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NOTES

THE ANTISKYJACK SYSTEM: A MATTER OF SEARCH—OR SEIZURE

I. Introduction

On October 29, 1972, four alleged murderers hijacked a commercial airliner at Houston, Texas, shot two airline employees, one of them fatally, and threatened to kill the thirty-six passengers and crew members on board the airplane if their demands were not met.¹ Twelve days later, on November 10, three wanted criminals took over a jet as it left Birmingham, Alabama, and for more than twenty-eight hours, the lives of thirty passengers and flight crew were in jeopardy. One crew member was wounded and three passengers required hospitalization.²

In response to these and similar events, President Nixon, on December 5, 1972, directed his Secretary of Transportation, John A. Volpe,³ to expand and strengthen United States' security practices in order to deter hijacking and extortion efforts against U.S. air carriers. That very day, Secretary Volpe instructed the Federal Aviation Administration to issue an emergency order amending procedures to carry out the President's directive. The new emergency security procedures required: (1) airport operators to station armed local law enforcement officers at passenger checkpoints during the periods when passengers are boarding or reboarding aircraft; (2) electronic screening of all passengers by the airlines as a condition to boarding; and (3) inspection by the airlines of all carry-on items accessible to passengers during flight.⁴ The FAA order required that the electronic screening devices be installed and in operation, and search of carry-on baggage commenced by the 5th of January, 1973; the stationing of armed guards was to be completed by the 5th of February.⁵

Soon after these new antihijacking procedures were initiated, United States Senator Vance Hartke refused to submit himself to them at the Evansville, Indiana, airport. The Senator said he refused to be searched at airports because he had "something to protect . . . this country! Airport search as it now is conducted under FAA rules, merely by [Department of Transportation] fiat, is a

1 37 Fed. Reg. 25934 (1972).

2 *Id.*

3 For a definitive statement by Secretary Volpe as to what has been done and what yet must be done to combat aircraft hijacking, see Volpe and Stewart, *Aircraft Hijacking: Some Domestic and International Responses*, 59 Ky. L.J. 273 (1971).

4 Emergency Security Procedures, Department of Transportation Press Release, No. 103-72 (Dec. 5, 1972) (hereinafter cited as Release, No. 103-72).

5 The United States District Court for the District of Columbia stayed for 10 days the FAA ruling requiring the placement of armed guards at all airports. Judge John Smith granted the temporary restraining order at the request of the Airport Operators Council International (AOCI), which represents about 200 of the biggest airports in the country. Action for the stay was brought after the FAA rejected AOCI's complaint that the requirement to hire guards locally was shirking federal government responsibility for a problem—air hijacking—which is national in nature. On February 11, 1973, one week after his initial order, Judge Smith upheld the authority of the FAA to set up airport security rules, and the FAA again ordered the placing of the guards, commencing the 16th of February, 1973. Chicago Sun-Times, Feb. 14, 1973, at 7, col. 1.

clear violation of our Constitution."⁶ Mr. Hartke charged that the airport searches went "far beyond legal and necessary protection against skyjacking. There are important constitutional questions at law in this matter. They must be settled."⁷

The purpose of this note is to examine the problem of effectively combating hijacking while considering at least one of the issues which concerns Senator Hartke and others disturbed by the antihijacking system developed by the Government and the airlines—the constitutionality of airline passenger and baggage searches.

II. United States Response to Hijacking

The first airline hijacking⁸ took place shortly before the start of World War II⁹ and widespread hijackings began seriously affecting United States domestic flights in May, 1961, when an armed Cuban forced a National Airlines pilot to fly him to Havana.¹⁰ Since that time, 160 United States registered aircraft have been hijacked.¹¹ In one nineteen-month period, some 2,916 passengers and crew members were aboard hijacked United States commercial airliners. One such hijacked plane carried 171 passengers and crew,¹² thus demonstrating the great danger to human life presented by the act of one armed "skyjacker."¹³ The emotional and psychological factors that have moved men to risk the lives of so many of their fellows are not always clear,¹⁴ and when known, they have varied

6 FAA Harassment, Hartke Press Releases (January 18, 1973; January 22, 1973).

7 *Id.* Senator Hartke refused to be searched several more times, and in two cases in which the FAA learned of airline submission to the Senator's demands, the airlines involved were fined \$1,000 each. After weeks of controversy, the Senator announced that he had made his point and would, rather than refuse to be searched, merely make a verbal "protest" before allowing the search. Hartke's stated objections to the search were threefold: (1) that the search devices were "inadequate and improper," some of them like "cattle-prods," and all causing "unnecessary indignity to anyone"; (2) the search violated senatorial immunity; and (3) the searches were an exercise of "illegal police power."

8 Airline hijacking consists essentially of taking for private use an aircraft as a means of transportation and forcibly changing its flight plan to a different destination.

9 *Hearings on Aircraft Hijackings Before the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 168 (1970).

10 *N.Y. Times*, July 25, 1961, at 1, col. 7.

11 Chronology of Hijackings of U.S. Registered Aircraft (Updated: 1 December 1972), FAA, Office of Air Transportation Security Release (December 1, 1972) (hereinafter cited as FAA, Chronology of Hijackings).

12 *N.Y. Times*, Jan. 20, 1969, at 1, col. 4.

