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The Constitutionality of Airport Searches

It became clear in the late 1960's that the novel crime of airplane hijacking not only posed particularly grave dangers, but was also unusually difficult to prevent. An immediate and effective response was required. The current airport search system was developed to fill this need. Since it was instituted, the number of skyjackings has been greatly reduced,1 and most observers attribute this reduction to the effectiveness of the procedures.

However, airport searches, which are not presently done under the authority of a warrant, may present problems under the fourth amendment to the United States Constitution, which provides:

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.2

1. From 1961 through 1967, there were only seven air hijackings in the United States. In 1968, however, 18 American and 12 foreign airplanes were hijacked. In 1969, there were 40 hijacking attempts—of which 33 were successful—involving American airplanes and 46 attempts—of which 37 were successful—one foreign airplanes. Since 1969, the number of hijackings has decreased each year. In 1970, there were only 26 attempted hijackings—of which 18 were successful—in this country, and another 58 attempts—with 36 successes—in the rest of the world. In 1971, America suffered 27 attempted hijackings—with only 12 successful—and there were 32 attempts—with 11 successful—one foreign airplane. McGinley & Downs, Airport Searches and Seizures—A Reasonable Approach, 41 FORDHAM L. REV. 293, 294-95 (1972). In 1972, there were 21 attempted hijackings in this country—of which only 10 were successful—and there were 31 attempts—with 10 successes—in the rest of the world. As of November 1, there had been only 2 hijacking attempts in the United States in 1973, and only one of those succeeded. Telephone interview with Mr. David Hess, Information Specialist, News Division, FAA, November 27, 1973.

2. In interpreting the fourth amendment the Supreme Court has ruled that, generally, "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment." Katz v. United States, 389 U.S. 347, 357 (1967). In addition to the amendment's requirements of probable cause and particularity the warrant must be issued by "a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 14 (1948).
The number of cases contesting the constitutionality of airport searches has greatly increased during the past year, but the courts have often failed to give the questions presented the careful analysis that they deserve. To date, most decisions, citing “the overwhelming societal interest created by the imminent danger of passenger deaths,” have held that the searches do not violate the fourth amendment. A few courts, however, have maintained that established search and seizure law simply cannot be stretched far enough to approve these searches in their present form. This Note will discuss airport searches in comparison to several situations in which the courts have found that the requirements of the fourth amendment do not apply or are satisfied even in the absence of a warrant: border searches, administrative searches, stop-and-frisk searches, and searches under express or implied consent. None of these are perfectly analogous to the present airport procedures. Therefore, if airport searches are to be allowed, either the procedures must be modified to fit the established exceptions, or a new exception to the warrant requirement of the fourth amendment must be created.

Airplane hijacking became a major problem in 1968, when there were eighteen successful attempts, and 1969, when there were forty attempts, thirty-three of which were successful. In response to this new danger, the government took both regulatory and legislative action. In late 1968, a special Federal Aviation Administration (FAA)

3. In the federal courts, approximately 12 airport search cases were tried from 1969 through 1972. From January through June 1973, another 11 airport search decisions have been reported, and there are almost certainly others that have not yet been published.


6. See, e.g., United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (must show actual consent to search); United States v. Kroll, 481 F.2d 884 (8th Cir. 1973) (search may become unreasonable if its scope expands beyond what is reasonable considering its purposes); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973) (must show compelling circumstances to justify airport searches); United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972) (in order to prove consent must show defendant knew he could avoid the search by not boarding).

Many observers are particularly concerned that fewer than 20 per cent of the arrests resulting from airport searches have involved crimes related to hijacking. N.Y. Times, Nov. 2, 1971, at 1, col. 3 (late city ed.). Over one third of the arrests not related to hijacking were for possession of narcotics, approximately another one third involved aliens illegally in the United States, and the remainder were distributed among a wide variety of other offenses.


8. McGinley & Downs, supra note 1, at 295.
Task Force, in cooperation with the commercial carriers, developed and implemented the initial antihijacking system,\(^9\) and the government provided United States deputy marshals and customs agents to carry out the searches.\(^{10}\) In 1970, by special Presidential directive, the searches were extended to all "appropriate" airports.\(^{11}\) Participation in the search procedure had initially been voluntary on the part of the airlines, but on February 1, 1972, the FAA issued a rule that required airlines to screen all commercial passengers themselves.\(^{12}\)

Most of the cases that have been decided to date arose under these early guidelines. Although the original system varied in its application, it was essentially a series of increasingly intrusive and stringent screening procedures. In a typical search, airline personnel would first apply a Hijacker Profile, developed by a task force of representatives from several federal agencies,\(^{13}\) to all passengers as they checked in, and special markings would be put on the tickets of the "selectees."\(^{14}\) At the boarding gate, all passengers were required to walk through a magnetometer (metal detector); in some cases only the "selectees" were actually monitored.\(^{15}\) If a passenger triggered the device, airline personnel would ask for identification. If he failed to produce satisfactory identification, a marshal was summoned, who would repeat the request.\(^{16}\) The selectee would be asked if he were wearing or carrying any metal and would then be asked to pass through the magnetometer a second time.\(^{17}\) Only if he again triggered the device would he be asked to submit to a "voluntary" frisk.\(^{18}\) The passenger's hand baggage might also be searched.\(^{19}\) Each successive intrusion was conditioned on the passenger's failure to satisfy the

\(^{9}\) United States v. Davis, 482 F.2d 893, 898-99 (9th Cir. 1973); Hearings on Aircraft Hijacking Before the House Committee on Foreign Affairs, 91st Cong., 2d Sess. 80 (1970) [hereinafter Hearings].

\(^{10}\) Hearings, supra note 9, at 80, 92.


\(^{12}\) 37 Fed. Reg. 2500-01 (1972) (codified at 14 C.F.R. § 121.538 (1973)). The new rule required air carriers to adopt a screening system "acceptable" to the FAA. Such a system would require the screening of all airline passengers "by one or more of the following systems: behavioral profile, magnetometer, identification check, physical search." FAA Press Release No. 72-26, Feb. 6, 1972.

\(^{13}\) United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971). The details of the profile are secret, but the government has revealed that the characteristics are based on a detailed study of all known hijackers. The characteristics are ostensibly concerned with the behavioral patterns of embarking passengers, rather than with any racial or social traits. 328 F. Supp. at 1086-87.

\(^{14}\) McGinley & Downs, supra note 1, at 303-04.

\(^{15}\) United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973).


\(^{19}\) United States v. Slocum, 464 F.2d 1180, 1181 (3d Cir. 1972).
preceding check, and at each step the majority of the passengers were cleared for boarding without further search.\textsuperscript{20}

Hijacking attempts continued, although with reduced success,\textsuperscript{21} and the FAA decided that more rigorous searches were necessary. On December 5, 1972, it ordered airlines to subject all passengers to a magnetometer screening and a search of carry-on items, as well as to the Hijacker Profile. The airlines were to conduct these searches with their own personnel or with private security guards, but armed law enforcement officers were to be present at all times.\textsuperscript{22} This new procedure abolished the successive screening that was the basis of the original system. No passenger was considered cleared until he had passed through all three stages.

Before these procedures are evaluated in terms of the fourth amendment, it should be pointed out that two other constitutional problems may be raised in cases involving airport searches. First, when the validity of the profile is in question,\textsuperscript{23} the courts have used \textit{in camera} hearings to ensure its continued secrecy.\textsuperscript{24} The defendant and the public are excluded from these hearings, although the defendant's counsel is present. It has been alleged that this procedure denies the defendant his right to a public trial, his right to confront...
tion of the witnesses against him, and his right to the effective assistance of counsel, all of which are guaranteed by the sixth amendment. In determining if these rights have been unconstitutionally impaired, the courts look to the extent to which they have been infringed and the strength of the public interest involved in the activity called into question. The validity of the procedure has been upheld in airport search cases because of the "serious danger" that if "even one characteristic of the 'profile' [were] generally revealed, the system could be seriously undermined by hijackers fabricating an acceptable profile." In recent cases the scope of in camera proceedings in airport search cases has been strictly limited in order to avoid unnecessary infringement on the defendant's rights. The courts have emphasized the fact that the earlier cases were justified only by the need to keep the profile secret and have reversed convictions where the in camera portions of the hearings dealt with subjects unrelated to the profile.

