Applying Constitutional Standards to Airport Security Searches

Jay M. Mann

Follow this and additional works at: http://lawecommons.luc.edu/luclj
Part of the Transportation Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol5/iss1/9
Applying Constitutional Standards
To Airport Security Searches

INTRODUCTION

The crime of air piracy dates back to as early as 1930,1 but did not become a real threat to the American airline industry until 1968, a year in which eighteen domestic, in addition to twelve foreign, hijackings occurred.2 The next year witnessed no less than forty attempted hijackings of United States planes, of which thirty-three were successful.3 Since 1969 there has been a general leveling off of attempted hijackings, with approximately thirty occurring each year.4

The Federal Aviation Authority, having primary responsibility for dealing with the hijacking problem, established a Task Force on the Deterrence of Air Piracy in October, 1968.5 Its principal product was the “hijacker personality profile,” a compilation of behavioral characteristics of the “typical” hijacker.6 Working together with airlines, the FAA established a security system for operation at airports around the country which included utilization of the profile, an electronic screening device such as a magnetometer or metal detection device,
and a weapons search of carry-on luggage and/or person if the magnetometer had been activated.\textsuperscript{7}

The implementation of this or any other security system was voluntary\textsuperscript{8} and remained so until the FAA "emergency regulation," issued January 31, 1972, demanded that all the airlines "adopt and put into use a screening system, acceptable to the Administrator, to prevent and deter the carriage aboard its aircraft of any sabotage device or weapon in carry-on baggage or on or about the persons of passengers. . . ."\textsuperscript{9} Thus the FAA for the first time was given the power to review airport security measures and order changes if needed in the opinion of its Administrator.\textsuperscript{10}

On December 5, 1972, the FAA issued a directive that all carry-on items be searched and an electronic screening of all passengers be implemented no later than January 5, 1973 as a condition for boarding.\textsuperscript{11} In addition, airport operators were required to provide armed law enforcement officers at all boarding gates when passengers are boarding, with authority "to carry and use firearms" and "vested with a police power of arrest under Federal, State, or other political subdivision authority."\textsuperscript{12}

The unprecedented security measures currently in use in the nation’s airports reflect the concern and alarm which skyjacking has evoked in the public mind. It is the purpose of this article to determine whether the searches resulting from these strict security measures, necessarily warrantless, can survive constitutional scrutiny, and, if so, to determine what their limitations may be.

\textbf{The Fourth Amendment}

The fourth amendment to the Constitution provides:

\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.\textsuperscript{13}
\end{quote}


\textsuperscript{8} See Searching for Hijackers 389-90.

\textsuperscript{9} 37 Fed. Reg. 2500, 2501 (1972).

\textsuperscript{10} See Searching for Hijackers 390.

\textsuperscript{11} See United States v. Davis, 482 F.2d 893, 901 (9th Cir. 1973).


\textsuperscript{13} U.S. Const. amend. IV.
The issuance of a warrant upon approval of a neutral magistrate before a "reasonable" search can be conducted is the true constitutional safeguard of the fourth amendment.\textsuperscript{14} As was stated by Justice Jackson in \textit{Johnson v. United States}:

The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement official.\textsuperscript{15}

Even if it were practical to station magistrates at boarding gates, a warrant could not be issued as the requirements of probable cause are not fulfilled in the typical search situation.\textsuperscript{16} Mere police suspicion is never sufficient for a finding of probable cause;\textsuperscript{17} airport security searches are conducted upon all persons attempting to board a commercial airliner in the absence of even mere suspicion. Therefore a magistrate would be barred from issuing a search warrant.

The United States Supreme Court, while not withdrawing from the position that the police must obtain prior judicial approval of searches and seizures through the warrant procedure whenever practicable,\textsuperscript{18} has held that the absence of a warrant may be excused when the "exigencies of the situation" make the warrantless search imperative.\textsuperscript{19} For example, exceptions to the warrant requirement of the fourth amendment have been made when evidence is in danger of "imminent destruction,"\textsuperscript{20} or in "plain view,"\textsuperscript{21} or when the search is conducted "incident to a lawful arrest."\textsuperscript{22} The only conceivable currently recognized

\textsuperscript{14} Coolidge v. New Hampshire, 403 U.S. 443, 481 (1972).
\textsuperscript{15} 333 U.S. 10, 13-14 (1948).
\textsuperscript{19} McDonald v. United States, 335 U.S. 451, 454-56 (1940).
\textsuperscript{22} Chimel v. California, 395 U.S. 752 (1969).
exceptions which may justify the absence of a warrant for searches conducted at airports under the current security measures are the "protective search for weapons,"23 "consent,"24 and the "administrative search,"25 each of which will be examined later in this article.

The fourth amendment standards of reasonableness do not apply to the private acts of individuals, but only to government action.26 However, even if the anti-hijacking measures were applied solely by airline employees, the airport searches would nevertheless be subject to constitutional scrutiny due to the active government involvement in the implementation of the security system.27 The involvement, whether characterized as "'encouragement' or as 'peripheral, or . . . one of several cooperative forces leading to the alleged constitutional violation'" is "significant for the purposes of the Fourth Amendment."28 A search that is "in substance a federal search, cast in the form of a carrier inspection to enable officers to avoid the requirements of the Fourth Amendment"29 must still meet the constitutional test of reasonableness.

Before the fourth amendment can be applied to the airport security measures under discussion, the inspections to which air travelers are subjected must be demonstrated to be within the constitutional definition of a search or seizure. For this purpose the next section is devoted to an examination of the components of the current anti-hijacking security measures and their possible subjection to constitutional scrutiny.