13 In the eighty hijacking incidents involving planes of United States registry up to June of 1970, weapons used to effectuate the hijackings included "55 firearms, 20 knives, 14 alleged bombs, 3 razors or razor blades, 1 BB gun, 1 tear gas pen and 1 broken bottle." *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

14 Several articles and a number of books dealing with the psychological make-up of hijackers have been published. See particularly D. HUBBARD, *THE SKYJACKER — HIS FLIGHTS OF FANCY* (1971). See also *Wall Street Journal*, Sept. 21, 1971, at 24, col. 7:

The typical airline hijacker is an emotionally disturbed adult acting out behavior patterns formed during a traumatic childhood, concludes a Dallas psychiatrist who interviewed some 40 would-be hijackers in prison. "As a child, he detested his 'old man,' who was an alcoholic, and violent; 'Mama' was a religious nut," says the psychiatrist, Dr. David G. Hubbard. As an adult, the hijacker tries to dash from a U.S. society he perceives as hostile, seeking refuge in "nations that are unfriendly" to America—just as he once dashed from the threat of an angry parent to the "sanctuary" of the other. The hijacker likely has a "singular, neurotic, preoccupation with space, motion and the force of gravity," Dr. Hubbard believes. The hijacker envies the seeming ability of pilots and astronauts to defy gravity. Dr. Hubbard

from pernicious political motives¹⁵ to blackmail-extortion¹⁶ and even to pathetic personal crises.¹⁷ The existence of such varied motives has only added to the difficulty of devising efficient antihijacking techniques and programs.

In spite of the clear and extreme dangers involved, initial governmental and airline response to hijacking was weak, ineffectual and slow in coming.¹⁸ In late 1961, the Federal Aviation Administration and the Department of Justice initiated the first "Sky Marshal" training program¹⁹ in which members of the United States' Border Patrol and Immigration Officials accompanied flights along the southern borders of the United States.²⁰ The Cuban hijackings of the early sixties led Congress to amend the Federal Aviation Act of 1958 so as to provide for the offenses of "aircraft piracy,"²¹ interference with flight crew members by assault or threat, and the carrying of dangerous weapons on board an aircraft by unauthorized persons.²² A further amendment made aircraft piracy punishable by death, under certain circumstances, or by imprisonment for not less than twenty years.²³ Despite the increased sanctions and stiffer penalties embodied in the amendments, the FAA, in carrying out the congressional mandate, did little more than request that the airlines place a senior supervisor at the ticket counter to "observe" enplaning passengers for suspicious behavior.²⁴ After several more hijackings, the Federal Aviation Administration on May 7,

theorizes that this envy may explain why the incidence of hijacking shot up after particularly exciting U.S. moon flights.

15 Such politically motivated hijackings have run the gamut from dropping leaflets over cities to holding the passengers and crew of airlines as hostages for the release of political prisoners. See Volpe and Stewart, *supra* note 3, at 286.

16 The total extortion demands made against U.S. airlines since November, 1971, was \$12.7 million as of November, 1972. Such extortion began when "D. Cooper" successfully obtained \$200,000 from Northwest Airlines. The total money actually paid has been \$9.4 million, \$6.85 million of which was recovered. AVIATION WEEK AND SPACE TECHNOLOGY, November 20, 1972, at 14.

17 One hijacker was fleeing with her child following a divorce action in which the child had been awarded to the father. N.Y. Times, Nov. 3, 1969, at 1, col. 2.

18 Almost one year after the FAA and the Department of Transportation made anti-hijacking information and devices available, only four out of the nineteen major airlines in the United States had initiated any use of such devices. Washington Post, Sept. 9, 1970, at 15, col. 1. Even such limited use of antihijacking devices was haphazard and cursory, in spite of sharp rises in hijacking figures. Washington Post, Sept. 16, 1970, at 10, col. 1. In late September, 1971, airline officials were balking at even minimal use of FAA guidelines, personnel and equipment. One American Airlines executive complained that the United States Marshals didn't pay for their transportation and meals on flights to which they were assigned to protect the passengers. In some instances U.S. Marshals have been bumped by airlines to make room for paying customers. Wall Street Journal, Sept. 21, 1971, at 1, col. 1.

19 Volpe and Stewart, *supra* note 3, at 281.

20 26 Fed. Reg. 7614 (1961).

21 Aircraft piracy is defined by law as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States." 49 U.S.C. § 1472(i)(2) (1970).

22 Present Federal Aviation Regulations provide:

No person may, while aboard an airplane being operated by an air carrier in air transportation, carry on or about his person a deadly or dangerous weapon, either concealed or unconcealed. This paragraph does not apply to —

a. officials or employees of a municipality or State, or of the United States, who are authorized to carry arms; and

b. crewmembers and other persons authorized by the air carriers to carry arms.

14 C.F.R. § 121.585 (Supp. 1971).

23 49 U.S.C. § 1472(i)(1) (1970).

24 *Hearings on S. 2268, S. 2375 and S. 2374 before the Aviation Subcomm. of the House Comm. on Commerce, 87th Cong., 1st Sess. 12 (1961).*

1964, in a further effort, adopted a rule that would require cockpit doors on all airlines and other commercial aircraft to be kept locked in flight.²⁵

As the number of hijackings continued to increase, several antihijacking programs were suggested by Congress and concerned citizens. One plan called for maneuvering the hijacker over a hidden trapdoor and dropping him from the plane.²⁶ It was suggested to Congress that free transportation to Cuba²⁷ be provided for anyone desiring to leave the United States²⁸ or that the Government build a simulated Havana airport in Florida, man it with U.S. military personnel disguised as Cubans and thus deceive and apprehend hijackers.²⁹ Few proposals dealt with the problem in its preflight stage. The emphasis was always centered on what to do in the air once the hijack had begun.³⁰

When the number of attempted and successful hijackings jumped from one in 1967 to twenty-two in 1968, and forty-three in 1969,³¹ federal concern grew. The Acting Administrator of the FAA manifested this concern by directing, in 1969, that a Special Hijacking Task Force be created and charged with the responsibility of seeking a solution to the problem of skyjacking.³² Before the Task Force could respond adequately to its charge, President Nixon, enraged by Arab terrorists' destruction of a hijacked airliner, announced that the federal government would place armed personnel on flights of American commercial airliners throughout the world. The President also called for the extensive use of electronic surveillance equipment.³³ In response to the President's directive, the Department of Transportation's Office of Civil Aviation Security increased the number of armed guards aboard United States airliners from 200 to 1,000 within a two-week period and began training and recruiting 1,500 more.³⁴ From late 1968 until December 1972, the Special Hijacking Task Force worked to develop and put into effect the antihijacking system used in most major United States' airports prior to President Nixon's December 5, 1972, order to further tighten security. The Task Force first undertook an extensive study of the characteristics, both psychological and physical, of all known skyjackers, seeking to isolate those elements of character which would help separate the potential skyjacker from the rest of the air passenger public, and thus identify

25 For current Federal Aviation Regulations, see 14 C.F.R. § 121.587 (Supp. 1971).

26 Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 704-05 (1969).

