this article, the court suggested that the stop and search in the case before it more closely resembled a roving-patrol stop than a highway checkpoint, which contributed to its holding that the initial seizure was unreasonable. See *id.* at 322-23.

Nor was there any readily identifiable checkpoint or station that would, in at least a general way, convey the sense that all vehicles were being stopped. As such, persons who did not wish an encounter with the police had no opportunity to turn back and use an alternative route away from the reservoir. And, lacking any prior warning, the sudden activation of blue lights and the order to stop would come as a complete surprise to a law-abiding motorist using Cobble Mountain Road, engendering all of the apprehension and anxiety that an unexpected stop entails.

Id.

106. See *infra* Part IV.

courts might rule when considering whether a counterterrorism roadblock is valid under the Fourth Amendment.¹⁰⁷

A. *Illinois v. Caballes*

The most significant citation to Justice O'Connor's dictum comes from Justice Ginsburg.¹⁰⁸ Dissenting in *Illinois v. Caballes*,¹⁰⁹ Justice Ginsburg—joined by Justice Souter—quoted the portion of the dictum related to counterterrorism roadblocks as support for her argument that “[t]he use of bomb-detection dogs to check vehicles for explosives without doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond*.”¹¹⁰ The majority in *Caballes* held that a dog sniff that reveals only the presence of drugs during a lawful traffic stop does not “change the character of [the] traffic stop” and does not impose a new, “constitutionally cognizable infringement” on privacy interests.¹¹¹ Justice Ginsburg disagreed, but suggested that a dog sniff for explosives, “involving security interests not presented here,” likely would be justified as part of a valid counterterrorism roadblock.¹¹² Thus, she suggested, a roadblock set up to prevent a terrorist attack, upheld as a valid seizure, would not become “unreasonable in scope” (as had the traffic stop in this case, based upon the introduction of a dog sniff for drugs, in her opinion) merely because it involved a bomb-detection dog sniff.¹¹³ In addition, she argued, “[e]ven if the Court were to change course and characterize a sniff as an independent Fourth Amendment search, the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.”¹¹⁴

107. See *infra* Part IV.

108. See *Caballes*, 543 U.S. 405, 424-25 (2005) (Ginsburg, J., dissenting).

109. 543 U.S. 405 (2005).

110. *Id.* (Ginsburg, J., dissenting). Justice Ginsburg's statement, followed by her quotation of Justice O'Connor's dictum, reveals the force of the connection between Justice O'Connor's and Justice Ginsburg's suggestions. See *id.*

The use of bomb-detection dogs to check vehicles for explosives without doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond*. As the Court observed in *Edmond*: “[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack”

Id. (quoting *Edmond*, 531 U.S. at 44).

111. *Id.* at 408-09 (majority opinion).

112. *Id.* at 423 (Ginsburg, J., dissenting) (“The dog sniff in this case, it bears emphasis, was for drug detection only. A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter.”).

113. *Id.* at 424-25 (“The use of bomb-detection dogs to check vehicles for explosives without doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond*.”).

114. *Id.* at 425 (citation omitted).

Seven justices, including Justice Ginsburg, agreed that a dog sniff for contraband—illegal drugs or explosives, for example—is not a search, so Justice Ginsburg’s additional argument that a bomb-detection dog sniff would be a valid, independent search appears unnecessary to make.¹¹⁵ In fact, the majority opinion cites to *Edmond* as support for this proposition, since the dog sniff in *Edmond* did not elevate the checkpoint stop from a seizure to a search.¹¹⁶ However, by justifying a bomb-detection dog sniff under both the line of suspicionless roadblock seizure cases articulated in *Edmond* and the special needs doctrine, Justice Ginsburg’s dissent suggests that such a procedure would be lawful regardless of the doctrinal approach the Court takes with regard to roadblocks (*i.e.*, regardless of whether the Court continues to analyze suspicionless roadblock schemes separately as seizures, as it did in *Edmond* and *Ferguson*, or whether it decides to analyze them—or least components of them—under the special needs doctrine, which presently applies to searches).¹¹⁷