AIRPORT SECURITY PROCEDURE

The Profile

Recognizing the difficulty of detecting potential hijackers while still on the ground, Judge Gewin in United States v. Moreno noted:

Airport security officials have the awesome responsibility of ferreting out hijacking threats from among thousands of passengers while at the same time avoiding any undue disruption to this nation's heavy flow of commercial air traffic. Inseparably related to this is the fact that the hijacker's modus operandi is designed to take optimum advantage of these pressures. The hijacker pre-

27. United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973).  
28. *Id.*  
29. Corngold v. United States, 367 F.2d 1, 5 (9th Cir. 1966).
fers the anonymity of the crowd where he is but a part of the blend.\textsuperscript{80}

In an effort to distinguish the potential hijacker from the general traveling public, the FAA in 1968 developed the "hijacker personality profile," a checklist of behavioral characteristics common to hijackers.\textsuperscript{31} It is typically applied by airline personnel at the ticket counter when passengers buy their tickets; individuals exhibiting some or all of the profile characteristics are designated "selectees" and subjected to close observation by security officials.\textsuperscript{32} This may include a questioning of the "selectee" and a request for identification, but a pat-down or frisk of his person for weapons will not be performed without a magnetometer or other electronic screening device also having been activated.\textsuperscript{33}

The profile is of necessity kept secret from the public\textsuperscript{34} and is therefore difficult to critically evaluate. Since there have been only 159 attempted hijackings in the United States, involving 218 hijackers, the statistical reliability of the profile compiled from such a small sample is questionable.\textsuperscript{35} In one survey conducted to determine the efficiency of the profile, of 500,000 persons purchasing airline tickets, .28\% or 1,406 were labelled selectees. Of these, approximately 6\% were found to be carrying weapons.\textsuperscript{36}

Applying the profile to air passengers is not an invasion of privacy within the scope of the fourth amendment. Only those readily observable characteristics which the traveler has voluntarily exposed to the general public or airline are studied.\textsuperscript{37} Furthermore, application of the profile does not involve any involuntary restraint of the individual.\textsuperscript{38} Therefore, it is not within the fourth amendment meaning of search or seizure and not subject to constitutional scrutiny.

The Electronic Screening

All passengers must submit to a scanning by an electronic screening

\begin{thebibliography}{38}
\bibitem{30} 475 F.2d 44, 49 (5th Cir. 1973).
\bibitem{32} Id. at 1083; McGinley and Downs 303-06.
\bibitem{33} McGinley and Downs 304.
\bibitem{35} Searching for Hijackers 397-98.
\bibitem{38} See Note, Airport Security Searches and the Fourth Amendment, 71 COLUM. L. REV. 1039, 1052 (1971) [hereinafter cited as Airport Security Searches]; Searching for Hijackers 397.
\end{thebibliography}
Airport Security Searches

device prior to boarding. The device typically used is a magnetometer or metal detector adjusted to discern on a person ferrous metal equivalent to that in a .32 caliber handgun. It consists of two upright metal poles which, when an individual walks between them, measure distortions in the relatively constant magnetic field surrounding the earth. The magnetometer cannot distinguish weapons composed of ferrous metal from other metallic objects; nearly 50% of all airline passengers carry enough ferrous metal in ordinary belongings, e.g., keys, cigarette lighters, coins, etc., to activate the magnetometer. In addition, the machine cannot detect weapons composed of material other than ferrous metal, such as plastic explosives.

The subjection to an electronic screening device such as a magnetometer is a minimal intrusion upon privacy and a minor inconvenience for most passengers. But it is still within the constitutional meaning of a search for purposes of the fourth amendment.

In Katz v. United States, the United States Supreme Court rejected the argument that physical intrusion into an enclosure is necessary to meet the constitutional definition of a search, and held "the Fourth Amendment protects people, not places." Justice Harlan, in a concurring opinion, formulated a threshold test for application of the fourth amendment: if a government intrusion is into an area in which the individual has a reasonable expectation of privacy, the search is subject to fourth amendment standards. It is the purpose and function of a magnetometer "to search for metal and disclose its presence in areas where there is a normal expectation of privacy." Thus the

39. See text at supra note 11.
40. More sophisticated devices based on X-rays or fluoroscopy have been used at certain airports. As these devices are able to better reveal what an individual has attempted to conceal, there is a greater intrusion upon privacy involved than with a magnetometer. Thus to demonstrate a magnetometer inspection is within the fourth amendment meaning of a search or seizure is, by implication, to demonstrate the same for more sophisticated devices. See Searching for Hijackers 401-02.
43. See McGinley and Downs 303; Searching for Hijackers 401.
45. See McGinley and Downs 303; Searching for Hijackers 401.
47. 389 U.S. 347 (1967).
50. See United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973).
invasion of privacy by use of the magnetometer or other electronic screening device, while minimal, is within the purview of the fourth amendment and must be constitutionally justified.

The Frisk and the Search of Carry-on Luggage

While there is no uniform procedure to be followed if a passenger activates a magnetometer, generally a request for satisfactory identification and other questioning is undertaken by an airline official or federal marshal. The individual may be asked to remove from his pockets the metallic objects that he claims to be carrying. If the marshal is still unsatisfied, a pat-down search or frisk will be conducted.\(^53\)

Unquestionably, the frisk is subject to fourth amendment standards of reasonableness. As Chief Justice Warren stated in *Terry v. Ohio*:

> It is quite plain that the Fourth Amendment governs seizures of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."\(^54\)

Similarly, the inspection of the contents of all carry-on luggage prior to boarding\(^55\) is within the constitutional meaning of a search.\(^56\) A traveler certainly has reasonable expectations of privacy as to the contents of his luggage and an inspection of his private belongings can hardly be considered a minimal intrusion.\(^57\)

Therefore, the electronic screening, the pat-down or frisk, and the inspection of carry-on luggage are government intrusions of privacy needing constitutional justification for the absence of a search warrant issued by a detached, objective magistrate upon a showing of probable cause. The next section of this article is devoted to an examination of the possible constitutional justifications.