27 113 of the 160 hijackings involving airlines of U.S. registry have had Cuba as their destination. FAA, Chronology of Hijackings.

28 HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, PRELIMINARY REP., AIRCRAFT PIRACY, H.R. REP. NO. 91-33, 91st Cong., 1st Sess. 3 (1969).

29 *Id.*

30 At a press conference on December 5, 1972, General Benjamin O. Davis, Jr., Assistant Secretary of Transportation for Safety and Consumer Affairs, discussed a departure from this early dependence on in-flight security measures:

We learned early in our experience with these criminals that the best place to prevent a hijacking is on the ground before the plane goes into the air. That is why the force of about 1,500 sky marshals recruited in 1970 to ride the planes now is employed primarily on security functions at our principal airports. Release, No. 103-72.

31 FAA, Chronology of Hijackings.

32 FAA Press Release, No. 69-25 (Feb. 28, 1969).

33 N.Y. Times, Sept. 12, 1970, at 1, col. 7.

34 AVIATION WEEK AND SPACE TECHNOLOGY, Sept. 28, 1970, at 26.

him before the possible hijack.³⁵ This "profile" of potential skyjackers was then supplied to airline employees who would, under the FAA antihijacking system, screen enplaning passengers. If a passenger met the "profile," the airline employees would alert those conducting the second phase of the program, the scanning of all passengers and their baggage by a metal-detecting magnetometer.³⁶ A person who triggered the magnetometer and met the profile requirements was then interviewed by airline personnel. If he could supply proper identification, he was permitted to board the airliner. Otherwise, he was designated a "selectee" and was denied passage until a federal agent was summoned. The agent would then request identification of the "selectee." If satisfactory information was not forthcoming, the agent would first ask the person if he had any metal on his person or in the baggage he was carrying, and then request that the selectee once again go through the magnetometer. If the person had stated that he had no metal objects on his person or in his baggage and had set off the magnetometer again, the federal agent would make a request that the selectee submit to a "voluntary" search. The agent would then pat down the external clothing of the subject in order to discover any weapons he might be carrying. If no weapon was found, the selectee's carry-on baggage would be checked, and if that search produced nothing, the subject was allowed to board the airplane.³⁷ This three-step screening process—profile, magnetometer, frisk—seems to have served its purpose well, for hijacking decreased in 1970 to half of what it was in 1969.³⁸ The percentage of successful attempts dropped from 83 per cent in 1969 to 64 per cent in 1970. It dropped again in 1971 to 44 per cent, and as of December 5, 1972, only 32 per cent of the attempts had been successful.³⁹ No flight fully protected by the strict application of this program had been hijacked as of May, 1971.⁴⁰

In the period from January 1971 through December 1972, some 2,008 weapons had been seized, and 65,952 weapons or "dangerous articles" had been detained and returned to the passenger after flight.⁴¹ There were 225

35 This "profile" is used to screen enplaning passengers. Its contents are secret, thus making attempts to evaluate its accuracy difficult. The task force which developed the profile studied a sample of 30 hijackers after the profile had been completed and found that over 90% of that new group would have met the profile. There has been a continuous process of reevaluation in light of new hijackings and changes in trends of hijacking. See 328 F. Supp. at 1086. Some questions were raised as to the effectiveness of the profile when a bearded young man dressed in combat fatigues and flaunting a Cuban flag was permitted to enter a 747 transport. The man subsequently hijacked the plane to Cuba. AVIATION WEEK AND SPACE TECHNOLOGY, August 10, 1970, at 26.

36 The magnetometer is an electronic weapons detector installed on the boarding ramp near the boarding agent's station. When a passenger having metal on his person or in his baggage (equal to or greater than the amount of metal in an average .25 caliber gun) passes through the magnetometer's magnetic field, a warning light flashes and a reading is visible on the meter. United States v. Bell, 335 F. Supp. 797, 801 (E.D.N.Y. 1971).

37 328 F. Supp. at 1083.

38 FAA, Chronology of Hijackings.

39 *Id.*

40 328 F. Supp. at 1084. Secretary Volpe stated on December 5, 1972:

We don't know just how many hijackings were prevented by this program. We do know that during one three-month period this year more than 1,500 passengers were prevented from boarding flights, more than 500 were arrested and hundreds of weapons ranging from pistols to knives were turned in by passengers before boarding. Release, No. 103-72.

41 Department of the Treasury, Bureau of Customs, Air Security Division Office of Investigations Report of Statistics from January 1971 through December 1972 (Jan. 5, 1972).

"hard narcotics" seizures, 1,438 marijuana and "dangerous drug" seizures and a total of 3,308 arrests.⁴² At least twenty-seven hijacking attempts had been prevented.⁴³ But with the seeming success of the antihijacking system devised by the FAA Task Force have come charges, Senator Hartke's included, that the searches conducted have been unconstitutional, violating the warrant requirement of the fourth amendment. Several of those arrested under the program have been charged not with hijacking but with the carrying of a concealed weapon or the violation of state and federal narcotics laws. Such arrests have raised serious questions as to the constitutionality of the antihijack search, and several courts have been required to deal with these questions.

