

Legal Aspects of Searches of Airline Passengers in the USA

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Keywords

airline, airlines, airplane, airplanes, airport, airports, baggage, border, carry-on, case, cases, consent, consented, Constitution, constitutional, contraband, court, courts, criminal, dog, evidence, explosives, federal, Fourth Amendment, freedom, frisk, government, hijacker, hijackers, hijacking, hijackings, identification, innocent, intrusion, intrusive, invasion, law, legal, luggage, magnetometer, metal detector, passenger, passengers, personal, piracy, privacy, public, reasonable, right, rights, safety, screening, search, searched, searches, searching, security, skyjacker, skyjackers, sniffs, state, Supreme Court, suspicion, suspicionless, terror, terrorist, terrorists, Terry, Transportation Security Administration, travel, traveler, travelers, TSA, unconstitutional, United States, unconstitutional, unreasonable, U.S., USA, weapon, weapons

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Introduction

This essay considers the intrusive screening of *all* passengers and *all* luggage on airplane flights in the USA and concludes that such so-called “security” measures are ineffective, unreasonably burdensome, and sometimes violate established civil liberties of people in the USA.

There are many hundreds of reported cases on this topic in the USA and many more cases on relevant issues in other contexts. Because I can not afford to devote my *unpaid* time to read and analyze *all* of these cases, I have marked the bottom of each page of this essay with the legend **preliminary draft** to remind the reader that this essay is not a finished product.¹ With the exception of one law review article published in 1972, I have also not had the time to search and read law review articles on this subject. I would welcome a grant or contract that would enable me to finish this essay. Nonetheless, I believe that the cases collected in the present draft will be useful.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . I caution the reader that I am *not* an expert on Fourth Amendment law about searches, however I have read the some of the major cases on that subject as they relate to a reasonable expectation of privacy.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

¹ Since 1996, I have written essays on dozens of topics in computer law, higher-education law, privacy law, intellectual property law, and the interaction between law and technology. A search of all reported cases in the USA since 1900 typically returns between approximately 10 and 100 cases on each topic of my previous essays, so I can read and carefully consider *all* of the reported cases and write an essay in less than a few hundred hours of my time. In contrast, there are many thousands of federal appellate cases in the USA on Fourth Amendment law since 1945, so it is not a reasonable project for my *unpaid* time to read *all* of the relevant cases and study how the law of search and seizure has developed. Because I can not do a reasonably complete job on this essay, I am writing this apology and disclaimer.

Overview

In the USA, hijacking of airplanes began in 1961, and was mostly limited to a few crazy people who wanted to go to Cuba. Beginning in 1968, Palestinian terrorists hijacked a number of airliners in the Middle East.

Brief History of Airport Security in USA

Major airlines voluntarily began screening all passengers around 1970, in an attempt to avoid hijackings of their airplanes. Beginning in 1973, the FAA required airlines to screen *all* passengers through a magnetometer, and X-ray all carry-on luggage, to prevent passengers from carrying weapons on board. These screenings were done by private contractors, were minimally intrusive, and also were *not* effective in stopping Arab terrorists from carrying weapons aboard four airplanes on 11 Sep 2001.

Because most people have forgotten how bad things were in the late 1960s, it is worthwhile to quote an opinion of an U.S. Court of Appeals.

In 1969 the number of successful hijackings and hijacking attempts of United States carriers peaked at 33 and 40, respectively. FAA, Office of Air Transportation Security, Hijacking Attempts on U.S. Registered Aircraft (Oct. 5, 1973). As the airport searches became more widespread and other aspects of the anti-hijacking program took effect, the number of successful hijackings dramatically declined to 10 in 1972, and, surprisingly, there have been no successful hijackings of a commercial airliner in the United States in over a year. *Id.*

U.S. v. Albarado, 495 F.2d 799, 804 (2nd Cir. 1974).

On 24 November 1971, a man using the name “Dan Cooper” purchased a ticket on a Northwest airlines flight. Once aboard, he displayed a bomb and extorted the airline to provide \$200,000 and four parachutes. Later that day, he lowered the aft staircase of the Boeing 727 during flight and jumped. In 1973, all Boeing 727s were modified to prevent lowering the aft staircase during flight, to prevent another Cooper-style hijacking.

During the 1980s and 1990s, there were few hijackings of airplanes inside the USA, perhaps as a result of the deterrent effect of searches of passengers at airports, or perhaps because hijackings were no longer in vogue (perhaps because Cuba began putting hijackers in prison).

On 21 Dec 1988, agents of the Libyan government put a bomb in a radio inside luggage of Pan Am flight 103, which exploded over Lockerbie, Scotland, killing 270 people. In response to that incident, the U.S. Government issued more security rules:

- Only luggage that accompanied a passenger aboard the same airplane is allowed. (While this rule would have prevented the Pan Am 103 explosion, this rule will not deter terrorists who are intending to die in an attack. Since the year 2000, there have been *many* suicide bombers, mostly Palestinians attacking Israelis.)
- When checking luggage at the airline counter, the airline employee asks “security questions”, which I have memorized because I have heard them so many times:
 1. Has anyone unknown to you asked you to carry an item on this flight?
 2. Did you pack your own bags?
 3. Have any of the items you are traveling with been out of your immediate control since the time you packed them?

(I consider these questions silly, since no criminal would declare: “I am an Islamic terrorist and there is a bomb in my suitcase.” The U.S. Government finally abandoned these security questions in Aug 2002, and admitted that these questions had prevented zero hijackings and zero bombings during 13 years of use.²)

On 11 Sep 2001, Arab terrorists hijacked four commercial airliners in the USA essentially simultaneously, flew two of them into the World Trade Center, one of them into the Pentagon, and the hijackers crashed one airplane in Pennsylvania while brave passengers revolted against the hijackers. Following that incident, the airspace in the USA was closed for two days — the first time in history that the U.S. airspace was closed — as a bewildered U.S. Government wondered what to do next. It quickly became accepted dogma in the USA that terrorists had declared war on the USA and that we were in a continuing national crisis.

On 22 Dec 2001, during an American Airlines flight from Paris to Miami, Richard Reid tried to detonate explosives hidden in his shoe.³ In response, U.S. Government screeners began asking some passengers to remove their shoes, to prove that no explosives were hidden inside.

After 19 Nov 2002, the U.S. Government’s Transportation Security Administration (TSA) operated screening of all passengers at airports and the screenings became much more intrusive and slower, with every passenger being treated as a criminal suspect. It was these intrusive searches, sometimes including removal of clothing, of innocent passengers that motivated me to write this essay.

² CNN, “James Loy: Changes to airport security rules,” <http://archives.cnn.com/2002/US/08/23/loy.cnn/> , 23 Aug 2002.

³ See *U.S. v. Reid*, 214 F.Supp.2d 84 (D.Mass. 26 July 2002), 369 F.3d 619 (1st Cir. 27 May 2004).

Beginning on 19 Dec 2002, passengers checking luggage could not lock their bags, because of possible security inspections inside luggage.⁴ Later, the TSA allowed travelers to use an “Accepted and Recognized Lock”.

Beginning 22 Sep 2004, the U.S. Government screeners began patting breasts and buttocks of some female airline passengers.⁵ A number of female airline passengers complained to journalists about groping by airport screeners.⁶ As a result of such intrusive searches, some women have stopped flying, which burdensomely increased their travel time to distant destinations. After three hundred women complained, the TSA’s official reaction⁷ — astoundingly — was that the screeners needed to better explain to their victims why the screeners were offensively touching them. I have posted a separate essay on sexual aspects of searches at <http://www.rbs2.com/travel2.pdf>, which contains quotations from many cases about touching of the crotch, buttocks, or female breasts during a search by law enforcement agents in the USA. After three months of fondling breasts, the TSA abandoned their policy on 23 Dec 2004, however TSA agents will continue to fondle breasts if a magnetometer detects metal on a specific passenger or if her clothing has irregular contours.⁸

⁴ See, e.g., “TSA: Unlock your baggage, ‘Living in a significantly heightened security environment’,” <http://archives.cnn.com/2002/US/12/19/tsa.screening/index.html>, 19 Dec 2002.

⁵ The official justification for such groping appears to be the belief that female terrorists carried explosives aboard two airplanes in Russia on 24 Aug 2004, which airplanes crashed, killing a total of 89 people.

⁶ Joe Sharkey, “BUSINESS TRAVEL: ON THE ROAD; When a Pat-Down Seems Like Groping,” *The New York Times*, 2 Nov 2004; Joe Sharkey, “BUSINESS TRAVEL: ON THE ROAD; Getting Familiar With All-Too-Intimate Pat-Downs,” *New York Times*, 9 Nov 2004; Ken Kaye, “Passengers complain about pat-down searches at airports,” *Sun-Sentinel*, <http://www.sun-sentinel.com/news/local/broward/sfl-spat23nov23,0,2105646,print.story>, 23 Nov 2004; Audrey Hudson, “TSA ‘pat-downs’ cross the line for some fliers,” *Washington Times*, <http://washingtontimes.com/national/20041124-115912-9297r.htm>, 25 Nov 2004; Associated Press, “Some Women Objecting to Airport Searches,” <http://www.cnn.com/2004/TRAVEL/11/30/airport.patdowns.ap/index.html>, 30 Nov 2004.

⁷ Sara Kehaulani Goo, “TSA Keeping Pat-Down Procedures in Place,” *Washington Post*, <http://www.washingtonpost.com/wp-dyn/articles/A33790-2004Dec3.html>, 4 Dec 2004.

⁸ Sara Kehaulani Goo, “Airport Pat-Down Protocol Changed,” *Washington Post*, <http://www.washingtonpost.com/wp-dyn/articles/A20026-2004Dec22.html>, 23 Dec 2004 (“... more than 400 passengers — mostly women — formally complained that the experience was invasive, humiliating and akin to being molested.”).

Summary and Organization of This Essay

In this essay, first, I tersely explain why I believe the current program of screening of passengers and luggage is *unconstitutional*. Second, I explain why I believe the current program of screening passengers will *not* stop terrorists from inflicting damage on the USA. The remainder of this essay discusses technical legal issues, including quoting many federal court cases. In the technical legal issues, (1) I briefly review the collision of search and seizure law with privacy law, (2) I argue that the government must use the least restrictive means to screen airline passengers, (3) I argue that any alleged "consent" to search is coercive, because the alternative is no travel by air, and (4) I quote dicta by the U.S. Supreme Court about searches at airports, then quote extensively from some U.S. Courts of Appeals cases on searches at airports.

Why Objectionable

Screening of passengers is objectionable for several reasons:

1. Screening treats innocent passengers as if they were criminals, without an "reasonable suspicion" of criminal conduct by an individual passenger. ("Reasonable suspicion" is defined and discussed below, beginning at page 12.)
2. Delays caused by intrusive screening of *all* passengers is burdensome to travelers. At busy times, the wait in line and during screening itself can take more than a half hour. There are many professionals in those lines whose time has a fair market value of more than \$ 100/hour. Such slow security measures are *not* minimally burdensome to passengers. Moreover, passengers and taxpayers must pay for the cost of security personnel and scanning equipment, which is an additional burden. (The issue of how intrusive searches can be before they are *unconstitutional* is discussed below, beginning at page 22.)
3. Offensive touching (i.e., groping), removal of clothing, etc. can be a civil rights violation or intentional infliction of emotional distress by screeners.
(See <http://www.rbs2.com/travel2.pdf> .)

Opening checked (i.e., suitcases *not* carried by a passenger onto an airplane) luggage for inspection is objectionable for several reasons:

1. Impermissible, unless there is "probable cause" for specific luggage.
2. Violation of passenger's privacy, as personal items are searched by strangers.
3. Offensive to have dirty hands (or dirty gloves) touching clean underwear and other possessions.

4. Opportunity for security personnel and baggage handlers to pilfer items from luggage that is now required to be unlocked.⁹
5. Increases likelihood that items will be lost or damaged, if unlocked luggage accidentally opens during handling.

In a discussion of civil liberties and sublime constitutional law, it seems mercenary to mention financial success of airlines. However, we do need viable airlines in the USA. As I write this in December 2004, two major airlines (United and US Air) are in bankruptcy and another major airline (Delta) is nearly bankrupt. Maybe more people would fly, and airlines would be more profitable, if flying were as enjoyable as it was during the 1980s and 1990s, when screening of passengers at airports was less intrusive than after 2001.

Why Ineffective

I believe that the current intrusive screening of all passengers and all luggage will *not* prevent a future terrorist attack on the USA, because:

1. Investigative journalists have repeatedly shown that one can still get through airport security checkpoints with weapons.¹⁰ These failures of security checks are easy to understand, because hijackers are extraordinarily rare amongst many millions of innocent passengers. As screening become more effective, it also becomes slower and more intrusive.¹¹

⁹ This is *not* a theoretical concern. In Sep 2004, the U.S. Government announced that it would pay more than \$ 1,500,000 to travelers as compensation for pilfered items from luggage. Matthew L. Wald, "U.S. to Pay Fliers \$1.5 Million for Pilfering of Checked Bags," *The New York Times*, 10 Sep 2004. There is recent litigation in which a passenger alleged theft of carry-on luggage containing more than US\$ 100,000 worth of jewelry at a passenger screening checkpoint. *Dazo v. Globe Airport Security Services*, 295 F.3d 934 (9th Cir. 2002).

¹⁰ See the collection of 100 media reports of breaches of security by the TSA: "Airport Insecurity," *The Seattle Times*, 11 July 2004, <http://seattletimes.nwsourc.com/news/nation-world/airportinsecurity/breaches/washington.html> and the accompanying article by Cheryl Phillips, Steve Miletich, and Ken Armstrong, "Airport-Security System in U.S. Riddled With Failures," *The Seattle Times*, 13 July 2004, http://seattletimes.nwsourc.com/html/localnews/2001976972_tsa11.html . Also see their main page at: <http://seattletimes.nwsourc.com/news/nation-world/airportinsecurity/> . In September 2002, reporters from the *New York Daily News* carried banned items, "including box cutters, razor knives, and pepper spray" aboard 14 different airplanes, without any detection by the TSA: Maki Becker and Greg Gittrich, "Weapons Still Fly at Airports," *New York Daily News*, 4 Sep 2002, <http://www.nydailynews.com/front/story/16104p-15186c.html> .

¹¹ A possible exception to this rule occurs when electronic instruments are used to automatically screen people and luggage for weapons, see page 63 of this essay.

2. And if terrorists believe that airports are secure, then the terrorists will find another way to attack the USA. Four widely mentioned possibilities are (a) using a shoulder-launched missile to bring down an airplane, (b) having a suicide bomber drive a truck full of explosives to a significant building, (c) using a small airplane to disperse chemical or biological weapons over a city, or (d) putting a weapon of mass destruction in a cargo container aboard a boat, to explode at a dock in the USA. In short, it is futile to take precautions that will absolutely prevent *all* possible future attacks by terrorists.

As one example, defeating an X-ray screening machine is as simple as arranging a knife inside carry-on luggage so that the knife blade is parallel to the X-rays, so the knife appears as a thin line, instead of as a two-dimensional image that is recognized as a blade. While such concealment techniques may be a surprise to law-abiding citizens, they are well known to terrorists and security experts.

The screening of airline passengers in the early 1970s was *not* designed to prevent *all* hijackings, instead it was designed to erect a series of obstacles that would deter hijackers with a personality profile of a chronic failure in life.¹² Stopping a professional terrorist will be much more difficult.

There were a total of only 19 terrorist hijackers aboard the four hijacked airliners on 11 Sep 2001. Compare this tiny number with the approximately half-billion innocent people who fly inside the USA every year. And consider that, except for one day in the year 2001, there have not been any recent hijackings of airliners in the USA by terrorists. Searching for hijackers at airports is truly like looking for a needle in a haystack. This consideration alone suggests that preventing terrorism by having security personnel search *everyone* is likely to be futile or ineffective, because of fatigue by security personnel.

Major attacks by terrorists are *not* common. Al-Qaeda, an Arab terrorist organization, is accused of bombing the U.S. Embassies in Nairobi, Kenya and in Dar es Salaam, Tanzania on 7 Aug 1998. Three years later, agents of Al-Qaeda hijacked four airplanes in the USA on 11 Sep 2001. How much intrusive security is justified for something that happens once every 1100 days?

Looking at the history of airline security (see above, beginning at page 4), one sees that each requirement was added in ad hoc fashion to close a vulnerability exposed by a previous hijacking or by a previous bomb. This approach produces a large number of intrusive or wasteful security measures that offer little assurance that a future terrorist attack will be prevented. Worse, these security measures persist for years after any justification for them has expired.

¹² Patrick W. McGinley and Stephen F. Downs, "Airport Searches and Seizures — A Reasonable Approach," 41 Fordham Law Rev. 293, 301, 304-05 (1972).

There is a natural reaction to a terrible crime to have an investigation, declare “this must never happen again”, and establish regulations that would prevent the past terrible crime. Such a reaction is generally repressive (i.e., a violation of freedom of innocent people), expensive, *and* ineffective in preventing a future terrible crime.

It is horrible that nearly 3000 people were killed in the USA by Arab terrorists on 11 Sep 2001. However, the fact is that such loss of life by terrorists is much less significant than the number of people killed in automobile accidents in the USA. Data for the five years 1999-2003 show that a total of 211,506 people died in automobile accidents in the USA,¹³ which is approximately 70 times more than the number killed in the USA by terrorists during those same years. If our goal is to save lives, we should rationally focus more on automobile accidents, and less on attacks by terrorists.¹⁴

Some Appropriate Security Measures

In advocating less intrusive screening of *all* airline passengers, I also believe that there are acceptable ways to increase airline security, such as the following:

- The pilot and co-pilot should be allowed to carry firearms, provided they have been trained in the use of those weapons against terrorists aboard airplanes.
- Reinforcing the cockpit door and keeping the door locked while the aircraft is in motion was a good idea. Letting terrorists enter the cockpit is a very bad idea.
- Luggage that is transported in the cargo compartment should be put inside bins that are resistant to explosions.
- Air marshals aboard flights may be a good idea, particularly when there is some reason to believe that a particular flight or route may be a target of a terrorist or hijacker.
- The U.S. Government needs to fund more scientific research for developing scanning machines that will quickly reveal the presence of explosive material on a person or inside luggage. Scanning by automatic machines is much less intrusive than searches by people, as explained on page 63 of this essay.

