

Thursday, October 30, 2008

### **Wherever I go, Big Brother follows.**

Â Bill of RightsÂ (From public domain.)Â In 1981, I started college a few miles outside of Boston. I very much enjoyed the subway system. Barely two stations were designed alike. Some stations had elevated platforms to get on the trains, and at least one other station had the opposite engineering. Some stretches of tracks went underground, and others aboveground. I always got a kick out of reading some of the station names, including Alewife, Mattapan, and Shawmut. Â In 1985, I started a year of work in the belly of the capitalist beast.Â It was the first time in my life that I daily rubbed elbows with as vast a cross section of people, most of them running from fascinating to interesting on lesser levels. Fed up with over two months of train commuting from what seemed like my middle-of-nowhere hometown, I signed a lease for a shoebox single residence occupancy apartment at the corner of Lexington and 23rd Street. I think Paul SchaefferÂ lived there, or at least I saw he found an opportunity early one Saturday eveningÂ to eat a slice of cheesy pizza at Zips's on the ground floor of my eventual apartment building. Â After signing my lease -- wondering why I had just agreed to pay over \$500 for the privilege of having my knees almost touch the wall when sitting on the toilet in a kitchenless tiny dormsize apartment -- I went to catch a subway train uptown. A man calmly walked onto the tracks, and calmly waited for the next train to arrive, facing his impending suicide. I freaked. I told the tokenbooth clerk what was happening, and sheÂ barely acknowledged me, as ifÂ I had just escaped from one of Bellevue Hospital's padded rooms. I bolted out of the station, selfishly trying to avoid hearing this man's screams, feeling powerless to convince him to leave the rails. I saw a nearby cop car -- before I had become so cynical of cops -- and told them. They also looked at me like I was nuts, perhaps nuts that I cared enough to tell them, or nuts to think I could change anything, or nuts that I had not just minded my own business and stayed there to be in the midst of a man flattened out by a subway train. After a business trip took me away from the neighborhood for six weeks, I returned and asked a different tokenbooth clerk what happened to the man. She said he was taken to a hospital's psychiatric ward; or was that a subsequent manÂ who had descended to the rails to await a gruesome death? Â Seven months later, I was returning to my apartment during rush hour. Two or three people jammed themselves onto the subway car with a full-sized couch. That was preferable to what came two months thereafter, when my friend and I ran to the next subway car, after we realized that the reeking odor overcoming us was vomit saturating a standing rider's beard. Sophomorically insensitive, we laughed our heads off about it after our escape. Â Then I came to Washington, D.C. in 1986 for law school. The subway cars were free of graffiti, had nobody standing by the door drenched in puke, and had nobody shoving large furniture items onto the subway, which would have been caught by the stationmanagers in the first place. Each subway station and subway car looked pretty much immaculately the same as the next one. Each underground stop choked its visitors in huge slabs of curved concrete. Whatever Washington's subway system's planners had in mind, the system then, as now, reflected the excessive facelessness and heartlessness of the surrounding overgrown government bureaucracy. Â In October 1999 I was hopping on the subway in the shadow of the World Trade Center. Two years later, murderers decimated the towers. Earlier that year I met with a prosecutor in the Pentagon to review discovery pending a trial date; to this day, I do not know if the murderous September 11 plane hit that part of the Pentagon. Â On my first post-September 11 trip to Manhattan, Grand Central Station had been transformed into a police state, with cops carrying the same sort of scary submachine guns that I thought were reserved for such other places as Singapore's Changi airport under that city-state's tyrannical government. Then, the New York City government added random searches of subway users. The Boston subway and bus lines did the same, at least during the 2004 Democratic national convention.Â Apparently not wanting to be on the sidelines, the Washington Area Metropolitan Transit Authority has gotten in on the act, not only on the subway line, but on busses, too. Such intrusions make the puke smell on a New York subway car in 1986 and the urine stench in a Boston subway walkway in 1983 seem like child'splay. Â And what about my two-year-old boy, who loves the subway and all other trains, andÂ who darts towards the nearest subway elevator and escalator to take a ride? What kind of lesson to himÂ is the garrison state that the subway system has become, other than a lesson of fear? How can I expect not to upset him tremendously if I explain that if we do not exercise our right to privacy we will lose it, and then refuse to enter the subway system? Were mine a life lived alone, it would be very easy to avoid the subway and buses. Many will find little financial choice to avoid the Metro system, considering how much less expensive it is to ride Metro than to own or drive a car. Â What nerve does the WMATA have to impose such a drastic change as random subway and busÂ searches, apparently with no notice or comment period for the public to put in its two cents in advance? Now that the public knows of this privacy-violating development, who will stand up against it? Â Thanks certainly go to my friends at Flex Your Rights -- the producers of the Busted video visually linked to every page of this blog --Â who yesterday afternoon were involved inÂ pursuing aÂ demonstration in Dupont Circle against the random searches (see the flyers they ask people to help hand out concerning the searches). Thanks also to Flex Your Rights for posting a webpage onÂ your rights in refusing D.C. Metro random searches, which looks right on target, except thatÂ as to FYR's recommendation about not giving one's name orÂ identityÂ to the cops, the Supreme Court'sÂ HiibelÂ case makes clear the Catch-22 of refusing at least to give the cops one's name, in the event a court later determines the cops

