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United States v. Solis: Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?

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UNITED STATES v. SOLIS: HAVE THE GOVERNMENT'S SUPERSNIFFERS COME DOWN WITH A CASE OF CONSTITUTIONAL NASAL CONGESTION?

INTRODUCTION

Large, intelligent dogs seem to fascinate people. This fascination may be attributable to the genre of shows such as "Lassie" or "Rin-Tin-Tin," or the awe a person experiences when a black Labrador retriever thrashes through a cluster of cattails and scares up pheasants hidden from human eyes. Many moviegoers thrilled to "Cool Hand Luke" sloshing down an irrigation canal with the yelps and howls of state tracking dogs ringing in his ears. In a recent addition to this lore, law enforcement agencies have been using highly trained dogs to assist them in detecting various types of drugs.[1] The propriety of using drug detection dogs to establish probable cause for search was argued in *United States v. Solis*.[2] In holding that the use of dogs, in itself, was a search, the Federal District Court for the Central District of California may have hindered government efforts to curtail the flow of illegal drugs.

The *Solis* case originated when an informant of "*unproven* reliability"[3] told a special agent of the Drug Enforcement Administration (DEA) that approximately 2,000 pounds of marijuana were hidden under the floorboards of an enclosed semitrailer parked behind a service station in Santa Ana, California. The DEA agent notified U.S. Customs which sent two trained dogs and their handlers to the service station. After arriving at the station, the first dog gave a positive alert twenty feet from the trailer indicating that marijuana was inside. The second dog gave a positive alert

1. This term or the term "narcotics" is used in this article to encompass marijuana, hashish, heroin, and heroin derivatives.
2. 393 F. Supp. 325 (C.D. Cal. 1975).
3. *Id.* at 325.

twenty-five feet from the trailer. Based on the dogs' alerts, a warrant was issued and the resulting search uncovered a large quantity of marijuana.[4]

When Solis moved to suppress the marijuana, the government relied solely on the positive responses of the two trained dogs to establish probable cause for the search. Without deciding if the dogs' alerts would be sufficient to establish probable cause for the warrant, the court held that the use of the dogs was itself a search lacking probable cause.[5]

In reaching the conclusion that the use of the dogs was a search, the court compared the use of marijuana detection dogs to the use of the electronic bugging device in *Katz v. United States*.[6] *Katz* involved an "uninvited electronic ear"; *Solis* involved "the uninvited canine nose." Since Solis had a "reasonable and justifiable expectation of privacy," the use of the dogs "contravened this expectation and invaded this private area."[7] The court used strong language to support its grant of Solis' motion.

> In the absence of a warrant supported by probable cause, or certain recognized exceptions for a warrantless search, people living in a free society should not, for example, be required to tolerate intrusions into their privacy by the Government's use of electronic monitoring equipment, high power telescopes, or the keen olfactory powers of specially trained dogs. These and other extraordinary information gathering devices gravely threaten each person's ability to maintain any semblance of privacy.[8]

Because cases similar to *Solis* are sure to arise in the future, and because courts are unable to agree on the proper way to treat drug-sniffing dogs, the use of narcotic detection dogs is certain to be a persistent problem. Law enforcement agencies have too much invested in their dog training programs to placidly accept the *Solis* decision. If the *Solis* rationale is followed in future decisions, the use of these highly trained dogs will be severely limited. Because the proper use of detection dogs is unclear it is necessary to discuss

4. *Id.* at 325-26.
5. *Id.* at 326-27. Having decided that the use of the dog was a search, the court concluded that the agent's search based on the warrant was also invalid as it was based on "fruit of the earlier illegal search."
6. 389 U.S. 347 (1967).
7. 393 F. Supp. at 327.
8. *Id.* at 328.

the consequences of *Solis* and how the case may be followed or overruled in the future.

IDENTIFICATION OF THE ISSUES

The *Solis* decision considered the basic questions that will continue to surface in the future cases. The threshold question is whether the use of a drug detection dog is a search per se. If using the dog is not itself a search, can the dog be used to establish probable cause to search? Prior to *Solis*, the military and civilian courts that dealt with the use of drug detection dogs did not squarely confront this question.

While military courts have not specifically decided the issue, there is a difference of opinion among military writers about whether the use of a detection dog is a search. One writer insists that using a trained narcotic detection dog is a search;[9] the opposing writers maintain that using a dog to supply probable cause for a search is not a search per se.[10] The military courts have employed a wide variety of factual situations[11] to avoid confronting the

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9. Kingham, *Marijuana Detection Dogs as an Instrument of Search: The Real Question*, THE ARMY LAWYER, DA PAM 27-50-5, 10 (May 1973). Kingham states that "the threshold question is more basic: whether the very use of the dog constitutes a search . . . should be the initial consideration . . . ." *Id.* at 10. The use of the dog is analogous to the employment of mechanical devices such as magnetometers and electronic bugging devices. Probable cause must antedate the use of the marijuana detection dog. *Id.* at 11-12.

10. Lederer & Lederer, *Admissibility of Evidence Found by Marijuana Detection Dogs*, THE ARMY LAWYER, DA PAM 27-50-4, 12, 13 (April 1973) [hereinafter cited as Lederer No. 1]. The Lederers state: "In light of recent case law the better answer would seem to be that the dogs can indeed supply probable cause." *Id.* The Lederers based their stance on the need to curtail drug use and the fact that the use of dogs is an effective tool for law enforcement officers in expanding their own olfactory senses. *Id.* at 14.