¹³ Data from the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation, <http://www-fars.nhtsa.dot.gov/> .

¹⁴ I suggest that automobile accidents are acceptable to Americans because the victims are spread over time and over a large geographical area, so that no more than a few people die in most metropolitan areas on one day. Further drivers of automobiles feel that they are in *control*, while airplane passengers feel passive.

- *Quickly* screening *all* passengers, and all items carried into the passenger compartment, is a good idea. Metal detectors should be set to detect large metal objects (e.g., pistols, hand grenades, bayonets, etc.) and *not* detect belt buckles, pens, and other innocuous small metal items.
- Instead of intensively searching either *all* passengers or passengers selected at *random*, I suggest intensively searching passengers only on the basis of reasonable suspicion (e.g., hand grenade in their luggage, fit a profile of terrorists, or whose name is on some watch list).
- Finally, airline passengers should actively cooperate with the flight crew in subduing terrorists aboard airplanes, *before* the terrorists can enter the cockpit or before the terrorists detonate explosives. A few people injured in such a revolt against hijackers is a much better outcome than the deaths of everyone aboard the airplane.

Searches for Radioactive Materials

While I was revising this essay in December 2004, I read a news article in *The Economist* about a related search problem.¹⁵ Because of fears that a terrorist would surround conventional explosives with radioactive materials (a so-called “dirty bomb”), governments in the USA have installed radiation detectors in public places. These radiation detectors are *not* finding terrorists, but are finding many innocent people who have undergone a recent medical diagnostic procedure with radioactive tracers or who are being treated with radioactive substances (e.g., ¹³¹I for thyroid cancer or Graves’ disease).

One individual, who has Graves’ disease, a thyroid disorder, was strip-searched twice in three weeks on the New York subway. In another case, a radioactive passenger on his way to Atlantic City caused a busload of passengers to be searched by police. No one knows for sure how many people are being needlessly interrogated, but anecdote suggests the numbers are high.

“Security Screening: Radio-too-active,” *The Economist*, p. 82, 4 Dec 2004.

The obvious solution to this problem of harassment of innocent patients is for them to carry a letter from their physician.

But practitioners of nuclear medicine who have tried furnishing their patients with such letters are jaded. They say the documents do not seem to help. Few security officials seem to understand the concept of medical radiation. And when they have called the Department of Homeland Security to discuss the problem, no one acknowledges that detectors even exist *Ibid.* at p. 83 (ellipses in original).

¹⁵ See also Lindy Washburn, “Irradiated Patients Are Triggering False Alarms,” *The Record*, Hackensack, NJ, 1 Dec 2004.

Reasonable Suspicion

The Fourth Amendment to the U.S. Constitution explicitly prohibits the government from engaging in any “unreasonable searches”. The Fourth Amendment generally requires that the government demonstrate “probable cause” to “a neutral and detached magistrate” before an arrest or search can be made.¹⁶

This requirement of “probable cause” has been weakened in a long line of U.S. Supreme Court decisions. Of particular interest to searches of airline passengers, the U.S. Supreme Court has held that the government must have “reasonable suspicion” of an individual’s involvement in criminal activity before he/she can be stopped for a brief time, required to identify him/herself, and be patted down. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40, 60-62 (1968) (first U.S. Supreme Court case to use phrase “reasonable suspicion”, which phrase appeared in New York State statute); *Brown v. Texas*, 443 U.S. 47 (1979). In *Terry*, the U.S. Supreme Court wrote:

There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. [footnote omitted]

We emphatically reject this notion. 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.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' [footnote omitted] It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Terry, 392 U.S. at 16-17.

Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

Terry, 392 U.S. at 24-25. Quoted with approval in *Illinois v. Wardlow*, 528 U.S. 119, 127 (2000); *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999); and many other cases.

However, 34 years after *Terry*, such intrusive searches are being routinely done on innocent people in U.S. airports, without reasonable suspicion that the individual has engaged in criminal conduct.

A U.S. Border Patrol agent walked along the aisle of a Greyhound interstate bus, squeezing the soft carry-on bags in the overhead luggage rack. The agent felt a suspicious “brick-like” object inside a bag, then got the consent of the owner of the bag to a search of the contents, and the agent discovered that the brick was methamphetamine. The bag’s owner was arrested and convicted of

¹⁶ *Johnson v. U.S.*, 333 U.S. 10, 14 (1948) and reaffirmed in many subsequent cases.

possession with intent to distribute illicit drugs. The U.S. Supreme Court held that the squeezing of bags, without reasonable suspicion, violated the Fourth Amendment:

Although Agent Cantu did not "frisk" petitioner's person, he did conduct a probing tactile examination of petitioner's carry-on luggage. Obviously, petitioner's bag was not part of his person. But travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand.

....

When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

Bond v. U.S., 529 U.S. 334, 337-339 (2000).

In a recent case involving analogous constitutional issues, the U.S. Supreme Court, by a narrow 5 to 4 vote, held that all children in high school could be required to submit a urine sample to prove they were not using illicit drugs, before the children were allowed to participate in extracurricular activities. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559 (2002). That case may be distinguishable from mandatory searches of all airline travelers in that: (1) travel is a fundamental right, while participation in extracurricular activities in school is not a legal right, and (2) children have fewer legal rights than adults. Even so, note that *Earls* was decided by a mere one-vote margin, which indicates its controversial nature. In a similar context, urine tests to detect illicit drugs of all patients in a state hospital's obstetrics ward was held to violate the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

In another analogous area, the U.S. Supreme Court held that illicit drug interdiction checkpoints on public roads violated the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

In a 1967 case, the U.S. Supreme Court held that a city must have probable cause and a warrant *before* city's inspectors could demand to enter a home to make inspections necessary for health or safety. This case is frequently quoted as establishing a test for reasonable searches under the Fourth Amendment by balancing the need to search against the intrusion.

Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. See *Frank v. State of Maryland*, 359 U.S., at 367-371, 79 S.Ct. at 809-811. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions — faulty wiring is an obvious example — are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself. Finally, because

the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 536-37 (1967).

While the above quotation seems to suggest that the search of homes is permissible without a warrant issued on probable cause, *Camara* actually holds that a warrant is necessary.

But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

Camara, 387 U.S. at 539.

Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.

Camara, 387 U.S. at 539-540.

Assuming the facts to be as the parties have alleged, we therefore conclude that appellant [i.e., *Camara*] had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection.

Camara, 387 U.S. at 540.

Camara involves a person's home, which has traditionally been granted a high level of respect by the U.S. Supreme Court in privacy cases, under the Fourth Amendment and otherwise. However, I believe that the contents of suitcases inspected at the airport, which contents will be used at home (or in a temporary home in a hotel or motel) should be just as private.

However, there are court cases from the 1970s and 1980s that hold that searches of airline passengers do *not* require "reasonable suspicion" of individual passengers, which further weaken the Constitutional protections in *Terry* and its progeny. These cases are discussed below, beginning at page 30. Note that these old cases apply to searches that are much less intrusive searches than post-2001 searches, which is why I am interested in the reasoning of search cases in general, instead of focusing only on cases involving searches of passengers at airports.

Border Searches

Searches at the border of the USA are a special circumstance under the Fourth Amendment, because of the need to enforce laws about import or export, including smuggling.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a

right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Carroll v. U.S., 267 U.S. 132, 153-154 (1925). Quoted with approval in many subsequent decisions of the U.S. Supreme Court, including *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 274-275 (1973); *U. S. v. Ramsey*, 431 U.S. 606, 618 (1977); *U.S. v. Ross*, 456 U.S. 798, 808 (1982); *U.S. v. Flores-Montano*, 124 S.Ct. 1582, 1586 (2004) (Quoting only one sentence: “Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”).

Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers '(t)o regulate Commerce with foreign Nations.' Art. I, s 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.

U.S. v. 12 200-Foot Reels of Super 8 mm. Film, 413 U.S. 123, 125 (1973). Quoted with approval in *U. S. v. Ramsey*, 431 U.S. 606, 619 (1977); *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537-538 (1985).

The leading recent U.S. Supreme Court decisions on border searches are *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973); *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); and *U. S. v. Ramsey*, 431 U.S. 606 (1977). See also *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 598, n. 6 (1983) (Brennan, J., dissenting). A statute authorizes searches of people without a warrant when a U.S. Customs officer has “a reasonable cause to suspect there is merchandise which was imported contrary to law”. 19 USC § 482. The words “reasonable cause” are not defined in the statute, but the U.S. Supreme Court held that “reasonable cause” was a lower threshold of suspicion than “probable cause”. *U. S. v. Ramsey*, 431 U.S. 606, 612-13 (1977).

So-called “border searches” can be conducted at airports in the interior of the USA (e.g., Chicago) for passengers arriving on international flights. Below, in connection with the *Lopez-Pages* case on page 48, I cite a few cases that classify searches of passengers at airports as a “border search” and I criticize those cases. In cases arising from Texas and Florida, the U.S. Court of Appeals for the Fifth and Eleventh Circuits have a series of cases that hold that border searches need neither “probable cause” nor “reasonable suspicion” — instead law enforcement agents may legally search travelers on “mere suspicion”, which means the agents need no articulable reason for the search. I believe that such a dilution of the Fourth Amendment needs correction by the U.S. Supreme Court, but that Court has consistently denied certiorari in cases involving searches of airline passengers.

Importance of Fourth Amendment

Beginning in the 1960s, the U.S. Supreme Court began to weaken the protections of the Fourth Amendment, by finding numerous exceptions¹⁷ to the Amendment's demand that "probable cause" be demonstrated to a neutral magistrate, before government agents search or seize someone or something. While I agree with the exception in *Terry* and the exception for exigent circumstances, those two are enough exceptions for this fundamental right. A number of dissenting opinions by justices of the U.S. Supreme Court have emphasized the importance of the Fourth Amendment.

Readers who are in a hurry should skip to page 22 below, for the next section of this essay.

A 1947 dissent by Justice Murphy, joined by Justices Frankfurter and Rutledge, said:

The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods. And 'good faith' on the part of the arresting officers cannot justify a lawless search, nor support a lawless seizure. In forbidding unreasonable searches and seizures, the Constitution made certain procedural requirements indispensable for lawful searches and seizures. It did not mean, however, to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment has shown good police intentions to be inadequate safeguards for the precious rights of man. But the Court now turns its back on that history and leaves the reasonableness of searches and seizures without warrants to the unreliable judgment of the arresting officers. As a result, the rights of those placed under arrest to be free from unreasonable searches and seizures are precarious to the extreme.

Now it may be that the illegality of the search and of the seizure in this case leads to the immunizing of petitioner from prosecution for the illegal possession of the draft certificates and notices. But freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution. That freedom belongs to all men, including those who may be guilty of some crime. The public policy underlying the constitutional guarantee of that freedom is so great as to outweigh the desirability of convicting those whose crime has been revealed through an unlawful invasion of their right to privacy. Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but

¹⁷ See e.g., *California v. Acevedo*, 500 U.S. 565, 582-583 (1991) (Scalia, J., concurring) ("Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions, including "searches incident to arrest ... automobile searches ... border searches ... administrative searches of regulated businesses ... exigent circumstances ... search[es] incident to nonarrest when there is probable cause to arrest ... boat boarding for document checks ... welfare searches ... inventory searches ... airport searches ... school search[es]...." Bradley, Two Models of the Fourth Amendment, 83 Mich.L.Rev. 1468, 1473-1474 (footnotes omitted). Since then, we have added at least two more. [citations to 2 cases omitted]"); *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 1298-1299 (2004) (Thomas, J., dissenting) ("As a result, the Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard. The Court has most frequently held that warrantless searches are presumptively unreasonable, ..., but has also found a plethora of exceptions to presumptive unreasonableness, That is, our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not. [citations to 12 cases omitted]").

they are not to be countenanced under our form of government. It is not a novel principle of our constitutional system that a few criminals should go free rather than that the freedom and liberty of all citizens be jeopardized.

Harris v. U.S., 331 U.S. 145, 193-194 (1947) (Murphy, J., dissenting).

Also in *Harris*, Justice Frankfurter, in a dissent joined by Justices Murphy and Rutledge, wrote: The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or the blackmarketeer. I cannot give legal sanction to what was done in this case without accepting the implications of such a decision for the future, implications which portend serious threats against precious aspects of our traditional freedom.

....

Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.

Harris v. U.S., 331 U.S. 145, 156-157 (1947) (Frankfurter, J., dissenting).

In a majority opinion written in 1948 by Justice Douglas, the U.S. Supreme Court said:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. U.S., 335 U.S. 451, 455-456 (1948).

Quoted in the majority opinion in *Chimel v. California*, 395 U.S. 752, 761 (1969). This paragraph from *McDonald* was also quoted in a dissent written by Justice Douglas, and joined by Chief Justice Warren and Justices Black and Brennan. *Frank v. State of Maryland*, 359 U.S. 360, 380-381 (1959) (Douglas, J., dissenting). More recently, Justice Marshall, in a dissent joined by Justices Brennan and Stevens, quoted several of these sentences from *McDonald*. *Illinois v. Rodriguez*, 497 U.S. 177, 191 (1990).

A 1949 dissent by Justice Jackson said:

When this Court recently has promulgated a philosophy that some rights derived from the Constitution are entitled to 'a preferred position,' *Murdock v. Pennsylvania*, 319 U.S. 105, 115, dissent at page 166, 63 S.Ct. 870, 876, 882, 87 L.Ed. 1292, 146 A.L.R. 81; *Saia v. New York*, 334 U.S. 558, 562, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574, I have not agreed. We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds. Indications are not

wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position.

[quotation of Fourth Amendment deleted]

These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we courts do nothing, an about which we never hear.

Brinegar v. U.S., 338 U.S. 160, 180-181 (1949) (Jackson, J., dissenting).

Justice Jackson's words about the Fourth Amendment being "not mere second-class rights" were quoted with approval in a long series of dissents by Justices Brennan and Stevens, sometimes joined by Justice Marshall:

Spinelli v. U.S., 393 U.S. 410, 435 (1969) (Fortas, J., dissenting);

Almeida-Sanchez v. U.S., 413 U.S. 266, 274 (1973) (Stewart, J., writing for the majority);

Illinois v. Gates, 462 U.S. 213, 274-275 (1983) (Brennan, J., dissenting);

U.S. v. Villamonte-Marquez, 462 U.S. 579, 610 (1983) (Brennan, J., dissenting);

Michigan v. Long, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting);

U.S. v. Leon, 468 U.S. 897, 960 (1984) (Brennan, J., dissenting);

U.S. v. Leon, 468 U.S. 897, 972-973 (1984) (Stevens, J., dissenting);

New York v. Class, 475 U.S. 106, 130-131 (1986) (Brennan, J., dissenting in part);

Anderson v. Creighton, 483 U.S. 635, 666, n. 22 (1987) (Stevens, J., dissenting);

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 469, n. 9 (1990) (Stevens, J., dissenting).

In 1950, Justice Frankfurter, in a dissent joined by Justice Jackson, wrote:

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them.

It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes

all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in [citations to four cases omitted] or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.

U.S. v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

Nineteen years later, a majority opinion of the U.S. Supreme Court stated: "Mr. Justice Frankfurter wisely pointed out in his *Rabinowitz* dissent that the Amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words' — a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution ...'" *Chimel v. California*, 395 U.S. 752, 760-761 (1969).

In 1980, Justice Marshall, in a dissent joined by Justice Brennan, wrote:

In the words of Mr. Justice Frankfurter: "A decision [of a Fourth Amendment claim] may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime." *Harris v. United States*, 331 U.S. 145, 157, 67 S.Ct. 1098, 1104, 91 L.Ed. 1399 (1947) (dissenting opinion). Today a majority of the Court has substantially cut back the protection afforded by the Fourth Amendment and the ability of the people to claim that protection, apparently out of concern lest the government's ability to obtain criminal convictions be impeded. A slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation. Because we are called on to decide whether evidence should be excluded only when a search has been "successful," it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society. Accordingly, I dissent.

Rawlings v. Kentucky, 448 U.S. 98, 120-121 (1980) (Marshall, J., dissenting).

In 1985, Justice Brennan, in a dissent joined by Justice Marshall, wrote:

Considerations of the deepest significance for the freedom of our citizens counsel strict adherence to the principle that no search may be conducted where the official is not in possession of probable cause — that is, where the official does not know of "facts and circumstances [that] warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S., at 102, 80 S.Ct., at 171; see also *id.*, at 100-101, 80 S.Ct., at 169-170 (discussing history of probable-cause standard). The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some "balancing test" than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the "reasonable" requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials — perhaps even supported by a majority of citizens — may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. [FN4] But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). That right protects the privacy and security of the individual unless

the authorities can cross a specific threshold of need, designated by the term "probable cause." I cannot agree with the Court's assertions today that a "balancing test" can replace the constitutional threshold with one that is more convenient for those enforcing the laws but less protective of the citizens' liberty; the Fourth Amendment's protections should not be defaced by "a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure." *United States v. Martinez-Fuerte, supra*, 428 U.S., at 570, 96 S.Ct., at 3088 (BRENNAN, J., dissenting).

FN4. As Justice Stewart said in *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971): "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."

New Jersey v. T.L.O., 469 U.S. 325, 361-362 (1985) (Brennan, J., dissenting).

In 1989, Justice Brennan, in a dissent joined by Justices Marshall and Stevens, wrote:

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people," *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (dissenting opinion), and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity.