---

54. 392 U.S. 1, 16 (1967).
55. See text at supra note 11.
56. See United States v. Legato, 480 F.2d 408 (5th Cir. 1973); United States v. Clarke, 475 F.2d 240 (2d Cir. 1973); United States v. Davis, 482 F.2d 893 (9th Cir. 1973).
57. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Searching for Hijackers* 404.
Exceptions to the Warrant Requirement

Consent

One of the recognized exceptions to the warrant requirement of the fourth amendment is consent given for a search. To operate as a valid waiver of the right of freedom from unreasonable searches and seizures, the consent given must be voluntary, unequivocal, specific, and intelligent. Furthermore, it must be free of duress and coercion.

In the very recent case of Schneckloth v. Bustamonte, the United States Supreme Court undertook to resolve a conflict between the federal and state courts as to what level of understanding was needed by the individual acquiescing for the consent to be valid. In so doing, Justice Stewart, enunciating the opinion of the Court, stated:

Voluntariness is a question of fact to be determined from all of the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Johnson v. Zerbst, a prior case involving the waiver of the constitutional right to counsel, had held that there must be a showing of an "intentional relinquishment of a known right or privilege," and was distinguished by the Court in Bustamonte from a waiver of rights under the fourth amendment. The high standards imposed in the Johnson case, Justice Stewart reasoned, were for the purpose of preserving the fairness of the trial process. "There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."

Consistent with the Bustamonte rationale is United States v. Ruiz-Estrella, a case involving an airport search in which the prosecution argued that the defendant had consented to the search. Ruiz-Estrella,
being identified by the ticket agent as a profile selectee, and unable to produce satisfactory identification upon request, was taken away from the boarding gate to a secluded area for questioning by the federal marshal. There he silently handed his bag to the marshal under circumstances which the Court reasoned to be inherently coercive.67 While Ruiz-Estrella need not have had knowledge of his right to leave for the "consent" to be a valid waiver, the mere acquiescence to lawful authority, which his actions indicated, can never be enough to satisfy the conditions of a freely given consent.68

Each airline search, as does every case which questions the validity of consent given for a search, must be decided on an individual basis depending on the manner and circumstances in which the consent was procured.69 Bustamonte and Ruiz-Estrella provide the basic guidelines for a determination of the constitutionality of an airport search pursuant to a consent. However helpful this analysis may be on a case-by-case basis, it does not answer the central question of this section of the article: can this exception to the warrant requirement of the fourth amendment be used to justify the warrantless, indiscriminate searching of all passengers attempting to board a commercial airplane? Obviously there will be instances in which a passenger will object to being searched; therefore, not all airport searches can be deemed constitutional on the basis of express consent. The only manner in which the airport security system can withstand constitutional scrutiny on the basis of the consent exception is if some action or conduct common to all passengers be shown to manifest an implied consent to be searched.

One proposed theory would make the act of attempting to board a plane an implied consent to a search.70 Under this reasoning, making consent a necessary prerequisite to boarding is reasonable "in light of the magnitude of the hijacking menace."71

67. United States v. Ruiz-Estrella, 481 F.2d 723, 728 (2d Cir. 1973). See also United States v. Muelener, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972), in which an airline passenger who opened his suitcase for inspection after being ordered to do so by a federal marshal was held to have given his consent in an inherently coercive situation.


69. The United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973), stated: "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."


71. Id. at 130.
As previously discussed, a consent must be informed to operate as a valid waiver of constitutional rights. The unsuspecting passenger who suddenly finds himself confronted with a search of his person and luggage can hardly be said to be informed. Furthermore, signs posted at various points throughout the airport, warning passengers of the possibility of being searched, do not sufficiently apprise an individual of the waiver of his constitutional rights. However, due to the Bustamonte ruling, a lack of knowledge regarding waiver of rights may not be as crucial for sustaining the legality of the search as previously believed under the Johnson decision.

There remains the much more serious problem of infringement upon the right to travel that conditioning boarding upon consent entails. Although there is no specific provision in the Constitution insuring the right to travel, the right was recognized as early as 1823 in Corfield v. Coryell. It is derived from the due process clause of the fifth amendment and apparently is a fundamental right; any burden upon it is seemingly subject to strict, careful scrutiny.

Conditioning the exercise of the constitutional right to travel upon the relinquishment of the fourth amendment right of freedom from unreasonable searches and seizures is inherently coercive. As other modes of transportation are inadequate substitutes for air travel, the traveler unwilling to consent to a search is not left with any reasonable alternatives by which to exercise a right given a very high priority in our constitutional framework. Therefore, the consent implied by the act of attempting to board a plane is not given in the free and voluntary manner which is required for a valid waiver.

Any theory which proposes to imply consent from an action common to all prospective passengers must have the same fatal defect: an intolerable burden upon the constitutional right to travel. The consent exception to the warrant requirement of the fourth amendment cannot

---

72. United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971), and United States v. Muelener, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972), have so held, but it should be noted that both cases were decided before Bustamonte and are therefore subject to criticism and possible revision on this issue.
74. 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823).
excuse the indiscriminate warrantless searches of all prospective passengers; one must look elsewhere for possible constitutional justification for the security systems currently employed at the airports to detect hijackers.

**The Protective Search for Weapons**

The vast majority of courts reviewing airport searches have upheld the constitutionality of the searches on the basis of the protective search for weapons exception to the warrant requirement of the fourth amendment. This exception was formulated primarily for the protection of a police officer or others nearby when investigating the suspicious activity of armed and dangerous individuals at close range, and is based on a substantial but lower level of suspicion than is needed for probable cause.