III. Response of the Courts

The leading case dealing with the constitutionality of the warrantless search in regard to antihijacking procedures is *United States v. Lopez*,⁴⁴ wherein the defendant was searched after he had passed through and activated a magnetometer several times. He had also met the hijacker "profile," and had, under initial questioning, given a name different from that appearing on his ticket. In the course of a "frisk" search, a federal agent discovered a quantity of heroin which was subsequently presented as evidence against him. Charged with concealing and facilitating the transportation of heroin, Lopez moved to suppress the heroin as evidence, alleging that it was the "fruit" of a warrantless and illegal search. The court upheld the constitutionality of the three-phase antihijacking system, and hence the search, but suppressed the heroin because the system had been misapplied and abused in the specific instance of Lopez' arrest.⁴⁵

The *Lopez* court had little difficulty in approving the antihijacking system, provided that each of its three phases was applied uniformly and in the manner intended. In justifying the search, the court recognized that the fourth amendment requires that police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. Rejecting the Government's contention that Lopez had voluntarily consented to be searched when he continued the boarding process after reading the posted and readily observable signs stating "PASSENGERS AND BAGGAGE SUBJECT TO

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 328 F. Supp. 1077 (E.D.N.Y. 1971).

⁴⁵ *Id.* at 1101. The court found that the "essential neutrality and objectivity" of the approved profile had been destroyed when an airline employee distorted the profile by eliminating one category from it and adding two others. The characteristic dropped from the profile by the employee was found to have been one fundamental to the profile's accuracy, and one of the added characteristics "introduced an ethnic element for which there [was] no experimental basis." The court had upheld the constitutionality of the antihijack system in part because the characteristics selected for inclusion in the profile were capable of being easily observed by airline personnel without requiring any exercise of judgment on their part. The characteristics did not discriminate against any group on the basis of religion, origin, political views or race. Because they were "precisely designed" to select only those who present a high probability of being dangerous, they did not violate any of the traditional equal protection standards. But when the airline employee altered the profile, the procedure instituted to detect hijackers became "unacceptable." "The approved system survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality. When elements of discretion and prejudice are interjected, it becomes constitutionally impermissible."

SEARCH," the court, nevertheless, approved the search under the "stop and frisk" doctrine of *Terry v. Ohio*.⁴⁶ Under *Terry*, a police officer who reasonably believes that an individual, whose suspicious behavior he is investigating, might be armed may properly search that individual and not be held to have violated the fourth amendment:

[W]here 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, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.⁴⁷

Almost all of the courts which have had to deal with the question of the legality of an antihijacking search have followed the *Lopez* court and found the antihijack system constitutional, basing their decision on the *Terry* exception to the warrant requirement.⁴⁸ This almost uniform application of the "stop and frisk" exception in each of the antihijacking search cases reported subsequent to *Lopez* assumes a similarity of those searches to that in *Terry v. Ohio*.

In determining whether a *Terry* search and seizure is reasonable, two questions must be raised: whether the officer's action was justified at its very inception; and, whether it was reasonably related in scope to the circumstances which justified the initial intrusion.⁴⁹ The *Terry* search requires more than "inarticulate hunches,"⁵⁰ that the suspect is armed, and less than probable cause to arrest.⁵¹ Rather, there must be a degree of probability that the subject of the search has been, is or is about to be engaged in criminal activity.⁵² Once the police officer has stopped the suspect, he need not be absolutely certain that he is armed before he can make a protective search of the suspect for weapons. He need only have a reasonable belief that, under the circumstances, his safety or that of others is in danger. Thus, to justify a particular intrusion, the officer must be able to point to some specific and articulable facts which led him, and would lead any reasonable man, to believe that the suspect was armed and dangerous.⁵³

To determine whether such a search is reasonable, it is necessary to focus upon the governmental interest which allegedly justifies an intrusion upon the

46 392 U.S. 1 (1968). The *Lopez* court stated: "[T]he only exception to the warrant rule under which the search of this defendant can be justified is the protective 'frisk' for weapons authorized by *Terry v. Ohio*." 328 F. Supp. at 1093.

47 392 U.S. at 30.

48 See *United States v. Bell*, 464 F.2d 667, 672 (2d Cir. 1972); *United States v. Bell*, 335 F. Supp. 797, 803 (E.D.N.Y. 1971); *United States v. Lindsey*, 451 F.2d 701, 703 (3d Cir. 1971); *People v. Erdman*, 69 Misc. 2d 103, 329 N.Y.S. 2d 654, 658 (1972).

49 392 U.S. at 20.

50 *Id.* at 22.

51 *Id.*

52 See *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 184 (1968).

53 392 U.S. at 27.

constitutionally protected interests of the private citizen, for the only test in determining reasonableness is to balance the need to search against the invasion which the search entails. Because the sole justification for the search is the protection of the police officer and any others perceived by him to be threatened, the search also must be limited in scope to an intrusion designed to discover guns, knives, clubs or other hidden weapons.⁵⁴

In determining the legality of the search in *Lopez*, the court, applying the *Terry* standard, sought to balance the elements requiring the search against the extent and manner of the invasion involved in the search. In so doing, the court considered such factors as the seriousness of the alleged offense, the need to conduct such an investigation, the nature of the locale, the activities of the suspect, the danger to the public if the action was not taken, the nature and length of detection, and even the degree of community resentment aroused by the search.⁵⁵ The court noted that the antihijacking system was unusual in that it provided statistics showing the exact probabilities that a weapon would turn up in such a search.⁵⁶ The statistical studies examined by the court demonstrated that out of every fifteen persons who were frisked, one was found with a weapon:

Thus the probability that any person who is selected to be frisked has a weapon is approximately 6%. We know that the frisk is conducted in private with as much courtesy as the circumstances permit and that those who are frisked and allowed to go on their way generally welcome the protective measures taken in their behalf rather than resent them. The substantial interest in preserving the integrity and safety of air travel by preventing hijacking is obvious. In light of the circumstances, a 6% danger of arms suffices to justify a frisk.⁵⁷

Because it found that the procedure operated on purely objective criteria and was calculated to help isolate and identify potential hijackers while involving only very minor inconvenience to a small percentage of the prospective air passengers, the court found that the warrantless search was constitutionally permissible under the circumstances.⁵⁸

IV. *Terry* and the Pirates

In applying the *Terry* warrant requirement exception, the *Lopez* court and others upholding the legality of the antihijack system have strained and to a degree misread the *Terry* rationale. Several of the courts, for instance, have stressed that they found *Terry* particularly applicable to the antihijack search because *Terry* stressed the safety and protection of both the officer making the search and "others":

We do not think significant that frisks are normally intended to protect the

54 *Id.* at 29.