A second constitutional objection that may be raised in relation to airport searches involves the right to travel. Although this right is not explicitly guaranteed by any provision of the Constitution, the Supreme Court has recognized that it is fundamental. In response to the charge that the right to travel is unconstitutionally infringed by the airport search system, it might first be argued that the search system does not burden travel unreasonably. This is not to say that travel must be completely prohibited before the right is infringed; the Court has stated that mere penalization is sufficient to make an infringement unconstitutional. For instance, the denial of welfare benefits to those who have not lived in a state for a year, and the


denial of the right to register to vote to those who have not resided in the state for one year and in the county for three months, have both been found to be impermissible burdens on the right to travel. It is unlikely, however, that the courts will find that the “minor . . . indignity incident to an airport search” is a similarly unreasonable burden. The intrusion caused by the use of the magnetometer is “quite minimal,” as is that caused by the use of the profile, and “the inconvenience of a pat-down is so minor” that, as one court has suggested, the procedures are not “a resented intrusion on privacy, but, instead, a welcome reassurance of safety.” Moreover, for those who find the airport search overly objectionable, other means of transportation are available.

Even if the right to travel is found to be burdened, it would be argued that the infringement is constitutional in that it is justified by a compelling state interest. In a case involving the right to travel outside the country, the Court analogized to the protected freedom to travel within the United States and pointed out that the right to travel “does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.” The airport searches constitute a smaller imposition on the traveling public than .

38. United States v. Epperson, 454 F.2nd 769, 772 (4th Cir. 1971), cert. denied, 406 U.S. 947 (1972). Some courts have viewed the search procedures differently. “[T]he intrusion which the airport search imposes on the public is not insubstantial. It is inconvenient and annoying, in some cases it may be embarrassing, and at times it can be incriminating.” United States v. Skipwith, No. 72-1932, slip op. at 6 (5th Cir., June 14, 1973). The Skipwith court did ultimately conclude that the searches were justifiable.

39. “There is no inherent right to travel to a certain place in a particular aircraft.” United States v. Fern, No. 72-1284, slip op. at 7 (7th Cir., Sept. 29, 1973) (Gordon, J., dissenting). It can be argued that Judge Gordon overstates the law. Some commentators view the right to travel as a right of personal mobility. See, e.g., Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 188-93 (1956). To the extent that airport searches deter people from using airplanes, they would seem to restrict an individual’s mobility.

40. See Dunn v. Blumstein, 405 U.S. 335, 353-42 (1972). The first Supreme Court case that strictly scrutinized governmental action and found it justified by a finding of a compelling interest was Korematsu v. United States, 323 U.S. 214 (1944). In that case, national security provided a compelling federal interest. Recently, in Roe v. Wade, 410 U.S. 113, 163-64 (1973), the Court explicitly found that the state has a compelling interest in the life of a mother after three months of pregnancy and in the fetus after it attains viability. Dicta in another recent case, In re Griffiths, 41 U.S.L.W. 5143, 5145 (U.S., June 25, 1973), suggests that a state may have a compelling interest in maintaining the high standards of its legal profession.

does an absolute quarantine, and they do serve similar interests in
that they protect the welfare and safety of American citizens. The
possible loss of life and property, especially when measured against
the minor inconvenience of airport searches, seem sufficient to consti­
tute a compelling governmental interest in conducting airport
searches. As one court concluded: “Any suggestion that the defend­
ant's constitutional right to travel has been improperly interfered
with would be amusing in other circumstances. We are trying to
assure that right for the public and the resulting inconvenience for
the few should at least be tolerable.”

The objections raised under the sixth amendment and the right
to travel have not been considered seriously by the courts, but have
been dismissed rather perfunctorily. A much more difficult problem
is posed by the prohibitions of the fourth amendment. The prelim­
nary question is whether the fourth amendment applies to airport
searches, which are typically conducted by private employees in a
public place and do not involve an intrusion into the office or home
of the person searched. In many respects the Court's interpretation
of the fourth amendment's protection against unreasonable searches
and seizures is unclear. There is general agreement, however, that
its fundamental purpose is "to safeguard the privacy and security
of individuals against arbitrary invasions by governmental officials."
Early interpretations emphasized that the amendment prohibited
governmental intrusions into "the sanctity of a man's home and
privacies of life." Over the years, however, the interpretation has
been expanded. The Supreme Court has now concluded that the
amendment "protects people, not places" and rejected the idea that

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42. United States v. Bell, 464 F.2d 667, 674 (2d Cir.), cert. denied, 409 U.S. 991 (1972). It must be remembered that the right to travel is an individual right. However, in light of the potential loss of life and property that airport searches prevent, there is ample governmental interest in conducting airport searches.


44. Even the Supreme Court admitted in one recent fourth amendment case that "[o]f course, it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent." Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971).


46. Boyd v. United States, 116 U.S. 616, 630 (1886). The Court has stated that the essence of the offense against the fourth amendment

[is not the breaking of his doors, and the rummaging of his drawers ... but it is the invasion of his indefeasible right of personal security, personal liberty, and private property .... Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Boyd v. United States, 116 U.S. 616, 630 (1886).

a "search" is limited to physical intrusions into the area to be searched. The Court has also recognized that the fourth amendment may protect an individual's justifiable expectations of privacy even in an area accessible to the public.

The frisks and the inspection of hand baggage are clearly covered by the term "search" as defined for fourth amendment purposes. There may still be a question as to whether the term is appropriately applied to the use of the profile and the magnetometer alone. It is difficult to argue that the use of the hijacker profile constitutes a search in and of itself, since it involves no physical intrusion. Similarly, although the magnetometer detects the presence of metal on or about the passenger's body, there is no physical contact with the passenger. However, several cases have now held that the use of the magnetometer alone does constitute a search within the meaning of the fourth amendment. In nonairport-search cases the courts have accepted the idea that electronic eavesdropping with no physical intrusion may constitute a search where the individual has a reasonable expectation of privacy; the use of the magnetometer is a similar electronic surveillance. However, since the use of the magnetometer is less intrusive than more traditional searches, the courts have found that its use may be justified on less stringent grounds.

Nor should the fact that private persons may be involved in conducting airport searches exempt the searches from fourth amendment coverage. It is true that the amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than government agencies." When federal agents are directly involved, even if the search is conducted jointly with airline per-

50. United States v. Slocum, 464 F.2d 1180, 1183 (3d Cir. 1972). One cause for concern, however, is that the too-ready acceptance of the use of the profile might, if carried to its logical extreme, serve as a precedent to justify using statistical methods to predict who might commit a crime, so that such individuals could be arrested in advance and preventively detained. See United States v. Lopez, 328 F. Supp. 1077, 1109 (E.D.N.Y. 1971). See also United States v. Bell, 464 F.2d 667, 676 (2d Cir.), cert. denied, 409 U.S. 991 (1972) (Mansfield, J., concurring).
55. Burdeau v. McDowell, 256 U.S. 465 (1921). These now include not only federal, but also state governmental agencies, because the fourth amendment has been incorporated into the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).
sonnel or private security guards, the courts will clearly regard it as involving state action,\(^56\) and when the government's involvement in a particular search is merely "peripheral" that also should be sufficient to qualify it as a government search for the purposes of the fourth amendment,\(^57\) for the search procedures were not only developed

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\(^{56}\) Corngold v. United States, 267 F.2d 1 (9th Cir. 1966).