This view may have been modified in a more recent publication even though, arguably, use of dogs may not be a search where there is a minimal expectation of privacy, or where dog use can be classified within a "plain smell" situation. But in view of the high degree of similarity between the use of dogs and the use of magnetometers in airport searches for weapons, these writers feel that it would be "fruitless" to argue that the use of the dogs, like magnetometers, is anything but a search. Lederer & Lederer, *Marijuana Dog Searches After United States v. Unrue*, THE ARMY LAWYER, DA PAM 27-50-12, 6, 7 (Dec. 1973) [hereinafter cited as Lederer No. 2]. *See also* United States v. Albarado, 495 F.2d 799 (4th Cir. 1974).

11. United States v. Neloms, 48 C.M.R. 702 (ACMR 1974) (base checkpoint car search); United States v. Carson, 22 U.S.C.M.A. 203, 46 C.M.R. 203 (1973) (airport baggage search); United States v. Ponder, 45 C.M.R. 428 (1972), *petition denied*, 45 C.M.R. 928 (1972) (barracks room and car search); United States v. Unrue, 46 C.M.R. 882 (1972), *aff'd*, 22 U.S.C.M.A. 466, 47 C.M.R. 556 (1973) (base checkpoint car search).

threshold question. In one case involving an automobile search at a base checkpoint, the court coupled circumstances indicating a lessened expectation of privacy with a showing of "military necessity" to allow the dog search.[12] In a similar situation, without evidence of "military necessity," the court determined that the method of search involving a dog went beyond the scope of the original purpose for stopping vehicles at a checkpoint.[13] In a dog search at a military airport, the court seized upon the facts that the baggage had not been committed to the control of the airport baggage area and that the officers involved had an opportunity to receive an on-the-spot authorization but failed to do so.[14] In another case, the court assumed *arguendo* that a trained dog could be used to supply probable cause, but the court did so only to hold that probable cause was not established because there was an insufficient showing of the dog's reliability to the authorizing officer.[15]

Despite these courts' failure to confront the threshold issue, they may have reached the conclusion sub silentio that the use of a trained dog is a search. Generally, these cases have groped for exigent circumstances to justify the dog searches. This rationale

12. United States v. Unrue, 22 U.S.C.M.A. 466, 467-70, 47 C.M.R. 556, 557-60 (1973). At an initial checkpoint, the attention of the occupants of the car in which the defendant was riding was directed to a large sign under which was placed an "amnesty" barrel. The occupants were informed by the sign that they could drop any drugs into the barrel with "no questions asked." The court placed great emphasis on "military necessity" caused by a high rate of drug infiltration onto the post and a corresponding rise in drug related offenses. *Id.* *But see* dissenting opinion of Judge Duncan, *id.* at 471, 47 C.M.R. at 561.

13. United States v. Neloms, 48 C.M.R. 702, 704-09 (ACMR 1974). Here there was no "amnesty" barrel, and only every fifth car was stopped. The pivotal facts here were that there was no evidence of a drug problem like that in *Unrue* and the occupants of the car were ordered to leave the doors of the car ajar to facilitate the dog's search. The court determined that the use of the dog was reasonable but this was not discussed further because the case revolved around the "unreasonable requirement to leave the doors ajar." *Id.* at 709.

14. United States v. Carson, 22 U.S.C.M.A. 203, 205-07, 46 C.M.R. 203, 205-07 (1973). The court never really addressed itself to the propriety of the use of the dog.

15. United States v. Ponder, 45 C.M.R. 428, 433-34 (1972). A trained dog was used to search the defendant's barracks room and his car after defendant allegedly sold marijuana to an undercover civilian policeman. The court's assumption *arguendo* that dogs might be used to establish probable cause for a search was based on the analogous use of tracking dogs and the cases allowing the admission of tracking dog evidence. *Id.* at 434.

would not be needed if the use of the dog was not a search. For example, in *United States v. Carson*,[16] the court required a prior authorization—the equivalent of a search warrant—to justify a dog search.[17] In finding "military necessity" to justify a dog search, the court seems to be implying that the search without a warrant would be improper if there were no finding of such a necessity.[18] The emphasis that the courts placed on the reliability of the dogs may have been designed to insure that when an invasion of privacy is initiated, it must be undertaken with a dog that at least would be sufficiently reliable to establish probable cause.[19]

The civilian courts handling the threshold question prior to *Solis* have not been any more explicit.[20] When *Solis* was decided, there was some confusion as to how drug detection dogs could be used consistently with the fourth amendment. The courts may have unconsciously confronted the threshold question in deciding the probable cause issue. These cases, however, may have simply assumed that the use of the detector dog was not a search.