One author points to Justice Ginsburg’s dissent as an example of a judge “see[ing] everyday criminal justice issues through the lens of terrorism.”¹¹⁸ Moreover, the author argues, such opinions demonstrate the existence of the phenomenon, which is “inevitable” in the wake of September 11, of courts “giv[ing] police a greater amount of power in search and seizure matters,” even in non-terrorism cases.¹¹⁹ This argument, which ties the Court’s alleged expansion of police power to the September 11, 2001 attacks, is not persuasive because the author cites only to Justice Ginsburg’s dissent for this point, and acknowledges that Justice Ginsburg

115. See *United States v. Place*, 462 U.S. 696, 707, 710 (1983) (holding that “the canine sniff is *sui generis*” and that, in the instant case, the “exposure of respondent’s luggage, which was located in a public place, to a trained canine[,] did not constitute a ‘search’ within the meaning of the Fourth Amendment”). The six-to-two majority in *Caballes* (Justice Rehnquist did not participate in the decision) cited *Place* approvingly. See *Caballes*, 543 U.S. at 409. Justice Ginsburg stated in her dissent that the Court would have to “change course” in order to “characterize a dog sniff as an independent Fourth Amendment search.” *Id.* at 425 (Ginsburg, J., dissenting). Ginsburg contemplated the possibility of such a change in course. See *id.* (“Even if the Court were to change course and characterize a dog sniff as an independent Fourth Amendment search, the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.” (citations omitted)). However, she did not join Justice Souter’s dissent, which argued that the dog sniff for drugs in the case before the Court was a search. See *id.* at 410 (Souter, J., dissenting).

116. See *id.* at 409 (majority opinion) (“In *United States v. Place*, we treated a canine sniff by a well-trained narcotics-detection dog as ‘*sui generis*’ because it ‘discloses only the presence or absence of narcotics, a contraband item.’”) (citations omitted) (quoting *Place*, 462 U.S. at 707); see also *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (“The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search.”).

117. For a comparison between the Court’s line of roadblock cases and the special needs doctrine, see *supra* notes 12-21 and accompanying text.

118. David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 9 (2006).

119. *Id.*

draws support for the permissibility of counterterrorism dog sniffs from Justice O'Connor's dictum in *Edmond*, a case decided prior to September 11.¹²⁰ Instead, Justice Ginsburg's dissent demonstrates the enduring relevance of Justice O'Connor's dictum in *Edmond*, and the Court's likely willingness to validate a counterterrorism roadblock.¹²¹ Because of the well-established (though concededly *not* terrorism-related) precedent from which Justices O'Connor and Ginsburg draw their suggestions for a counterterrorism roadblock, there is no need, as the author suggests, for any further erosion of civil liberties in order to accomplish such a roadblock.

B. MacWade v. Kelly

A significant discussion of Justice O'Connor's dictum, in the context of counterterrorism measures, is contained in the 2006 Second Circuit decision, *MacWade v. Kelly*.¹²² In *MacWade*, the Second Circuit upheld, under the special needs doctrine, a suspicionless container inspection program implemented by the New York City subway system to prevent a terrorist attack.¹²³ As an initial matter, the court held the program fell under the special needs exception—and, thus, so long as it was reasonable, required neither a warrant nor individualized suspicion—because “preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation.”¹²⁴ The court then conducted a balancing test for reasonableness, concluding that the government's interest was substantial and that the program was minimally intrusive (in part because subway riders had advance notice and could choose not to ride the subway), and reasonably effective.¹²⁵ Thus, the program was lawful.¹²⁶

MacWade did not involve the highway checkpoint (*i.e.*, roadblock) seizures discussed in *Edmond*, but rather a randomized *search* program on public transportation, under the related special needs doctrine.¹²⁷

120. *See id.* at 9-10 (“In case anybody had missed her point, Justice Ginsburg quoted approvingly from *Edmond*: “[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.” (quoting *Caballes*, 543 U.S. at 424-25 (Ginsburg, J., dissenting))).

121. *See Caballes*, 543 U.S. at 424-25 (Ginsburg, J., dissenting); *Edmond*, 531 U.S. at 44.