\(^{57}\) United States v. Guest, 385 U.S. 745, 755-56 (1966). The existence of governmental action has been extensively discussed in cases involving airline freight or package service. See, e.g., Clayton v. United States, 413 F.2d 297 (9th Cir. 1969), cert. denied, 395 U.S. 911 (1970); Gold v. United States, 378 F.2d 588 (9th Cir. 1967); United States v. Blum, 329 F.2d 49 (2d Cir.), cert. denied, 377 U.S. 933 (1964); United States v. Thoreson, 281 F. Supp. 598 (N.D. Cal. 1967), rev'd. on other grounds, 428 F.2d 651 (9th Cir. 1970). These cases may be read to suggest that federal agents must actively instigate, initiate, or participate in a particular search in order for it to be governed by the fourth amendment. However, they can be distinguished from the antihijacking passenger search situation because they all involved searches of freight or of packages shipped with common carriers who had explicitly reserved the right to inspect anything that they transported.

Two cases have found that no government action was involved in airport searches. In United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), the court simply asserted that

[a]irport "search" cases hardly invoke Fourth Amendment standards. The context is not basically a citizen-to-government context, and invocation of the Fourth Amendment appears as an almost gratuitous consequence of the presence in the background of governmental air safety regulation and of the governmental provision at airports of peace officers to apprehend people found actually committing or attempting crimes. The real problem is to assure the safe transit of private persons on privately owned aircraft.

352 F. Supp. at 42. No judicial or statutory support is offered for this analysis.

A second case, United States v. Wilkerson, 478 F.2d 813 (8th Cir. 1978), offers a more sophisticated statement of this position. In that case, a young woman purchased a ticket in San Diego to travel on a flight to St. Louis. She checked two bags and then asked directions to the restroom. After the plane had left the loading gate, officials discovered that she had never boarded. Since airline regulations require that a passenger accompany his checked baggage and since the woman had partially fit the hijacker profile, the plane was recalled, and the two bags were searched by airline employees; plastic bags containing vegetable matter were discovered. Police officers were called in, and it was ascertained that the bags contained marijuana. The luggage was shipped to St. Louis, and defendant was arrested there when he picked them up. In this case, the court relied on two other cases that it had recently decided and asserted that "[t]hese two cases stand for the proposition that searches of luggage by airline employees are private searches that are invulnerable to fourth amendment attack so long as the searches are conducted by the carrier for its own purpose and without the instigation or participation of government officers." 478 F.2d at 815, citing United States v. Echols, 477 F.2d 37 (8th Cir. 1972), cert. denied, 42 U.S.L.W. 3195 (U.S., Oct. 9, 1973), and United States v. Burton, 475 F.2d 469 (8th Cir. 1972).

It is not clear that the search in Wilkerson was conducted solely "by the carrier for its own purpose." Judge Heaney, concurring on the ground that there was probable cause for the search, pointed out:

As of March 9, 1972, each airline was required to adopt a security program with respect to checked baggage . . . . These regulations which were in effect when this search was made but not when the Echols and Burton searches were made remove any doubt as to the government's involvement in this search. Even though the search here was conducted by airline personnel, it was carried out at the instigation and direction of the government . . . .

478 F.2d at 816-17. In addition, both Echols and Burton are distinguishable on their facts. In Echols, an airline employee, acting pursuant to airline regulations, opened an unclaimed suitcase, solely for the purpose of identifying the owner. In Burton, an airline ticket agent became suspicious because the defendant fit the hijacker profile.
and implemented with government assistance, but are also required by FAA regulation.\textsuperscript{58}

Once it is determined that the airport searches are subject to the fourth amendment, the court must determine if they are permissible within the terms of the amendment. The general rule in this area is "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."\textsuperscript{59} Searches that fall within the exceptions must still be reasonable, although they are not subject to the requirement that a warrant be procured upon a showing of probable cause.\textsuperscript{60} There are, of course, no warrants involved in airport antihijacking searches as the system now exists; the nature of the procedure is such that there is no time in which to procure them. Further, even if there were time, in most situations the airport officials could not meet the level of probable cause required for a normal search warrant, since the only evidence available before the magnetometer is employed would be the fact that the passengers had met the profile. This fact in itself is not "sufficient . . . to warrant a man of reasonable caution to believe that an offense . . . is being committed,"\textsuperscript{61} for fewer than one in fifteen of those selected by the profile have proved to be carrying weapons.\textsuperscript{62}

Many of the existing exceptions to the warrant requirement clearly have no relevance to airport searches. For instance, a search incident to a lawful arrest is constitutional without a warrant, provided that it is limited to the arrestee's person and the area within his immediate control.\textsuperscript{63} However, an airport search typically involves no arrest at all. If an arrest does take place it is preceded by and caused by the search, a relationship that is insufficient to justify the search as "incident to a lawful arrest."\textsuperscript{64} It could be argued that the antihijacking search itself constitutes a temporary arrest, especially when it includes a search of hand-baggage or a frisk. No court has ruled on the point, but the search would not appear to meet the common standards for arrest, which require that the detention be "performed with the intention to effect an arrest, and [be] so understood by the person detained."\textsuperscript{65}

\textsuperscript{58} See text accompanying notes 9-12 \& 22 \textit{supra}.
\textsuperscript{59} Katz v. United States, 389 U.S. 347, 357 (1967).
\textsuperscript{60} Elkins v. United States, 364 U.S. 206, 222 (1960).
\textsuperscript{64} Sibron v. New York, 392 U.S. 40, 62-63 (1968).
\textsuperscript{65} Jenkins v. United States, 161 F.2d 99, 101 (10th Cir. 1947).
Other exceptions to the warrant requirement that were made for certain exigent circumstances seem similarly inapplicable. For instance, no visible offense that might justify a search is being committed in the presence of a police officer. Nor can airport searches be justified as incident to the "hot pursuit" of a fleeing felon. There is no danger that necessary evidence will be destroyed before a warrant can be procured. Nor can airport searches be assimilated into the exception for inventory searches, which are conducted by the police after an arrest in order to account for the suspect's belongings.

There are four other situations in which a warrantless search may be allowed, all of which have been suggested as possible grounds for approving the present airport search system.

I

Border searches, which are typically conducted without a warrant, do not constitute an exception to the warrant requirement of the fourth amendment; they have never been viewed as subject to the limits of the fourth amendment at all. Since 1789, customs officials have been authorized by statute to search, without a warrant or a specific demonstration of probable cause, anyone entering the United States. The Court has reasoned that, since the authorizing statute was passed by the same Congress that proposed the Bill of Rights for ratification by the states, border searches were never intended to be included within the prohibition of the amendment. In Witt v. United States, the ninth circuit, following this reasoning, held that there was reasonable and probable cause to search every person entering the United States by reason of that entry alone. In a later case, the same court found that a border search need not be based on probable cause; "unsupported" or "mere" suspicion was found sufficient.

The rationale of the border search cases is not directly applicable

72. 287 F.2d 389 (9th Cir. 1961).
to antihijacking searches, for the border search procedures are used to search people before they enter the United States; they could not be used to screen people who board planes within the United States and who do not intend to cross any national borders. However, on a policy level, there are many similarities between airport searches and border searches. The special standards applied to border searches are "based on policy considerations which recognize the difficult problems of effectively policing . . . national boundaries" and the overriding public interest in preventing contraband and illegal aliens from entering the country. The marshals that assist in airport searches probably incur even greater policing problems with regard to time and urgency than do customs officials, and the public interest in stopping air piracy is certainly as compelling as that in protecting the borders.