55 328 F. Supp. at 1094.

56 *Id.* at 1095.

57 *Id.* at 1097.

58 *Id.*

officer . . . while the anti-hijacking frisk is utilized to protect passengers It is not without significance that *Terry* repeatedly recognized that the policeman's frisk could be justified on the ground that it was needed to "protect himself and others from possible danger."⁵⁹

It is clear from *Terry*, however, that the "others" to be protected are bystanders—those in the vicinity of the search who would be equally threatened should the suspect draw a weapon and attempt to use it.⁶⁰ When the *Lopez* court and others note that the search is designed to protect airline passengers from being hijacked, they at least partially remove the search from the approved *Terry* circumstances.

Even if *Terry* could be assumed to apply to "others" endangered by the suspect far from the time and place of the search, and certainly far from the searching officer, the *Terry* facts themselves present another obstacle to that decision's application to airline searches. *Terry*'s exception to the warrant requirement is applicable only after the police officer has had his suspicions aroused by the conduct or activity of the suspect. The officer must be able to "point to specific and articulable facts"⁶¹ giving rise to his suspicion. Under the facts of *Lopez*, it can be argued that when the magnetometer flashes a warning that one who has met the "profile" is carrying on his person or in his baggage a quantity of metal equal to that of a handgun or some other weapon, the officer's suspicions can logically be raised. At such point, the officer would know that the "selectee" not only has a number of characteristics in common with past hijackers, but that he may well be armed. But what of those cases where the magnetometer reading alone arouses the suspicions of the officers, as in *United States v. Epperson*,⁶² a United States Court of Appeals case decided after *Lopez*? The *Epperson* court also relied on the *Terry* exception to the warrant requirement to justify the pat down search of the suspect, but failed to apply the full *Terry* test to the initial search by the magnetometer, a search taking place before any police suspicions could logically be aroused.⁶³ Nothing in *Terry* allows the warrantless search of anyone merely passing by a given area or participating in a clearly legal activity.⁶⁴ In straining to apply the *Terry* rationale to the antihijack search, the *Epperson* court and others have posed the necessary question of reasonableness at the wrong time—before the "frisk" search, rather than before the search by the magnetometer.

This is not to suggest that elements of *Terry* do not directly apply to and thus help justify searches by antihijacking personnel. *Terry* clearly can apply to searches which do not involve a magnetometer screening, but which take place only after specific activities on the part of persons attempting to board airlines

59 *Id.* A number of the reported cases dealing with the antihijacking system, and depending on the *Terry* doctrine to uphold it, have emphasized the *Terry* language dealing with the protection of "others" by way of the frisk. *See, e.g.,* *United States v. Bell*, 464 F.2d 667, 673 (2d Cir. 1972); *United States v. Epperson*, 454 F.2d 769, 772 (4th Cir. 1972).

60 "The sole justification of the search in the present situation is the protection of the police officer and others nearby." 392 U.S. at 29 (emphasis added).

61 *Id.* at 21.

62 454 F.2d 769 (4th Cir. 1972).

63 *See* note 134, *infra*.

64 *See* note 85, *infra*, on the right to travel.

arouse the suspicions of police authorities.⁶⁵ In those cases which do involve an initial search by the magnetometer, the courts should not strain to apply the *Terry* exception, but rather look to the basis of that, and every other, exception to the search warrant requirement, namely, the reasonableness of the search under the circumstances involved.

V. Reasonableness and the Exceptions to the Warrant Requirement of the Fourth Amendment

It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures . . . [I]t can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement.⁶⁶

The Supreme Court has considered at great length and on many occasions the history and purposes of the fourth amendment⁶⁷ and has attempted for more than a century to develop some coherent body of fourth amendment law. That attempt has been rife with conflict and contradiction, most of it caused by disagreement over the importance of requiring law enforcement officials to secure warrants prior to making a search. Members of the Court have argued that the fourth amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so.⁶⁸ Others have believed that the only relevant constitutional test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.⁶⁹ The Court has generally held that

65 See, e.g., *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971), wherein, the U.S. Marshal in charge of the antihijacking system at a Newark, New Jersey, airport, observed the defendant, Lindsey, rush into the boarding lounge. The defendant handed a ticket to the ticket agency and instructed the agent to "save a seat for Williams." The ticket agent noticed that the ticket was in the name of "James Marshall," and made a gesture to Marshal Brophy, indicating that the defendant should be watched. His suspicions aroused, Marshal Brophy continued to observe the defendant. Lindsey appeared nervous and was perspiring heavily and looking about. When the boarding time was reached, Marshal Brophy stopped Lindsey as he attempted to board the plane and asked for proper identification. Lindsey produced a Selective Service card in the name of "Melvin Giles," and a Social Security card in his correct name, "Bobby Lindsey." He appeared to become even more nervous. In the course of ascertaining Lindsey's identity, Marshal Brophy noted two large bulges in the defendant's coat pocket. Fearing the bulges might be weapons, the Marshal asked the defendant to come with him to a less crowded area. There, Brophy conducted a "frisk" of Lindsey's coat. Brophy extracted two "very solid" packages from the coat pockets, which turned out to be heroin. The court found Brophy's actions justified and the search to be constitutional:

In the context of a possible airline hijacking with the enormous consequences which may flow therefrom, and in view of the limited time in which Marshal Brophy had to act, the level of suspicion required for a *Terry* investigative stop and protective search should be lowered. Therefore, despite the fact that it may be said that the level of suspicion present in the instant case is lower than in *Terry*, it was sufficiently high to justify Marshal Brophy's acting.

66 *Elkins v. United States*, 364 U.S. 206, 222 (1960).

67 The fourth amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . and no warrants shall issue, but upon probable cause . . .

For an extensive study of continued debate as to what the Founders intended by this language, see Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393 (1963).

68 *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971).