122. 480 F.3d 260 (2d Cir. 2006).

123. *See id.* at 263.

124. *Id.* at 270-71.

125. *See id.* at 271-75.

126. *See id.* at 275.

127. *See id.* at 264-65.

Officers exercise virtually no discretion in determining whom to search. The supervising sergeant establishes a selection rate, such as every fifth or tenth person, based upon

Nevertheless, the court analogized Justice O'Connor's dictum on counterterrorism roadblocks to the subway container inspection program, concluding that Justice O'Connor's "passing observation" regarding counterterrorism roadblocks "is neither controversial nor constraining."¹²⁸ The court made this point in response to the plaintiffs' argument that Justice O'Connor's dictum only permitted counterterrorism checkpoints under the special needs exception "in the face of an imminent attack."¹²⁹ The court disagreed, and implicitly noted that Justice O'Connor's dictum did not rely upon the special needs doctrine, but instead merely observed that a counterterrorism checkpoint regime (here, the court erroneously characterized O'Connor's dictum, which only contemplated counterterrorism *roadblocks*) "'would almost certainly' be constitutional" under the Fourth Amendment.¹³⁰

One case comment analyzes *MacWade* as an unwarranted extension of Justice O'Connor's dictum in *Edmond*, which the author characterizes as a "suggest[ion] that the [special needs] doctrine's requirements might be relaxed in the face of an impending terrorist attack."¹³¹ The comment argues that, because the Second Circuit considered whether subway riders' expectations of privacy were diminished (the court found they were not) as one factor in determining the reasonableness of the counterterrorism search program, rather than making diminished expectations of privacy a "threshold requirement" to applying the special needs doctrine, the court had "weaken[ed] Fourth Amendment protections" beyond what the Court in *Edmond* had intended.¹³² Specifically, the comment argues, Justice O'Connor's dictum "hinted at an expansion of the special needs exception by suggesting that certain otherwise impermissible police activities might be deemed reasonable in light of a terrorist threat. But it is unlikely that the

considerations such as the number of officers and the passenger volume at that particular checkpoint. The officers then search individuals in accordance with the established rate only.

Id. For a comparison between the line of suspicionless roadblock seizure cases discussed in *Edmond*, and the special needs doctrine, see *supra* notes 12-21 and accompanying text.

128. *MacWade*, 460 F.3d at 271.

129. *Id.*

130. *Id.* (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

131. Recent Case, *Second Circuit Holds New York City Subway Searches Constitutional Under Special Needs Doctrine*, 120 HARV. L. REV. 635, 635 (2006) [hereinafter Recent Case].

132. *Id.* at 637-38. The comment cites to several Supreme Court opinions, including *Sitz*, where, the comment argues, the Court "placed great emphasis on search subjects' diminished privacy interests when justifying a search based on the special needs doctrine." *Id.* at 638 & n.32. But *Sitz* approved only a DUI checkpoint's initial *seizure*, and stated that an additional level of inspection "may require satisfaction of an individualized suspicion standard." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450-51 (1990); see also *supra* Part III.A. Moreover, the Court in *Sitz* considered drivers' expectations of privacy only in the context of a balancing test of the checkpoint program's reasonableness, see *Sitz*, 496 U.S. at 449-50, the very methodology the comment criticizes the Second Circuit for employing, see Recent Case, *supra* note 131, at 638.

Court intended by this suggestion to weaken Fourth Amendment protections.”¹³³ In other words, the comment posits, Justice O’Connor’s dictum would expand the special needs exception in *one* aspect: allowing for some overlap with ordinary police activity, typically disallowed under the special needs doctrine, in “emergency” circumstances including a terrorist threat.¹³⁴ *MacWade*, in the same spirit of loosening standards, expands the special needs exception in a *different* aspect: allowing suspicionless searches even in the absence of a diminished expectation of privacy.¹³⁵