In a recent line of cases, the fifth circuit has upheld airport searches by analogizing to border searches. Initially, in a case involving the search of a person who had not yet reached the boarding area, the court merely mentioned that the gravity of the danger in the two situations was analogous. More recently, the court explicitly accepted border search standards as appropriate to airport searches when the person searched has actually presented himself for boarding; in United States v. Skipwith, the court held that "the standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations."
The court weighed three factors in determining whether a standard less strict than the usual requirement that probable cause be demonstrated was appropriate. First, it noted that the public need to prevent air piracy is "judicially-recognized." Second, it indicated that the procedures appear to be "the most efficacious that could be used." Third, the court insisted that the degree of intrusion into the privacy of the person made by airport and border searches was far less offensive than that made by similar searches in other contexts, although it still represented a not insubstantial burden on the traveling public. The court pointed out that there is no social or moral stigma attached to a search at a boarding gate and that the individuals searched have entered the search area voluntarily and with knowledge that they would be searched. The court also argued that the public and supervised nature of airport searches and the desire of the airline companies to avoid harassment of and inconvenience to their passengers further minimize the possibility of abuse. The *Skipwith* court concluded that it is reasonable to allow searches of "those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country," on the basis of "mere or unsupported suspicion."

*Skipwith* overlooks the fact that, although the analogy between border and airport searches may be close and the policy considerations quite similar, the border search doctrine was originally based on specific legislation that indicated that the framers of the fourth amendment did not intend to require a warrant for such searches. The exception was not simply established by judicial fiat. Moreover, the Constitution restricts the ability of government to limit interstate travel, which is involved in most airport searches, while it does permit extensive regulation of travel into or out of the country, which is involved in border searches. *Almeida-Sanchez v. United States*.

79. No. 72-1932, slip op. at 6.
80. No. 72-1932, slip op. at 6.
81. No. 72-1932, slip op. at 6-7. The court stressed that the search was not "extraordinary or unexpected" because "Skipwith came to the specific part of the airport where he knew or should have known all citizens were subject to being searched." No. 72-1932, slip op. at 4.
82. No. 72-1932, slip op. at 8.
84. The power of Congress to deal with foreign affairs, which is inherent in the sovereignty of the United States, supports the many immigration laws that regulate the entry, sojourn, and departure of aliens. See Galvan v. Press, 347 U.S. 522, 530 (1954); The Chinese Exclusion Case, 130 U.S. 581 (1889); L. Henkin, Foreign Affairs and the Constitution 74-75 (1972).
85. The right of Congress to regulate travel out of the country by passing a statute that makes it illegal for a United States citizen to leave the country without a valid passport is also rooted in the power of Congress to enact legislation to regulate foreign affairs. See Worthy v. United States, 328 F.2d 386, 393 (5th Cir. 1964).
States, a 1973 Supreme Court decision regarding border searches, stresses the strict limitations of the original exception and refuses to extend them. It is unlikely that many lower courts will, so soon after the Supreme Court's admonition, follow Skipwith in extending the relaxed border search standards to airport searches.

Congress may be willing to pass legislation—similar to that authorizing reduced standards for border searches—that expressly exempts airport searches from the requirements of procuring a warrant or demonstrating probable cause. Such legislation would not have the presumption of validity contained in the original border search law because it would not have been adopted contemporaneously with the fourth amendment. As a result, any legislation is likely to be no more than a futile attempt to modify a constitutional prohibition by statute.

II

In certain situations that are admittedly subject to the fourth amendment the Court has carved out exceptions to the warrant requirement upon a showing that a compelling governmental interest exists and that a warrant cannot be obtained without frustrating the purpose of the search. However, the Court has "specifically established' and '. . . jealously and carefully drawn'" the purpose and scope of each exception. The facts in each case must be carefully scrutinized to determine whether they are sufficiently similar to the facts upon which the Supreme Court focused in authorizing the original exception.

Administrative searches, such as fire, health, and safety inspections, used to be considered to be a general exception to the warrant requirement. In the 1967 case of Camara v. Municipal Court, however, the Supreme Court considerably limited the right of government officials to conduct administrative searches without a warrant. In that case the Court, for the first time, expressly used a

89. 387 U.S. 523 (1967).
90. The appellant had refused to allow city building inspectors to enter his apartment without a warrant. As a result, the city brought criminal charges against him for violating the housing code by refusing to permit a legitimate inspection. While awaiting trial, he petitioned for a writ of prohibition, arguing that the ordinance authorizing warrantless inspections was unconstitutional on its face as a violation of the fourth and fourteenth amendments. In its decision the Supreme Court specifically overruled Frank v. Maryland and ruled that under the facts as alleged petitioner's writ should be granted. The Court held that under the fourth amendment defendant had a constitutional right to insist that the inspectors procure a search warrant.
balance-of-interests analysis to decide a fourth amendment question. Weighing governmental necessity against the citizen's right to privacy, the Court held that a lessee could insist that a warrant be produced for an inspection of his apartment, even though the inspection was conducted for a legitimate governmental purpose. However, the probable cause standard that would make such a search "reasonable" was "reduced" from that used in the ordinary criminal case: The court would be allowed to consider the general condition of the neighborhood, rather than merely the condition of the particular building, in determining if probable cause to search exists. Furthermore, the Court indicated that in emergency situations, where the government interest is sufficiently urgent or the delay occasioned by obtaining the warrant would frustrate the proper purpose of the search, a warrantless administrative search would still be permissible.

In three recent cases, the Court indicated certain factors that might lead it, despite the Camara rule, to approve an administrative search in the absence of a warrant. In Colonnade Catering Corp. v. United States, the Court found that, in an industry that, like the liquor industry, has a long history of federal regulation, Congress has broad powers to "fashion standards of reasonableness" with regard to searches. In Colonnade, however, Congress had made the imposition of a fine the exclusive sanction for refusal to permit entry for inspection and did not authorize forcible entry without a warrant. In United States v. Biswell, the premises searched without a warrant were the storeroom of a licensed gun dealer. In upholding the search, the Court found that, although "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, . . . close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." It also noted that the intrusion on the individual's privacy was not objectionable, for the dealer had chosen to enter the business with knowledge of the mandatory inspection procedures.

91. 387 U.S. at 538-39. For a perceptive analysis of the halting development of this interests-balancing approach, see Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and Terry, 61 Calif. L. Rev. 1011 (1973). Greenberg argues that the balancing test approach introduced in Camara and Terry has great potential for resolving difficult fourth amendment questions, but he points out that the Supreme Court has failed to use it since those two cases.

93. 397 U.S. at 77.
95. 406 U.S. at 315.
96. 406 U.S. at 316.
In *Wyman v. James*, the plaintiff, a former recipient of Aid-to-Families-with-Dependent-Children payments, contested a state law that conditioned the receipt of future benefits on the recipient's consent to periodic home visits by caseworkers. The question of the validity of the visits was not raised directly, for when plaintiff refused to allow them, no forcible entry was made; instead, her welfare benefits were terminated. The Court held that the home visits were not "searches" within the meaning of the fourth amendment, but were merely of an interview nature. However, it also concluded that the visits would not be proscribed by the fourth amendment as "unreasonable" even if they were "searches." The warrant requirement was found inappropriate, for it "necessarily would imply conduct either criminal or out of compliance with an asserted governing standard." In determining whether the visit in question was reasonable under fourth amendment standards the Court considered the purpose of the visit (which was not to get criminal information, but to ensure that the government's objective of benefiting the child was being served), the efficacy of alternative means of accomplishing that purpose, the degree of intrusion on the homeowner's rights, and the widespread use of the practice in other states.