69 *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

a search or seizure carried out without a warrant is per se unreasonable⁷⁰ unless the police can demonstrate that it falls within a number of specific exceptions to the warrant requirement which the Court has created, based on the presence of "exigent circumstances."⁷¹ The exceptions are "carefully drawn,"⁷² and there must be a showing that the exigencies of the warrantless search situation made that course "imperative."⁷³ The burden is on those seeking the exemption to show the need for it.⁷⁴

In determining whether the public interest demands creation of an exception to the warrant requirement, the question is not only whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant. This depends in great part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.⁷⁵ In each case in which the Court has carved out an exception to the warrant requirement, it has balanced the intrusion on the citizen's privacy with the governmental interest in the warrantless search. Some of these exceptions are long established, and others only recently developed, but each is based on necessity or reasonableness.⁷⁶

In a number of cases dealing with the legality of the antihijack search, the Government has argued that each passenger who attempts to board an airline has, because of the extensive stated warning that each passenger is subject to search, impliedly consented to the search. Such a theory of consent is the weakest possible basis for search,⁷⁷ and no court considering the question has found such

70 In the case of the warrant requirement, the exception seems most often to be the rule. In this respect, see The American Law Institute, A Model Code of Pre-Arrest Procedure XVIII-XXI (Tent. Draft No. 3), (April 24, 1970):

[D]espite [an] impressive array of judicial support for the warrant, the evidence in hand, incomplete as it is, compels the conclusion that searches under warrant have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling law. During the five year period July 1, 1961, to June 30, 1966, the New York City police obtained 24,557 warrants. Of these, 21,293 (82.6%) were for bookmaking and policy and 3,580 (14.6%) for narcotics searches. During the five years, only 684 warrants constituting 2.8% of the total, were issued for other purposes (stolen property, dangerous weapons, and other). In the year 1963, the District Attorney of New York County obtained 614 warrants, of which 596 were for narcotics; in 1966, the comparable figures were 575 and 543.

Comparison of the total number of search warrants issued with the arrests made is equally illuminating. In 1966, the New York police obtained 3,897 warrants and made 171,288 arrests. It is reliably reported that in San Francisco in 1966 there were 29,084 serious crimes reported to the police, who during the year obtained only 19 search warrants. In 1968, there were 20 such warrants issued. In Nashville, Tennessee, during the five year period 1963-67, there were 240 search warrants, with only 71 in the highest year.

71 *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

72 *Jones v. United States*, 357 U.S. 493, 499 (1958).

73 *McDonald v. United States*, 335 U.S. 451, 456 (1948).

74 *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

75 *See Schmerber v. California*, 384 U.S. 757, 770 (1966).

76 Although a majority of the Supreme Court referred to the "plain view exception to the warrant requirement" in *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971), Justice Black's dissent in that case demonstrates clearly that the police are not required to have a warrant in such cases because no search takes place: the evidence is literally in "plain view." *Id.* at 507-08. *See also* *United States v. Lee*, 274 U.S. 559 (1927); *Trupiano v. United States*, 334 U.S. 699 (1948); *Ker v. California*, 374 U.S. 23 (1963); *Chimel v. California*, 395 U.S. 752 (1969).

77 *People v. Erdman*, 69 Misc.2d 103, 329 N.Y.S.2d 654, 657 (1972).

consent.⁷⁸ Where effective consent is given, a search may be conducted without a warrant and without probable cause,⁷⁹ but the courts will indulge every reasonable presumption against such a waiver.⁸⁰ Consent to a search, in order to be voluntary, and hence effective, must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion,⁸¹ and is not lightly to be inferred.⁸² The burden of showing that the consent was freely given is on the Government.⁸³ The courts have held that a mere showing that the suspects searched cooperated with those conducting the antihijack system, and did not protest, does not meet the test of true consent.⁸⁴ Nor have the courts accepted the Government's argument that it can condition the exercise of the constitutional right to travel on the voluntary relinquishment of fourth amendment rights.⁸⁵ Implied consent under such circumstances would be inherently coercive.⁸⁶

Warrantless searches also may be made in the course of "hot pursuit" of a criminal suspect by the police.⁸⁷ This exception to the fourth amendment warrant requirement was first enunciated in *Warden v. Hayden*,⁸⁸ where police authorities in Baltimore, Maryland, arrived at the home of an armed robber moments after being alerted to his whereabouts by a taxi driver who had followed the robber from the scene of his crime. Upon gaining entrance to the suspect's residence, the police spread throughout the house searching for the robber and any weapons he might use against them. In the course of their investigations, one officer discovered the suspect and arrested him, while another continued to search the cellar of the residence. While in the cellar, the officer discovered clothing matching the description of those worn by the suspect. It was later presented as evidence against the accused at trial. The defense contended that because the

78 See *United States v. Lopez*, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971); *United States v. Bell*, 335 F. Supp. 797, 803 (E.D.N.Y. 1971); *People v. Erdman*, 69 Misc.2d 103, 329 N.Y.S.2d 654, 657 (1972).

79 See *Zap v. United States*, 328 U.S. 624, 628 (1946); *Milyonico v. United States*, 53 F.2d 937, 938 (7th Cir. 1931); *Woodard v. United States*, 254 F.2d 312, 313 (D.C. Cir. 1958); *United States v. Dornblut*, 261 F.2d 949, 951 (2d Cir. 1958); *United States v. Sclafani*, 265 F.2d 408, 415 (2d Cir. 1959).

80 *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Martin*, 176 F. Supp. 262, 267 (S.D.N.Y. 1959).

81 *Rosenthal v. Henderson*, 389 F.2d 514, 515-16 (6th Cir. 1968).

82 *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965); *United States v. Viale*, 312 F.2d 595, 601 (2d Cir. 1963).

83 *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951).

84 See the cases cited in note 78, *supra*.

85 *United States v. Lopez*, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971). In *United States v. Guest*, 383 U.S. 745, 757 (1966) the Court stated:

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.