The exception was first applied by the United States Supreme Court in *Terry v. Ohio*. In this case a police detective with thirty-nine years of experience observed two men pacing repeatedly before a downtown Cleveland department store, occasionally pausing to peer into the display window or confer with one another. Suspicious that the men were “casing a job, a stick-up,” the officer followed the men when they left the area to meet with a third man. When they returned to the department store, the detective, having decided the situation called for direct action, approached the men and asked their names. The only response was a mumbled answer, and the detective, fearful that the suspects were armed, spun one of the men around and patted down the outside of his clothing. Because he felt a hard, noticeable bulge in the breast pocket, the detective ordered the suspect to remove his coat, uncovering a pistol.

The detective’s actions were found to be reasonable and appropriate under the circumstances. Distinguishing between a limited search of outer clothing or frisk and a full exploratory search, the Court directed attention to the “specific and articulable facts” in the case which, although each may have been seemingly innocent in itself, taken

---


81. 392 U.S. 1 (1967).

82. Id. at 6-7.

83. Id. at 26.
as a whole warranted the limited invasion of the defendant’s privacy for the protection of the police officer. The Court emphasized that for such a search to meet the constitutional standard of reasonableness, the threat to the police officer or others nearby had to be substantial and immediate; the officer must be justified “in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous. . . .” (emphasis added)

A protective weapons search, justified at its inception, may become unreasonable if its scope is not confined to what is minimally necessary for the officer’s protection. In *Sibron v. New York*, the companion case to *Terry*, the officer made no initial exploration for arms before “thrusting” his hand into the defendant’s pocket, and discovering envelopes of heroin. The Court held the search unreasonable because it “was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment. . . .”

In *Adams v. Williams*, the Supreme Court expanded the *Terry* exception by allowing a police officer to make a protective search for the deterrence of a possessory offense rather than a crime of violence when the only basis for fear of danger was an uncorroborated informant’s tip. Rejecting the defendant’s argument that the facts known to the police officer prior to the search did not meet the high standards required by *Terry*, the Court held the information of a reliable informant to be sufficient for the specificity of information necessary to justify a valid protective search for weapons.

The lower federal courts have applied the protective search exception in a multitude of different ways to airport searches. *United States v. Epperson* upheld the indiscriminate magnetometer searching of all persons boarding planes on the basis that the overwhelming public interest in the deterrence of hijacking outbalanced the minimal invasion

---

84. *Id.* at 28.
85. *Id.* at 24.
86. 392 U.S. 40, 65 (1967).
87. *Id.* at 65. See also *Tinney v. California*, 408 F.2d 912 (9th Cir. 1969), in which a search by an officer who did not believe the suspect being investigated was armed and dangerous was held unconstitutional because not limited to the discovery of weapons.
of privacy which a magnetometer screening entails. The positive reading, the court reasoned, provided the reasonable suspicion necessary for the subsequent frisk of the defendant. In United States v. Lopez the exhibition of characteristics of the hijacker personality profile, although not sufficient in itself for a finding of probable cause, was found to provide the specific and articulable facts needed for a magnetometer search. The court held that activation of a magnetometer, in combination with conformity to the profile, justified the further government intrusion of a pat-down or frisk.

United States v. Lindsey upheld a search of a prospective passenger acting suspiciously in the boarding lounge who could not produce adequate identification when requested to do so by a federal marshal. Recognizing the level of suspicion to be lower than that approved in Terry, the court held that:

In the context of a possible airplane hijacking with the enormous consequences which may flow therefrom, and in view of the limited time in which [the federal marshal] had to act, the level of suspicion required for a Terry investigative stop and protective search should be lowered.

In United States v. Slocum a search of carry-on luggage was approved after a frisk of the passenger had failed to disclose what had activated a magnetometer. A similar search of carry-on luggage was not upheld in United States v. Muelener because it was not preceded by a pat-down of the defendant's outer clothing. Thus, the court reasoned, the search was not reasonably limited in scope to the detection of weapons, as a pat-down might have obviated the need for searching the suitcase. Reflecting the conflict and inconsistencies which anti-hijacking security searches have evoked in the federal courts, the Fifth Circuit in United States v. Skipwith expressly declined to follow the Muelener rule and allowed the searching of hand-luggage as necessary for the detection of easily concealed plastic explosives.

93. 328 F. Supp. 1077, 1100 (E.D.N.Y. 1971). However, the search considered in Lopez was found invalid due to discriminatory application of the profile by airline personnel.
94. Id. at 1096-97.
95. 451 F.2d 701, 703 (3d Cir. 1971). But see United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973), in which only conformity to the profile was held not to supply the reasonable suspicion needed for a search of a passenger's hand luggage.
96. 464 F.2d 1180, 1183 (3d Cir. 1972).
98. Id. at 1292.
99. 482 F.2d 1272, 1277 (5th Cir. 1973).
Indeed, the Fifth Circuit, relying upon Terry for precedent, has labelled airports "critical zones in which special fourth amendment considerations apply."\textsuperscript{100} Citing with approval the concurring opinion of Judge Friendly in United States v. Bell that due to the hijacking threat, danger alone meets the constitutional test of reasonableness,\textsuperscript{101} the court in United States v. Skipwith held that anyone who presents himself for boarding is subject to a search based on mere or unsupported suspicion.\textsuperscript{102} However, the suspect need not be in the boarding area to be searched; an individual acting suspiciously may be taken from a washroom\textsuperscript{103} or a parking lot\textsuperscript{104} and brought to the airport security office for a search much more intrusive then the pat-down of outer clothing allowed in Terry v. Ohio.\textsuperscript{105}

It is the contention of this author that the protective weapons search is inappropriate to serve as a constitutional justification for airport security searches. The bases upon which Terry was decided—the reasonable suspicion of danger founded on specific and articulable facts and the immediacy of the threat—are lacking when the federal marshals perform the pre-boarding searches. To so lower the standards of this exception as the lower courts have done would likely have adverse repercussions upon the validity of protective searches in other contexts, such as the Terry or Sibron type of street confrontation with a suspected criminal.