A few recent decisions have upheld the constitutionality of airport searches on the basis of administrative search standards, pointing out that both are conducted as part of general regulatory schemes in furtherance of legitimate administrative purposes. However, the analogy does not appear to be appropriate. If the *Camara* rule were to be applied, the present airport search system would not meet its standards. No provision is presently made to obtain a warrant if one is demanded, and the delay occasioned by obtaining a warrant would effectively frustrate the purpose of the search, which is to promote the smooth and uninterrupted progress of safe air travel. If a warrant is sought, even the *Camara* standard of "reduced" probable cause will not be met. In the current inspection system, all passengers are searched by magnetometer; no evidence is produced that would indicate that violations of the law might exist in the "area" or group searched. If the profile were still used as a screening device, it might meet the *Camara* standard, but even under the original airport search system the profile was not used to support the issuing of a warrant. Nor do the airport searches fall within the exceptions to the *Camara* rule suggested by the later cases. The relaxed requirements

98. 400 U.S. at 317-18.
99. 400 U.S. at 318.
100. 400 U.S. at 324.
102. See, e.g., United States v. Davis, 482 F.2d 892, 903-12 (9th Cir. 1973).
of all three post-Camara cases discussed above were specifically outlined in statutes. The airport system, in contrast, is required, not by legislation, but by regulations promulgated by a federal agency. Moreover, Colonnade and Biswell involve the inspection of businesses with a long history of government regulation. The aviation industry has been regulated almost since its inception, but the individual whose privacy is invaded by the search is not the regulated businessman, as in Colonnade and Biswell, but merely a passenger, who has not chosen "to engage in [a] pervasively regulated business . . . with the knowledge that [he] will be subject to effective inspection."\footnote{103} The airport searches are not similar to the welfare visits in Wyman, for the former are primarily intended to gather information relating to criminal activity and are thus more likely to lead to criminal prosecution than are the welfare visits. Also, the scope of the airport search extends to the individual's person and in this respect is more intrusive than an inspection of a room or a dwelling.

It could be suggested that airport searches fit into the exception for emergency situations left open in Camara. The system now in use cannot be so justified, however, for it is part of an ongoing regulatory process and is not limited to emergency circumstances.

III

Most of the cases\footnote{104} that have upheld the airport search procedures have relied on a broad interpretation of the "stop-and-frisk" doctrine enunciated in Terry v. Ohio.\footnote{105} Terry dealt with the admissibility of evidence found in the course of a stop and frisk rather than with the validity of the search itself, but, as the Court said, "A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence."\footnote{106}

\footnotetext[103]{United States v. Biswell, 406 U.S. 311, 316 (1972).}


\footnotetext[105]{392 U.S. at 1.}

\footnotetext[106]{392 U.S. 1 (1968). In Terry, an experienced police officer observed Terry and one of his codefendants walking up and down a street, peering intently into one particular store window, and then meeting to talk at a street corner where they were joined by the other defendant. The officer suspected that they were planning a robbery and thought that they might be armed; he approached the three men, identified himself as a police officer, and asked for their names. They "mumbled something," and the officer grabbed Terry, spun him around, and patted down his clothing. He felt a bulge in the coat pocket, which proved to be a pistol. Terry was charged with carrying a concealed weapon, and at trial he moved to suppress the gun as evidence discovered incident to an illegal search. The trial court denied Terry's motion and found him guilty. That decision was sustained by an Ohio intermediate court, the Ohio supreme court, and the United States Supreme Court.

\footnote{106}
The Court found that an investigatory stop and a limited frisk (patting down the outer clothing of a person for weapons) is justified when a police officer "has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." 107 The Court stressed that no frisk could be justified on the basis of mere "inaarticulate hunches" 108 and that the searching officer would have "to point to specific and articulable facts which, taken together with rational inferences from those facts [would] reasonably warrant [the] intrusion." 109 In determining that the "reasonableness" requirement had been satisfied, the Court used a balancing test as it had in evaluating the degree of probable cause required in Camara. The Terry Court admitted that even a frisk constituted a serious invasion of personal privacy, 110 but it felt that the search was justified in the circumstances by the interest of the individual policeman in protecting himself and others from imminent harm. 111

In Adams v. Williams, 112 the latest stop-and-frisk case, the Court has apparently relaxed the requirement that "specific and articulable facts" be shown. Approving a stop and frisk that was conducted entirely on the basis of a tip from an unidentified informant known to the officer, 113 the Court said that the officer had "ample reason to fear for his safety" because the investigation occurred in a high crime area in the early morning when the officer was alone on patrol. 114

The first case that extended the stop-and-frisk doctrine to airport searches was United States v. Lindsey. 115 Although the search in question occurred in an airport and was carried out by a special air marshal, neither the profile nor the magnetometer was used. Rather, defendant was questioned because his nervous and unusual behavior in the boarding lounge aroused the suspicions of the marshal and the ticket clerk. 116 The court held that, although "the level of sus-

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107. 392 U.S. at 27.
108. 392 U.S. at 22.
110. 392 U.S. at 24-25.
111. 392 U.S. at 24-27. In Sibron v. New York, 392 U.S. 40 (1968), a companion case to Terry, the Court underscored the limited nature of the stop-and-frisk exception to the warrant requirement. The circumstances in that case were very similar to those in Terry, but the Court held the contraband seized inadmissible because the search was clearly motivated by the officer's desire to discover drugs, rather than by his need for self-protection.
113. 407 U.S. at 144-45.
116. The defendant gave a different name than that which appeared on his ticket. When the marshal asked him for identification, he produced two cards, in two other names. The marshal observed bulges in the defendant's coat pockets and, fearing
Piccion in the instant case is lower than in *Terry*, it was sufficiently high to justify the limited, protective, pat-down search in view of the possible danger of a airline hijacking and the limited time in which the marshal had to act. These circumstances would seem to meet the requirement of “specific and articulable facts.”

*United States v. Lopez* was the first case to hold that the use of the profile and the magnetometer to justify the frisking of a passenger is constitutional under the *Terry* rationale. The court stressed the effectiveness of the search procedures, the compelling interest of the government in preventing hijackings, and the fact that the *Terry* rule allows an officer to perform a frisk “in the belief that his safety or that of others [is] in danger.” Although the marshal in this case may not have been in any danger himself if the defendant had been allowed to board, he was presumably performing the frisk with the intention of protecting the other passengers. The court pointed out that “the probability that any person who is selected to be frisked has a weapon is approximately 6%,” a proportion that it concluded was sufficient to justify the frisk in the context of the great danger of hijacking.

*Lopez* expressly did not discuss whether “the use of the magnetometer might be an objectionable intrusion were it not accompanied by an antecedent warning from the profile indicating a need to focus particular attention on the subject.” This question was answered in *United States v. Epperson*, where the defendant was frisked solely because he activated the magnetometer. The fourth 451 F.2d at 702-03.

117. 451 F.2d at 703.

118. 328 F. Supp. 1077 (E.D.N.Y. 1971). After the defendant was selected by airline employees as one who fit the hijacker profile, had activated the magnetometer as he passed through it, and had failed to produce identification upon request, federal marshals were summoned. When defendant again activated the magnetometer, again failed to produce any identification, and admitted that the name on his ticket was erroneous, the marshal frisked him for weapons. The marshal felt a hard bulge, large enough to be a pistol. It proved to be an envelope tightly packed with heroin. Lopez was arrested and charged with concealing and transporting narcotics. 328 F. Supp. at 1081-82. The court found that the antihijacking search system used was highly effective and held that it was not unconstitutional. However, they found that, in this particular instance, an airline official had, without authority, issued an order modifying the profile by adding an ethnic element for which there was no experimental basis. Since the defendant might have been selected by this altered profile, the court held that his constitutional rights had been violated. They therefore granted his motion to suppress and dismissed the indictment against him. 328 F. Supp. at 1101-02. See discussion in note 24 supra.


120. 328 F. Supp. at 1097.

121. 328 F. Supp. at 1097.

122. 328 F. Supp. at 1106.

123. 454 F.2d 769 (4th Cir.), cert. denied, 466 U.S. 947 (1972).
circuit held that the use of a magnetometer did constitute a "search" under the fourth amendment, but that, under the *Terry* doctrine, the search was reasonable. It suggested that the warrant requirement was set aside in *Terry* because of the limited scope and purpose of the search, the element of danger, and the necessity for swift action; the court found this case similar in that "[t]he danger is so well-known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances." 124

In his concurring opinion in *United States v. Bell*, 125 Judge Friendly of the second circuit court of appeals relied on *Terry* and suggested that the great danger from hijacking would in itself justify as reasonable not only the use of the magnetometer, but also more intrusive searches:

I would not wish us to be understood as implying that searches of airplane passengers are lawful only . . . where a person first meets a "profile," . . . and then activates a magnetometer . . .