It is interesting to note, however, that "implied consent" statutes have been enacted in all 50 states, in spite of the fact that they restrict the exercise of this "fundamental" constitutional right. These statutes have been upheld as constitutional. See *Fallis v. Dept. of Motor Vehicles*, 264 Cal. App.2d 373, 70 Cal. Rptr. 595 (1968). Thus, these statutes may well furnish precedent for extending the notion of implied consent to another area involving the right to travel — the right to travel by air.

86 328 F. Supp. at 1093.

87 *United States v. LaVelle*, 391 F.2d 123, 127 (2d Cir. 1968); *United States v. Alloway*, 397 F.2d 105, 112 (6th Cir. 1968) ("fairly 'warm'" pursuit); *United States v. DeBose*, 410 F.2d 1273, 1275 (6th Cir. 1969); *White v. Brough*, 332 F. Supp. 438, 449 (D. Md. 1971).

88 387 U.S. 294, 298 (1967).

search was warrantless, the clothing must be suppressed as evidence. The Supreme Court found that though the search was indeed warrantless, the police officers, in "hot pursuit," acted reasonably in entering the house and making their search. The Court found that the search for the robber without a warrant was not invalid where the "exigencies of the situation made that course imperative."⁸⁹ The police acted "reasonably" when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them:

The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. . . . The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.⁹⁰

Another exception to the warrant requirement was recently formulated by the California Supreme Court in *People v. Sirhan*.⁹¹ This so-called "political assassination exception" is based both on reasonableness and the gravity of the offense precipitating the search. On June 5, 1968, a few hours after Sirhan shot Democratic presidential hopeful Senator Robert Kennedy, California police officials arrived at the residence of the already arrested Sirhan. They had been led there by one of Sirhan's brothers and had entered the house without a warrant. The court later held that Sirhan's brother did not consent to the search, and that the house was owned by Sirhan's mother, who was not present during the search. The officers stated that they made their search because they were "interested in evidence of possible conspiracy in that there might be other people that were not yet in custody."⁹² Inside the assassin's bedroom, the officers found several writings and notations later proven to be in Sirhan's handwriting, and all of them making it clear that the Kennedy assassination had been planned by Sirhan long before the murder took place. Because the search was without warrant, the burden was on the state to demonstrate proper justification for the police's actions.⁹³ It justified the warrantless search based on the pressing emergency to ascertain the existence of a "possible conspiracy" to assassinate presidential candidates or high government officials.⁹⁴ Relying on the doctrine of *Johnson v. United States*⁹⁵ that there are "exceptional circumstances" in which, on balancing the need for effective law enforcement against the right of privacy, a warrant for search may be dispensed with, and also quoting the "grave emergency" language of *McDonald v. United States*,⁹⁶ the court upheld the legality of the Sirhan search:

Although the officers did not have reasonable cause to believe that the house

89 *Id.*

90 *Id.*

91 7 Cal.3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

92 *Id.* at 735.

93 *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

94 7 Cal.3d at 739.

95 333 U.S. 10, 14 (1948).

96 335 U.S. 451, 455 (1948).

contained evidence of a conspiracy to assassinate prominent political leaders, we believe that the mere possibility that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy. Today when assassinations of persons of prominence have repeatedly been committed in this country, it is essential that law enforcement officers be allowed to take fast action in their endeavors to combat such crimes.⁹⁷

The court noted the "enormous gravity" of the crime and accepted the argument of the prosecution that the "exigencies of the situation" made the police search "imperative."⁹⁸

The most significant exception to the warrant requirement is the search incident to the arrest. Far more searches are sustained on this basis than upon actual search warrants.⁹⁹ The rule allowing searches contemporaneous to arrest is justified both by the need to seize weapons or other things which might be used to assault the arresting officer or effect an escape, and by the need to prevent the destruction of evidence of the crime.¹⁰⁰ The scope of permissible search extends to both the person of the individual arrested and to the area "under his immediate control."¹⁰¹ Such a search and seizure's validity depends, of course, upon the legality of the arrest to which it is an incident.¹⁰² The courts have uniformly condemned searches incident to an arrest where it is clear that the arrest was used merely as a pretext for conducting the search.¹⁰³ The reasonableness and necessity of this further exception to the warrant requirement were made clear in *Chimel v. California*:¹⁰⁴

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.¹⁰⁵

The threatened destruction of evidence has caused the creation of another exception to the warrant requirement, and not only in circumstances strictly "incident" to the arrest of a suspect. In *Schmerber v. California*,¹⁰⁶ the Supreme

97 7 Cal.3d at 739.

98 *Id.*

99 *See, e.g., Weeks v. United States*, 232 U.S. 383, 392 (1914); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Chimel v. California*, 395 U.S. 752, 762 (1969).

100 *Preston v. United States*, 376 U.S. 364, 367 (1964).

101 *Chimel v. California*, 395 U.S. 752, 763 (1969); *see also Vale v. Louisiana*, 399 U.S. 30, 33 (1970).

102 *Carroll v. United States*, 267 U.S. 132, 158 (1925).

103 *See, e.g., United States v. Lefkowitz*, 285 U.S. 452, 463-64 (1932); *Henderson v. United States*, 12 F.2d 528, 531 (4th Cir. 1926).

104 395 U.S. 752 (1969).

105 *Id.* at 762-63.

106 384 U.S. 757 (1966).