Florida v. Riley, 488 U.S. 445, 463-464 (1989) (Brennan, J., dissenting).

In 1989, Justice Marshall, in a dissent joined by Justice Brennan, wrote:

Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike. *Illinois v. Gates*, 462 U.S. 213, 290, 103 S.Ct. 2317, 2359-60, 76 L.Ed.2d 527 (1983) (BRENNAN, J., dissenting). In the present case, the chain of events set in motion when respondent Andrew Sokolow was stopped by Drug Enforcement Administration (DEA) agents at Honolulu International Airport led to the discovery of cocaine and, ultimately, to Sokolow's conviction for drug trafficking. But in sustaining this conviction on the ground that the agents reasonably suspected Sokolow of ongoing criminal activity, the Court diminishes the rights of *all* citizens "to be secure in their persons," U.S. Const., Amendment. 4, as they traverse the Nation's airports. Finding this result constitutionally impermissible, I dissent.

The Fourth Amendment cabins government's authority to intrude on personal privacy and security by requiring that searches and seizures usually be supported by a showing of probable cause.

U.S. v. Sokolow, 490 U.S. 1, 11-12 (1989) (Marshall, J., dissenting).

In 1990, Justice Brennan, in a dissent joined by Justice Marshall, wrote:

Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action. See *Prouse, supra*, 440 U.S., at 654- 655, 99 S.Ct., at 1396; *Martinez-Fuerte, supra*, 428 U.S., at 577, 96 S.Ct., at 3092 (BRENNAN, J., dissenting) ("Action based merely on whatever may pique the curiosity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct and to avoiding abuse and harassment"). By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police. I would have hoped that before taking such a step, the Court would carefully explain how such a plan fits within our constitutional framework.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 457-458 (1990) (Brennan, J., dissenting).

The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some 'balancing test' than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the 'reasonable' requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials — perhaps even supported by a majority of citizens — may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.' *Olmstead v. United States*, 277 U.S. 438, 478 [48 S.Ct. 564, 572, 72 L.Ed. 944] (1928) (Brandeis, J., dissenting).

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 459-460 (1990) (Brennan, J., dissenting), quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 361-362, 105 S.Ct. 733, 753, 83 L.Ed.2d 720 (1985) (BRENNAN, J., concurring in part and dissenting in part).

In 1991, Justice Marshall, in a dissent joined by Justices Blackmun and Stevens, wrote:

Our Nation, we are told, is engaged in a "war on drugs." No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law-enforcement technique is not proof of its constitutionality. The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method. See *Boyd v. United States*, 116 U.S. 616, 625-630, 6 S.Ct. 524, 529-532, 29 L.Ed. 746 (1886); see also *Harris v. United States*, 331 U.S. 145, 171, 67 S.Ct. 1098, 1111, 91 L.Ed. 1399 (1947) (Frankfurter, J., dissenting). In my view, the law-enforcement technique with which we are confronted in this case — the suspicionless police sweep of buses in intrastate or interstate travel — bears all of the indicia of coercion and unjustified intrusion associated with the general warrant. Because I believe that the bus sweep at issue in this case violates the core values of the Fourth Amendment, I dissent.

At issue in this case is a "new and increasingly common tactic in the war on drugs": the suspicionless police sweep of buses in interstate or intrastate travel.

Florida v. Bostick, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting).

In 1995, Justice Stevens wrote:

The Fourth Amendment's Warrant Clause provides the fundamental check on official invasions of the individual's right to privacy. *E.g., Harris v. United States*, 331 U.S. 145, 195-196, 67 S.Ct. 1098, 1118-1119, 91 L.Ed. 1399 (1947) (Jackson, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 20 (1995) (Stevens, J., dissenting).

In conclusion, the above-quoted dissenting opinions of these justices eloquently criticize eroding Fourth Amendment protections to make it easier for law enforcement to apprehend criminals, especially in the crisis concerning illicit drugs. Below, beginning at page 34, I quote from some judges in the U.S. Courts of Appeal who have made the same point.

Intrusion

My reading of the U.S. Supreme Court decisions since 1970 suggests to me that the Court balances the need for a search against three considerations: (1) intrusiveness of the search, (2) duration of the detention and search, and (3) the probability of inconveniencing innocent people. Minimally intrusive, routine screening (so-called "administrative searches") of all people entering courthouses and airports is permissible. However, burdensome or intrusive searches are *not* legally permissible, unless there is at least "reasonable suspicion" of an individual.

Brief stops of all vehicles on a highway (i.e., suspicionless stops) where Border Patrol officers look in automobiles for illegal immigrants are constitutional. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976). The Court noted the minimally intrusive nature of this screening:

Most motorists are allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases the "point" agent will conclude that further inquiry is in order. He directs these cars to a secondary inspection area, where their occupants are asked about their citizenship and immigration status. The Government informs us that at San Clemente the average length of an investigation in the secondary inspection area is three to five minutes.

Martinez-Fuerte 428 U.S. at 546-547.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to "free passage without interruption," *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925), and arguably on their right to personal security. But it involves only a brief detention of travelers

Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. This objective intrusion the stop itself, the questioning, and the visual inspection also existed in roving-patrol stops. But we view

checkpoint stops in a different light because the subjective intrusion the generating of concern or even fright on the part of lawful travelers is appreciably less in the case of a checkpoint stop.

Martinez-Fuerte 428 U.S. at 557-558.

The objective intrusion of the stop and inquiry thus remains minimal. Moreover, selective referrals rather than questioning the occupants of every car tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public.

Martinez-Fuerte 428 U.S. at 560.

And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.

Martinez-Fuerte 428 U.S. at 562.

We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [footnote omitted] we perceive no constitutional violation. Cf. *United States v. Brignoni-Ponce*, 422 U.S., at 885-887, 95 S.Ct., at 2582- 2583. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved

Martinez-Fuerte 428 U.S. at 563-564.

Finally, the court notes that about 725 illegal aliens were found in a total of 146,000 vehicles that passed through the San Clemente, California checkpoint during eight-days in 1974. *Id.* at 554.

Similarly, consider the analogy of a police roadblock late at night to catch drunk drivers, a so-called sobriety checkpoint. The U.S. Supreme Court held that such checkpoints are permissible. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). The Court noted that about 1.5% of the drivers stopped were drunk, and the average duration of the stop for unimpaired drivers was only 25 seconds, circumstances which are readily distinguishable from the more intrusive searches of airport passengers, much longer waits, and very few terrorists apprehended.

Least Restrictive Means

The legal standard in the USA for government actions that infringe a fundamental right of people is that the government must use the “least restrictive means” of achieving some compelling state interest. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 520 (1984) (Marshall, J., concurring); *Bernal v. Fainter*, 467 U.S. 216, 219, 227 (1984); and many subsequent cases.

Right to Travel

While freedom of travel is *not* explicitly mentioned in the U.S. Constitution and its Amendments, the U.S. Supreme Court has repeatedly recognized the legal right to travel:

- *Kent v. Dulles*, 357 U.S. 116, 125-126 (1958) (international travel case: “The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. [footnote omitted] [Prof. Z.] Chafee, *Three Human Rights in the Constitution of 1787* (1956), 171-181, 187 et seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”).
- *U.S. v. Guest*, 383 U.S. 745, 757-758 (1966) (“The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”).
- *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.” *Shapiro* also quotes *Guest*, supra, with approval.). *Shapiro* also holds that:
 ... in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.
Shapiro, 394 U.S. at 634.
Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964), is the only case in which this Court invalidated on a constitutional basis a congressionally imposed restriction. *Aptheker* also involved a flat prohibition but in combination with a claim that the congressional restriction compelled a potential traveler to choose between his right to travel and his First Amendment right of freedom of association. It was this Hobson's choice, we later explained, which forms the rationale of *Aptheker*. See *Zemel v. Rusk*, [381 U.S. 1] at 16, 85 S.Ct. at 1280 [(1965)].

Shapiro v. Thompson, 394 U.S. at 649.

- *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (“Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference.”).
- *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (“(F)reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” Quoting *Guest*, supra, with approval.).
- *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974) (“The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.” [citations omitted]).
- *Califano v. Torres*, 435 U.S. 1, 4, n. 6 (1978) (“The constitutional right of interstate travel is virtually unqualified. For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.”).
- *Regan v. Wald*, 468 U.S. 222, 240-241 (1984) (Summarizing cases on freedom of travel).

The U.S. Supreme Court has distinguished

- (1) freedom of Americans to travel to foreign countries, which freedom is protected by the “due process” clause of the Fifth Amendment, but which freedom may be regulated by the Secretary of State (e.g., prohibiting travel to Cuba)

from

- (2) the absolute freedom of Americans to travel inside the USA.

Califano v. Torres, 435 U.S. 1, 4, n. 6 (1978); *Califano v. Aznavorian*, 439 U.S. 170, 176-177 (1978); *Haig v. Agee*, 453 U.S. 280, 306-307 (1981).

In the context of searches of airline passengers, a U.S. Court of Appeals said

... it is firmly settled that freedom to travel at home and abroad without unreasonable governmental restriction is a fundamental constitutional right of every American citizen.

U.S. v. Davis, 482 F.2d 893, 912 (9th Cir. 1973).

However, *Davis* held that the search at the airport was “consistent with” the defendant’s “constitutional right to travel.”

In short, the end does not justify the means. The government *can not* use any possible method of preventing attacks by terrorists, even though such prevention is highly desirable. As mentioned above, beginning at page 12, I believe that the government should have “reasonable suspicion” of an individual before conducting an intensive search of that person or his/her luggage.

Consent

I would expect an exasperated government bureaucrat to object to my arguments about lack of “reasonable suspicion”, violations of privacy, and burdensome intrusion by saying that airline passengers had *consented* to these intrusive searches. I would counter this argument by saying that the alleged consent is illusory. If a passenger refuses to undergo these intrusive and burdensome searches, that passenger would be denied access to the airplane and would forfeit his/her nonrefundable ticket. It is elementary constitutional law that the government can *not* make some benefit (e.g., permitting travel on an airline) conditional on surrender of a constitutional right (e.g., agreeing to an *unconstitutional* search).¹⁸

The problem of involuntary consent to searches at airports has been recognized at least since 1972, if not earlier.¹⁹ It is not adequate to say that there exists alternative forms of travel (e.g., buses, trains, automobile) without searches of travelers, because in a country as large as the USA these alternative forms are too slow. One can easily fly between Boston and Los Angeles in one day, but the same one-way trip in an automobile would require approximately 7 days. Many businessmen fly across the country for a one-day meeting, which takes a total of 3 days including travel time by airplane. The same one-day meeting could be *uneconomical* if it required more than five days of round-trip travel by automobile.

I have found a few cases in which judges have recognized the choice of either (1) so-called consent to a search at an airport or (2) spending many additional hours or days in an alternative means of travel. Such a so-called choice is coercive and should be unacceptable.

In July 1972, a passenger attempted to fly from Kansas City to Chicago, with a small quantity of amphetamine in his attaché case. Because the passenger fit the profile of a hijacker, he was searched at the gate area. A U.S. Marshal found the amphetamine and arrested the passenger. The passenger’s attorney successfully argued that the amphetamine had been seized in violation of the Fourth Amendment, and hence the amphetamine was *inadmissible* as evidence. The U.S. Court of Appeals wrote:

Because the search was conducted without a warrant, the government is required to show that it was justified by exceptional circumstances. It attempts to meet this burden by contending, first, that the defendant consented to the search and, second, that it was a reasonable search for weapons or explosives.

¹⁸ Ronald B. Standler, *Doctrine of Unconstitutional Conditions in the USA*, <http://www.rbs2.com/duc.pdf> (Feb 2005). In the context of searches at airports, see *U.S. v. Davis*, 482 F.2d 893, 912, 913 (9th Cir. 1973) (“Moreover, exercise of the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right (here the Fourth Amendment right to be free of unreasonable search), absent a compelling state interest.”).

¹⁹ Patrick W. McGinley and Stephen F. Downs, “Airport Searches and Seizures — A Reasonable Approach,” 41 *Fordham Law Rev.* 293, 322 (1972).

I. Consent.

The burden is upon the government to prove that "consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). To sustain its burden, the government points out that warnings were posted at the airport advising passengers that they were subject to being searched prior to boarding aircrafts. It reasons that:

* * * [W]here a person is clearly warned in advance that he will be searched and he still has time to withdraw as defendant did here, his conduct in seeking to board the plane must be inferred to include a free, voluntary and intelligent consent to be searched.

The District Court [351 F.Supp. 148, 155 (D.Mo. 1972)] found that this did not constitute consent "in any meaningful sense." We agree. Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent to the search when to do otherwise would have meant foregoing the constitutional right to travel. [FN2] *United States v. Meulener*, 351 F.Supp. 1284, 1288 (C.D.Cal. 1972); *United States v. Lopez*, 328 F.Supp. 1077, 1093 (E.D.N.Y. 1971).

FN2. It might be suggested that a prospective airline passenger will not actually be deprived of his right to travel because there are alternative means of travel available. We do not find this argument persuasive "since, in many situations, flying may be the only practical means of transportation." McGinley & Downs, *Airport Searches and Seizures-A Reasonable Approach*, 41 *Fordham L.Rev.* 293, 322 (1972).

U.S. v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973).

In another early case, an airline passenger who failed a metal detector test at an airport was searched and found to be carrying counterfeit currency wrapped in aluminum foil. The U.S. Court of Appeals in New York wrote:

In this regard we do not predicate decision upholding magnetometer searches in general on the basis of 'consent.' While a search which would otherwise be unlawful may through the consent of the person searched become lawful, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *United States v. Callahan*, 439 F.2d 852 (2d Cir.), *cert. denied*, 404 U.S. 826, 92 S.Ct. 56, 30 L.Ed.2d 54 (1971), such consent entailing as it does the waiver of a constitutional right, must be freely and voluntarily given; it must not be directly or indirectly the result of coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964, 86 S.Ct. 1591, 16 L.Ed.2d 675 (1966). To make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973), in many situations a form of coercion, however subtle. Cf. *Lefkowitz v. Turley*, 414 U.S. 70, 79-82, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all. [FN14]

FN14. Again by analogy, if the government were to announce that hereafter all telephones would be tapped, perhaps to counter an out-break of political kidnappings, it would not justify, even after public knowledge of the wiretapping plan, the proposition that anyone using a telephone consented to being tapped. It would not matter that other means of communication exist — carrier pigeons, two cans and a length of string; it is often a necessity of modern living to use a telephone. So also is it often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense.

U.S. v. Albarado, 495 F.2d 799, 806-807 (2nd Cir. 1974).

This case also considered consent to a frisk by security personnel and held that the frisk in this case was *unlawful*.

The intrusiveness of the airport frisk is also limited by foreknowledge of it. Signs warn of searches and one standing in line may see those in front being frisked. Thus, when one is himself frisked, it is not a surprise, and there is an element of voluntariness. [FN15] Even after activating the magnetometer, the prospective passenger may refuse to submit to a frisk and instead forfeit his ability to travel by air, because this serves the purpose of the whole search procedure, which is not to catch criminals, but rather to keep armed hijackers from getting on airplanes. *United States v. Davis*, 482 F.2d 893, 908 & n. 41 (9th Cir. 1973). The signs and highly visible magnetometers and frisks serve as a deterrent, and indeed the hope is that the prospective hijacker will turn around and leave. Thus, while there is coercion to submit to the airport frisk, there is no compulsion, as there is in an ordinary street frisk, and the airport frisk is, as we say, less intrusive thereby.

FN15. At the same time, by conditioning air travel on a waiver of fourth amendment rights, the prospective air traveler is often being 'coerced' in a sense, as we have said. The condition itself, if it serves a compelling governmental interest, may be justified, thereby making the search reasonable; it is lawful, however, not through consent, but rather through reasonableness.

U.S. v. Albarado, 495 F.2d 799, 807-808 (2nd Cir. 1974).

The U.S. Court of Appeals in California in 1989 held that an airline passenger may have consented to a search for weapons, but the passenger did *not* consent to a search for a large amount of currency in his carry-on briefcase, which was confiscated by U.S. government agents.

We have already determined that an airport screening system cannot be justified as a limited search for weapons under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Davis*, 482 F.2d at 905-08. Nor can we uphold the search, as the government would have us do, on the basis of consent. There is some sense, we suppose, in which it could be said that Campbell consented to the search that led up to the discovery of the currency by FTS agents. But the scope of the consent is perforce limited by the nature of the search to which the subject submits. Passengers rushing to board a plane can fairly be said to have consented to a search for weapons and explosives; any such devices found in their possession are fair game for seizure. But passengers would be surprised to learn that they are also submitting to a more generalized search for contraband or, broader yet, things that are not in themselves illegal but merely look suspicious.

We are reluctant to hold that the consent given for airport security searches exceeds the rationale of those searches. Indeed, we doubt that the government could extract so broad a consent as a condition for boarding an airplane. As Professor LaFave notes, should the government decide to screen all passengers on trains, buses or cars, such a procedure could not be upheld on grounds of implied consent, in the absence of a constitutionally sufficient justification. Any other conclusion "not only offends common sense, but flies in the face of the most fundamental Fourth Amendment principle that the government cannot 'avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped or that all homes would be searched.'" 4 W. LaFave, *Search and Seizure* 10.6(g) (2d ed. 1987) (quoting *Davis*, 482 F.2d at 905). [FN8]

FN8 The true voluntariness of an airport search is doubtful in any event. As one commentator noted:

A passenger is not, of course, compelled to travel by airplane, but many travelers would reasonably conclude that they had no realistic alternative. Instead of justifying passenger searches as consensual, we should candidly acknowledge the element of coercion and seek a rationale which justifies them, coercion notwithstanding.