had reasonable suspicion to suspect the person was committing a crime. However, one would hope that no court will find the existence of reasonable police suspicion when the person merely leaves to avoid a random subway or bus search. My search of Metro's website and Google indicates that Metro never instituted a public notice and comment period before announcing the random search program. That is foul in a society that purportedly has government governing at the consent of the governed, and where Congress, federal agencies, and the states where Metro runs (D.C., Maryland and Virginia) ordinarily provide the public notice and comment opportunities for proposed legislation. Billions of tax dollars get poured into the Metro system. Why should my tax dollars go into a system that blatantly violates the Fourth Amendment and privacy with random searches? Metro's website has an overly brief FAQ page (and just about nothing else on its website) about the random search approach, which claims the program is Constitutional based on the Second Circuit's denial in *MacWade v. Kelly*, 460 F.3d 260 (2006), of a challenge to the New York City subway's random search program and an unreported ruling from the U.S. District Court in Massachusetts, on a challenge to Boston's subway and bus search program during the 2004 Democratic presidential convention (did the bad karma of the failure of John Kerry and his campaign to stand up against such searches feed into his electoral loss?). *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, 2004 U.S. Dist. LEXIS 14345 (D. Mass. July 28, 2004) (unreported). However, the foregoing rulings are from outside jurisdictions, and are therefore not controlling on the courts where the D.C.-area Metro runs. Finally, the D.C.-area Metro search program includes buses, which *MacWade* does not involve, and which *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.* only involved during the few days of a presidential convention. Such a distinction might at least lead to a court victory against random Metro bus searches, and hopefully a wider victory than that. I have offered assistance to my local ACLU for a court challenge. The ACLU probably will find no shortage of qualified pro bono attorneys for such a lawsuit, and the local affiliate already has an excellent crop of in-house lawyers. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Quibble on Hibbel. Hibbel does not empower police to demand identification or require a person to identify themselves to police. Nor does Hibbel entitle police to search or arrest those who fail to identify themselves. Hibbel said it does not violate the Fourth Amendment for a jurisdiction to enact a law requiring suspects to identify themselves to police, failure to do so then resulting in arrest. D.C. has no such law, and therefore, Hibbel does not empower police to enforce such a (so far) non-existent requirement. Anonymous on Oct 30 2008, 19:17

Thanks, Kirby, for your comment.

Read literally, Hibbel should not apply absent a specific statute criminalizing not identifying oneself when asked by the cop. A question arises about whether trial judges -- let alone cops -- will misread Hibbel too broadly and allow convictions under such laws as disorderly conduct for failure to obey a "lawful" police order, merely for not identifying oneself.

I have not needed yet to research whether DC, VA and MD (Metro goes to all three jurisdictions, and possibly to federal facilities, which then might implicate federal laws on identifying oneself, too) have such a law as that involved in Hibbel. You say D.C. has no such law; I do not know if you make that conclusion merely by not seeing any D.C. law listed in Hibbel, which list is not necessarily exhaustive and now is a few years old.

Thanks, again, for your comment. Jon

Anonymous on Oct 31 2008, 00:01