. . . When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking . . . and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air. 126

This view has not as yet found wide acceptance; Judge Mansfield concurred separately for the express purpose of disagreeing with Judge Friendly's position:

I do not share the view that [airplane hijacking] justifies a broad and intensive search of all passengers, measured only by the good faith of those conducting the search, regardless of the absence of grounds for suspecting that the passengers searched are potential hijackers.

. . . [T]he ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike. 127

The district court in *United States v. Mitchell* 128 drew from Judge Friendly's concurrence authority for its conclusion that the fourth amendment was not applicable to airport searches absent a showing that the search in question was motivated by a governmental interest in detecting crime, rather than a private interest in airplane safety. The court said that

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124. 454 F.2d at 771.
126. 464 F.2d at 674-75.
127. 464 F.2d at 675-76.
the profile and magnetometer checks are not circumstances sub­stituting for probable cause authorizing a Fourth Amendment search for evidence of criminality or for contraband but rather are coarse­screening devices adopted as a convenient substitute for total search of all passengers, flight personnel and baggage . . . . Those not cleared for boarding are searched not as under positive suspicion or as indicated by probable cause but simply because they are the only ones of all those originally and still notionally subject to search who have not been cleared for boarding through an unobtrusive but real conceptual pat-down.129

The Terry rationale may have been appropriate in the early cases that involved the original multilevel screening process, for that system provided some, albeit a low, level of reasonable suspicion to justify each successive search.130 Although the profile itself is not intrusive enough to be a search, it may provide reasonable suspicion to justify the use of the magnetometer, which is a search; the magnetometer, in turn, may justify any frisk deemed necessary. This analysis, first advanced in Lopez, accepts an extremely low level of "reasonable suspicion" by the Terry standard, which required "specific and articulable facts," but it may be justified by the particularly compelling government interest involved.

A different question is presented by a case, like Epperson, that arises under the new search procedures, for under these procedures the initial screening by magnetometer is itself a search, yet is not supported by reasonable suspicion.131 Epperson found the search reasonable on the grounds that the government interest involved is compelling and the personal intrusion slight; it claimed that this rationale was merely an extension of Terry. However, it must be pointed out once more that an essential requirement in Terry was that the officer possess a reasonable suspicion, based on specific facts, that the person searched is armed and presently dangerous. Magnetometer searches do not meet this requirement; they are applied indiscriminately to all passengers. The newest procedures go even further, for they also require that the hand baggage of each passenger be searched. Adams v. Williams132 may have relaxed the Terry standard, but in that case the officer's reasonable suspicion was still directed to a specific individual. In the airport search the objects of suspicion are all passengers, the vast majority of whom are unlikely to attempt a hijacking.

129. 352 F. Supp. at 43.
131. To have grounds for searches in these cases, it would be necessary to assume that anyone who wishes to travel by airplane is, by virtue of that fact alone, under reasonable suspicion. This argument is similar to one approach used in justifying border searches. See Witt v. United States, 287 F.2d 589, 591 (9th Cir. 1961).
132. See text accompanying notes 112-14 supra.
If the courts do persist in extending the stop-and-frisk doctrine to include airport searches, they will have to reach the question, discussed at length in Terry, of the permissible scope of the search. The Supreme Court has repeatedly held that even a search that is reasonable at its inception may violate fourth amendment protections if its scope and intensity become intolerable. A search must be reasonably limited by its objective. In the case of the anti-hijacker searches the objective is the discovery of weapons. The permissible scope of airport searches has not been definitively defined by the courts that apply Terry to justify them, but there are few cases on point. In United States v. Kroll, the scope of a search of a passenger’s briefcase was found to be unreasonably extended, although the general search of hand luggage was justified at the outset. In that case, a suspicious marshal searched the contents of an ordinary business envelope that had a very small bulge at one end. The court said that it was obvious from the testimony that at the time that the marshal asked the defendant to empty the envelope, he was searching, not for weapons of any kind, but for the contraband that his trained intuition told him was there. The court said that this went beyond the scope of a reasonable airport search, which is not a “license for the wholesale exploration of a passenger’s luggage and its contents.” United States v. Meulener, in contrast, found that any search of hand luggage was unreasonable unless the passenger was first subjected to a frisk. The court based its finding on Terry, which approved only a limited pat-down as an initial step. Further intrusions, it said, may be justified only on the basis of evidence discovered in the course of the frisk. These decisions indicate that, even if airport searches are constitutional on the basis of Terry, the scope of the present system may be found to be unreasonably broad.

IV

The doctrine of implied or express consent has also been relied upon to justify anti-hijacking searches. Because consent to a search

136. 351 F. Supp. at 150.
137. 351 F. Supp. at 152.
139. The court also felt that the search was unreasonable because the defendant was not given the opportunity to refrain from boarding the aircraft.
140. 351 F. Supp. at 1292.
141. But see United States v. Rivera, No. 72 CR 1309, slip op. at 10 (E.D.N.Y., May 20, 1973): “[T]he court ought not to second-guess an air-marshal as to the procedures that should precede a patdown of a passenger who meets the profile and who had substantially activated the magnetometer.”
is a waiver of a fundamental constitutional right, the courts require that "[s]uch a waiver or consent ... be proved by clear and positive testimony, and ... that there [be] no duress or coercion, actual or implied ... The government must show a consent that is unequivocal and specific, and freely and intelligently given."\textsuperscript{142} Mere verbal agreement does not create a conclusive presumption of consent.\textsuperscript{143} Since even the polite request of a uniformed official acting under apparently lawful authority may have a coercive effect on the average citizen, the courts have held that even such "lawful coercion" will usually invalidate consent or acquiescence to a search.\textsuperscript{144}

In its last term, the Supreme Court appeared to relax the standards for establishing an effective consent. In \textit{Schneckloth v. Bustamonte}\textsuperscript{145} the Court refused to accept an argument that its earlier cases required that the prosecution's proof of consent to a search meet the strict standards of "an intentional relinquishment ... of a known right."\textsuperscript{146} It reasoned that such guarantees as the privilege against compulsory self-incrimination\textsuperscript{147} and the right to counsel,\textsuperscript{148} which preserve the defendant's right to a fair criminal trial and which do require proof of a "knowing and intelligent waiver," are of an entirely different order from those rights guaranteed by the fourth amendment. The Court found that, since the latter rights are not essential to procedural fairness, the requirement of a knowing waiver is inappropriate, and a less stringent standard can be used.\textsuperscript{149} The Court did not specifically describe what the appropriate standard would be, but it did state that the defendant's knowledge of his right to refuse to be searched is only one factor to be considered in determining if the consent was voluntarily given.\textsuperscript{150} In that case,

\begin{itemize}
\item[142.] Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951).
\item[143.] Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965), cert. denied, 385 U.S. 826 (1966).
\item[145.] 412 U.S. 218 (1973).
\item[146.] 412 U.S. at 235-46.
\item[148.] Johnson v. Zerbst, 304 U.S. 458 (1938).
\item[149.] Justice Marshall vigorously contested this conclusion in dissent:
\end{itemize}

\begin{itemize}
\item[150.] In the final analysis, the Court now sanctions a game of blindman's bluff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police. But the guarantees of the Fourth Amendment were never intended to shrink before such an ephemeral and changeable interest. The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights. It is not for this Court to restrike that balance because of its own views of the needs of law enforcement officers.
\end{itemize}

412 U.S. at 284, 289-90.

150. 412 U.S. at 248-49.
the search was found to be constitutional when the defendant agreed to it verbally, even though it had not been proved that he knew of his right to refuse.

Before *Schneckloth*, the courts had held, in the few airport search cases in which the question was raised, that mere verbal agreement was insufficient to provide the necessary express consent. But the court did find express consent in *United States v. Legato*, where the defendant voluntarily allowed his bag to be searched after he had been informed of his right to refuse. The present airport system is unlikely to meet the standards of express consent even after *Schneckloth*, for at no point is the verbal or written assent of the passenger obtained.