Wright, *Hijacking Risks and Airport Frisks: Reconciling Airline Security with the Fourth Amendment*, 9 Crim.L.Bull. 491, 499-500 (1973). We have held that the "exercise of the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right (here, the Fourth Amendment right to be free of unreasonable search), absent a compelling state interest." *Davis*, 482 F.2d at 913. Because some compelling state interest must exist before the government can burden the constitutional right to travel, airport searches cannot be justified by consent alone. "At the minimum, governmental restrictions upon freedom to travel are to be weighed against the necessity advanced to justify them, and a restriction that burdens the right to travel 'too broadly and indiscriminately' cannot be sustained." *Id.* at 912.

We conclude, therefore, that the airport search established by the record in this case cannot be justified by consent.

U.S. v. \$124,570 U.S. Currency, 873 F.2d 1240, 1247-48 (9th Cir. 1989).

In a recent case involving a checkpoint on a road intended to search drivers for illicit drugs, a U.S. Court of Appeals found that the search violated the Fourth Amendment. In dictum, Judge Posner wrote about "the use of metal detectors and x-ray machines to screen entrants to government buildings and embarking air travelers" and other searches pursuant to safety regulations.

These measures, moreover, usually make only limited inroads into privacy, because a person can avoid being searched or seized by avoiding the regulated activity, though we hesitate to put much weight on this point; people are unlikely to feel they can afford to "ground" themselves in order to avoid airport searches.

Edmond v. Goldsmith, 183 F.3d 659, 664 (7th Cir. 1999), *aff'd sub nom.*, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Another analogous case involves a sheriff who strip searched all visitors to a jail. A woman sued the sheriff. The sheriff argued that visitors to the jail had automatically consented to a strip search. Both the U.S. District Court and the U.S. Court of Appeals rejected the sheriff's argument. *Blackburn v. Snow*, 586 F.Supp. 655, 661 (D.Mass. 1984), *aff'd*, 771 F.2d 556, 567-569 (1st Cir. 1985). *Blackburn* is discussed in my companion essay at <http://www.rbs2.com/travel2.pdf>.

Specific Cases on Security Screening

Beginning in the early 1970s, all airplane passengers in the USA were routinely screened: people walked through a metal detector and carry-on baggage was X-rayed. Sometimes these routine screenings found illicit drugs or other contraband that was *not* useful as a weapon in hijacking an airplane. Criminal defense attorneys (nearly always *unsuccessfully*) argued that searches conducted for the safety of passengers from hijackers could *not* be used to gather evidence for prosecution in criminal cases. Courts quickly recognized that searches of all passengers at airports were an exception to the general rule that required “reasonable suspicion” for any search by government agents. Therefore, contraband found in searches of airline passengers was admissible evidence in criminal trials. While the focus of these cases is on evidence law in criminal trials, there are often incidental remarks about the acceptability of such searches of *all* airline passengers. As general comments about all of these cases:

- (1) these cases involve pre-11 Sep 2001 screening that is much less intrusive than post-11 Sep screening.
- (2) the remarks about screening of all passengers may be obiter dictum, which is *not* binding precedent.

There are many reported cases on search and seizure at airports.²⁰ To conserve my *unpaid* time on this project, I have ignored the opinions of federal trial courts, which are not precedent. To learn how searches were initially justified, I have read many (but not all) of the opinions of the U.S. Courts of Appeals during 1971-74. To learn the current law, I have read some of the recent cases from the U.S. Courts of Appeals. I caution the reader that the following is *not* a complete survey of case law. However, I believe that some of the following quotations will be useful to attorneys who are currently challenging intrusive searches of airline passengers.

U.S. Supreme Court

The U.S. Supreme Court has said remarkably little about searches of *all* airline passengers at airports. Most of the Court’s comments about searches of airline passengers are dicta in cases involving other issues.

In a 1989 case involving mandatory urine specimens of U.S. Treasury Dept. employees who applied for promotion, the U.S. Supreme Court remarked:

The point is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, see, *e.g.*, *Camara v.*

²⁰ My search of all federal cases on Westlaw for {(search! /S (passenger luggage suitcase)) /P (airplane airport airline)} found 1257 items on 3 Dec 2004. My search for all federal cases on Westlaw for { (magnetometer (metal /S detector)) /P (security hijack! terror!)} found 267 items on 3 Dec 2004.

Municipal Court of San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:

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, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage 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.

United States v. Edwards, 498 F.2d 496, 500 (CA2 1974) (emphasis in original).

See also *United States v. Skipwith*, 482 F.2d 1272, 1275-1276 (CA5 1973); *United States v. Davis*, 482 F.2d 893, 907-912 (CA9 1973). It is true, as counsel for petitioners pointed out at oral argument, that these air piracy precautions were adopted in response to an observable national and international hijacking crisis. Tr. of Oral Arg. 13. Yet we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline. It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.

Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the Government's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program. In the 15 years the program has been in effect, more than 9.5 *billion* persons have been screened, and over 10 *billion* pieces of luggage have been inspected. See Federal Aviation Administration, Semiannual Report to Congress on the Effectiveness of The Civil Aviation Program (Nov. 1988) (Exhibit 6). By far the overwhelming majority of those persons who have been searched, like Customs employees who have been tested under the Service's drug-screening scheme, have proved entirely innocent — only 42,000 firearms have been detected during the same period. *Ibid.* When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. See *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979).

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 675, n. 3 (1989)

In a 1991 case involving searches of luggage at interstate bus terminals, the majority opinion of the U.S. Supreme Court began by saying:

We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.

Drug interdiction efforts have led to the use of police surveillance at airports, train stations, and bus depots. Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them potentially incriminating questions. Broward County has adopted such a program. County Sheriff's Department officers routinely board buses at scheduled stops and ask passengers for permission to search their luggage.

Florida v. Bostick, 501 U.S. 429, 431 (1991).

In a 1997 case involving a Georgia state statute that required candidates for public office to pass a test for illicit drugs, the U.S. Supreme Court tersely remarked at the end of its opinion:

We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" — for example, searches now routine at airports and at entrances to courts and other official buildings. See *Von Raab*, 489 U.S., at 674-676, and n. 3, 109 S.Ct., at 1395-1396, and n. 3. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

Chandler v. Miller, 520 U.S. 305, 323 (1997).

Note the use of the word *may*, because the U.S. Supreme Court has apparently not yet considered the constitutionality of routine searches of many billions of airline passengers in the USA since 1970.

In the year 2000, the U.S. Supreme Court held that checkpoints on city streets, in which police searched automobiles for illicit drugs, violated the Fourth Amendment. In reviewing the law in that case, the Court noted:

We have also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. See, e.g., *New York v. Burger*, 482 U.S. 691, 702-704, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (warrantless administrative inspection of premises of "closely regulated" business); *Michigan v. Tyler*, 436 U.S. 499, 507-509, 511-512, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534-539, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (administrative inspection to ensure compliance with city housing code).

We have also upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens, *Martinez-Fuerte*, *supra*, and at a sobriety checkpoint aimed at removing drunk drivers from the road, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). In addition, in *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), we suggested that a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible. In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.

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

The U.S. Supreme Court's opinion in *Edmond* concludes:

When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.

Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute. Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control. Our holding also does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose. Finally, we caution that the

purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene. Cf. *Whren*, [517 U.S. 806, 813 (1996)] Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment. The judgment of the Court of Appeals is, accordingly, affirmed. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). Judge Posner's summary of the law in his opinion at the U.S. Court of Appeals in this case is quoted below, beginning at page 49.

In a recent case involving searches of luggage on interstate buses, the U.S. Supreme Court wrote:

Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. See, e.g., *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion); see *id.*, at 523, n. 3, 103 S.Ct. 1319 (REHNQUIST, J., dissenting); *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (*per curiam*) (holding that such interactions in airports are "the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest"). Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage — provided they do not induce cooperation by coercive means. See *Florida v. Bostick*, 501 U.S., at 434-435, 111 S.Ct. 2382 (citations omitted). If a reasonable person would feel free to terminate the encounter, then he or she has not been seized. *U.S. v. Drayton*, 536 U.S. 194, 200-201 (2002).

See also:

- *U.S. v. Chadwick*, 433 U.S. 1 (1977) (Later abrogated by *Acevedo*.)
- *Arkansas v. Sanders*, 442 U.S. 753 (1979) (Later abrogated by *Acevedo*.)
- *U.S. v. Mendenhall*, 446 U.S. 544 (1980).
- *Robbins v. California*, 453 U.S. 420 (1981) (Overruled by *Ross*.)
- *U.S. v. Ross*, 456 U.S. 798 (1982).
- *Florida v. Royer*, 460 U.S. 491 (1983).
- *U.S. v. Place*, 462 U.S. 696 (1983).
- *Florida v. Rodriguez*, 469 U.S. 1 (1984).
- *California v. Acevedo*, 500 U.S. 565 (1991).
- *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

There have been several dissenting opinions, which are *not* law, by Justices of the U.S. Supreme Court that mention searches at airports. For example, Justice Stevens, joined by Justices Brennan and Marshall, dissented in a case involving sobriety checkpoints on roads.

The most disturbing aspect of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures. Although the author of the opinion does not reiterate his description of that interest as "diaphanous," see *Delaware v. Prouse*, 440 U.S., at 666, 99 S.Ct., at 1403 (REHNQUIST, J., dissenting), the Court's opinion implicitly adopts that characterization. On the other hand, the Court places a heavy thumb on the law enforcement interest by looking only at gross receipts instead of net benefits. Perhaps this tampering with the scales of justice

can be explained by the Court's obvious concern about the slaughter on our highways and a resultant tolerance for policies designed to alleviate the problem by "setting an example" of a few motorists. This possibility prompts two observations.

First, my objections to random seizures or temporary checkpoints do not apply to a host of other investigatory procedures that do not depend upon surprise and are unquestionably permissible. These procedures have been used to address other threats to human life no less pressing than the threat posed by drunken drivers. It is, for example, common practice to require every prospective airline passenger, or every visitor to a public building, to pass through a metal detector that will reveal the presence of a firearm or an explosive. Permanent, nondiscretionary checkpoints could be used to control serious dangers at other publicly operated facilities. Because concealed weapons obviously represent one such substantial threat to public safety, [footnote omitted] I would suppose that all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search. [FN18] Likewise, I would suppose that a State could condition access to its toll roads upon not only paying the toll but also taking a uniformly administered breathalyzer test. That requirement might well keep all drunken drivers off the highways that serve the fastest and most dangerous traffic.

FN18. Permanent, nondiscretionary checkpoints are already a common practice at public libraries, which now often require every patron to submit to a brief search for books, or to leave by passing through a special detector.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 473-474 (1990) (Stevens, J., dissenting).

U.S. Courts of Appeals

There is a list of early cases in *U.S. v. Albarado*, 495 F.2d 799, 801, n. 1 (2nd Cir. 1974) (listing 18 decisions by U.S. Courts of Appeals) and in *U.S. v. Davis*, 482 F.2d 893, n. 32 (9th Cir. 1973) (listing 11 decisions by the U.S. Courts of Appeal). Of course, a search in Westlaw— which I have done — is a better way to find relevant cases.

Epperson

U.S. v. Epperson, 454 F.2d 769 (4th Cir. 1972), *cert. den.*, 406 U.S. 947 (1972).

A magnetometer at an airport detected metal carried by Epperson. To determine what the magnetometer detected, a U.S. Marshal searched Epperson's jacket and found a loaded .22 caliber pistol. The U.S. Court of Appeals in Virginia declared that use of a magnetometer at an airport "was a search within the meaning of the Fourth Amendment", but such a search was reasonable.

We think the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and precriminal events, fully justified the minimal invasion of personal privacy by magnetometer. The use of the device, unlike frisking, cannot possibly be "an annoying, frightening, and perhaps humiliating experience," *Terry, supra* at 25, 88 S.Ct. at 1882, because the person scrutinized is not even aware of the examination.

Epperson, 454 F.2d at 771.

It is clear to us that to innocent passengers the use of a magnetometer to detect metal on those boarding an aircraft is not a resented intrusion on privacy, but, instead, a welcome reassurance

of safety. Such a search is more than reasonable; it is a compelling necessity to protect essential air commerce and the lives of passengers. The rationale of *Terry* is not limited to protection of the investigating officer, but extends to "others . . . in danger." *Terry, supra*, 392 U.S. at 30, 88 S.Ct. 1868, 20 L.Ed.2d 889. That all passengers are endangered by the presence of weapons on aircraft needs no exposition.

When the high metal indication of the magnetometer was not satisfactorily explained by Epperson, the subsequent physical "frisk" of his jacket was entirely justifiable and reasonable under *Terry*. At this stage of the encounter the reasonable fear of the marshal for the safety of airline passengers increased and he was entitled, for their protection, to conduct a carefully limited search of the clothing of Epperson in an attempt to discover weapons which might be used for air piracy. Since the use of the magnetometer was justified at its inception, and since the subsequent physical frisk was justified by the information developed by the magnetometer, and since the search was limited in scope to the circumstances which justified the interference in the first place, we hold the search and seizure not unreasonable under the Fourth Amendment.

Epperson, 454 F.2d at 772.

Bell

U.S. v. Bell, 464 F.2d 667 (2nd Cir. 1972), *cert. den.*, 409 U.S. 991 (1972).

An airline ticket agent identified Bell as within the criteria of the FAA's hijacker profile. Further, as passengers stepped through a magnetometer, the device indicated the presence of metal on Bell. Bell then consented to a search by a U.S. Marshall, who found heroin in Bell's pocket. Bell was then arrested and convicted on a narcotics charge. Bell's attorney appealed, alleging that the search and seizure were unlawful. Judge Mulligan wrote the main opinion of the three-judge panel of the U.S. Court of Appeals that affirmed Bell's conviction.

The governmental interest here is self-evident. Airplane hijacking is a nasty business from any point of view. Thousands of innocent passengers have been terrorized and their lives jeopardized by the venal, the political terrorist and the mentally disturbed. The interest in stopping the crime is apparent and the limited intrusion upon Bell's privacy was, in balance, insignificant. Any suggestion that the defendant'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 of the few should be at least tolerable. *Bell*, 464 F.2d at 674.

Judge Mulligan's main opinion contains an incidental and hypothetical remark about the adjustment of the magnetometer to detect a pistol.

Even if the machine were oversensitive in some measure we fail to see the constitutional significance. This is primarily a matter of the practical effectiveness of the device. If it is oversensitive, its use becomes self-defeating but it hardly becomes unconstitutional. *Bell*, 464 F.2d at 673.

I do not agree with Judge Mulligan, because, in my opinion, the magnetometer provides the "reasonable suspicion" that justifies a frisk under the standards of *Terry*.²¹ In this particular case,

²¹ However, the magnetometer must be adjusted so that it does not flag small, innocuous pieces of metal on a passenger, so most innocent passengers pass the magnetometer test.

there was an independent ground for reasonable suspicion (i.e., Bell fit the profile of a hijacker), but, as a general rule, failing the magnetometer test is the only reason for frisking an airline passenger.

Chief Judge Friendly wrote a concurring opinion that later, in *Edwards*, became a majority opinion.

Although my Brother Mulligan's excellent opinion satisfactorily disposes of this case, I would not wish us to be understood as implying that searches of airplane passengers are lawful only in such circumstances as are here presented, where a person first meets a "profile," whose details, however carefully guarded, are necessarily known to so many thousands of people that we may well be reading them someday in the press, and then activates a magnetometer. At least so long as the present wave of airplane hijacking continues, permissible subjection of airline passengers and their baggage to a search for objects that might be used for air piracy or to cause or constitute a threat of an explosion goes far beyond this.

The Founders banned only "unreasonable searches and seizures." Determination of what is reasonable requires a weighing of the harm against the need. When the object of the search is simply the detection of past crime, probable cause to arrest is generally the appropriate test. On the other hand, when "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," a lower standard prevails. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884 (1968). The threatened criminal activity in *Terry* was the burglary of a store. 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 or like damage 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. [footnote omitted]

Since all air passengers and their baggage can thus be constitutionally searched, there is no legal objection to searching only some, thereby lessening inconvenience and delay, provided there is no national or racial discrimination without a rational basis (such as the destination of a particular flight). I would thus have no difficulty in sustaining a search that was based on nothing more than the trained intuition of an airline ticket agent or a marshal of the Anti-Hijacking Task Force, as the Third Circuit did in *United States v. Lindsey*, 451 F.2d 701 (1971). Moreover, the existence of a program does not preclude the search of someone outside it, whether for some reason, as in *Lindsey*, or because of pardonable error.

In other words, while the Federal Aviation Administration is to be commended for its efforts to devise a program that limits intrusions on privacy and reduces flight delays, this should be recognized as a self-imposed expedient for minimizing inconvenience to those not believed to constitute a danger, not as an element necessary to validate a particular search. And the courts should say nothing that would create doubt concerning the legality of wider or less precise measures when and if these should prove to be needed.

Bell, 464 F.2d at 674-675 (Friendly, J., concurring).

Judge Mansfield, the remaining member of the three-judge panel in *Bell*, disagreed with Judge Friendly. The following quotation is Judge Mansfield's entire opinion.

I join in Part I of Judge Mulligan's excellent opinion and agree in addition that the seizure of the heroin from appellant's raincoat was lawful. In view of the concurring opinion of my brother Chief Judge Friendly, however, I feel that additional comment is appropriate.

Airplane hijacking indeed poses a grave threat to the safety and convenience of the travelling public. However, I do not share the view that it 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. To adopt such a vague principle would be to abandon standards that have been carefully constructed over the years as a means of protecting individual rights guaranteed by the Fourth Amendment. Cf. *Carroll v. United States*, 267 U.S. 132, 153-154, 45 S.Ct. 280, 69 L.Ed. 543 (1925). If the danger to the public posed by the current wave of hijackings were held to constitute adequate ground for such a broad expansion of police power, the sharp increase in the rate of serious crimes in our major cities could equally be used to justify similar searches of persons or homes in high crime areas based solely upon the "trained intuition" of the police. With the door thus opened, a serious abuse of individual rights would almost inevitably follow.

History reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an "emergency" or threat to the public. But the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 483, 54 S.Ct. 231, 256, 78 L.Ed. 413 (1934) (Sutherland, J., dissenting).

No necessity exists for punching a hole in the Fourth Amendment in order to enable the FAA and airline authorities to deal effectively with the air piracy problem. As the Government's brief informs us, no flight fully protected by the present anti-hijacking screening system has been hijacked. Furthermore, should there be any increase in the threat of hijackings, airline authorities, in addition to their use of existing methods described in the majority opinion (which are undoubtedly undergoing improvement and refinement on the basis of experience) may protect themselves and the public by refusing passage to a suspected hijacker rather than by subjecting all passengers to the wholesale indignities that would be permitted in the exercise of broad powers of the type urged.

In any event we are neither asked nor required to venture out upon such an uncharted constitutional sea in the present case, where Deputy Marshal Walsh, having sufficient grounds for suspecting Bell of hijacking, had the power to stop and frisk him. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). I would prefer not to "anticipate a question of constitutional law in advance of the necessity of deciding it", *Ashwander v. TVA*, 297 U.S. 288, 346-347, 483, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). *Bell*, 464 F.2d at 675-676 (Mansfield, J., concurring).

I am troubled by Judge Friendly appointing himself as a cheerleader for the FAA anti-hijacking program — judges are supposed to guard the rights and liberties of citizens from violations by the government. One law review article mentions that Judge Friendly's eagerness to search airline passengers is not consistent with his dissent in another Fourth Amendment case.²² It is sad that Judge Mansfield's more cautious view did not prevail in *Edwards* and other later cases.

²² Patrick W. McGinley and Stephen F. Downs, "Airport Searches and Seizures — A Reasonable Approach," 41 *Fordham Law Rev.* 293, 315-316 (1972).

Moreno

U.S. v. Moreno, 475 F.2d 44 (5thCir. 1973).

Moreno arrived by airplane at the San Antonio, Texas airport on 21 Jan 1972, departed in a taxicab, then returned about two hours later and purchased an airline ticket. Because Moreno appeared to be very nervous, Moreno was stopped by a U.S. Marshal who was serving on an anti-air piracy detail. The Marshal noticed a “prominent bulge” on one side of Moreno’s coat and Moreno gave false answers to some of the Marshal’s questions. The bulge was a package of 87 grams of heroin. Moreno was then arrested and convicted. Moreno appealed, but the U.S. Court of Appeals affirmed the District Court’s decision.

The opinion of the U.S. Court of Appeals mentions in seven paragraphs the urgent need to protect people from hijacking of airplanes. *Moreno*, 475 F.2d. at 45, 47, 48, 49, 51. However, my reading of this opinion finds no facts to indicate that the U.S. Marshal suspected Moreno of being a possible hijacker, other than a one-sentence mention that the Marshal suspected that the bulge in Moreno’s coat was “some kind of weapon or explosive device that could be used in an air piracy attempt.” *Id.* at 46. Obviously, it is more likely that the bulge was illegal drugs. I believe that *Moreno* is an ordinary narcotics distribution case. Aside from the Court of Appeals’ gratuitous remarks about the air piracy crisis, *Moreno* is important for the following paragraph and its footnote:

Due to the gravity of the air piracy problem, we think that the airport, like the border crossing, [FN8] is a critical zone in which special fourth amendment considerations apply. It is the one channel through which all hijackers must pass before being in a position to commit their crime. It is also the one point where airport security officials can marshal their resources to thwart such acts before the lives of an airplane's passengers and crew are endangered. In applying *Terry* were we to hold that airport security officials must always confine themselves to a "pat down" search where there is a proper basis for an air piracy investigation, we think that such a per se restriction in the final analysis would be self-defeating. We have already pointed out that the hijacker can conceal explosives or weapons in places which might be overlooked in the course of a cursory pat down. It should be emphasized that such a search is not primarily for the investigating officer's protection, but rather for the protection of a distinct and uniquely threatened class — this nation's air carriers, their crews and passengers.

FN8. Customs officials conducting border searches have always been exempt from the usual fourth amendment requirement that searches be based on probable cause. Aside from the historical argument that this exception has always been recognized, it is also justified by the vital national interest in preventing illegal entry and smuggling, particularly of narcotics. Although under some circumstances searches can be conducted away from the border crossing area, all persons searched must be shown to have come through that critical zone to make this exception to the warrant requirement applicable. The mere suspicion of possible illegal activity is enough cause to justify a border search. See *United States v. Warner*, 441 F.2d 821, 832 (5th Cir. 1971); *Validity of Border Searches and Seizures by Customs Officers*, 6 A.L.R.Fed. 317 (1971). Our discussion of border searches is by way of analogy. We do not propose to substitute the "suspicion standard" applicable in border search cases for the *Terry v. Ohio* standard which is the basis for our decision.

Moreno, at 51.

While *Moreno* applied the “reasonable suspicion” standard in *Terry*, the Fifth Circuit of the Court of Appeals later adopted the lower “mere suspicion” standard for justifications of all searches at airports. See the discussion of *Lopez-Pages*, below at page 48.

Legato

U.S. v. Legato, 480 F.2d 408 (5th Cir. 1973), *cert. den.*, 414 U.S. 979 (1973).

In a separate opinion that concurred only in the result, Judge Goldberg wrote tersely that airport security programs were finding many ordinary criminals and few terrorists.

Under the commands of *Moreno* I concur only in the result. The exigencies of skyjacking and bombing, however real and dire, should not leave an airport and its environs an enclave where the Fourth Amendment has taken its leave. It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding. Seeking to prevent or detect crime, standing alone, has never justified eroding the right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment.

U.S. v. Legato, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., specially concurring).

Ruiz-Estrella

U.S. v. Ruiz-Estrella, 481 F.2d 723 (2nd Cir. 1973), *on remand*, 362 F.Supp. 660 (E.D.N.Y. 1973).

An airline ticket agent at JFK airport identified Ruiz-Estrella as within the criteria of the FAA’s hijacker profile. A federal marshall then searched Ruiz-Estrella’s shopping bag and found a shotgun with an illegally short barrel and several shotshells hidden amongst some toys. Ruiz-Estrella was then arrested. He admitted that “he intended to rob a liquor store in Miami, and then flee to his native Santo Domingo.” Ruiz-Estrella was convicted on firearms offenses and his attorney appealed. In an unusual ruling, the U.S. Court of Appeals held that there was no probable cause, and thus the search and seizure were *unconstitutional*.

The U.S. Government conceded that there was no probable cause, but argued that Ruiz-Estrella had consented to the search. The Court of Appeals disagreed.

The fact that a suspect, who has not been warned of his right to refuse the search, silently hands over his bag in such circumstances will not support the inference of freely given consent. Under these particular facts, the government has shown no more than acquiescence to apparent lawful authority, and the theory of consent cannot be accepted.

Ruiz-Estrella, 481 F.2d at 728.

The Court of Appeals briefly considered “reasonable suspicion” under *Terry*.

Ruiz-Estrella neither passed through nor activated a magnetometer, [footnote omitted] and it is conceded that he did nothing at all during the period in question that could be construed as suspicious in nature. At worst, he met the profile and produced marginally confusing

identification, and any reliance on the latter factor must be negated by the marshal's candid admission that the identification was irrelevant to the intended search.

Ruiz-Estrella, 481 F.2d at 729.

We hold only that under the particular facts of this case, where the suspect did nothing at all suspicious and did not activate the magnetometer, the *Terry* rationale will not support the search of his bag.

Ruiz-Estrella, 481 F.2d at 730.

The Court of Appeals also considered an alternative justification.

We move on then, to Chief Judge Friendly's *Bell* theory, that a limited airport search is justified by the danger alone, as long as the defendant is aware of his ability to avoid the search by refusing to board the aircraft. Even assuming *arguendo* the correctness of this theory, [FN5] which the *Bell* majority did not adopt, the facts here do not amount to "a showing that he [appellant] was aware that he had a right to refuse to be searched if he should choose not to board the aircraft," *Clark, supra*, 475 F.2d at 247. The record makes it quite clear that neither the ticket agent, the boarding agent, nor the sky marshal made *Ruiz-Estrella* aware of any such option.

FN5. At least two commentators have viewed Judge Friendly's *Bell* concurrence as inconsistent with both *Terry* and general Fourth Amendment principles. See *McGinley & Downs, supra* n. 1, 41 *Fordham L.Rev.* at 315- 16. Cf. Note, *Airport Security Searches and the Fourth Amendment, supra* n. 1, 71 *Colum.L.Rev.* at 1049-50, suggesting that conditioning exercise of the right to travel upon relinquishment of Fourth Amendment rights is constitutionally impermissible. In view of our disposition of this case, we express no views on the merits of either of these contentions.

Ruiz-Estrella, 481 F.2d at 728.

Davis

U.S. v. Davis, 482 F.2d 893 (9th Cir. 1973).

Davis is the leading case in the Ninth Circuit on searches of airline passengers. *Davis* carried a loaded revolver in his briefcase, which he attempted to carry aboard a flight from San Francisco to Thailand in 1971. *Davis* was arrested, convicted, and fined \$250. There are several principal holdings of this case.

1. Searches of airline passengers by employees of airlines are "state action" for purposes of the Fourth Amendment, because of the FAA's involvement in establishing security requirements.²³ (After the year 2002, this holding is no longer important, because the TSA now conducts searches using employees of the U.S. government.)
2. Neither probable cause nor reasonable suspicion for airline employee to open *Davis*' briefcase. *Davis* at 904-908. (There was neither X-ray nor magnetometer examination of his briefcase that would give probable cause.) The Court remarked "...*Terry* does not justify the wholesale 'frisking' of the general public in order to locate weapons and prevent future crimes." *Davis* at 908.

²³ For identical holding in a recent case, see *U.S. v. Doe*, 61 F.3d 107, 109, n. 3 (1st Cir. 1995) ("The Fourth Amendment is implicated even though airport security checkpoints are manned by nongovernmental personnel, since the FAA prescribes extensive administrative directives.").

3. The airport search program was justified as an “as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.” *Davis* at 909. Such an “administrative search” is reasonable and therefore lawful. *Davis* at 908-910.
4. A person must have the opportunity “to avoid search by electing not to board the aircraft.” *Davis* at 910-911. (Of course, a person has a legal right to chose *not* to fly. However, above, beginning at page 26, I criticize courts for justifying an intrusive search based on a person’s alleged voluntary consent by choosing to fly. In this case, *Davis* would have needed to travel by boat to Thailand if he had not flown, which would have greatly increased the duration of his journey.)
5. In this case, the briefcase was opened without the express consent of its owner. *Davis* at 913-915. The case was remanded for further consideration of the consent issue. There is no subsequent opinion in the Westlaw database for *Davis*.

Cyzewski

U.S. v. Cyzewski, 484 F.2d 509 (5th Cir. 1973), *cert. den.*, 415 U.S. 902 (1974).

In a dissenting opinion, which is not law, Judge Thornberry began with the observation that airport security programs were finding many ordinary criminals and few terrorists.

The exigencies of skyjacking and bombing, however real and dire, should not leave an airport and its environs an enclave where the Fourth Amendment has taken its leave. It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding. *United States v. Legato*, 5th Cir. 1973, 480 F.2d 408, 414 (Judge Goldberg, concurring). The majority recognize that the airport security search at issue in this case goes a step further than any we have previously approved. Specifically, that step is the retrieval of checked luggage well beyond the reach of the suspected skyjacker for the purpose of searching it. With deference, I cannot agree that the danger of air piracy warrants or authorizes upholding this search under Fourth Amendment standards.

Terry v. Ohio, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 has served as the foundation of the airport security search cases.

U.S. v. Cyzewski, 484 F.2d 509, 515-516 (5th Cir. 1973) (Thornberry, J., dissenting).

Albarado

U.S. v. Albarado, 495 F.2d 799 (2nd Cir. 1974).

The U.S. Court of Appeals in New York wrote in 1974 a terse history of airport security, in which one can see the slowly increasing intrusiveness. They also noted the problems in considering whether such searches were constitutionally permissible.

The airport search is a direct reaction to the wave of airplane hijackings which began in 1968, at which time popular feelings of fear and anger, and ultimately rage, called out for some program to safeguard air flights, and understandably so. Airplane hijacking is a particularly frightening crime. Many hijackers have been psychotic or political fanatics, for whom death holds no fear and little consequence, willing to bargain with the lives of defenseless passengers for money, transportation to a safe haven, the release of 'political'

prisoners, or some other otherwise unattainable demand. Congress's penalty for hijacking reflects the public mood: death, if the jury so recommends. 49 U.S.C. § 1472(i)(1)(A). The present antihijacking system did not spring full blown into life. 'Profiles' and selective investigation came first; plainclothes sky marshals became regular forward seat passengers; anathema as it was to some to do so, diplomatic overtures were made to Cuba to eliminate it as a refuge for hijackers. Finally, technology with magnetometers, metal detection devices and X-rays was brought to bear. Today, the general methodology of the airport search has become more or less routine. [footnote omitted]

Inevitably, the legality of these searches has been contested, and courts have responded differently. [footnote omitted] Our own circuit has indeed demonstrated in its confrontations with the problem [footnote omitted] that it has no unanimous point of view. This is not surprising perhaps when one considers the fact that neither component of the usual airport search of the person [footnote omitted] — the use of the magnetometer or the frisk— seems to fit readily within any of the traditional exceptions to the warrant requirement, [footnote omitted] and yet each seems reasonable in light of the overwhelming public acceptance of the search, and the necessity for it. It is helpful to consider these two components separately. Before doing this, however, we note our guideline for decision lies in the language — through not the specific holding — of *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968), that 'the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures,' since an airport search 'as a practical matter could not be subjected to the warrant procedure.' The ultimate standard of the fourth amendment on which we must base our opinion, therefore, is one of reasonableness. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). And the reasonableness of a search depends upon the facts and circumstances and the total atmosphere of each case. *Chimel v. California*, 395 U.S. 752, 765, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Our inquiry here must be directed to the basic issue whether in the totality of circumstances such a search is reasonable.

Albarado, 495 F.2d at 803-804.

I am troubled by the Court's use of "the overwhelming public acceptance of the search", because we do not put constitutional rights to a popular vote. For example, school prayer or requiring all pupils to say the Pledge of Allegiance is not constitutionally permissible, even if a majority of people want it.²⁴

The Court of Appeals then noted that magnetometers were too sensitive.

In determining the reasonableness of a search, one must also balance the need for the search against the invasion of privacy involved. There is a compelling need for a search to detect weapons before they are brought on an airplane. While this might justify some search of all prospective passengers at an airport, the question becomes whether it will justify in any given case the search as carried out and, for this case, the search of appellant here, first by use of the magnetometer.

I. USE OF THE MAGNETOMETER.

Initially it may be noted that the magnetometer search as we have it here could be viewed as 'inefficient' in that all passengers are searched, but only a fraction of one per cent have weapons. The magnetometer, although calibrated supposedly to be activated by a mass of

²⁴ See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 304-305 (2000).

metal approximating a .25 calibre pistol, often is activated by car keys, ladies' sewing scissors, briefcase hinges and latches, and the like. Indeed, one case says that there is evidence that up to 50 per cent of the passengers passing through a magnetometer may activate it. [FN11] See *United States v. Lopez*, 328 F.Supp. 1077, 1086 (E.D.N.Y. 1971). Thus the device is activated by numerous objects not useful as weapons, and if in each instance the person were subsequently to be frisked as a matter of course, a large number of unnecessary invasions of privacy would result.

FN11. In the instant case the percentage was at least 15 per cent and might have been as high as 25 per cent. Compare this with the only 1/10th of one per cent of all passengers who meet the 'profile.'

This 'inefficiency' in the use of the magnetometer to search for weapons is troublesome for two reasons. First, whatever the extent of airplane hijackings in the future, one suspects that anti-hijacking measures and the accompanying airport search will remain a part of our way of life for some time to come. While the system was justified originally as a means to stop hijackings, now that it seems to be proven successful, its retention will be justified as necessary to stop their resurgence. In any case, the search may eventually remain without an actual, existing threat to justify it. Second, there is the possibility that the purpose of the airport search may degenerate from the original search for weapons to a general search for contraband. Again, the recent experience of courts with airport searches, including the present one, is not wholly reassuring from this point of view. [FN12] And as potential hijackers are further deterred by the search, the only defendants before us as a result of airport searches will be those caught with contraband. [FN13]

FN12. Of the cases we have found reaching courts of appeals, four involved the discovery of a weapon and 16 involved discovery of drugs. Less than 20 per cent of the arrests resulting from the anti-hijacking system have been for offenses related to aircraft security. See N.Y. Times, Nov. 26, 1972, at 1, col. 2. See also *United States v. Davis*, 482 F.2d at 909, n. 43.

FN13. Faced with the possibility of abuse, some have suggested that the searches would be reasonable if only weapons could be seized and used as evidence; any evidence unrelated to the legitimate purpose of the regulatory search would be excluded. See *United States v. Skipwith*, 482 F.2d at 1279 (Simpson, J., concurring); 482 F.2d at 1281 (Aldrich, J., dissenting); Note, Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems, 63 J.Crim.L.C. & P.S. 356, 365 (1972).

To the extent that 'inefficiency' as we have referred to it is a necessary concomitant of a successful anti-hijacking system, the standard of reasonableness still prevails and the system must be viewed with due allowance therefor. To the extent, however, that the system were allowed to degenerate into bureaucratic shortcuts which served no legitimate purpose and still constituted an invasion of protected rights of privacy, then the system would be unreasonable per se. As was said by the Supreme Court in *Terry*, 'The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.' 392 U.S. at 19, 88 S.Ct. at 1878, quoting *Warden v. Hayden*, 387 U.S. 294, 310, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (Fortas, J., concurring). In other words, it is, and indeed for preservation of a free society must be, a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions.