Under the current anti-hijacking security measures, all passengers must submit to an electronic screening as a condition for boarding.\textsuperscript{106} The Epperson court misinterpreted Terry as allowing such a minimal intrusion solely on the basis of the "overwhelming" public interest in the prevention of skyjacking. Any protective search within the confines of the fourth amendment, no matter how inoffensive, must be grounded upon a reasonable suspicion of danger; the airport searches are performed indiscriminately regardless of the level of suspicion of the individual searched. Therefore, the protective weapons search exception cannot justify the electronic searching of all passengers.\textsuperscript{107}

Similarly, the searching of all carry-on luggage\textsuperscript{108} cannot be vali-

\textsuperscript{100.} United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973).
\textsuperscript{101.} 464 F.2d 667, 675 (2d Cir. 1972) (Bell, J., concurring).
\textsuperscript{102.} 482 F.2d 1272, 1276-77 (5th Cir. 1973).
\textsuperscript{103.} United States v. Moreno, 475 F.2d 44 (5th Cir. 1973).
\textsuperscript{104.} United States v. Legato, 480 F.2d 408 (5th Cir. 1973).
\textsuperscript{105.} 392 U.S. 1 (1967). The Fifth Circuit will allow any search, including a thorough examination of a suspect's overcoat (Moreno) or a shopping bag he is carrying (Legato), if it is reasonably related to the thwarting of hijacking. See also United States v. Fern, 484 F.2d 666 (1973).
\textsuperscript{106.} See text at supra note 11.
\textsuperscript{108.} See text at supra note 11.
dated by this exception. These searches are also performed indiscrimi-
nately and therefore not based upon reasonable suspicion as is required
by Terry. The search of an individual's suitcase or briefcase is cer-
tainly a more offensive invasion of privacy than a mere electronic
screening and needs, perhaps more so than a magnetometer, a prior
reasonable suspicion of danger to be valid.109

Several courts and legal scholars have proposed that the profile pro-
vides the reasonable suspicion needed for a magnetometer search.110
However, as was previously discussed, the reliability of the profile is
very questionable; only 6% of the selectees are found to be carrying
weapons.111 This small percentage is hardly a circumstance that would
"warrant a man of reasonable caution" to take immediate steps to neu-
tralize the threat of danger which the Supreme Court deemed to be
a prerequisite to a valid weapons search.112

Predicating a pat-down or carry-on luggage search on a positive
magnetometer reading in combination with selection by the profile suf-
fers the same fatal flaw of insufficient grounds for suspicion. Nearly
50% of all passengers activate the magnetometer at boarding gates;113
even in combination with the profile this does not provide the security
official performing the search with the specific and articulable facts
needed for a reasonable suspicion of the individual subjected to the
search.114

The courts applying the protective search exception to airport
searches appear to have overlooked the very important requirement that
the suspect must pose an immediate threat to the safety of the police
officer or others in the nearby area. The security searches extend to
articles of the prospective passenger, accessible only after the individual
has boarded the plane.115 As there is very little danger that a poten-
tial hijacker, seeking anonymity in the crowd of the traveling public,
will make use of a weapon during the pre-boarding process, the airport
security searches are outside the scope of the protective weapons excep-
tion.

109. United States v. Davis, 482 F.2d 893, 905-06 (9th Cir. 1973); Searching for
Hijackers 404.
111. See text at supra note 36.
112. See Terry v. Ohio, 392 U.S. 1, 21 (1967). A similar compilation of char-
acteristics of the typical mugger or narcotics addict could be prepared, but to base
searches in high crime areas solely on such a profile would be patently unconstitutional.
McGinley and Downs 314.
113. See text at supra note 44.
114. See McGinley and Downs 314. But see Airport Security Searches 1054.
115. See United States v. Davis, 482 F.2d 893, 907 (9th Cir. 1973).
The author cannot agree with the *Lindsey* court that the hijacking problem dictates a lowering of the *Terry* standards. Such a ruling places in jeopardy the safeguards carefully included by the Supreme Court in *Terry* to insure that a watering down of the fourth amendment would not develop. The exception was designed for the protection of police officers doing field interrogation of suspected criminals; a lowering of standards for a valid airport search would probably give rise to a lowering of standards in the more common situation in which a police officer feels threatened—the street confrontation with a suspected criminal. To allow protective searches to extend to circumstances involving little reasonable suspicion of immediate harm is to invite police behavior specifically condemned by the fourth amendment—the searching of citizens without the prior approval of a neutral magistrate and based on a lesser standard than probable cause.

*The Administrative Search*

The administrative search exception is much more adaptable to the airport security searches than either of the exceptions previously examined. It is designed to allow an administrative agency to accomplish a purpose of high public utility, under a general regulatory scheme, in circumstances in which adherence to the warrant requirement of the fourth amendment would be impractical. The exception is based upon a series of United States Supreme Court cases outlining the standards of reasonableness to be applied to searches in these special situations.