The Training and Reliability of Drug Detection Dogs

An examination of the training and reliability of detection dogs provides insight into the question of whether the use of the dog is a search per se or is an appropriate means of establishing probable cause. The use of dogs to detect narcotics is the offshoot of the use of tracking dogs to apprehend fugitives and suspected criminals—an accepted practice in many jurisdictions.[21] The U.S. Customs Service and the Department of Defense have led the development of training programs for detector dogs.[22]

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16. 22 U.S.C.M.A. 203, 46 C.M.R. 203 (1973).
17. *Id.* at 205-07, 46 C.M.R. at 205-07.
18. Lederer No. 2, *supra* note 10, at 8.
19. *Id.* at 10.
20. *See*, United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974); People v. Furman, 30 Cal. App. 3d 457, 106 Cal. Rptr. 366 (1973). These cases involved a bus depot dog search and an airport dog search in that order. In both cases the trained dog was not used until the officers received tips from "reliable informers." In both situations, the informants' tips were corroborated by the officers' independent investigations, and the prosecutor in each case established an adequate foundation for the dogs' reliability as investigative devices. Both cases were summarily disposed of and the idea that use of dogs is a search was not seriously considered. 498 F.2d at 748-49; 61 Cal. App. 3d at 458-59, 106 Cal. Rptr. at 368.
21. *See generally* 1 Wigmore on Evidence § 177 (3d ed. 1940); McWhorter, *The Bloodhound As a Witness*, 54 Am. L. Rev. 109 (1920); Comment, 9 Wash. & Lee L. Rev. 248 (1952); Annot., 18 A.L.R.3d 1221 (1968).
22. Savage, *Drug Detector Dogs*, All Hands, Aug. 1973, at 46; L.A. Times, Aug. 24, 1975, § I, at 1, col. 1. Two known U.S. Customs centers are at Front Royal, Virginia and San Antonio, Texas. As of 1973, there

Most of the dogs[23] used by the Customs Service are bought from or donated by private owners.[24] The entrance requirements are rigid, and the dogs are screened throughout the training program.[25] During the training period, a dog will work with the same handler so that the handler can learn which movement or action by the dog is an indication of a drug find.[26] For the dogs, training is a hide-and-seek game. In the initial training, the trainer tosses a packet of marijuana to the dog. This develops into a large-scale exercise in which narcotics are hidden in open fields, buildings, cars, and other locations dogs encounter when they graduate from the training course.[27]

A dog can alert to the drug in a variety of ways; the dog can snarl, bark, whine, or paw at a container.[28] Each dog may respond differently.[29] The alert is either "true" or "dead" depending upon whether the drug is actually at the spot the dog indicates or has only recently been there, and all that is left is a lingering odor caused by cigarette papers, pipes and other paraphernalia that have been in contact with narcotics.[30]

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was a training center run by the Washington, D.C. Metropolitan Police Department's K-9 Division. Until recently, the U.S. Army Land Warfare Laboratory was working under a grant to train narcotics detection dogs.

According to U.S. Customs:

> Detector dogs were introduced on a wide scale in September, 1970 as a major tool in the stepped up drive to halt narcotics smuggling through border ports and at major gateways. U.S. CUSTOMS SERVICE, CUSTOMS DOG DETECTOR PROGRAM 1, in letter from Chief, Cargo Processing Branch to Max Hansen, Sept. 23, 1975.

23. CUSTOMS, *supra* note 22; Lederer No. 1, *supra* note 10, at 12; L.A. Times, *supra* note 22, at 9, col. 4. The most prominent breed used by Customs is the German shepard, but Customs also uses golden retrievers, border collies, Brittany spaniels, Labrador retrievers and various mixed breeds.

24. L.A. Times, *supra* note 22, at 9, col. 4.

25. CUSTOMS, *supra* note 22, at 2. Only about one dog out of 130 passes the entrance test and these dogs must exhibit "natural retrieving desire, sensitivity, energy, willingness, inquisitiveness and boldness." To graduate, the dog and handler must score 100 percent on a battery of tests patterned after real-life situations. *Id.*

26. *Id.*; *see* Savage, *Drug Detector Dogs*, ALL HANDS, Aug. 1973, at 46, 47.

27. CUSTOMS, *supra* note 22, at 2.

28. United States v. Fulero, 498 F.2d 748, 749 (D.C. Cir. 1974); United States v. Solis, 393 F. Supp. 325, 326 (C.D. Cal. 1975); People v. Furman, 30 Cal. App. 3d 454, 455, 106 Cal. Rptr. 366, 367 (1973).

29. CUSTOMS, *supra* note 22, at 2.

30. United States v. Unrue, 46 C.M.R. 882, 884-85 (1972), *aff'd*, 22 U.S. C.M.A. 466, 47 C.M.R. 556 (1973).

These training programs provide dogs that are valuable government tools for drug detection[31] with impressive records of reliability.[32] The purpose of the various training programs for drug detection dogs is to make the dogs as reliable as possible, but ironically the intensive training programs may result in a determination that the dogs are not just highly reliable informants, but are like finely tuned machines. Classifying the dogs as machines will determine the *Solis* issue for other courts: the use of the dog, like the use of a bugging device, is itself a search.

If *Solis* is not followed and the dogs are used to establish probable cause for a search, the dog must satisfy the same constitutional requirements as other informants. To support a showing of probable cause to search, the *Aguilar*[33]-*Spinelli*[34] test will be applied. Under this test, the magistrate must be informed of "underlying circumstances" which are the basis for the informant's conclusion "that narcotics were where he claimed they were," and the underlying circumstances that are the basis for the officer's conclusion that he was using a "credible" informant with "reliable" information.[35] If the information supplied by the informant is partially corroborated by other information the total effect must be as dependable as a tip that has passed the two-step standard without corroboration.[36]

Various methods of providing an index of the dog's reliability and credibility narrow down to some basic elements. The magistrate should be advised of the following: the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the "track record" of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has fur-

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31. *See* CUSTOMS, *supra* note 22; L.A. Times, *supra* note 22. The U.S. Customs Service estimates that for the fiscal year 1974 their trained dogs:

> [S]creened 90,500 vehicles, 4 million mail packages, and 6,052,049 units of cargo in just a fraction of the time it would have taken customs inspectors. The dog teams accounted for the seizure of 22,722 pounds of marijuana, 2,166 pounds of hashish, 25 pounds of cocaine, 13 pounds of heroin and 2 million units of the dangerous drugs (detected because of similar chemical properties). *See* CUSTOMS, *supra*.