It has been suggested that those who seek to travel on a common carrier have a lower 'expectation of privacy' regarding their person and the bags they carry than those who, say, merely walk on a public street. Such a suggestion has little analytical significance; if it were announced that all telephone lines would be tapped, it could be claimed that the public had no expectation of privacy on the telephone. What is clear is that the public does have the

expectation, or at least under our Constitution the right to expect, that no matter the threat, the search to counter it will be as limited as possible, consistent with meeting the threat.

While the magnetometer may be 'inefficient' in that it searches every passenger, balanced against this is the absolutely minimal invasion of privacy involved. There is no detention at all; there is no 'probing into an individual's private life and thoughts' *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 1398, 22 L.Ed.2d 676 (1969). The passing through a magnetometer has none of the indignities involved in fingerprinting, paring of a person's fingernails (*Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (upheld where incident to a valid arrest)), or a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it. Not even the activation of the alarm is cause for concern, because such a large number of persons may activate it in so many ways. No stigma or suspicion is cast on one merely through the possession of some small metallic object. Nor is a magnetometer search done surreptitiously, without the knowledge of the person searched. Signs warn passengers of it, and the machine is obvious to the eye.

Upon this balance we have no difficulty in reaffirming the conclusion of *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972), that the use of a magnetometer is a reasonable search despite the small number of weapons detected in the course of a large number of searches. The absolutely minimal invasion in all respects of a passenger's privacy weighed against the great threat to hundreds of persons if a hijacker is able to proceed to the plane undetected is determinative of the reasonableness of the search.

Albarado, 495 F.2d at 805-806.

The paragraphs from *Albarado* on consent were quoted above, beginning at page 27.

Edwards

U.S. v. Edwards, 498 F.2d 496 (2nd Cir. 1974).

Judge Friendly wrote:

Although no one could reconcile all the views expressed in the opinions of the various circuits or, indeed, of this circuit alone, a consensus does seem to be emerging that an airport search is not to be condemned as violating the Fourth Amendment simply because it does not precisely fit into one of the previously recognized categories for dispensing with a search warrant, [FN5] but only if the search is 'unreasonable' on the facts.

[FN5] An analogy has been found in the border search, see *United States v. Moreno*, 475 F.2d 44, 51 (5 Cir.), *cert. denied*, 414 U.S. 840, 94 S.Ct. 94, 38 L.Ed.2d 76 (1973); *United States v. Skipwith*, 482 F.2d 1272, 1275 (5 Cir. 1973). However, the principle that seems most nearly applicable to the airport search is that recognized in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), and applied in *United States v. Biswell*, 406 U.S. 311, 314-317, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), sustaining warrantless searches of records maintained or products held by regulated industries. Such 'administrative searches,' conducted pursuant to a general regulatory scheme rather than an investigation to secure evidence of a crime, have regularly been upheld where the statutory procedures have been deemed reasonable. Cf. *Wyman v. James*, 400 U.S. 309, 318, 324-325, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971); *Downing v. Kunzig*, 454 F.2d 1230 (6 Cir. 1972); *United States v. Schafer*, 461 F.2d 856, 858 (9 Cir.), *cert. denied*, 409 U.S. 881, 93 S.Ct. 211, 34 L.Ed.2d 136 (1972); *United States v. Miles*, 480 F.2d 1217, 1218-1219 (9 Cir.) *cert. denied*, 414 U.S. 1008, 94 S.Ct. 369, 38 L.Ed.2d 245 (Nov. 5, 1973). But since an attempt to fold airport searches under the rubric of this type of administrative search would entail the question of reasonableness, as well as the need for dealing with language in *Almeida-Sanchez v. United States*, 413 U.S. 266, 271, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), the issue of reasonableness may as well be faced directly.

Edwards, 498 F.2d at 498.

Nothing in the history of the Amendment remotely suggests that the framers would have wished to prohibit reasonable measures to prevent the boarding of vessels by passengers intent on piracy.

Edwards, 498 F.2d at 498.

In my concurring opinion in *United States v. Bell*, [464 F.2d 667 (2nd Cir. 1972)] at 675, I wrote concerning searches designed to prevent airplane hijacking:

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 or like damage 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.

While that view was not accepted by a majority, neither was it rejected. Judge Mulligan, who wrote for the court, had no occasion to consider the question; while Judge Mansfield expressed some misgivings, the facts did not require him to consider the special problem of the conceded inapplicability of the 'profile' method to shuttle flights. *United States v. Ruiz-Estrella*, [481 F.2d 723 (2nd Cir. 1973)], left the question open in this circuit since the majority there refused to infer on the basis of the record that the posters had apprised the defendant of his ability to avoid search by not boarding the flight, 481 F.2d at 728-729. Approving references to the view expressed in the concurring opinion in *Bell* have been made in *United States v. Doran*, 482 F.2d 929, 932 (9 Cir. 1973), and *United States v. Skipwith*, *supra*, 482 F.2d at 1276. [FN10] We apply it on the facts here. [footnote omitted]

FN10. In addition, Judge Browning reached essentially the same conclusion in his thorough opinion for the court in *United States v. Davis*, 482 F.2d 893, 910-912 (9 Cir. 1973).

The reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion. We need not labor the point with respect to need; the success of the FAA's anti-hijacking program should not obscure the enormous dangers to life and property from terrorists, ordinary criminals, or the demented. The search of carry-on baggage, applied to everyone, involves not the slightest stigma, see *United States v. Albarado*, *supra*, 495 F.2d at 807. More than a million Americans subject themselves to it daily; all but a handful do this cheerfully, even eagerly, knowing it is essential for their protection. To brand such a search as unreasonable would go beyond any fair interpretation of the Fourth Amendment.

Edwards, 498 F.2d at 500.

Judge Oakes, another member of the three-judge panel that decided *Edwards*, wrote a separate opinion that concurred only in the result.

I concur in affirmance but on grounds different from Judge Friendly. Judge Friendly's concurrence in *United States v. Bell*, 464 F.2d 667, 674 (2d Cir.), *cert. denied*, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972), and his decision here rest upon the proposition that 'the danger alone' of possible hijackings makes airport searches reasonable so long as they are made in good faith, with reasonable scope, and the passenger has prior notice of the search so as to be able to avoid air travel. [FN1] This proposition, however, while perhaps not explicitly rejected, certainly has not been adopted by this circuit. Rather, as suggested by Judge Mansfield in his concurrence in *Bell*, 464 F.2d at 675-676, the proposition seems inconsistent with the Supreme Court decisions on search and seizure and basic fourth amendment principles. See McGinley & Downs, *Airport Searches and Seizures — A Reasonable*

Approach, 41 Fordham L.Rev. 293, 315-16 (1972). Cf. Note, Airport Security Searches and the Fourth Amendment, 71 Colum.L.Rev. 1039, 1049- 50 (1971).

[FN1] Judge Friendly says that prior notice of 'fair warning' goes to 'reasonableness.' He does not claim that consent is implied by proceeding through the airport search when warned of its existence. In *United States v. Albarado*, 495 F.2d 799, 806-807 (2d Cir. 1974), this court held that if air travel were conditioned on submission to a search, the potential air traveler's submission would be the product of coercion and hence would not constitute implied consent. It was noted, however, that the warning of the search made the search less intrusive thereby, as compared, for instance, with a Terry search with its element of surprise and actual physical coercion. *Id.* at 807. Judge Friendly does not 'necessarily agree with everything said on (consent) in ' but that portion of the *Albarado* decision dealing with consent was not dictum, since to find the evidence unlawfully seized it was necessary to refute the claim that appellant had impliedly consented to the search.

Today airports, tomorrow some other forms of search, which may be 'applied to everyone' in the words of Judge Friendly's majority opinion. It is all too easy to permit encroachments upon personal liberty whenever there surfaces 'a barbarism hidden behind the superficial amenities of life.' See R. Heilbroner, *An Inquiry into the Human Prospect* 15 (1974). Airplane hijacking is not the only 'barbarism' which may result in calls for new means of investigation and detection 'applied to everyone.' Whether it be a wave of political kidnappings, as are so common in South America but not yet common in this country; racial murders of random victims, which in San Francisco resulted in the stop and search of persons solely on the basis of race, see *Bazile v. Alioto*, C 74 0867 ACW (N.D.Cal. Apr. 25, 1974) (preliminarily enjoining such searches); organized civil disobedience on a grand scale, such as occurred in Washington, D.C., in 1971 resulting in the unlawful arrests of literally thousands of persons, see *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.) (on rehearing), *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973); or the publication of classified defense information which was thought by some governmental officials to justify warrantless wiretaps or even the hiring of an extra-legal staff to burglarize a doctor's office,

history reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. But the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike.

United States v. Bell, 464 F.2d at 676 (Mansfield, J., concurring). See also *Fifth Avenue Peace Parade Committee v. Gray*, 480 F.2d 326, 333-335 (2d Cir. 1973) (Oakes, J., dissenting; *cert. denied*, 415 U.S. 948, 94 S.Ct. 1469, 39 L.Ed.2d 563 (1974)).

In acknowledging that the general airport search does not seem to fall within the recognized exceptions to the warrant requirement, the majority opinion seems to me all too unconcerned with the Supreme Court command that "except in certain carefully defined classes of cases, a search . . . without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706 (1973), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-529, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Whether this statement be 'judicial gloss' (the Supreme Court referred to it as 'one governing principle, justified by history and current experience,' *Camara v. Municipal Court*, 387 U.S. at 528) [footnote omitted] or the Framers' intention based on common law experience, it recognizes the proper reluctance of courts to authorize searches without probable cause found by an independent magistrate.

Edwards, 498 F.2d at 501-03 (Oakes, J., concurring in the result).

In *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974), this court engaged in a very careful weighing of the privacy invaded and the danger involved in allowing that a particular, strictly limited and supervised airport search would be 'reasonable' as a new 'carefully defined'

and jealously guarded exception to the warrant requirement. In so doing, this court attempted to give guidance and direction to law enforcement officials as to the permissible limits of the airport search and to make clear that cries of 'danger' from those whose primary concern is 'security' would be strictly scrutinized and critically examined when made to justify hitherto unknown searches. This, I feel, is the critical omission from Judge Friendly's opinion, which through its broad phraseology does not provide guidance to officials, but instead implies that those cries of 'danger' will be accepted at face value and that determinations of reasonableness by those entrusted with providing security will be accorded some sort of weight. Such an approach tends to abandon the responsibility of courts to make those very determinations entrusted to them and to relegate our individual liberties to the discretion of security officials. [footnote omitted]

Edwards, 498 F.2d at 503-504 (Oakes, J., concurring in the result).

Judge Friendly's opinion in *Edwards* was cited with approval by the U.S. Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675, n. 3 (1989).

Singleton

An airline passenger on a flight from JFK to Jamaica in Dec 1972 received a pat-down search by a U.S. Customs Officer (no magnetometer was available) and \$20,000 in cash was found on the passenger. That cash eventually resulted in a charge of income tax evasion. The U.S. Court of Appeals held that the search was proper.

Warrantless searches without proper consent are per se unreasonable under the fourth amendment except in certain carefully defined classes of cases. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). It is now settled that one such exception is a pre-boarding screening search of airline passengers and their carry-on luggage for weapons and explosives. See, e. g., *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972). The courts have recognized that, absent a search, there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane, and have therefore held that some pre-boarding screening search of each passenger sufficient in scope to detect the presence of weapons and explosives is reasonable under the fourth amendment. The reasonableness of a particular pre-boarding screening search is to be determined by weighing the need to conduct the search against the invasion that the search entails. See *United States v. Freeland*, 562 F.2d 383 (6th Cir.), cert. denied, 434 U.S. 957, 98 S.Ct. 484, 54 L.Ed.2d 315 (1977); *United States v. Dalpiaz*, 494 F.2d 374 (6th Cir. 1974); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). See also cases collected in *United States v. Albarado*, 495 F.2d 799, 801 n.1 (2nd Cir. 1974).

Measured by this test, we conclude that the pre-boarding screening program conducted here was reasonable. The government unquestionably has the most compelling reasons the safety of hundreds of lives and millions of dollars worth of private property for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane. In response to this need, the FAA anti-hijacking screening requirements in effect on December 7, 1972 were implemented to assure the uninterrupted and safe operation of our commercial airline passenger transportation system. As to the extent of the invasion, inasmuch as BOAC had not perfected a satisfactory magnetometer, a pat-down search of each passenger was virtually the only screening procedure available to the customs service at the BOAC terminal on December 7, 1972. Although the screening did involve a pat-down search of each passenger, its level of intrusiveness was proportionate to its justification. Passengers

were searched courteously, were given advance notice that the search was to be conducted, and could elect not to be searched by deciding not to board the aircraft.

The availability of this option to each passenger serves as our alternative ground for sustaining the search. By electing to proceed and board the aircraft, with advance notice of the search requirement, Singleton impliedly consented to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Freeland*, 562 F.2d 383 (6th Cir.), cert. denied, 434 U.S. 957, 98 S.Ct. 484, 54 L.Ed.2d 315 (1977).

Accordingly, we determine that there was no violation of appellant's fourth amendment rights; he was therefore not prejudiced by the tax court's evidentiary rulings. *Singleton v. Commissioner of Internal Revenue*, 606 F.2d 50, 52 (3rd Cir. 1979).

Lopez-Pages and Other Border Search Cases

U.S. v. Lopez-Pages, 767 F.2d 776 (11th Cir. 1985).

A man traveling from Orlando to Dallas in 1984 fit the profile of a hijacker. A pat-down of the traveler found a vial of cocaine and three marijuana cigarettes. Then a search of his luggage found more cocaine. The U.S. Court of Appeals in Florida held that fitting the profile of a hijacker was "sufficient to provide the requisite 'mere suspicion' necessary to conduct the searches in this case." *Id.* at 778.

I believe that fitting the profile of a hijacker or terrorist, or failing a magnetometer test, provides a basis for "reasonable suspicion" under *Terry*. However, I am concerned about the erosion of the protections in the Fourth Amendment by the Eleventh Circuit of the U.S. Court of Appeals in Florida, from "reasonable suspicion" under *Terry* to "mere suspicion"²⁵ of travelers at airports. *U.S. v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir.(Fla.) 1973) ("... we hold that those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion."); *U.S. v. Sandler*, 644 F.2d 1163, 1165-1166 (5th Cir.(Fla.) 1981)²⁶; *U.S. v. Herzbrun*, 723 F.2d 773, 776 (11th Cir.(Fla.) 1984); *Lopez-Pages*, 767 F.2d at 778-779 (1985). The "mere suspicion" standard first appeared in a border search case involving transportation of marijuana from Mexico to the USA via truck. *U.S. v. Warner*, 441 F.2d 821, 832 (5th Cir.(Tex.) 1971) ("... the agents' 'mere suspicion' of possible illegal activity is enough cause to justify a border search."). In 1976, the Ninth Circuit in California briefly considered the opinions of the U.S. Court of

²⁵ "Mere suspicion" is unsupported by articulable facts.

²⁶ But see the dissenting opinion by Judge Hatchett, joined by two other judges in this en banc hearing: "The only justification that can be offered is a concern for drug smuggling. In its zeal to combat drug smuggling, a problem that may well vanish in the fullness of time, the majority does damage to the character and spirit of the fourth amendment to the Constitution of the United States. After today's decision, every international traveler, adult or child, male or female, American citizen or visitor, becomes subject to a search of the person solely upon 'the subjective response of a customs official who considers that the circumstances make such a search appropriate.'" *Sandler*, 644 F.2d at 1170 (Hatchett, J., dissenting).

Appeals in Florida and rejected the holding that airports are places where the Fourth Amendment offers less protection. *U.S. v. Homburg*, 546 F.2d 1350, 1352 (9th Cir. 1976), *cert. den.*, 431 U.S. 940 (1977).

Note that the original border search justification was to find violations of import/export laws, *not* to find weapons on airplanes and *not* to deter/prevent hijacking of airplanes. It may be that the U.S. Courts of Appeals in Florida are focusing too much on the location of the search (i.e., at an international airport) and forgetting about the reason or purpose of the search.

Edmond

In a recent case involving a police checkpoint on a road intended to search drivers for illicit drugs, a U.S. Court of Appeals found that the search violated the Fourth Amendment. While this case does not involve searches of airline passengers, it is included here because of its excellent summary of the law of evidence. Judge Posner reviewed cases in which searches without reasonable suspicion had been allowed by other courts:

But courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement, see, e.g., *Whren v. United States*, *supra*, 517 U.S. at 810, 116 S.Ct. 1769, rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders. E.g., *Michigan v. Tyler*, 436 U.S. 499, 504-06, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *Camara v. Municipal Court*, *supra*; *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574 (7th Cir. 1999). Because it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy. In high-crime areas of America's cities it might justify methods of policing that are associated with totalitarian nations. Cf. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). One can imagine an argument that it would be reasonable in a drug-infested neighborhood to administer drug tests randomly to drivers and pedestrians. Although there is nothing in the text of the Fourth Amendment to prevent dragnet searches (read literally, the text requires only that searches and seizures be "reasonable" and confines the requirement of "probable cause" to searches or seizures made pursuant to warrant), the Supreme Court has insisted that "to be reasonable under the Fourth Amendment, a search **ordinarily** [emphasis added by Standler] must be based on individualized suspicion of wrongdoing," save in cases of "special need" based on "concerns *other than crime detection*." *Chandler v. Miller*, 520 U.S. 305, 313-14, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) ([*italic*] emphasis added [by Posner]); see also *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560-61, 96 S.Ct. 3074; *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Program-level justifications for searches in support of specific regulatory programs do not carry over to general criminal law enforcement. See, e.g., *Chandler v. Miller*, *supra*, 520 U.S. at 313-14, 117 S.Ct. 1295; *New York v. Burger*, 482 U.S. 691, 716 n. 27, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Michigan v. Tyler*, *supra*, 436 U.S. at 508, 98 S.Ct. 1942; *Donovan v. Dewey*, 452 U.S. 594, 598 n. 6, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *Abel v. United States*, 362 U.S. 217, 226, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (plurality opinion); *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989).

