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Homeland Insecurity: Checkpoints, Warrantless Searches and Security Theater

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Since June 2013, the American public, press, and policy-makers have been debating the implications of Edward Snowden's disclosures of mass U.S. government surveillance programs, most established after the 9/11 attacks. Our reliance on modern communications technology and its connection with our basic constitutional rights of free speech and Fourth Amendment protections against warrantless seizures and searches is at the heart of that debate. But while that controversy has raged very publicly (even globally), another series of U.S. government search and seizure activities have only recently started to receive the scrutiny they deserve. And just as the over-reach by the NSA sparked what I have previously termed the "digital resistance movement," these other searches—conducted by elements of the Department of Homeland Security (DHS)—have sparked a more traditional form of citizen resistance.

Enter the VIPR

Less than three years after the 9/11 attacks struck American commercial aviation carriers, Al Qaeda-inspired terrorists targeted a different kind of transportation system— Madrid's commuter rail network. Just over a year after that attack, terrorists struck the London bus and subway system. Fearing U.S. transit systems would be next, DHS officials responded by creating Visible Intermodal Prevention and Response (VIPR) teams, composed of Transportation Security Administration (TSA) and Federal Air Marshall (FAM) personnel, augmented by state or local law enforcement organizations. Touted as a means of deterring and preventing terrorism, the VIPR program has grown from a single team in 2004-05 to over 30-teams and an annual budget of over $100 million today. As the number and scope of VIPR operations have grown, so has the controversy surrounding their employment.

While VIPR teams began as extensions of security at major airports, TSA officials gradually began pushing VIPR operations beyond airports—to major transit systems in Washington, Houston, Boston, New York City, and most recently, Chicago. Multiple published reports over the past several years have documented warrantless baggage searches by VIPR teams on these transit systems. TSA officials claim that the judicially-created "special needs" exception to the Fourth Amendment provides them with the legal authority to conduct such searches. In 2011, a VIPR team took over the Amtrak station in Savannah, Georgia and conducted warrantless

searches of detraining passengers. The same year in Tennessee, VIPR teams conducted warrantless searches of trucks at weigh stations.

Over the last decade, VIPR teams have conducted thousands of such searches (according to Congressional testimony by TSA officials) and uncovered no terrorists. Indeed, the November 2013 shooting at Los Angeles International Airport was a demonstration of how the alleged "deterrent" effect of random VIPR operations was no deterrent to a determined gunman. The same month, the Government Accountability Office published areport calling into question a key component of VIPR teams—Behavior Detection Officers and the validity of the operational concept underlying their use. The ACLU has declared the VIPR program "a direct assault on the Fourth Amendment". In the 113th Congress, Rep. Scott Garrett (R-NJ) tried to kill the VIPR program altogether, regrettably without success—but it is very likely Garrett will make another attempt in 2015.

VIPR teams represent an expensive and ineffective counterterrorism tool whose tactics and practices are, in the view of privacy and civil liberties community, constitutionally abhorrent. However, VIPR is not the only DHS component engaged in attempted or actual warrantless searches of the travelling public.

"Papers, please"

Throughout the southwest United States and at selected points near the Canadian border, U.S. Customs and Border Protection operates a series of inland checkpoints on American highways, sometimes as much as 100 miles inside the United States. Most Americans who do not live in areas where the checkpoints are located are probably unaware that these inland CBP checkpoints have existed for decades, legitimized by an ill-considered Supreme Court decision in *United States v. Martinez-Fuerte*.

That case, which involved three separate incidents involving the transportation of illegal aliens into the United States, examined the question of whether the use of such checkpoints for warrantless seizures and visual inspection (read "searches") violated the Fourth Amendment. Writing for the Court's majority, Justice Powell asserted that given the huge problem of illegal immigration and CBP's responsibility of to prevent it, under "the circumstances of these checkpoint stops, which do not involve searches, the Government or public interest in making such stops outweighs the constitutionally protected interest of the private citizen…In summary, we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant." The court's reasoning seemed to be thus: Abiding by the traditional probable cause standard was too burdensome to the effort to stem illegal immigration.

Justices Brennan and Marshall strongly dissented, with Brennan noting

> "The Court assumes, and I certainly agree, that persons stopped at fixed checkpoints, whether or not referred to a secondary detention area, are 'seized' within the meaning of the Fourth Amendment. Moreover, since the vehicle and its occupants are subjected to a "visual inspection," the intrusion clearly exceeds mere physical restraint, for officers are able to see more in a stopped vehicle than in vehicles traveling at normal speeds down the highway…Finally, the Court's argument fails for more basic reasons. There is no principle in the

jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied. Dispensing with reasonable suspicion as a prerequisite to stopping and inspecting motorists because the inconvenience of such a requirement would make it impossible to identify a given car as a possible carrier of aliens is no more justifiable than dispensing with probable cause as prerequisite to the search of an individual because the inconvenience of such a requirement would make it impossible to identify a given person in a high-crime area as a possible carrier of concealed weapons."

And as I will outline below, the majority made a monumental mistake in taking CBP's assertions at face value about the typical interaction at such stops: "Motorists whom the officers recognize as local inhabitants, however, are waved through the checkpoint without inquiry".