32. United States v. Solis, 393 F. Supp. 325, 326 n.1 (C.D. Cal. 1975); United States v. Unrue, 46 C.M.R. 882, 883-85 (1972); L.A. Times, *supra* note 22.

33. Aguilar v. Texas, 378 U.S. 108 (1964).

34. Spinelli v. United States, 393 U.S. 410 (1969).

35. Aguilar v. Texas, 378 U.S. 108, 114 (1964).

36. Spinelli v. United States, 393 U.S. 410, 415-16 (1969).

nished). Only after this information has been furnished, is a magistrate justified in issuing a warrant.[37]

There are arguments against the reliability of dogs. The situations where courts have allowed dogs to establish probable cause to search are analogous to the use of tracking dogs to apprehend fugitives or suspects.[38] There are objections to the latter practice. The main arguments against the use of tracking dogs are that results are uncertain because the success of tracking dogs is dependent on a wide range of variables, and that the legendary prowess of tracking dogs may prejudice the trier of fact.[39] Where the use of drug detection dogs is concerned, the first objection is lessened because a detector dog's mistake usually benefits the criminal. The dog is only trained to smell contraband and if there are no drugs in the searched area or the drugs' odors are effectively disguised, the criminal usually goes free,[40] although there may be some false alerts.[41] The second objection to bloodhound evidence does not apply to drug detection dogs unless the lore surrounding the effectiveness of drug-sniffing dogs has reached proportions prejudicial to a defendant.

Just because the use of drug detection dogs is sufficiently different from the use of tracking dogs, to avoid those problems does not mean that the use of drug detection dogs is without its pitfalls. Many times the possibility of a false alert will be overlooked by a handler as will the dog's inability to differentiate between a "live" scent and a "dead" scent. Each dog will also vary in its ability to ignore detractors and masking agents and each dog's performance is affected differently by working conditions and its respective attention span. There is also a possibility that a handler may unintentionally or otherwise prompt his dog to alert.[42]

Despite the decisions which allow dogs to supply probable cause to search, maintaining that a dog is reliable enough to establish

37. United States v. Ponder, 45 C.M.R. 428, 435, *petition denied*, 45 C.M.R. 928 (1972); *see also* Lederer No. 1, *supra* note 10, at 14-15.
38. *See* note 21 *supra*.
39. 1 WIGMORE ON EVIDENCE § 177, at 635-37 (3d ed. 1940); McWhorter, *The Bloodhound As a Witness*, 54 AM. L. REV. 109, 119-22 (1920); Comment, 9 WASH. & LEE L. REV. 248, 251-54 (1952).
40. United States v. Bronstein, 17 CRIM. L. REP. 2477, 2478 (2d Cir. 1975).
41. Lederer No. 1, *supra* note 10, at 14-15.
42. *Id.* at 15.

the probable cause for the issuance of a search warrant creates a paradoxical situation. In the attempt to train and employ a dog that would appear to be highly reliable, the Government provides the basis for an argument that the dog is much more similar to mechanical surveillance equipment than to an informant. The whole object of the training courses is to provide a dog that exhibits 100 percent efficiency in the detection of drugs. This is evidenced by the final screening process where each dog must score 100 percent in a battery of tests.[43] The similarity to surveillance equipment can also be seen in the close relationship between the dog and handler. Throughout the training programs each handler is taught how to read his dog like a finely tuned instrument because the dog is useless if the handler cannot detect a positive alert.[44]

If the use of a trained dog is sufficiently similar to mechanical surveillance equipment to be ruled a search, there must be some justification prior to the dog search. Before employing a detector dog, a police officer has to procure a warrant as was required in *Katz*, or the officer must attempt to bring the dog search within one of the "well-delineated exceptions" to the warrant requirement.[45] Without the antecedent justification, any subsequent seizure is tainted,[46] and other decisions such as *Solis* are inevitable.

Application of a Plain Smell Doctrine to a *Solis* Situation

If the odor of the marijuana is in plain smell, arguably, the use of a detector dog is not a search[47] because the defendant has not exhibited an expectation of privacy.[48] A brief overview of the plain view doctrine is essential to an understanding of the applicability of a plain smell doctrine to dog searches.

United States v. Lee[49] and *Ker v. California*[50] sowed the seeds of the plain view doctrine. In each of these cases, the Supreme Court decided that there was not a search within the meaning of the fourth amendment because the contraband in each case was in

43. *See* note 25 *supra* and accompanying text.
44. *See* notes 25-29 *supra* and accompanying text.
45. Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Solis, 393 F. Supp. 325, 328 (C.D. Cal. 1975).
46. Wong-Sun v. United States, 371 U.S. 471 (1963). *See also* United States v. Solis, 393 F. Supp. 325, 327 (C.D. Cal. 1975).
47. United States v. Bronstein, 17 Crim. L. Rep. 2477, 2478 (2d Cir. 1975).
48. Katz v. United States, 389 U.S. 347, 351 (1967).
49. 274 U.S. 559 (1927) (seizure of smuggled liquor on the high seas).
50. 374 U.S. 23 (1963) (seizure of marijuana found on a kitchen counter).