If the airport procedures were to be altered to obtain express consent, the consent should be requested very early, probably at the time that the airline ticket is purchased, in order to facilitate refusal and allow the making of alternative plans. The ticket should specify, in large and prominent type, that consent to be searched is "a condition to passage on this and every other airline." Although *Schneckloth* may have made this unnecessary, as a further guarantee that consent is made with knowledge the passenger could be provided with a separate consent form, which explains in specific and nontechnical language the rights of the citizen under the fourth amendment and the extent to which they are waived by the signing of the form.

It has been argued that a passenger who continues the boarding process after reading a sign that states, "Passengers and Baggage Subject to Search," has impliedly consented to the search. The courts before *Schneckloth* uniformly rejected this suggestion and found that at most there was acquiescence to the demands of the marshals. Even if the courts were to apply the *Schneckloth* analysis


153. *Legato* did not arise in the course of the normal airport search. The defendant was searched on the basis of an anonymous telephone tip that had warned airline officials to watch for a man carrying a bomb in an orange shopping bag. Defendant was searched because he was seen carrying an orange shopping bag containing a large package. 42 U.S.L.W. at 2019.

154. See, e.g., *Roe v. R.A. Naylor, Ltd.*, [1917] 1 K.B. 712, where it was held that if an important contractual provision is placed in such a position on the document that a man of ordinary care and intelligence would not expect to find it there, then that condition would not be binding. See generally 2 A. Corbin, *Contracts* § 288, at 51-52 (1950).

155. It must be clear to the passenger that the separate consent form is a material part of the contract for the ticket. See *Jones v. Great Northern Ry.*, 68 Mont. 231, 217 P. 673 (1923). See generally 3 A. Corbin, *Contracts* § 548 (rev. ed. 1968).

to the requirement of proof of knowledge in cases of implied as well as express consent, they are not likely to find implied consent in the passenger's failure to turn back, for such behavior does not meet the requirement, undisturbed by Schneckloth, that consent be specific and unequivocal.

Even if the courts were to find that the obtaining of express consent as detailed above provided a valid waiver, it could be argued that the passengers are being forced to waive one constitutional right, the freedom from unreasonable searches and seizures, in order to exercise another, the right to travel. The Supreme Court has held, in other contexts, that the exercise of one constitutional right may not be conditioned on the waiver of another.157 However, as discussed above,168 the courts will probably find that the right to travel has not in fact been infringed or that the infringement is permissible because of the compelling state interest involved. As one judge has noted, "There is no inherent right to travel to a certain place in a particular aircraft. Accordingly, airline authorities may condition the sale of a ticket or permission to board the airplane upon a person's consent to be searched for weapons, explosives, and the like."169

V

None of the existing exceptions to the warrant can be successfully adapted to validate the airport search system in its present form. It might seem to be a relatively easy matter to obtain the consent of the passengers in order to bring the procedures within the exception for searches authorized by the persons searched. However, even such a minor change may make a significant difference in terms of time and expense when so many people must be processed, and the inconvenience to the passengers may actually be increased. Since mere verbal assent may cause problems of proof, a written consent will probably be necessary. If the consent is to be anything more than a mere formality—and especially if pre-Schneckloth standards are applied—the extent of his fourth amendment rights and the full import of the waiver must be explained to each passenger. This procedure would impose a burden on the processing of passengers far greater than the benefit it would confer.

Rather than imposing such a burden merely to fit airport searches into an existing exemption to the warrant requirement, the courts should create a new exception that would cover airport procedures


158. See text accompanying notes 29-42 supra. But see United States v. Lopez, 323 F. Supp. 1077, 1093 (E.D.N.Y. 1971): "Nor can the government properly argue that it can condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights."

159. United States v. Fern, No. 72-1284, slip op. at 7 (7th Cir., Sept. 20, 1973) (Gordon, J., dissenting).
as they now exist.\textsuperscript{160} Even if the present procedures are not considered inviolate, creating a special exception—rather than adapting the system to meet the standards for proper consent—would allow the courts to deal specifically with the unique problems of airport searches in answering certain questions, such as what is the permissible scope of the search,\textsuperscript{161} whether there is a need for consent and what sort of consent is required, and whether the search can be avoided, once one has reached the point at which the search is to be performed, by choosing not to board the aircraft.\textsuperscript{162} The interests of the passenger could be accommodated to the greatest degree possible consistent with the government's interest, for the courts could see that the searches were no more intrusive than is reasonably necessary under the specific circumstances, rather than holding them to standards formulated for other situations. Defining a new exception to the warrant requirement would also preserve the integrity of the existing exceptions, for it would avoid extending them beyond their initial justifications to cover an entirely new fact situation.

There have already been guarded suggestions that a new exception for airport searches would be appropriate.\textsuperscript{163} In \textit{United States v. Moreno},\textsuperscript{164} for example, the court upheld a warrantless airport search and declared that "due to the gravity of the air piracy problem, we think that the airport . . . is a critical zone in which special fourth amendment considerations apply."\textsuperscript{165}

It could be argued that creating yet another exception would seriously undercut the fourth amendment, a process at least as dangerous as stretching the current exceptions too far. However, the

\textsuperscript{160} As of the end of its 1973 Term, the Supreme Court had not granted certiorari in any airport search cases. See, e.g., \textit{United States v. Echols}, 477 F.2d 37 (8th Cir. 1973), \textit{cert. denied}, 42 U.S.L.W. 3195 (U.S., Oct. 9, 1973); \textit{United States v. Riggs}, 474 F.2d 659 (9th Cir. 1973), \textit{cert. denied}, 42 U.S.L.W. 3194 (U.S., Oct. 9, 1973); \textit{United States v. Bell}, 464 F.2d 667 (2d Cir.), \textit{cert. denied}, 409 U.S. 991 (1972); \textit{United States v. Epperson}, 454 F.2d 769 (4th Cir.), \textit{cert. denied}, 406 U.S. 947 (1972); \textit{United States v. Lindsey}, 451 F.2d 701 (3d Cir. 1971), \textit{cert. denied}, 405 U.S. 995 (1972). However, as the flood of cases continues and the disagreements between the circuits become more pronounced, it is to be hoped that the Court will soon hear a case in this area.


\textsuperscript{163} To date, however, these suggestions have been inferential rather than direct, as the courts have been mainly concerned with fitting airport searches into existing case law. In one early case, the court justified an airport search as an extension of the \textit{Terry} rule but stated 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 marshal] had to act, the level of suspicion required for a \textit{Terry} investigative stop and protective search should be lowered." \textit{United States v. Lindsey}, 451 F.2d 701, 703 (6th Cir. 1971), \textit{cert. denied}, 405 U.S. 995 (1972). See also \textit{United States v. Epperson}, 454 F.2d 769, 771 (4th Cir.), \textit{cert. denied}, 406 U.S. 947 (1972), discussed in text accompanying notes 122-24 supra.

\textsuperscript{164} 475 F.2d 44 (6th Cir. 1973).

\textsuperscript{165} 475 F.2d at 51.
exception would be to the warrant requirement, not to the fourth amendment. It must be remembered that "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." 166 In framing a new exception the Court would merely be determining that in the special circumstances a search is reasonable without a search warrant or a demonstration of probable cause.

The Court adopts a balancing analysis 167 to determine whether to exempt a certain kind of search from the warrant requirement. Three factors are typically weighed: the nature and strength of the government's need to search, the seriousness of the special enforcement problems involved, and the degree of intrusion that the search would entail.

In considering the government's need to search, the Court has felt that a police officer's need to protect himself in an immediately dangerous situation is a sufficient justification for the stop-and-frisk doctrine. In administrative searches, the government's need to perform fire and health inspections is not as immediately compelling, and thus a warrant is generally required. The urgent need to prevent airplane hijackings, which place large numbers of citizens in serious danger, can cost millions of dollars in loss of equipment or in ransom money, and may have serious international effects, would seem to fall in the former category.