At the outset, Justice O’Connor’s dictum, which applied explicitly to “roadblock[s],” should be considered a natural outgrowth of the Court’s line of suspicionless roadblock seizure cases, not an expansion of the special needs doctrine, on which it did not rely.¹³⁶ Moreover, even if the Court were to analyze roadblocks under the special needs doctrine,¹³⁷ the argument that a diminished expectation of privacy should be a “threshold requirement” to applying the doctrine carries less force in this context, as the Supreme Court has observed generally that drivers have a diminished expectation of privacy.¹³⁸ If anything, the argument would seem to bolster the validity of highway checkpoint schemes, relative to other types of suspicionless searches and seizures, as any such scheme would be more likely to pass a “threshold requirement” of a diminished expectation of privacy.¹³⁹ Thus, while it may have valid critiques of the Second Circuit’s

133. Recent Case, *supra* note 131, at 638.

134. *Edmond*, 531 U.S. at 44; *see also supra* Part II.

135. *See* Recent Case, *supra* note 131, at 640.

136. *Edmond*, 531 U.S. at 44.

137. *See supra* text accompanying note 117.

138. *See, e.g., California v. Carney*, 471 U.S. 386, 392 (1985) (“The public is fully aware that it is accorded less privacy in its automobiles because of [a] compelling governmental need for regulation.”). In *Lidster*, the Court reiterated that such a lowered expectation of privacy applies in determining the constitutionality of highway checkpoints. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (“The Fourth Amendment does not treat a motorist’s car as his castle. And special law enforcement concerns will sometimes justify highway stops without individualized suspicion.” (citations omitted)).

139. If, on the other hand, the argument is that such diminished expectation of privacy should not only be a “threshold requirement” but also remain divorced from a balancing test for reasonableness, then the argument would cut against highway checkpoint programs by removing one factor in favor of their reasonableness. If it makes the latter argument, the comment does not give a principled reason why this central notion of reasonableness, in the Fourth Amendment context, should be divorced from any balancing test a court employs to determine reasonableness (regardless of whether such a balancing test is sound—a separate question). Moreover, the Court in *Sitz*, which approved a highway checkpoint program, apparently considered expectations of privacy in its balancing test for reasonableness, despite the comment’s suggestion to the contrary. *See supra* note 132. Finally, the Court in *Edmond* emphasized that, because the holdings in *Sitz* and *Martinez-Fuerte* upholding DUI and border checkpoints, respectively, remained undisturbed, “the constitutionality of such checkpoint programs still depends on a *balancing of the competing interests at stake* and the effectiveness of the program.” *Edmond*, 531 U.S. at 47 (emphasis added). Presumably these interests include drivers’ diminished expectations of privacy.

application of the *special needs doctrine* to a counterterrorism *search* regime, the comment's analogy between Justice O'Connor's dictum and *MacWade*'s treatment of expectation of privacy is not particularly useful to determining the validity of *suspicionless roadblock seizures*, the focus of this article.¹⁴⁰ Perhaps, as the comment suggests, a movement toward expanding the special needs doctrine in the context of counterterrorism measures is afoot, but a roadblock designed to combat terrorism need not rely upon any such expansion—or any change to the expectation of privacy calculus—beyond Justice O'Connor's observation and the preceding line of suspicionless roadblock seizure cases.¹⁴¹

C. United States v. Abbott, United States v. Rogers, and United States v. Rodger

In two unpublished, *per curiam* opinions, the U.S. Court of Appeals for the Fifth Circuit upheld a single roadblock implemented in response to an armed bank robbery where police had particularized knowledge about the probable location of escape vehicles and the direction of escape due to electronic tracking devices embedded in the stolen cash.¹⁴² The roadblock stopped all traffic traveling in one direction on one road, and officers visually inspected vehicles and occupants waiting in a queue “for anything suspicious consistent with the limited descriptions of the robbers, bag, and car(s).”¹⁴³ In identical language that cited *Edmond*, both Fifth Circuit opinions approved of the same checkpoint scheme because it was “properly tailored to detect evidence of a particular criminal wrongdoing rather than for general crime control” and was not unreasonable under the circumstances.¹⁴⁴ Similarly, the U.S. Court of Appeals for the Eleventh