"plain view."[51] *Coolidge v. New Hampshire*[52] established the two elements that must be met to invoke the plain view doctrine: first, the police officer must have a prior justification for being in the position where he obtains the view of the object; second, the officer must discover the object inadvertently.[53] The first criterion is met as long as the police officer's presence is justified by a warrant, an exception to the warrant requirement, or another valid reason. The second criterion is met if the discovery of the contraband was not anticipated.[54]

Cases following *Coolidge* have defined the parameters of the plain view doctrine. While it is clear that officers may not use the plain view doctrine to conduct a general exploratory search,[55] it is permissible to use flashlights,[56] binoculars,[57] and searchlights[58] to facilitate the application of the doctrine. Generally, the courts require that the officer use his own senses; the use of flashlights and other aids seems to be justified because they merely afford illumination or magnification of what the officer could see otherwise.

The lower courts have subjected the requirements of the *Coolidge* test to many interpretations. Instead of requiring the object to be in physical plain view, the lower courts employ concepts such as "constructive sight" and "totality of circumstances."[59] Instead of requiring that the incriminating nature of the object be "immediately apparent," the courts use a less than probable cause standard.[60] The inadvertency requirement has either been re-

51. *Id.* at 43; United States v. Lee, 274 U.S. 559, 563 (1927). *See also* Harris v. United States, 390 U.S. 234, 236 (1968).
52. 403 U.S. 443 (1971).
53. *Id.* at 466, 467, 469.
54. *Id.*
55. *Id.* at 466.
56. United States v. Wright, 449 F.2d 1355, 1356 (D.C. Cir. 1971).
57. United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).
58. United States v. Lee, 274 U.S. 559 (1927).
59. *See* United States v. Welsch, 446 F.2d 220, 223 (10th Cir. 1971); State v. Palmer, 5 Wash. App. 405, ___, 487 P.2d 627, 630-31 (1971); Comment, *Plain View—Anything But Plain: Coolidge Divides the Lower Courts*, 7 LOYOLA L.A. L. REV. 489, 494-97 (1974).
60. United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971); *Plain View, supra* note 59, at 502-04.

jected, or diluted to the point where it is dependent on what type of objects are involved—evidence or contraband.[61]

Although the United States Supreme Court has not yet decided the plain smell issue, it has stated in dicta that the odor of a narcotic substance detected by an officer may be very persuasive evidence of probable cause for a justified warrantless search, or for obtaining a warrant.[62] Lower courts followed this dicta in allowing drug searches based in part on the olfactory perceptions of police officers.[63] These cases generally involve the seizure of marijuana or hashish because these substances have a distinguishable odor and are easily detectable. But lower courts have also refused to extend plain view seizures to plain smell situations by explicitly stating that, even though the contraband was emitting an unmistakable odor, it was not in plain view.[64]

The position of the California courts is unclear. In *People v. Marshall*,[65] it appeared that the California Supreme Court settled the plain smell issue. The court stated that the marijuana in a closed paper bag found in a closet could not be in plain view or plain smell. A search was required to determine the contents of the bag—a search which "demands a warrant." The court explicitly dealt with the plain smell argument when it stated that no matter how keen an officer's sense of smell may be, the officer cannot seize the thing he smells unless he rummages through the places that could be the sources of the odor. The officers may not do this without a warrant any more than they could use a highly trained dog

61. North v. Superior Ct., 8 Cal. 3d 301, 307-08, 502 P.2d 1305, 1308-09, 104 Cal. Rptr. 833, 836-37 (1972); Barnato v. State, 88 Nev. 508, 512, 501 P.2d 643, 647 (1972); *Plain View, supra* note 59, at 509-10, 511-514.

62. Johnson v. United States, 333 U.S. 10, 13 (1948). The Supreme Court excluded opium seized by officers after they smelled the burning drug and searched the defendant's apartment. The evidence was excluded because the officers failed to obtain a warrant even though they had ample opportunity to do so. *Id.*

63. United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973); United States v. Barron, 472 F.2d 1215 (9th Cir. 1973); United States v. Leazar, 460 F.2d 982 (9th Cir. 1972); Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972); People v. Christensen, 2 Cal. App. 3d 546, 83 Cal. Rptr. 17 (1969). *See also* 1 SEARCH AND SEIZURE LAW REPORT No. 5, at 1 (1974).

64. United States v. Babich, 347 F. Supp. 157, 160 (D. Nev. 1972), *aff'd on other grounds*, 477 F.2d 242 (1973), *cert. denied*, 414 U.S. 828 (1973).