With regard to enforcement problems, the Court has regularly refused to approve a warrantless search simply because it was more convenient for the police. However, "in applying the Fourth Amendment, the Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement." 168 Most of the current exceptions to the warrant requirement are grounded in special circumstances in which requiring a warrant would be unreasonable because it would frustrate the purpose of the search. For example, in the traditional stop-and-frisk situation, where the lives of police officers or bystanders might be in immediate danger, it would be unreasonable to require that a warrant be obtained and traditional probable cause be established; rather, it is the duty of the officer to disarm the suspect and thus remove the immediate danger before proceeding any further. 169 Likewise, in the administrative search cases it would be difficult, if not impossible, to establish that there was sufficient probable cause to believe that code violations existed in a particular building without first searching that building. 170 Therefore, the courts are allowed to consider

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the general character of the neighborhood in deciding if probable cause exists. Those making airport searches are under similar time and investigatory constraints. They must pass upon a great number of people in a very short period of time, and the variety of possible hijackers plus their increasing inventiveness in hiding weapons and explosives makes the task increasingly difficult. Since the potential hijacker must be stopped before he can board the aircraft and threaten harm to other travelers, there is no time for the officer to establish probable cause or to obtain a search warrant without detaining either the plane or the suspect passenger.

Against the government’s need to search and the special enforcement problems, the Court will balance the degree of intrusion that the search entails:171 Is the scope of the search so broad, even when it is limited as much as possible consistent with its purpose, that the invasion of privacy outweighs opposing interests? In *Terry* a patdown of the suspect’s outer clothing was found to be both adequate to remove the possible danger and sufficiently unintrusive. The use of a magnetometer would seem to be less offensive than a patdown. The search of carry-on luggage does go farther, but the passenger has the option of checking all of his baggage and thus not having it searched. Furthermore, since everyone who boards an aircraft will be searched for weapons,172 the passenger who is searched is not singled out for special and unexpected treatment and should therefore feel no particular embarrassment or discomfort.

If the courts feel that the intrusion caused by the present airport system goes only so far as is absolutely necessary to effect the purpose of the search, they are likely to find that the creation of a new exception to the warrant requirement is appropriate. However, the fact that fewer than twenty per cent of the arrests resulting from the current search system have involved crimes related to hijacking173 may indicate that the system now in use is unnecessarily broad. The suspicions that those conducting the searches are, at least in some cases, using them as a pretext to uncover evidence of other crimes is inevitable.174 The use of the system for fishing expeditions would

172. See note 12 supra. New York Times, Nov. 1971, at 1, col. 3 (late city ed.).
173. See note 6 supra.
174. See, e.g., United States v. Mitchell, 352 F. Supp. 58, 43-44 (E.D.N.Y. 1972), where the court noted that if a defendant can offer any evidence that the search in his case was not actually directed entirely towards discovering weapons, the court will carefully examine the circumstances of the search. In United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972), *affd.*, 481 F.2d 884 (8th Cir. 1973), the court refused to admit the amphetamines discovered in defendant’s briefcase during an airport search. Although the search was justified at its inception, the marshal went beyond its permissible scope and intensity when he searched a regular business envelope, which could not have concealed a weapon, and discovered the drugs.
be especially abusive in view of the vast number of citizens to which it is applied.

Judge Aldrich, dissenting in United States v. Skipwith,\(^\text{176}\) has suggested that a new exclusionary rule be devised for airport searches. Judge Aldrich would exclude “extraneous materials [such as drugs] not within the purpose of the search, but fortuitously discovered in the passenger’s possession, to support a criminal prosecution.”\(^\text{176}\) Only weapons and explosives that could be used in hijacking an airplane would be admissible, although the search itself would be authorized. Judge Aldrich argued that such a rule would remove the incentive for overzealous law officers to misuse the procedure without impairing the prevention of hijacking and would thus “guarantee to the public that the government is not using airport search procedure for other purposes, an offensive thought to any innocent person suffering the inconvenience.”\(^\text{177}\)

At least one state has already imposed a similar exclusionary rule by statute.\(^\text{178}\) In an Illinois act making it a crime to board an aircraft with a firearm, explosive, or lethal weapon,\(^\text{179}\) it is stipulated that “any evidence of criminal activity found during [an airport] search” will be admissible only for the purpose of establishing a violation of that act.\(^\text{180}\) Evidence discovered in the course of an airport search “is inadmissible as evidence in any legal proceeding for any other purpose.”\(^\text{181}\)

The enactment of such legislation ensures that, as a matter of public policy, the search system will be used only to prevent possible hijackings. When such legislation exists, the courts may be more likely to create a special exception to the warrant requirement, for the degree of intrusion might be reduced. It is unlikely, however, that the courts will themselves create a new exclusionary rule in the absence of legislation. They may be deterred by the fear that many people caught with contraband would not be prosecuted for a crime that they had clearly committed. However, in other cases the inability to prosecute guilty individuals has been found to be an acceptable price to pay for the preservation of an important constitutional right.\(^\text{182}\)

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\(^{175}\) No. 72-1932, slip op. at 17-21 (5th Cir., June 14, 1973).

\(^{176}\) No. 72-1932, slip op. at 17-18.

\(^{177}\) No. 72-1932, slip op. at 20.

\(^{178}\) Also, at least one commentator suggested a similar special extension of the exclusionary rule soon after the Terry decision. He advocated the exclusion from evidence of all contraband except weapons discovered during a frisk. Note, The Supreme Court, 1967 Term, 82 HARV. L. REV. 65, 185-86 (1968).

\(^{179}\) ILL. ANN. STAT. ch. 38, §§ 84-1 to -7 (Smith-Hurd 1970), as amended, ILL. ANN. STAT. ch. 38, §§ 84-6 to -7 (Smith-Hurd Supp. 1975).

\(^{180}\) ILL. ANN. STAT. ch. 38, § 84-4 (Smith-Hurd 1970).

\(^{181}\) ILL. ANN. STAT. ch. 38, § 84-4 (Smith-Hurd 1970).

\(^{182}\) See, e.g., Elkins v. United States, 364 U.S. 206, 222-23 (1960) (evidence seized in violation of fourth amendment by state officers cannot be used in federal prosecution).
A much more significant deterrent to a court-created rule is the fact that the suggested rule would be a significant extension of the present exclusionary rule. The “plain view” doctrine now permits the admission of any evidence unexpectedly discovered in the normal course of an otherwise legal search, while the “exclusionary rule” in its present form bars the admission only of evidence discovered in the course of a search that is itself illegal. The exclusion of only some of the evidence discovered in a legal search, as the Skipwith dissent suggests, would be a dramatic extension of the present rule. Moreover, the suggested rule, unlike the existing rule, would not be related to the preservation of judicial integrity. As one of its major purposes, the existing rule refuses to make the courts a “party to lawless invasions of the constitutional rights of citizens.” No such invasion would exist in airport cases if, as is suggested, the search itself is justified. It is true that the suggested rule might share the rationale of the present rule in that it deters the misuse of the search procedure. However, the effectiveness of even the present rule in deterring misuse has been called into question: “[I]t can be fairly said of the Exclusionary Rule that it cannot be proved to have a significant deterrent effect and this effect is not so inherently likely that we can assume it to exist in the absence of proof.” In a time when the value of the present rule is increasingly called into question, it seems unlikely that the courts will extend it as suggested. Rather, the courts should find that the present airport search system is sufficiently unintrusive to allow the creation of a new exception to the warrant requirement of the fourth amendment in the light of the compelling government interest in preventing airplane hijackings.

184. No. 72-1932, slip op. at 11.
186. Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Tex. L. Rev. 795, 741 (1972). From the point of view of a defendant, deterrence may seem irrelevant. He is interested in avoiding incarceration and the rule allows him to do so.