*Camara v. Municipal Court*\(^\text{116}\) involved a warrantless inspection of a private residence by a housing inspector for possible violations of a municipal housing code. Justice White, announcing the opinion of the Court, took careful note of the importance of fire, health, and housing code inspections in large metropolitan areas, the long history of judicial and public acceptance of these inspections, and the relatively limited intrusion upon privacy involved in such an inspection which is neither personal in nature nor aimed at the discovery of evidence of criminal activity.\(^\text{117}\) A test of determining reasonableness was established by “balancing the need to search against the invasion which the search entails.”\(^\text{118}\) However, the public need in *Camara* was not held to be dispositive because the burden of procuring a search warrant

---

117. Id. at 534-37.
118. Id. at 537.
was not likely to frustrate the governmental purpose behind the search.\footnote{119}

The companion case to \textit{Camara, See v. City of Seattle},\footnote{120} involved a similar warrantless inspection of a commercial warehouse by a representative of the Seattle Fire Department. The Court recognized the need for these routine, periodic city-wide inspections for municipal ordinance violations, but again found the searches unconstitutional because the purpose of the regulatory scheme could be accomplished while adhering to the warrant requirement of the fourth amendment.\footnote{121}

In \textit{Wyman v. James},\footnote{122} conditioning the continuance of benefits under the Aid to Families with Dependent Children (AFDC) program upon the recipient's permission for a home visitation by a caseworker was found not to be an unreasonable invasion of privacy. Stressing the interview rather than investigative character of the home visit, the Court initially made the determination that it was not a search within the meaning of the fourth amendment.\footnote{123} But, the Court continued, even assuming that the visitation did fall within the protection of the fourth amendment, the intrusion upon the privacy of the welfare recipient was held not to be unreasonable. The high public interest in the protection of the dependent child, the concern of the administrative agency in knowing how its funds are utilized, the minimal burden upon the recipient, and the inadequacy of other means for obtaining the information desired made the home visitation by a caseworker a "reasonable administrative tool," serving a "valid and proper administrative purpose for the dispensation of the AFDC program."\footnote{124}

In \textit{United States v. Biswell},\footnote{125} the Supreme Court again applied the administrative search exception to uphold a warrantless government search. The storeroom of a federally licensed dealer of firearms was searched pursuant to an inspection procedure authorized by the Gun Control Act of 1968,\footnote{126} resulting in the seizure of two sawed-off rifles which the dealer was not licensed to possess. The inspection procedure was found to be a crucial part of the regulatory scheme necessary for the prevention of violent crimes,\footnote{127} and necessarily warrantless:

\begin{quote}
Here, if inspection is to be effective and serve as a credible
\end{quote}

\begin{footnotes}
\item[119]\textit{Id.} at 533.
\item[120] 387 U.S. 541 (1967).
\item[121] \textit{Id.} at 545.
\item[122] 400 U.S. 309 (1971).
\item[123] \textit{Id.} at 317.
\item[124] \textit{Id.} at 318-24, 326.
\item[125] 406 U.S. 311 (1972).
\end{footnotes}
deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.\textsuperscript{128}

Furthermore, when the defendant had chosen to accept the federal license to deal in firearms, he had done so with the knowledge that his business records and premises were subject to unannounced inspections.\textsuperscript{129} Thus, the dealer was not “left to wonder about the purposes of the inspector or the limits of his task.”\textsuperscript{130}

In \textit{Downing v. Kunzig},\textsuperscript{131} the Sixth Circuit applied the administrative exception to a security system very analogous to the airport security measures under discussion. In response to bombings of federal buildings and hundreds of bomb threats, the General Services Administration, having principal responsibility for the protection of federal property, in October, 1970, issued an order directing the immediate implementation of strict security measures. These included the denial of entrance to a federal building to anyone carrying a suspicious package unless he submitted to an examination of the package in question.\textsuperscript{132}

The court found the threat of violence and destruction to be real and substantial, and that the searches were conducted for the “strictly limited purpose of determining that no explosives or dangerous weapons were transported into the building.”\textsuperscript{133} As the procurement of a search warrant was impractical, the public interest in performing the searches was balanced against the intrusion of a brief stop and examination of suspicious packages upon the privacy of an individual desiring entrance into a federal building. The searches were found to be reasonable under the circumstances.\textsuperscript{134}

Two lower federal courts have utilized the administrative search exception to justify warrantless airport searches. The luggage search in the Honolulu airport considered in \textit{United States v. Schafer}\textsuperscript{135} was not made for the purpose of anti-hijacking security, but pursuant to

\begin{flushright}
\textsuperscript{128} Id. at 316. \\
\textsuperscript{129} Each licensee annually receives a revised list of ordinances that describe his duties and the inspectors’ authority to make the searches. 18 U.S.C. § 921(a)(19) (1968). \\
\textsuperscript{130} United States v. Biswell, 406 U.S. 311, 316 (1972). \\
\textsuperscript{131} 454 F.2d 1230 (6th Cir. 1972). \\
\textsuperscript{132} 40 U.S.C. §§ 318a and 318b (1948) vest the General Services Administration with the power to establish rules and regulations needed for the protection of federal property. \\
\textsuperscript{133} Downing v. Kunzig, 454 F.2d 1230, 1232 (6th Cir. 1972). \\
\textsuperscript{134} Id. at 1233. \\
\textsuperscript{135} 461 F.2d 856 (9th Cir. 1972). \\
\end{flushright}
a quarantine of the State of Hawaii imposed by the Secretary of the Agriculture\textsuperscript{136} to prevent the spread of certain plant diseases. Because of the inherent time delays involved, the requirement of procuring a warrant prior to the baggage search was found likely to frustrate the purpose of the inspections. "Unless all departing passengers could be detained while warrants could be obtained, the goods would be moved before the warrants could issue."\textsuperscript{137} The court held the security searches to be reasonable under the Camara ruling and emphasized the non-criminal investigative nature of the searches as well as the impossibility of any other means of achieving acceptable results.\textsuperscript{138}