The effect of the *Martinez-Fuerte* decision was that CBP agents were allowed to use the Court's ruling to conduct "immigration inspections" on **any** vehicle seeking to pass through a checkpoint, and CBP officers were instructed to inquire as to the citizenship of the drivers and passengers. What the decision did not require—at least explicitly—was that motorists actually answer the questions posed by CBP agents. Rather that actually waving through known, recognized locals, CBP agents continue—on a daily basis—to stop, and frequently detain, American citizens simply seeking to go about their business in the communities in which they live. The court also apparently did not anticipate that CBP agents would elect to ignore the court's admonition in the *Martinez-Fuerte* ruling that "[A]ny further detention . . . must be based on consent or probable cause."

If you conduct a YouTube search utilizing the phrase "checkpoint refusal videos", you will get nearly 6 million hits—and you could easily spend days watching them. One Arizona man has created Roadblock Revelations, a website dedicated to exposing CBP abuses of motorists (the website operator has to travel through a CBP checkpoint daily in order to get to and from work). A recent ReasonTV piece documents the case of one American citizen who, upon refusing to disclose his citizenship at the Laredo, Texas checkpoint, was detained by CBP without charge for 19 days (the case is now the subject of litigation). In some cases, CBP agents have used violence to remove motorists from their vehicles when they decline to answer questions after asserting their rights. DHS' offices of inspector general and privacy and civil liberties have yet to respond to an Arizona ACLU complaint filed in October 2013 regarding CBP mistreatment of multiple Arizona residents at checkpoints in the state. The abuses at these checkpoints have become so serious that the ACLU has initiated the Border Litigation Project, which seeks to monitor and combat in court CBP's excesses at the checkpoints.

And the CBP is not simply concerned with conducting warrantless (and usually pointless) searches of motorists. Private pilots have recently been the victims of similar tactics

Operation SKYLANE

In 2012, the Aircraft Owners and Pilots Association (AOPA) began receiving reports from its members that their aircraft were being searched without warrants by CBP personnel. In 2013, *The Atlantic's* James Fallows published a major piece on the topic, noting that CBP was profiling pilots and aircraft, looking for drug smugglers. One incident involved Larry Gaines, a

California resident and private pilot. Fallows lays out the chronology of Gaines' flight and experience with CBP:

- "A private pilot set out from an airport in the Sierra foothills of California, headed to Oklahoma;
- "He made the trip 'VFR' — under visual flight rules, choosing his own path and knowing that he did not need to check in with air-traffic controllers as long as he stayed out of certain kinds of airspace (around big airports, in military zones, or subject to other restrictions).
- "He eventually landed at a tiny little airport in rural Oklahoma, where a friend met him and took him home for dinner.
- "The pilot realized that he had dropped his eyeglass case at the airport and went back to retrieve it.
- "At which point all hell broke loose, as he describes in detail. In short, local, county, and federal enforcement agents were there to inspect him and his plane — and when he asked why, they said that his 'suspicious' profile was 'flight west to east, from California.'"

Gaines was detained for two hours without probable cause on the basis of nothing more than an untested "suspicious profile" that Gaines was a drug smuggler.

AOPA documented more incidents in 2013 and 2014, finally engaging Rep. Sam Graves (R-MO) and Senator Pat Roberts (R-KS) to lean on CBP to explain why it was engaged in search and seizure operations against general aviation (GA) pilots. CBP officials asserted that they had the right, under federal regulations, to seek to inspect documentation all GA pilots are required to have on hand. AOPA challenged that assertion, and demanded a meeting with the head of CBP, R. Gil Kerlikowske. Kerlikowske met with AOPA officials in April 2014 and promised a thorough review of the incidents. As of January 2015, AOPA had not received any further reports of its members being detained or their aircraft searched without probable cause by CBP personnel.

That good news is tempered by the fact that Kerlikowske's top-down review of CBP domestic general aviation law enforcement operations makes clear that the very opaque profiling process that led to AOPA's confrontation with CBP will continue. From the report:

"Operation SKYLANE is the processes by which [Air and Marine Operations Center] AMOC personnel research GA aircraft and detect, identify, and if necessary, coordinate interdiction of GA aircraft which exhibit characteristics that might indicate involvement in illicit activity. There is no one characteristic that determines or indicates illegal behavior; AMOC is looking for a variety of factors that, which seen as a complete picture, sets one aircraft apart from thousands." It should be noted that to date Operation SKYLANE has not been the subject of either a DHS IG or GAO investigation to determine whether its operations, and specifically its GA profiling activities, pass constitutional muster.

The DHS activities I've described in this piece share a common theme: each activity involves the use of taxpayer dollars for the conduct of search and seizure operations that are potential violations of the Fourth Amendment. And none of these operations have led to the arrest of a

single terrorist nor have they uncovered or disrupted a single terrorist plot. This is “security theater” writ large.

The broader question before us is whether we believe these programs are consistent not only with the Constitution, but with our expectations as Americans. Warrantless searches and internal checkpoints are characteristics of totalitarian political systems. They have no place in a truly functional democratic republic.

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