140. See Recent Case, *supra* note 131, at 635.

141. Here, the comment's reasoning seems flawed, at least to the extent it suggests that the Second Circuit was motivated by *Edmond* to further expand the special needs doctrine in counterterrorism cases. See Recent Case, *supra* note 131, at 638 (arguing that “it is unlikely that the Court intended by [O'Connor's] suggestion to weaken Fourth Amendment protections,” which the Second Circuit has done). Indeed, the Second Circuit did not even view O'Connor's statement—which it considered only when invoked by petitioners in an argument unrelated to expectation of privacy—as an expansion of the special needs doctrine. See *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006). Of course, the comment could be correct, as a descriptive matter, that the special needs doctrine is expanding in this area, an observation beyond the scope of this article.

142. See *United States v. Abbott*, 265 F. App'x 307, 309 (5th Cir. 2008) (*per curiam*) (holding that roadblock was “not unconstitutional *per se*” because it was “properly tailored to detect evidence of a particular criminal wrongdoing rather than for general crime control” and also not unreasonable under the circumstances) (citing *Lidster*, 540 U.S. at 424; *Edmond*, 531 U.S. at 44)); *United States v. Rogers*, 244 F. App'x 541, 542-43 (5th Cir. 2007) (*per curiam*) (same).

143. *United States v. Abbott*, No. CRIM. H-05-309, 2005 WL 3591007, at *1, *3 (S.D. Tex. Dec. 30, 2005). Officers worked with a “vague description” of the alleged robbers as three African-American males who wore dark clothing (and one red shirt), had taken the money in a black bag, and might have driven one of several models of cars in various colors. See *id.* at *1.

144. *Abbott*, 265 F. App'x at 309; *Rogers*, 244 Fed. App'x at 543.

Circuit cited to Justice O'Connor's dictum in upholding an "appropriately tailored" roadblock set up to catch an armed bank robber, in an unpublished *per curiam* opinion from 2013.¹⁴⁵

The roadblocks upheld by the Fifth and Eleventh Circuits were intended to capture "dangerous criminal[s] who [are] likely to flee by way of a particular route,"¹⁴⁶ the language in Justice O'Connor's dictum contained alongside her suggestion for a roadblock "set up to thwart an imminent terrorist attack."¹⁴⁷ As these decisions have shown, Justice O'Connor's language about using roadblocks in response to a specific crime or terrorist incident, rather than for a general interest in "ordinary crime control," remains instructive.¹⁴⁸

V. CONCLUSION

Justice O'Connor's dictum in *Edmond* regarding counterterrorism roadblocks has had lasting power in the decade and a half since she first wrote it.¹⁴⁹ Since then, two major terrorist attacks—September 11 and the Boston Marathon bombings—have caused courts, public officials, scholars, and the public to consider the Fourth Amendment and other constitutional protections in the context of a counterterrorism investigation.¹⁵⁰ This article proposes that Justice O'Connor's suggestion for a counterterrorism roadblock is permissible under the Supreme Court's unique line of suspicionless roadblock seizure cases. The precise issue has not yet come before the Court, but, if and when it does, the Court will likely find that an "appropriately tailored" counterterrorism roadblock is a valid seizure under the Fourth Amendment.

145. *United States v. Rodger*, 521 F. App'x 824, 828-29 (11th Cir. 2013) (*per curiam*). The court held that the roadblock was reasonable, following Justice O'Connor's suggestion, because it was "appropriately tailored to protect the state's interest in capturing an armed and dangerous criminal while minimizing the intrusion on drivers' privacy." *See id.* The Court further observed that officers "constructed the roadblock in the robber's known path, as indicated by the tracking device on the bait money, and they screened vehicles, stopping a person only if he matched the description of the robber." *Id.*

146. *Abbott*, 2005 WL 3591007, at *6 (quoting *Edmond*, 531 U.S. at 44); *see also Rodger*, 521 F. App'x at 829 ("The roadblock was appropriately tailored to protect the state's interest in capturing an armed and dangerous criminal while minimizing the intrusion on drivers' privacy.").

147. *Edmond*, 531 U.S. at 44.

148. *Id.*

149. *See supra* Part IV.

150. *See, e.g., supra* notes 2, 4, 34.