\textit{United States v. Davis}\textsuperscript{139} involved the search of a prospective passenger's briefcase during the pre-boarding process in accordance with airport anti-hijacking security measures. The court found the administrative search exception an appropriate constitutional justification for a carry-on luggage search only if the passenger had retained the right to avoid the search by leaving the airport.\textsuperscript{140}

The author agrees with the \textit{Davis} court that the only exception to the warrant requirement applicable to the anti-hijacking security measures is the administrative search exception. The airport searches are conducted not for the purpose of criminal investigation, but as part of the general regulatory scheme for the deterrence of hijacking.\textsuperscript{141} This is an administrative purpose which will be frustrated by strict adherence to the warrant requirement due to time delays inherent in the procedure for obtaining a warrant. As there are no means available to accomplish the desired result other than indiscriminate searching of all passengers, the important public interest in the prevention of hijackings outweighs the intrusion upon the privacy of the prospective passenger if the search is carefully limited in scope to the purpose of the security measures—to deter persons from carrying weapons or explosives on board a commercial airliner.

To be reasonable and therefore constitutional, the airport searches must be limited to what is minimally necessary for the accomplishment of the deterrence of hijackers; any greater intrusion upon the privacy of prospective passengers cannot be justified by the administrative search exception.\textsuperscript{142} The next section of the article is devoted

\textsuperscript{136} The Secretary of the Agriculture was authorized to do so by 7 U.S.C. § 161 (1912).
\textsuperscript{137} United States v. Schafer, 461 F.2d 856, 858 (9th Cir. 1972).
\textsuperscript{138} \textit{Id.} at 859.
\textsuperscript{139} 482 F.2d 893 (9th Cir. 1973).
\textsuperscript{140} \textit{Id.} at 913.
\textsuperscript{141} \textit{Id.} at 908.
\textsuperscript{142} Cf. \textit{Camara} v. Municipal Court, 387 U.S. 523, 536 (1967); Downing v.
to a determination of the constitutional limitations on the anti-hijacking security systems used at airports.

CONSTITUTIONAL LIMITATIONS

The indiscriminate searching of all passengers, while necessary for the protection of the traveling public, raises the possibility of abuse by the security officials conducting the searches. Statistics concerning the arrests pursuant to the airport security searches during the period from January, 1971, to November, 1972, demonstrate how real this possibility is. Of the 3000 persons arrested, fewer than 20% were for offenses related to hijacking; nearly one-third were for drug possessory charges, one-third involved illegal entry offenses, and the remainder were for crimes ranging from parole violation to forgery.\textsuperscript{143} That anti-hijacking searches have at times been converted into general searches for the purpose of criminal investigation was admitted by the Director of Security for Pan American World Airways:

We've shaken down people—just by virtue of experience, say sky marshal or customs experience—we've shaken down any number of people that we've found thoroughly undesirable to have aboard an airplane but are not basically hijackers. Narcotics!—we're knocking off people day after day carrying the hard stuff.\textsuperscript{144}

To pass constitutional scrutiny, the airport searches must be strictly limited to that which is minimally necessary to deter hijackers. The good faith of the security official performing the search is not enough.\textsuperscript{145} The search must be limited to only those areas which might possibly conceal a weapon accessible to a hijacker aboard a plane when airborne. Any further investigation is beyond the scope of the administrative search exception to the warrant requirement.

Search of Checked Luggage

In \textit{Chimel v. California},\textsuperscript{146} the United States Supreme Court held that a lawful search incident to arrest cannot be made of objects outside the suspect's immediate control. The search incident to arrest exception to the warrant requirement was formulated to allow the arresting officer to remove any weapons which the arrestee might possibly

\textsuperscript{143} McGinley and Downs 306.
\textsuperscript{144} United States v. Davis, 482 F.2d 893, 909 n.43 (9th Cir. 1973), quoting J. Arey, \textit{The Sky Pirates} 242 (1972).
\textsuperscript{145} See Beck v. Ohio, 379 U.S. 89, 97 (1964); Terry v. Ohio, 392 U.S. 1, 21 (1967).
\textsuperscript{146} 395 U.S. 752 (1969).
use against the officer in an effort to escape and to prevent the arrestee from concealing or destroying possible evidence. The exception cannot justify any search beyond the suspect's immediate control—"the area from within which he might gain possession of a weapon or destructible evidence."\(^{147}\)

Similarly, there can be no justification under the administrative search exception for a search of checked luggage by airport security officers. The purpose of the airport searches is to prevent persons from carrying onto planes weapons or explosives which might be utilized to accomplish a hijacking. Checked luggage is inaccessible to passengers during the pre-boarding process and after the plane has taken off; any objects contained therein cannot possibly be utilized to effect a hijacking. One must conclude that the searches of checked luggage are performed only for criminal investigatory purposes, which is clearly beyond the scope of a permissible search in the absence of a warrant issued by a magistrate.

**Search of Persons Not Attempting to Board**

Persons not desiring entrance onto planes, but who are merely in the airport for other purposes, do not pose any threat of perpetrating a hijacking. An airport is not, as the Fifth Circuit has decided, a "critical zone where special fourth amendment considerations apply" for all persons located in the nearby area.\(^{148}\) Minimal security measures necessary to deter hijackers need not include searches of individuals who are not boarding planes, and who are therefore not in a position to commit a hijacking. Such warrantless searches cannot be justified by any of the exceptions to the warrant requirement and are violative of the fourth amendment.

**Election to Avoid the Search**

Conditioning boarding upon submission to a security inspection as part of a general regulatory scheme is justified by the administrative exigencies of preventing hijackings.\(^{149}\) However, if the anti-hijacking system is to involve only the minimal invasion of privacy necessary to accomplish its purpose, a passenger must be allowed, at any time dur-

\(^{147}\) *Id.* at 763.