The qualification in "ordinarily" must not be overlooked. When the police establish a roadblock on a route that they know or strongly suspect is being used by a dangerous criminal to escape, the probability is high not only of apprehending the criminal but also of preventing him from engaging in further criminal, or otherwise hazardous, activity incidental to his escape. See, e.g., *United States v. Harper*, 617 F.2d 35, 40-41 (4th Cir. 1980). So the roadblock is allowed even though it is likely to "seize" some individuals who are not suspected of wrongdoing.

But here the roadblock is meant to intercept a completely random sample of drivers; there is neither probable cause nor articulable suspicion to stop *any* given driver. Even so, we can imagine cases in which, although the police do not suspect anyone, a roadblock or other dragnet method of criminal law enforcement would be reasonable. We may assume that if the Indianapolis police had a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis, they would not be violating the Constitution if they blocked all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity. See *Maxwell v. City of New York*, 102 F.3d 664 (2d Cir. 1996); *Norwood v. Bain*, 143 F.3d 843, 845-50 (4th Cir. 1998), *aff'd.* (so far as pertinent), 166 F.3d 243, 245 (4th Cir. 1999) (en banc) (per curiam); *United States v. Williams*, 372 F.Supp. 65 (D.S.D. 1974); *Brinegar v. United States*, 338 U.S. 160, 183, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (Jackson, J., dissenting); 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 9.6(a) (3d ed. 1996); American Law Institute, *A Model Code of Pre-Arrest Procedure* 110.2(2) (1975). When urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact.²⁷ But no such urgency has been shown here.

The Supreme Court has upheld the validity of roadblocks in less extreme cases, however, and it is on these that the City pitches its defense of its program. The Court upheld sobriety checkpoints — roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs — in *Michigan Dept. of State Police v. Sitz*, 496 U.S.

²⁷ Here Judge Posner refers to a famous remark in a U.S. Supreme Court opinion: "... for while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Quoted with approval in *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964); *Haig v. Agee*, 453 U.S. 280, 309-310 (1981). First, this remark is a nifty slogan, not a thoughtful statement. Second, two of these cases — *Aptheker and Agee* — involve limitations on the power of the government to issue or to revoke passports for travel by U.S. citizens to foreign countries. The U.S. government has traditionally been granted broad power to regulate travel to foreign countries, while travel *inside* the U.S.A. has been traditionally free of restrictions. Third, the remaining case — *Mendoza-Martinez* — involves an attempt by the U.S. Government to revoke the U.S. citizenship of an alleged draft evader, an issue which is quite different from regulation of travel inside the U.S.A. In his next sentence, Judge Posner shows he is aware of these distinctions.

There is an earlier U.S. Supreme Court case that mentions this hyperbole in a dissenting opinion:

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

The issue in *Terminiello* was a public speaker who was arrested for violation of a Chicago law that prohibited causing a riot or other breach of the peace. The "suicide pact" feared by Justice Jackson's dissent never materialized.

444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and roadblocks designed to intercept illegal immigrants, in *United States v. Martinez-Fuerte*, *supra*. The Court has not, however, ever held or stated that *all* roadblock programs (even those not vulnerable to a charge of delegating too much discretion to individual police officers) are consistent with the Fourth Amendment. On the contrary, the amendment would be violated if "the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." *Texas v. Brown*, *supra*, 460 U.S. at 743, 103 S.Ct. 1535 (plurality opinion); see also *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975).

Randomized search programs have been upheld that involved the compelled provision of urine samples for drug testing of law enforcement officers, jockeys, railroad workers, and other classes of employee, e.g., *Vernonia School District 47J v. Acton*, *supra*; *National Treasury Employees Union v. Von Raab*, *supra*, 489 U.S. at 665-66, 109 S.Ct. 1384; *Skinner v. Railway Labor Executives' Ass'n*, *supra*; *Dimeo v. Griffin*, *supra*, as well as administrative searches conducted without any basis to suspect any particular individual of wrongdoing, but rather pursuant to a program of inspections incidental to a general scheme of licensing or other regulation. E.g., *New York v. Burger*, *supra*; *Michigan v. Tyler*, *supra*; *Camara v. Municipal Court*, *supra*; *In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127 (7th Cir. 1988). But again the Court has not granted *carte blanche*.

Many of the cases we have cited do involve criminal prosecutions, however, and we must consider how they can be squared with the principle that the requirement of individualized suspicion is to be relaxed only on the basis of (as the Supreme Court said in the *Chandler* case, an example of a systematic search program that did not pass constitutional muster) "concerns *other than* crime detection." The answer is that the concern which lies behind the randomized or comprehensive systems of inspections or searches that have survived challenge under the Fourth Amendment is not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged. Consider employment drug tests for transport workers, as in the *Skinner* case. The employee who uses drugs will perform badly in his work, to the detriment of fellow employees or the general public; and the most effective preventive measure may be to test all or a random selection of applicants or employees. Similar are sobriety checkpoints, which are designed to protect other users of the road from the dangers posed by drunk drivers; administrative searches that are ancillary to concededly lawful systems of inspection; and the use of metal detectors and x-ray machines to screen entrants to government buildings and embarking air travelers. *United States v. Herzbrun*, 723 F.2d 773, 775-76 (11th Cir. 1984); *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) (Friendly, J.); *United States v. Davis*, 482 F.2d 893, 908-10 (9th Cir. 1973). These cases rest on the commonsense principle that employers and other proprietors (such as the state as the owner of public roads), including the quasi-proprietor that is the government in heavily regulated industries, see, e.g., *United States v. Biswell*, 406 U.S. 311, 316-17, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), have a right to take reasonable measures to protect the safety and efficiency of their operations. These measures, moreover, usually make only limited inroads into privacy, because a person can avoid being searched or seized by avoiding the regulated activity, though we hesitate to put much weight on this point; people are unlikely to feel they can afford to "ground" themselves in order to avoid airport searches.

Edmond v. Goldsmith, 183 F.3d 659, 662-664 (7th Cir. 1999), *aff'd sub nom.*, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

At the end of his scholarly opinion, Judge Posner summarized:

... we have identified four exceptions to the principle that a search or seizure is forbidden by the Fourth Amendment unless there is a basis for believing that a particular search or seizure, as distinct from a program of universal or randomized searches or seizures, will yield evidence or fruits or instrumentalities of crime. The first exception, illustrated by the roadblock set up to catch a fleeing criminal, is where there is a suspect — the police have identified the criminal and have only to find him — but it is infeasible to avoid an indiscriminate search or seizure of other persons, persons not suspected of crime, as well. The second exception, illustrated by the hypothetical dynamite case, is where no specific person is under suspicion but the circumstances make it impossible to prevent a crime without an indiscriminate search. The third exception is the regulatory search, the objective of which is to protect a specific activity rather than to operate as an adjunct to general criminal law enforcement. The last exception is the prevention of illegal importation whether of persons (a power limited to the federal government, *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999)) or of goods.

Edmond v. Goldsmith, 183 F.3d 659, 665-666 (7th Cir. 1999).

It is the third exception, the “regulatory search”, that is implicated in searches of passengers and luggage at airports. The U.S. Supreme Court affirmed Judge Posner’s decision in this case.

Gilmore

Gilmore v. Ashcroft, 2004 WL 603530 (N.D.Cal. 23 Mar 2004).

On 18 July 2002, John Gilmore filed a Complaint in U.S. District Court challenging essentially two aspects of the TSA’s policy for airline passengers:

1. challenged the constitutionality of the mandatory searches of *all* passengers by either magnetometer or pat-down. Such searches had been held constitutional in many decisions of the U.S. Courts of Appeals since 1972, although their reasoning was a bit fuzzy (i.e., finding a so-called “administrative search” exception to the Fourth Amendment, or sometimes finding that the passenger “consented” to the search as a condition of traveling by airplane).
2. challenged the constitutionality of requiring showing government-issued identification (e.g., driver’s license) before being allowed to board a domestic airline flight inside the USA.

Gilmore’s challenge essentially asserts a novel right to travel anonymously inside the USA.

At the beginning of his Complaint, Gilmore asserts: “No security threat is as important as the threat to American society caused by erosion of the right to travel, the right to be free from unreasonable searches, and the right to exercise First Amendment rights²⁸ anonymously.”

²⁸ Specifically, the right to travel by airplane from California to Washington DC to “petition the Government for a redress of grievances.” The quoted right to petition the government is from the First Amendment.

Details about *Gilmore v. Ashcroft*, including copies of some of the Briefs, can be found at the following websites:

- <http://freetotravel.org/>
- <http://www.papersplease.org/gilmore/legal.html>
- <http://www.eff.org/Privacy/> (John Gilmore is a co-founder and member of the board of directors of the Electronic Frontier Foundation.)

In providing these links, I am endorsing neither these websites nor their comments on the *Gilmore v. Ashcroft* litigation.

The unpublished opinion of the District Court summarized the facts of this case and the Complaint:

Plaintiff John Gilmore is a California resident who is suing the United States [footnote omitted] and Southwest Airlines for refusing to allow him to board an airplane on July 4, 2002 without either displaying a government-issued identification [or] consenting to a search. Plaintiff alleges that these security requirements imposed by the United States government and effected by the airline companies violate several of his constitutional rights, including his rights under the First and Fourth Amendments. [footnote omitted]

On July 4, 2002 plaintiff went to the Oakland International Airport and attempted to fly to the Baltimore Washington International Airport to "petition the government for redress of grievances and to associate with others for that purpose."

....

Plaintiff's complaint alleges that as a result of the requirement that passengers traveling on planes show identification and his unwillingness to comply with this requirement, he has been unable to travel by air since September 11, 2001. Plaintiff's complaint asserts causes of action challenging the apparent government policy that requires travelers either to show identification or to consent to a search which involves wandering, walking through a magnetometer or a light pat-down. Whether this is actually the government's policy is unclear, as the policy, if it exists, is unpublished. However, this Court for the purpose of evaluating plaintiff's complaint, assumes such a policy does exist, and reviews plaintiff's complaint accordingly.

Plaintiff asserts the unconstitutionality of this policy on the following grounds: vagueness in violation of the Due Process Clause; violation of the right to be free from unreasonable searches and seizures; violation of the right to freedom of association; and violation of the right to petition the government for redress of grievances.

Gilmore, at *1.

On motion of the Defendants, the judge dismissed the portions of Plaintiff's Complaint about the searches (e.g., magnetometer or pat-down), because the Plaintiff had not been "injured":

The only injury alleged by plaintiff was his inability to board a plane as a result of the identification requirement. Article III [of the U.S. Constitution] requires that to have standing a plaintiff must show that (1) he was injured (2) that the injury is directly related to the violation alleged and (3) that the injury would be redressable if plaintiff prevailed in the lawsuit. [citation omitted]

Gilmore, at *2.

The judge apparently did not consider deprivation of constitutional right to travel as an injury, so Plaintiff had no standing to sue. Further, jurisdiction to challenge the TSA's regulations is only in the U.S. Courts of Appeals (49 U.S.C. § 46110), so the U.S. District Court had no jurisdiction to hear the case. Consequently, the judge in the District Court dismissed the parts of this case regarding searches by magnetometer or pat-down.

The District Court held that the requirement that airline passengers show their driver's license or other identification was lawful:

In plaintiffs' case, he was not required to provide identification on pain of criminal or other governmental sanction. Identification requests unaccompanied by detention, arrest, or any other penalty, other than the significant inconvenience of being unable to fly, do not amount to a seizure within the meaning of the Fourth Amendment. Plaintiff has not suggested that he felt that he was not free to leave when he was asked to produce identification. None of the facts submitted by plaintiff suggests that the request for identification implicated plaintiff's Fourth Amendment rights. Therefore, plaintiff's claim that the identification requirement is unreasonable does not raise a legal dispute that this Court must decide.

[Defendants cited federal statutes and argued that "the request for identification is a reasonable means of effectuating the purpose of airline safety" and satisfying statutes.]

It appears to this Court that the requirement that identification be provided before boarding an airplane is a minimal intrusion on personal privacy and is a reasonable, if modest, step toward ensuring airline safety. It may be, as plaintiff argues, that easy access to false identification documents will reduce the effectiveness of the effort, but the effort itself seems a reasonable one. However, in light of this Court's finding that no search or seizure occurred, no finding concerning the reasonableness of the identification requirement is required.

Gilmore, at *5.

However, if a search did occur, the search was reasonable. An airport screening search is reasonable if: "(1) it is not more extensive or intensive than necessary ...; (2) it is confined in good faith to [looking for weapons and explosives]; and (3) passengers may avoid the search by electing not to fly." *Torbet v. United Airlines*, 298 F.3d 1087, 1089 (9th Cir. 2002); see *United States v. Davis*, 482 F.2d at 895 (9th Cir. 1973) ("We hold further that while 'airport screening searches' per se do not violate a traveler's rights under the Fourth Amendment, or under his constitutionally protected right to travel, such searches must satisfy certain conditions, among which is the necessity of first obtaining the 'consent' of the person to be searched."). In *Torbet* the Court held that the placement of luggage on an x-ray conveyor belt was an implied consent to a luggage search. 298 F.3d at 1089. At all times plaintiff was free to leave the airport rather than submit to search. Further, searches of prospective passengers are reasonable and a necessary as a means for detecting weapons and explosives. *Torbet v.*

United Airlines, Inc., 298 F.3d at 1089-90. Accordingly, the request that plaintiff consent to search was reasonable and not in violation of the Fourth Amendment.

....

However, plaintiff's allegation that his right to travel has been violated is insufficient as a matter of law because the Constitution does not guarantee the right to travel by any particular form of transportation. *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) ("[B]urdens on a single mode of transportation do not implicate the right to interstate travel."); *Monarch Travel Serv. Assoc. Cultural Clubs, Inc.*, 466 F.2d 552 (9th Cir. 1972). The right to travel throughout the United States confers a right to be "uninhibited by statutes, rules and regulations which unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 486, 499 (9th Cir. 1973). This Court rejects plaintiff's argument that the request that plaintiff either submit to search, present identification, or presumably use another mode of transport, is a violation of plaintiff's constitutional right to travel.

Gilmore, at *6.

The trial judge then dismissed the remainder of this case.

I think the U.S. Court of Appeals in *Davis* was too quick to dismiss the legal right to travel by airplane, for reasons given above in this essay, beginning at page 26. However, the trial judge in *Gilmore* was bound by the precedent in *Davis* on that issue.

My impression of the trial judge's opinion in *Gilmore* is that the judge believed that Plaintiff's Complaint was a scatterbrained and silly collection of seven causes of action. However, in litigation on a novel issue, plaintiff's attorney should allege *all* of the plausible causes of action in a Complaint, because it is not known which causes of action will be accepted by the trial judge and appellate courts, and a revised Complaint might be barred by the statute of limitations or res judicata.

Finally, note that the TSA regulation that requires all airline passengers to present government-issued identification is a secret regulation. The U.S. Government proposed to disclose the secret regulation to the judges of the U.S. Court of Appeals in *Gilmore v. Ashcroft*, but not disclose the secret regulation to Gilmore or his attorneys. In an unpublished order dated 10 Sep 2004, the Court of Appeals denied the U.S. Government's proposal.

Other Cases

There have been several recent cases involving mandatory screening of all people at places other than airports, which screenings were justified by the government as allegedly necessary for security. Some of these cases are discussed below.

Norwood

Norwood v. Bain, 143 F.3d 843 (4th Cir. 1998), *aff'd en banc*, 166 F.3d 243 (4th Cir. 1999), *cert. den.*, 527 U.S. 1005 (1999).

Tips to police indicated that several thousand bikers, including two rival gangs, would attend a charity motorcycle rally in 1994 and that the gang members would *not* be wearing their usual insignia to identify them as gang members. The police were sincerely concerned about the possibility of a violent confrontation between the two rival gangs. Based on those tips, police searched the interior of all motorcycle saddlebags and the interior of all closed compartments on each motorcycle. The searches caused “long lines of motorcycles awaiting entry” to the rally.

Norwood filed a class action complaint under 42 USC § 1983, alleging violation of civil rights by the allegedly unconstitutional searches of the motorcycles. The district court found for plaintiffs. A three judge panel of the U.S. Court of Appeals affirmed, with one judge dissenting on the issue of the search. On a rehearing en banc, half of the 14 judges held the search was *unconstitutional*, which (just barely) affirmed the trial court. The U.S. Supreme Court refused to hear an appeal.

Norwood appears to stand for the proposition that police can *not* search closed containers to prevent future crimes, even when the police have specific information that a crime is likely. The information on the threat in *Norwood* is specific, local in space, and limited in time to only one day. In contrast to *Norwood*, recognize that the routine searches of carry-on luggage of *all* airline passengers nationwide, for more than thirty years, is based only on the vague possibility that there *might* be another hijacking, at an unknown place and unknown time.

If *Norwood* is correct that the search of motorcycle saddlebags is truly *unconstitutional*, then the search of luggage of airline passengers is probably also *unconstitutional*. The en banc U.S. Court of Appeals decided *Norwood* in January 1999. I wonder if the seven judges who held the search *unconstitutional* would still reach the same conclusion after 11 Sep 2001.

Little Rock School District (LRSD)

A U.S. Court of Appeals invalidated searches of pupils in the Little Rock School District (LRSD):

Jane Doe is a secondary school student in the LRSD. One day during the school year, all of the students in Ms. Doe's classroom were ordered to leave the room after removing everything from their pockets and placing all of their belongings, including their backpacks and purses, on the desks in front of them. While the students were in the hall outside their classroom, school personnel searched the items that the students had left behind, including Ms. Doe's purse, and they discovered marijuana in a container in her purse. The parties have stipulated that LRSD has a practice of regularly conducting searches of randomly selected classrooms in this manner.