65. 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968). An officer engaged in a search of an apartment for suspects smelled marijuana emanating from a bedroom closet. Closer inspection revealed that the source of the odor was an open cardboard box in which there was a closed paper bag. The officer opened the bag, and seized the contraband.

to detect contraband they reasonably believe will be found in the premises.[66] In *Guidi v. Superior Court*,[67] the California Supreme Court may have limited the *Marshall* decision. In *Guidi*, government counsel urged the court to "treat plain smell as the equivalent of plain view," but the court side-stepped this request.[68] The court was still able to distinguish *Marshall* by using the abolition of the "mere evidence rule"[69] to its favor. Because the bag of hashish on the floor of Guidi's apartment was in plain sight and the officer was informed that the contraband was in a similar brown paper bag, the seizure of the bag was "constitutionally reasonable."[70] Arguably, this result undermines *Marshall*, but the *Guidi* court refused to overrule *Marshall* despite the urgings of government counsel and the strong dissent of Justice Mosk.[71]

Notwithstanding lower court decisions to the contrary, it is evident that in certain situations some courts will allow a police officer to base a search or seizure on information received through his olfactory senses.[72] A search or seizure based on plain smell may also satisfy the requirements of the *Coolidge* test, especially in view of the dilution of these requirements by lower courts.[73] In most dog search cases the officers failed the inadvertency requirement because they employed the trained dogs knowing there was a good chance they would find contraband.[74] If plain smell is sufficiently similar to plain view, police officers might also employ certain aids like the use of binoculars and flashlights in a plain view situation.[75]

The Second Circuit in *United States v. Bronstein*[76] combined similar justifications in order to apply a "plain smell" theory to

66. *Id.* at 59, 442 P.2d at 670, 69 Cal. Rptr. at 590.
67. 10 Cal. 3d 1, 513 P.2d 908, 109 Cal. Rptr. 684 (1973).
68. *Id.* at 14-16, 513 P.2d at 917-20, 109 Cal. Rptr. at 693-96.
69. *See* Warden v. Hayden, 387 U.S. 294 (1967).
70. 10 Cal. 3d at 14-16, 513 P.2d at 917-20, 109 Cal. Rptr. at 693-96.
71. *Id.* at 17 n.18, 19-20, 513 P.2d at 919 n.18, 921-22, 109 Cal. Rptr. at 695 n.18, 697-98.
72. *See* cases cited note 63 *supra*.
73. *See* notes 59-61 *supra* and accompanying text.
74. *See, e.g.*, United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975). The officer had already been informed by an informer that there was marijuana in the trailer.
75. *See* notes 56-58 *supra* and accompanying text.
76. 17 CRIM. L. REP. 2477 (2d Cir. 1975).

a dog search. *Bronstein* is an even more recent civilian case dealing with dog searches and the court reached its decision despite the holding in *Solis*. A DEA agent in San Diego warned the DEA in Hartford, Connecticut, that airline ticket agents had observed "highly suspicious behavior" on the part of some passengers bound for Hartford. The Hartford DEA agents, state police, and a trained dog converged on the Hartford airport with a full description of the men and their four pieces of luggage. The dog alerted to two of the suitcases as the cases came out on the luggage conveyer belt.[77]

The appellants' contention was that the use of the dog was a search without probable cause or a warrant. The court emphasized that the tip was from airline employees who the west coast DEA agent regarded as reliable. The court concluded that this was enough cause for the agents in Hartford to make the search. The court disposed of the threshold question when it added that this was not a "search" but a "plain smell" situation. The court reasoned the use of the dogs was no different from the officer's use of his olfactory senses which would have been permissible.[78] This line of reasoning also occasioned a comparison of detector dogs to magnetometers that are used in airport searches. The *Bronstein* court distinguished these methods because a magnetometer search is indiscriminate in that it subjects a person to a search no matter what kind of metal he has on his person or in his baggage. A search by a trained dog can only detect contraband, the possession of which is an offense, and any mistake a dog makes only benefits the criminal.[79]

Bronstein distinguished *Solis* on two grounds. First, *Solis* involved a closed trailer, a "private place where there was a reasonable expectation of privacy." Second, in *Solis* the dogs "were employed in response to an informer of unproven reliability."[80] There was a concurring opinion in *Bronstein* by Judge Mansfield in which he adopted the majority's idea that there was a lesser expectation of privacy, because a person's expectation in respect to his baggage declines as "anticipated public access to the baggage increases." Under these circumstances, the search was reasonable, but Judge Mansfield refused to adopt the majority's "plain smell" theory.[81]

77. *Id.* Sixty pounds of marijuana were found when the luggage was opened.
78. *Id.*
79. *Id.* at 2477-78.
80. *Id.* at 2478.
81. Judge Mansfield maintained this was a search:

The application of a "plain smell" doctrine to dog searches like the theory in *Bronstein* stretches the imagination. The courts cannot escape the fact that in *Solis* and other cases dealing with detection dogs, none of the officers involved was able to detect the odor of narcotics; the drugs were not in the plain smell of the officers. The officers needed trained dogs to sniff out the contraband.[82] The decision as to whether the use of a trained dog is a plain smell situation depends on whether the dog is comparable to a flashlight and binoculars, or more similar to a magnetometer or other mechanical devices, the use of which is impermissible without antecedent justification. The latter possibility seems the more logical analogy because the dogs' training makes them finely tuned machines.[83] This may be a fine distinction, but the use of a dog seems to differ in kind and degree from the use of artificial light or magnification. Where an officer uses a flashlight or binoculars, he still perceives the object that is viewed, but when a trained dog is used to sniff out drugs, the odor of the drugs is never transmitted by the dog to the officer's olfactory senses.