\(^{148}\) *See* United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973); United States v. Legato, 480 F.2d 408, 411 (5th Cir. 1973); United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973).

\(^{149}\) This should be distinguished from a consent to search conditioned upon the exercise of the constitutional right to travel. *See* text at *supra* notes 74-77.
ing the pre-boarding process, to avoid the search by electing not to fly at that time. The individual who chooses not to board is in virtually the same position as anyone else in the airport not desiring access to a plane; as he does not pose an immediate threat of accomplishing a hijacking, he cannot be constitutionally searched without a properly obtained warrant.

This limitation has been criticized as transforming the airport security system into only a temporary obstacle to the individual who intends to commit a hijacking. However, if security measures are constantly maintained, the potential hijacker will again be thwarted should he attempt to carry weapons onto a plane at a later time. The risk of a hijacker's successfully passing through a security system in the future is relatively small compared to the additional intrusion which compulsory searches of all passengers involve.

The statistics concerning the number of arrests for other crimes and the attitude of security officials clearly demonstrate that the officers performing the security searches have been engaging in pretext searching, i.e., utilizing their power to search for possible hijacking weapons to discover evidence of other crimes. This is constitutionally impermissible and can be prevented if all passengers are aware of their right to avoid the search by electing not to fly. Signs posted throughout the airport warning of the possibility of a search if an individual attempts to board a commercial airliner do not adequately apprise a passenger of his rights and options under the airport security system. An information sheet handed to each passenger when purchasing his ticket or a verbal warning by the federal marshal prior to searching would insure that each individual who is searched has voluntarily submitted to the inspection process.

Manner of the Search Must Be Consistent with the Purpose

An airport search which only extends to areas which may possibly conceal a weapon or explosive may still be unconstitutional if the actions of the officer conducting the search are inconsistent with the only

151. United States v. Legato, 480 F.2d 408 (5th Cir. 1973).
152. United States v. Davis, 482 F.2d 893, 911 (9th Cir. 1973).
154. In United States v. Biswell, 406 U.S. 311 (1972), the Court emphasized that information sheets were mailed annually to the firearms dealers apprising them of the possibility of an inspection of their business premises. Thus the dealers were made aware of the purpose and limits of the searches performed.
legitimate purpose of the search: to detect and prevent the carriage aboard a plane of any weapons which a passenger may use to effect a hijacking.\textsuperscript{155} Too many of the courts have upheld airport searches with only a cursory examination of how the search was conducted. The Eighth Circuit refused to follow this trend in deciding United States v. Kroll.\textsuperscript{156}

*Kroll* concerned a search of an attache case which a passenger attempted to carry aboard a plane. The federal marshal stationed at the boarding gate had become suspicious when the passenger, after being directed to open the case for inspection, appeared hesitant about opening the file section in the upper portion of the attache case. For this reason, the marshal conducted an intensive search which included the emptying of the contents of an ordinary business envelope located in the file section. The envelope was found to contain a bag of amphetamines and a small quantity of marijuana.

The court found the marshal’s actions to be inconsistent with any legitimate purpose for the search. The envelope was too small to contain a weapon, and the emptying of the contents in an area crowded with people demonstrated that the marshal was not seriously searching for explosives. The court could only conclude that the marshal “was not searching for weapons of any kind that could be used to hijack the plane but was searching for contraband.”\textsuperscript{157} The actions of the marshal had transformed a search reasonable at its inception into an unreasonable invasion of the passenger’s privacy.

All airport searches should be subjected to the same careful scrutiny as the search in *Kroll*. A judicial rebuke for the security official who oversteps the bounds of a legal search is needed to discourage illegal pretext searches. The security searches required for the protection of the traveling public must be conducted in a manner consistent with the legitimate end of preventing hijackings in order to retain their reasonableness under the fourth amendment.

**CONCLUSION**

Air hijacking has only recently emerged as a threat to the safety of the American traveling public. In response to the wave of hijackings in the late 1960’s and early 1970’s, the FAA has implemented in airports across the nation an intensive security system designed to


\textsuperscript{156} 481 F.2d 884 (8th Cir. 1973).

\textsuperscript{157} Id. at 887.
detect and prevent the carriage aboard planes of any weapons or explosives which could be used to commit a hijacking. The security measures include the indiscriminate searching of all passengers and their baggage during the pre-boarding process, but due to the inherent time delay in the procurement of a search warrant issued by a magistrate, these searches are necessarily warrantless.

The administrative search exception to the warrant requirement of the fourth amendment provides the constitutional justification for the absence of search warrants. The FAA, under a general regulatory scheme which includes the searching of passengers, is attempting to accomplish a purpose of high public utility under circumstances in which the procurement of a warrant is impractical. Thus the searches are precisely of the type the administrative search exception is intended to validate.

However, for the searches to be reasonable by fourth amendment standards there must be as little government invasion upon privacy as is minimally necessary to prevent hijackings. In considering airport search cases, the courts have too often upheld the searches with only the slightest regard for the intrusiveness which the search involves. Many security officials have interpreted these rulings as a license to make general searches for evidence of all crimes.

Indiscriminate general searches by government agents are prohibited by the fourth amendment. To retain their reasonableness, airport searches must be strictly confined to only those areas where a weapon or explosive could be concealed and would be accessible to a hijacker after the plane is airborne. Furthermore, the federal marshals must conduct the searches in a manner consistent with the limited purpose of preventing the particular crime of hijacking. To exceed these limitations is to jeopardize the specific constitutional guarantee of freedom from unreasonable searches and seizures.

JAY M. MANN