Doe ex rel. Doe v. Little Rock School Dist., 380 F.3d 349, 351 (2004).

Whatever privacy interests the LRSD students have in the personal belongings that they bring to school are wholly obliterated by the search practice at issue here, because all such belongings are subject to being searched at any time without notice, individualized suspicion, or any apparent limit to the extensiveness of the search. Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs. Indeed, dogs and magnetometers are often employed in conducting constitutionally reasonable large-scale "administrative" searches precisely because they are minimally intrusive, and provide an effective means for adducing the requisite degree of individualized suspicion to conduct further, more intrusive searches. The type of search that the LRSD has decided to employ, in contrast, is highly intrusive, and we are not aware of any cases indicating that such searches in schools pass constitutional muster absent individualized suspicion, consent or waiver of privacy interests by those searched, or extenuating circumstances that pose a grave security threat.

Another relevant consideration is the purpose for which the fruits of the searches at issue are used. In *Vernonia* and *Earls*, which involved drug testing of voluntary participants in competitive extracurricular activities, the results of the searches at issue were never disclosed to law enforcement authorities, and the most serious form of discipline that could possibly result from failing the tests was exclusion from the relevant extracurricular activities. See *Earls*, 536 U.S. at 833, 122 S.Ct. 2559; *Vernonia*, 515 U.S. at 651, 115 S.Ct. 2386. The Court in *Earls*, 536 U.S. at 834, 122 S.Ct. 2559, found that "the limited uses to which the test results are put" contributed significantly to a conclusion that the invasion of the students' privacy was insignificant. In sharp contrast to these cases, the fruits of the searches at issue here are apparently regularly turned over to law enforcement officials and are used in criminal proceedings against students whose contraband is discovered. In fact, Ms. Doe was convicted of a misdemeanor as a result of the search of her purse. Because the LRSD's searches can lead directly to the imposition of punitive criminal sanctions, the character of the intrusions is qualitatively more severe than that in *Vernonia* and *Earls*. Rather than acting *in loco parentis*, with the goal of promoting the students' welfare, the government officials conducting the searches are in large part playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used in prosecuting students.

380 F.3d at 355.

School of Americas (SOA)

The U.S. Army operates the "School of Americas" (SOA) to train Latin American government personnel how to oppose communist insurgents. Naturally, this offends some liberals in the USA, who protest outside the School, which is located at Fort Benning, near Columbus, Georgia. The city government in Columbus, Georgia (Defendants in this case) was grievously offended at the protests outside the School, and the city retaliated by installing burdensome "security" checkpoints. The U.S. Court of Appeals described the reaction of the City:

In November 2002, a week before that year's protest, the City of Columbus ("the City") instituted a policy requiring everyone wishing to participate in the protest to submit to a magnetometer (essentially, a metal detector) search at a checkpoint "a couple of long city blocks" away from the SAW protest site. If the magnetometer indicated the presence of metal as a protester was walking through it, police would physically search that individual's person and belongings. The police estimated that protestors "would probably have to arrive ... an hour and a half, maybe 2 hours, ahead of time" to get through the metal detector checkpoints to the protest site.

Bourgeois v. Peters, 387 F.3d 1303, 1307 (11th Cir. 15 Oct 2004).

In a suggestion that the city government may have disapproved of the protester's message or methods (i.e., the City violated the protesters' First Amendment rights) the City noted that the protesters "engaged in frenzied dancing".

The protesters then sued the City in Federal Court, seeking that the City be enjoined from such "security" measures. A three-judge panel of the U.S. Court of Appeals unanimously concluded that these searches violated both the First and Fourth Amendments. They found five violations of the First Amendment! (*Ibid.* at 1316.) The Court of Appeals said:

The City's position would effectively eviscerate the Fourth Amendment. It is quite possible that both protestors and passersby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. *Cf. Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (requiring that police demonstrate individualized suspicion that a suspect is armed before frisking him). Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence — rather than potentially effective, broad, prophylactic dragnets — as the constitutional norm.

Bourgeois 387 F.3d at 1311-12.

Later the Court of Appeals said:

The City may contend that the searches are permissible because they are entirely voluntary. No protestors are compelled to submit to searches; they must do so only if they choose to participate in the protest against the SOA. This is a classic "unconstitutional condition," in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right. *See Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986) ("The doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional

provisions proscribe."). This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right — freedom from unreasonable searches and seizures — not merely to receive a discretionary benefit but to exercise two other fundamental rights — freedom of speech and assembly. *Bourgeois* 387 F.3d at 1324.

This SOA case has First Amendment issues that are absent in the airport screening situation, however the airport cases have freedom to travel issues that are absent in this protest at the SOA.

Exclusionary Rule

My interest in writing this essay is only to protect innocent travelers from invasions of their privacy at airports. However, my general concern with fairness motivates me to say a few words about prosecution of people for contraband that was discovered during an airport search for weapons useful to hijackers or terrorists.

The cases mentioned above, at page 34 to 56, show that searches of airline passengers were initially justified as administrative searches to protect the public health and safety, by preventing hijackings.²⁹ Some cases³⁰ specifically said that the reason for such searches was the security of innocent passengers, *not* to obtain evidence of violation of laws. Such a statement seems strange to me, because anyone attempting to carry a weapon onto an airplane was arrested and charged with violating 49 USC § 1472, which had criminal penalties.³¹ Moreover, as the cases cited above show, the fruits of searches at airports are admissible as evidence in criminal trials, even if the fruits are contraband that is associated with *neither* hijacking *nor* crime aboard the airplane.

Assuming that a passenger, by choosing to fly aboard a commercial airliner, automatically consented to a search of his body and luggage, the scope of that consent is arguably limited only to a search for weapons or explosives that could be used by potential hijackers or terrorists. See *U.S. v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1244, 1247 (9th Cir. 1989); *U.S. v. Doe*, 61 F.3d 107, 111-112, n. 7 (1st Cir. 1995).

²⁹ Indeed, the U.S. Supreme Court has declared that suspicionless searches are legal if done to protect the public health and safety, but *not* if done for the primary purpose of finding criminals. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

³⁰ See e.g., *Epperson*, 454 F.2d at 771 (“sole purpose”); *Davis*, 482 F.2d at 908.

³¹ For history of 49 USC § 1472, see *U.S. v. Healy*, 376 U.S. 75, 83-85 (1964); *U.S. v. Pliskow*, 354 F.Supp. 369, 371-72 (E.D.Mich. 1973); *U.S. v. Irving*, 509 F.2d 1325, 1328-29 (5th Cir. 1975); *U.S. v. Basic*, 592 F.2d 13, 20 (2nd Cir. 1978). Section 1472 was repealed in 1994 and replaced with new sections. *U.S. v. Spellman*, 243 F.Supp.2d 285, 292-93 (E.D.Pa. 2003); *U.S. v. Wallace*, ___ F.3d. ___ (5th Cir. 28 Oct 2004).

On the other hand, it is clear that the searches at the airport are *not* pretextual. Searches at an airport clearly are *intended* to prevent hijackings and terrorism. Because of this sincere intention, there is no justification for applying the exclusionary rule (i.e., refusing to admit as evidence any contraband, in order to deter police from making *unconstitutional* searches or seizures) in these airport cases. Nonetheless, there has been a minority proposal that, in airport search and seizure cases, contraband unrelated to hijackings should not be admitted into evidence during subsequent criminal prosecution. *U.S. v. Skipwith*, 482 F.2d 1272, 1280-81 (5th Cir. 1973) (Aldrich, J., dissenting).

Because hijacking of airplanes was always a rare event (i.e., fewer than one flight in 50,000 was hijacked), most of the contraband detected in carry-on luggage was not weapons for hijackers, but was illicit drugs or other items that posed no danger to other passengers. In that connection, see the remarks of Judge Goldberg in *Legato* and the remarks of Judge Thornberry in *Cyzewski*, which were quoted above.

Preemption

In general, discussions of civil liberties should consider *both* federal and state law, because it is possible that state law might give more protection to people than federal law. In the specific instance of searches of passengers at airports, it is likely that only federal law applies.

The Federal Aviation Act of 1958, as amended in 1974, (codified at 49 U.S.C. § 1511) authorized private airlines to inspect passengers and cargo for “dangerous weapon(s), explosive(s), or other destructive substance(s).” See *U.S. v. Fannon*, 556 F.2d 961, 963-964 (9th Cir. 1977) (this case involves inspection of airfreight by United Airlines, but the opinion has general remarks about statute), *rev’d en banc sub nom.*, *U.S. v. Gumerlock*, 590 F.2d 794, 796-800 (9th Cir. 1979), *cert. den.*, 441 U.S. 948 (1979); *O’Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989) (intoxicated passenger removed from aircraft, passenger’s state law claims preempted by federal law), *cert. den. sub nom. O’Carroll v. Chaparral Airlines, Inc.*, 490 U.S. 1106 (1989).

The Airline Deregulation Act of 1978 (now codified at 49 U.S.C. § 41713) preempts state law claims against airlines. See *Smith v. Comair, Inc.*, 134 F.3d 254, 257-259 (4th Cir. 1998) (passenger denied boarding because passenger did not have photo identification). See also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (deceptive advertising). But see *Smith v. America West Airlines, Inc.*, 44 F.3d 344, 347 (5th Cir. 1995) (Passengers sued airline for allowing insane man to board aircraft in 1990. The man subsequently hijacked the airplane. Passengers’ claims of negligence under state law held *not* preempted.); *In re September 11 Litigation*, 280 F.Supp.2d 279, 297-298 (S.D.N.Y. 9 Sep 2003) (Claims of negligence under state law against airlines and airport security companies who allowed hijackers to board airplanes held *not* preempted by federal law.).

The Warsaw Convention preempts claims under state law on international flights. See *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) (Tseng alleged that he was intrusively searched by employees of El Al at JFK airport.); *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1273-77 (2nd Cir. 1991), *cert. den. sub nom. Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991).³²

Since the year 2002, searches of passengers in airports have been conducted by U.S. government employees, part of the Transportation Security Agency (TSA), which is part of the U.S. Department of Homeland Security. 49 U.S.C. § 44901 (enacted 2002).

Automatic "Searches" Using Technology

When I was doing legal research for this essay, I encountered remarks in federal cases³³ that suggested to me a way of doing "searches" of passengers at airports without offending innocent people.

Back in the year 1983, the U.S. Supreme Court held that using a trained dog to sniff luggage for the odor of illicit drugs is *not* a search within the meaning of the Fourth Amendment.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *Id.*, at 13, 97 S.Ct., at 2484. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure of

³² *Bernardi v. Apple Vacations*, 236 F.Supp.2d 465, 469 (E.D.Pa. 19 Nov 2002) (*In re Air Disaster at Lockerbie* "overruled on other grounds by *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), as recognized in *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1029 (2d Cir. 1996)").

³³ For example, *U.S. v. Vega-Barvo*, 729 F.2d 1341, 1346-47 (11th Cir. 1984); *U.S. v. Thomas*, 757 F.2d 1359, 1366 (2nd Cir. 1985).

respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment.

U.S. v. Place, 462 U.S. 696, 706-07 (1983).

This rule in *Place*³⁴ was reiterated in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), where stopping a car, then walking around the car a trained dog to sniff for illicit drugs was held to *not* be a search, because of the *unintrusive* nature of the dog sniffing. See also *Illinois v. Caballes*, 125 S.Ct. 834, 838 (2005).

Adding more reasoning is a U.S. Court of Appeals decision in a case involving walking a trained dog along the public corridor in a passenger train, to sniff for odor of illicit drugs coming from a private sleeping compartment.

Furthermore, here, as there, the sniff “caused ‘virtually no annoyance and rarely even contact with the owner of the bags, unless the [test result] is positive.’ ” [*United States v. Beale*, 736 F.2d 1289, 1291 (9th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 1072 (1984)] (quoting *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3543, 77 L.Ed.2d 1392 (1983)). See also *Terry*, 392 U.S. at 15, 88 S.Ct. at 1876 (the Fourth Amendment imposes upon the courts the “responsibility to guard against police conduct which is overbearing or harassing”). We find these concerns much more compelling than the simple fact that in both *Place* and *Jacobsen* the items searched were totally removed from their owners' possession. To the extent that it is relevant, the distinction is subsumed by these more compelling considerations. [footnote omitted]

Not only do the authorities and the text of the Fourth Amendment convince us that the canine sniff in question was not a search for Fourth Amendment purposes,

In sum, because Max's [the dog's] sniff “d[id] not expose noncontraband items that otherwise would remain hidden from view,” and was not conducted in a manner or location that subjected appellant “to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods,” *Place*, 462 U.S. at 707, 103 S.Ct. at 2644, we conclude that the *Place*-enunciated rule governs, and, thus, no search occurred.

U.S. v. Colyer, 878 F.2d 469, 476-77 (D.C.Cir. 1989).

³⁴ The disagreement as to whether this quotation from *Place* is obiter dictum or a holding was tersely explained in a later U.S. Court of Appeals case:

Although the sniff-test discussion was not necessary to the decision in *Place*, the Court has characterized its analysis as a "holding." [*U.S. v. Jacobsen*, 466 U.S. at 123-24, 104 S.Ct. at 1661-62 [(1984)]. Thus, "[w]hether or not the statement in *Place* was a holding or dictum, the Supreme Court has clearly directed the lower courts to follow its pronouncement." *United States v. Beale*, 736 F.2d 1289, 1291 (9th Cir.) (*en banc*) (*Beale*), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984).

U.S. v. Lingenfelter, 997 F.2d 632, 637 (9th Cir. 1993).

The law seems clear that both (a) dog sniffs of things (e.g., luggage or automobiles) and (b) dog sniffs of air in public places are *not* searches within the meaning of the Fourth Amendment. But dog sniffs of a person *might* be a search.³⁵

While a person could be afraid of dogs, such fear is not an issue when a machine automatically samples and chemically analyzes puffs of air taken near a person's body. Such automatic sampling could be done quickly and without intrusion upon the person. Hence, such automatic sampling is less intrusive than a sniff of a person by a dog, and much less intrusive than a pat-down by a government employee. If the machine detects gases from either explosives, gunpowder residue on a pistol, or other contraband, the machine's results would be probable cause for a search by government agents. For these reasons, I believe that using automatic machines to screen *all* airline passengers would be constitutional.

Conclusion

It is legally permissible to quickly walk *all* airline passengers through a magnetometer. It is legally permissible to use X-ray or other equipment to screen *all* luggage carried onto an airplane by passengers. However, I believe that searches that are more intrusive, or take more than a minute, should require "reasonable suspicion" of individual criminal conduct (e.g., failing the magnetometer search,³⁶ hand grenade in their carry-on luggage, fit a profile of terrorists, or whose name is on some watch list). Further, I believe that airline passengers should be able to lock luggage that is transported in the cargo compartment, which is not accessible to passengers during flight.

The suspicionless searches of all airline passengers in the USA since 1970 is consistently accepted by the U.S. Courts of Appeals, although the reason that such suspicionless searches are legal is generally poorly explained. Some cases said that the hijacking of airplanes was a crisis that justifies suspicionless searches of all passengers. Other cases made a bogus argument about alleged "consent" to search, when the traveler chose to fly. The U.S. Supreme Court has said that suspicionless searches may be legal, unless their primary purpose is to find and arrest criminals. Above, at page 59, I noted that carrying weapons aboard an airplane is a crime. As many

³⁵ *U.S. v. Place*, 462 U.S. 696, 720 (1983) ("I have expressed the view that dog sniffs of people constitute searches.") (Brennan, J., concurring in result); *Doe v. Renfrow*, 451 U.S. 1022, 1025-26 (1981) (Brennan, J., dissenting from denial of certiorari). See also *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 479 (5th Cir. 1982), *cert. den.*, 463 U.S. 1207 (1983); *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260 (9th Cir. 1999); *U.S. v. Kelly*, 302 F.3d 291, 293, n. 1 (5th Cir. 2002), *cert. den.*, 537 U.S. 1094 (2002).

³⁶ However, the magnetometer must be adjusted so that it does not flag small, innocuous pieces of metal on a passenger, so most innocent passengers pass the magnetometer test. An overly sensitive magnetometer that detects belt buckles and paper clips is *not* a credible source of information about possible weapons being carried by the passenger.

dissenting judges have said, erosion of civil liberties in an attempt to apprehend smugglers of illicit drugs, or in an attempt to prevent airline hijackings, is a bad idea.

In the current hysteria about security and preventing a future attack by terrorists, it is worthwhile to remind ourselves that the U.S. Constitution properly restricts intrusion by government into private lives of people in the USA.

Whenever individual liberty is at risk of being jettisoned in combatting a national crisis, courts have a special obligation to stand stubborn in requiring that the sacrifice be necessary. Otherwise, our Constitution and those it protects will surely suffer. See *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). For even after the crisis subsides — as it inevitably does — the constitutional fallout lingers on and takes a creeping toll. We cannot count ourselves victorious on any front, in any war, unless our Constitution survives the battle.

National Treasury Employees Union v. U.S. Customs Service, 27 F.3d 623, 630 (D.C.Cir. 1994) (Wald, J., dissenting). Above, at page 10, it was shown that automobile accidents have killed approximately 70 times more people than terrorists in the USA during the years 1999-2003, so airplane hijacking is far from the biggest threat to public safety in the USA. I suggest that, just as it is *unavoidable* that criminals will harm people, it is also *unavoidable* that governments will react excessively, and judges will sometimes fail to protect people from intrusions by the government. However, once problems have been exposed, the government and, especially judges, should correct their mistakes.

We need to ask ourselves how much inconvenience we should routinely tolerate in order to possibly (*not* certainly) prevent a future attack by terrorists. I believe we should *not* surrender any of our constitutionally protected liberties, allegedly to protect ourselves from terrorism, because then the terrorists have won and we have lost. The national anthem of the USA declares that the USA is “the land of the free and the home of the brave”. It is time for us to be a little freer at airports and a little braver in the face of the possibility of terrorism.

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