Judge Mansfield summed up this concept in the *Bronstein* case. The use of a dog to ascertain the contents of a closed bag and the employment of an X-ray machine or magnetometer to intrude upon a closed area are all nonhuman means of search. Just because a dog search is more discriminate than a magnetometer search does not establish a legal distinction, because the relative accuracy of a sensing device is not the important factor. The important fact is that, by use of dogs or mechanical devices, police officers can intrude into a "closed area otherwise hidden from human view, which is the hallmark of any search."[84]

If the use of a drug detection dog is not within a "plain smell" situation, the officers must either seek a magistrate's impartial determination of the existence of probable cause for the use of a dog, or attempt to fit a dog search into one of the "well-delineated exceptions" for exigent situations.[85] In either case, the use of the

> I am unable to agree with the majority that use of a marijuana sniffing dog to ascertain the contents of a private bag amounts to some sort of "plain smell" . . . rather than a search. *Id.*

82. *See, e.g.*, United States v. Solis, 393 F. Supp. 325, 327 (C.D. Cal. 1975).
83. *See* notes 25-32 *supra* and accompanying text.
84. United States v. Bronstein, 17 CRIM. L. REP. 2477, 2478 (2d Cir. 1975) (concurring opinion).
85. Katz v. United States, 389 U.S. 347, 357 (1967).

dog is superfluous because probable cause must be established before the dog is used.

Solis AND THE PRESENT TREND IN SEARCH AND SEIZURE

The rationale underlying *Katz* existed long before the case was decided. The Supreme Court previously had stated that warrantless searches were unlawful despite the fact that there was probable cause.[86] Before *Katz*, the Supreme Court repeatedly emphasized that the fourth amendment demands "adherence to judicial processes," and that searches made without prior judicial approval are "*per se* unreasonable"[87] unless they fall within one of the few "well-delineated exceptions."[88]

Against this backdrop, *Katz* had to decide what acts constituted a search within the meaning of the fourth amendment. In determining that the occupant of a telephone booth had a justifiable expectation of privacy that caused electronic surveillance to be a search, the *Katz* court overruled the line of cases that had required a physical trespass of the area that the person sought to keep private.[89] In his concurring opinion in *Katz*, Justice Harlan put forth a test that represents the *Katz* doctrine today.[90] The test is twofold: the person must exhibit an "actual (subjective) expectation of privacy," and the expectation must "be one that society is prepared to recognize as reasonable."[91] Thus, *Katz* extended fourth amendment protection to electronic surveillance, and redefined the meaning of a search and seizure.[92]

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86. *Id.* The Constitution requires that the "deliberate impartial judgment of a public officer" be used as a buffer between citizens and police officers. *Id., citing* Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

87. *Id.* Here in note 18 the Court cites Stoner v. California, 376 U.S. 483, 486-87 (1964); Chapman v. United States, 365 U.S. 610, 613-15 (1961); Rios v. United States, 364 U.S. 253, 261 (1960); Jones v. United States, 357 U.S. 493, 497-99 (1958).

88. Katz v. United States, 389 U.S. 347, 357 (1967). Here in note 19 the Court cites Warden v. Hayden, 387 U.S. 294, 298-300 (1967); Cooper v. California, 386 U.S. 58 (1967); Brinegar v. United States, 338 U.S. 160, 174-77 (1949); McDonald v. United States, 335 U.S. 451, 454-56 (1948); Carroll v. United States, 267 U.S. 132, 153, 156 (1925).

89. *See* Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928).

90. Katz v. United States, 389 U.S. 347, 361 (1967). Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 65-66 (1974); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 982 & n.88 (1968).

91. Katz v. United States, 389 U.S. 347, 361 (1967).

92. *A Man's Home Is His Fort, supra* note 90, at 66. *See also* Cranwell, *Judicial Fine Tuning of Electronic Surveillance*, 6 SETON HALL L. REV. 225 (1975).

Since *Katz*, the Supreme Court has seemed too ready to decide that there was no expectation of privacy, or that in light of the circumstances, the expectation was unreasonable.[93] The lower courts have also used the "expectation of privacy" terminology in a way which supports the actions of law enforcement officers.[94] It seems that in a courtroom setting it is easy to misconstrue what a defendant's subjective expectation of privacy encompassed at the time a search was made.[95] But there are other lower courts that have attempted to strictly interpret the subjective expectation standard.[96]

As required by *Katz*, the *Solis* court looked at the defendant's *actual* expectation of privacy.[97] The defendant met the first requirement of Justice Harlan's test because the trailer was completely enclosed and unexposed to the public. The government agents standing outside the trailer were not able to smell the marijuana, and by using the dogs, the information the agents gained was equivalent to what they would have gained if they had opened the trailer doors and looked inside.[98] The court determined that Solis' expectation of privacy was reasonable because the warrantless use of the dogs was a form of government activity that "a free society should not . . . be required to tolerate."[99]

Is *Solis* a logical extension or an aberration of *Katz*? While the answer will vary according to the beliefs of the observer, the *Solis* court seems to have done nothing more than employ a straightforward application of the *Katz* doctrine.[100] Considering the "Or-

93. Cardwell v. Lewis, 417 U.S. 583, 589, 591 (1974); United States v. Dionisio, 410 U.S. 1, 8, 14-15 (1973) (grand jury subpoena and voice exemplars); Couch v. United States, 409 U.S. 322 (1973) (tax records); Combs v. United States, 408 U.S. 224, 227 (1972) (liquor).

94. United States v. Magana, 512 F.2d 1169, 1171 (9th Cir. 1975); United States v. Wilson, 472 F.2d 901, 902-03 (9th Cir. 1973); Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969).

95. *See, e.g.*, Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 44-45 (1975).

96. Burrows v. Superior Ct., 13 Cal. 3d 238, 242-43, 529 P.2d 590, 593-94, 118 Cal. Rptr. 166, 169-70 (1974) (search and seizure of bank records); North v. Superior Ct., 8 Cal. 3d 301, 308-11, 502 P.2d 1305, 1309, 104 Cal. Rptr. 833, 837 (1972) (jailhouse conversation).

97. 393 F. Supp. at 327.

98. *Id.*

99. *Id.* at 328.

100. *Accord*, People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253

wellian"[101] implications of the use of trained dogs, a holding like that in *Solis* may be necessary to provide a constitutional balance. A further argument in favor of *Solis* is that in view of the training received by government dogs, they might easily be considered similar to forms of electronic surveillance which some commentators consider always a violation of *Katz* without some antecedent justification.[102]

Future Applications of the Dog Search Cases

In most situations, the use of a drug detection dog should be a search. This search should be unconstitutional unless there is some antecedent justification or an exception to the warrant requirement. Nevertheless there will be some situations in which the use of a detector dog does not constitute an illegal search despite the fact that there is no supporting warrant. These situations involve circumstances in which it can be shown that the person did not have an actual expectation of privacy, or that in light of society's demands, it was not reasonable. These exceptions to the warrant requirement lend themselves to some illustrations.

Use of dogs may be justified where a person consents to the search of his car, home, or personal effects.[103] The same reasoning applies to dog searches of open fields or abandoned property.[104] A valid justification may be available in car and baggage searches at border checkpoints by U.S. Customs agents since border searches enjoy a relaxation of the probable cause requirement.[105] War-

(1975). The court in *Williams* seemed to be suggesting a similar approach when they upheld the suppression of narcotics uncovered during a dog search of a baggage area at the San Diego airport. The court emphasized the facts that the officers did not have a search warrant or probable cause, the baggage area was closed to the public, the officers did not have permission from the airline to make the search, there was no tip from a reliable informer, and the dog's actions had nothing to do with a search for weapons or bombs. *Id.* at 349-50, 124 Cal. Rptr. 254-55.

101. United States v. Unrue, 22 U.S.C.M.A. 466, 470, 47 C.M.R. 556, 560 (1973).

102. *See* notes 25-32 *supra* and accompanying text. *Post Katz Study*, *supra* note 90, at 986.

103. W. Ringel, Searches & Seizures, Arrests and Confessions § 230 *et seq.* (1972). *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968). Query how knowing and voluntary is the consent if the person is not apprised of the effectiveness and reliability of the dog that will be used? *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

104. W. Ringel, *supra* note 103, §§ 255-56. *See, e.g.*, Hester v. United States, 265 U.S. 57, 58 (1924). *Cf.* Katz v. United States, 389 U.S. 347 (1967) and the Court's statement that the fourth amendment protects people and not places. Gedko v. Heer, 18 Crim. L. Rep. 2006-07 (U.S.D.C. W. Wisc. 1975).

105. Ringel, *supra* note 102, at §§ 167.01, 247. *See, e.g.*, United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973).

rantless dog searches at airports might be considered valid especially since these situations are analogous to the border searches where the airports in question are international ports of entry.[106] This theory could also be extended to ship cargo searches by U.S. Customs agents at this country's international ports. It is apparent that warrantless dog searches are not justified where the searches involve a person's private residence or his place of business.[107] The holding in *Solis* also shows that in some situations even a container, like a semitrailer, that is highly movable requires that a warrant be procured before a dog search is undertaken.[108]

CONCLUSION

The *Solis* court was the first to confront the threshold question and decide that the use of a trained dog constitutes a search per se. Until *Solis*, courts had either decided that dogs could supply probable cause to search or had failed to explicitly hold this was not a search. The training of drug detection dogs discloses that in an effort to make the dogs reliable, the government creates highly effective surveillance devices very similar to magnetometers and X-ray machines. The *Bronstein* court distinguished *Solis* and applied a "plain smell" theory to the use of a trained dog in order to avoid calling the dog's activities a search. This theory tortures the plain view exception beyond a reasonable extension. Unlike *Bronstein* and the courts that use an objective standard to judge a person's subjective expectation of privacy, *Solis* exhibits a consideration of a person's subjective expectation which is what the *Katz* doctrine requires. There are some situations in which dog searches may be justified, but the situations must be based on valid exceptions to the warrant requirement.

The *Solis* case is not an aberration of the *Katz* doctrine. The case only reiterates the long-standing rule that the fourth amend-

106. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS §§ 247.01, 250 (Cum. Supp. 1974). *See, e.g.*, United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973). The justification for dog searches at airports is different than the justification given for airport magnetometer searches for potential hijackers. Query what hijacking danger is presented by a passenger that is carrying only narcotics and no weapons?

107. RINGEL, *supra* note 102, § 167.01. *See, e.g.*, United States v. Dicorvo, 37 F.2d 124, 132 (D. Conn. 1927).

108. United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975).

ment, which was drafted to provide security for persons and property, should be "liberally construed."[109] It may be easy to overlook this rule when the person who expects privacy is a drug smuggler, but the fourth amendment protects all people.[110] The fundamental question is inescapable. "Where indeed will reasonable means to search stop and 1984 begin?"[111]

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109. *See* Boyd v. United States, 116 U.S. 616, 635 (1886).
110. United States v. Costa, 356 F. Supp. 606, 609 (D.D.C.), *aff'd*, 479 F.2d 921 (D.C. Cir. 1973).
111. Lederer No. 2, *supra* note 10, at 11.