Court upheld the administration of a blood test to a defendant who had been arrested for drunken driving. The Court found the police physician's removal of the defendant's blood to be a search, but concluded that the police officials acted properly even though they had not obtained a warrant prior to the blood test. While stressing importance of the warrant requirement, particularly in cases dealing with the invasion of the body, the Court found the search wholly reasonable under the circumstances:

The Officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the "destruction of evidence."¹⁰⁷

The rules covering both border and custom searches also greatly reduce traditional warrant requirements, and judicially sanctioned statutes give customs agents and officials broad authority to search without warrants.¹⁰⁸ A customs officer has the unique power to stop a person at an international entry point and conduct a "border search" without having a search warrant or even probable cause to believe the person has committed a crime.¹⁰⁹ Thus, mere suspicion of possible illegal activity within his jurisdiction is enough cause to permit a customs officer to stop and search a person.¹¹⁰ Under federal statutes, border and customs agents are allowed to "stop, search and examine" persons and vehicles "on which or whom he or they shall suspect" there is merchandise subject to duty.¹¹¹ They are also permitted to search the "baggage of any person"¹¹² arriving in the United States, and inspect and examine all "imported merchandise."¹¹³ Finally, all authorized customs officers and agents may search "all persons" coming into the United States.¹¹⁴ These border searches are often blocks¹¹⁵ or even more than one hundred miles away from actual United States borders,¹¹⁶ and searches have been upheld which took place as much as eight hours after the suspect had crossed the international boundary.¹¹⁷ These warrantless searches, conducted far away from the border in terms of both distance and time, are still upheld as reasonable and exempted from the warrant requirement because of the peculiar and "special" problems faced by customs officials.¹¹⁸ They are justified by "practical and historical" considerations involving experience with difficulties in

107 *Id.* at 770.

108 *See* Landau v. United States Attorney, 82 F.2d 285, 286 (2d Cir. 1936), *cert. denied*, 298 U.S. 665 (1936); United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); United States v. Marti, 321 F. Supp. 59, 62 (E.D.N.Y. 1970).

109 United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969).

110 Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966), *cert. denied*, 385 U.S. 977 (1966); Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967); Rodriguez-Gonzalez v. United States, 378 F.2d 256, 258 (9th Cir. 1967).

111 19 U.S.C. § 482 (1970).

112 19 U.S.C. § 1496 (1970).

113 19 U.S.C. § 1499 (1970).

114 19 U.S.C. § 1582 (1970).

115 Thomas v. United States, 372 F.2d 252, 253 (5th Cir. 1967).

116 Castillo-Garcia v. United States, 424 F.2d 482, 484 (9th Cir. 1970) (105 miles). *See also* Walker v. United States, 404 F.2d 900, 901 (5th Cir. 1968) (45 miles).

117 Walker v. United States, 404 F.2d 900, 901 (5th Cir. 1968).

118 United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969).

controlling smuggling into the country that antedate the adoption of the Constitution.¹¹⁹ As was stated in *Carroll v. United States*,¹²⁰ travellers may be stopped and searched as they cross into the United States because "national self protection reasonably" requires that one entering the country identify both himself and his belongings as a prerequisite to entrance.¹²¹

In considering other circumstances which justify warrantless searches, the Supreme Court has long distinguished between an automobile and a home or office.¹²² On several occasions, the Court has pointed out that warrantless searches of automobiles may be lawful when probable cause to search and "exigent circumstances" are present.¹²³ In *Carroll* the Court held that automobiles may be searched without warrant in circumstances that would not justify a warrantless search of a house or an office, provided that there was probable cause to believe that the car contained articles that the officers were entitled to seize. In upholding such searches, the Court has stressed both reasonableness and necessity, noting that it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.¹²⁴ In *Chambers v. Maroney*,¹²⁵ a later case dealing with warrantless auto searches, the Court noted that the circumstances which furnished probable cause to search an auto for particular articles are most often unforeseeable. The opportunity to search is "fleeting since a car is readily moveable."¹²⁶ If an effective search is to be made at any time, either the search must be made immediately, without warrant, or the car itself must be seized and held without warrant for whatever period is necessary to obtain a warrant for the search. In *Chambers*, the suspects were already under arrest, and the automobile impounded. There was clearly time to obtain a search warrant. The Court's upholding of the search without warrant thus went beyond the single question of the car's mobility, and implied a more extensive distinction between an automobile and the home or office of a suspect.¹²⁷

A final exception to the fourth amendment warrant requirement involves the search of impounded automobiles. In *Cooper v. California*,¹²⁸ the Supreme Court upheld a conviction which rested in part on the introduction into evidence of a small piece of brown paper sack seized by police without a warrant from the glove compartment of an automobile which the police, upon the petitioner's arrest, had impounded and were holding in a garage. The search occurred a week after the arrest of the petitioner. Under state law, the police were required to impound the car and to keep it until forfeiture proceedings were concluded.

119 *United States v. Marti*, 321 F. Supp. 59, 62 (E.D.N.Y. 1970).

120 267 U.S. 132 (1925).

121 *Id.* at 154.

122 *See, e.g., Carroll v. United States*, 267 U.S. 132, 147 (1925). *See also Scher v. United States*, 305 U.S. 251, 254 (1938); *Brinegar v. United States*, 338 U.S. 160, 170 (1949).

123 *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

124 267 U.S. at 153.

125 399 U.S. 42 (1970).

126 *Id.* at 51.

127 In this regard, see Szwajkowski, *The Aftermath of Cooper v. California*, U. ILL. L. F. 401, 410 (1968): "[t]he privacy interest in the automobile may be sufficiently inferior to that of a home to justify permitting a less stringent procedure for search."

128 386 U.S. 58 (1967).

The Court held that it would be "unreasonable" to hold that the police, "having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."¹²⁹ Under the circumstances of the case, the Court held that it "could not hold unreasonable under the fourth amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding."¹³⁰

VI. A New Exception to the Warrantless Search

Clearly, there are "exigent" circumstances involved in the protection of our nation's air passengers from hijackers. Indeed, none of the present exceptions to the warrant requirement involve the protection of so many innocent citizens from such grave danger.¹³¹ When a well-aimed bullet or an explosive can cause the deaths of as many as 294 passengers and crew members on a single 747 airliner, and when any one or more of the 277 passengers could be carrying such a weapon or device, the need to effectively screen those attempting to board passenger airliners is an urgent one. As was stated by Judge Friendly in his concurring opinion in *United States v. Bell*:¹³²

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. . . .¹³³

All of the reported cases dealing with the antihijack search have recognized that the search, at least the three-step system described in *Lopez*, is not only reasonable, but also a compelling necessity to protect essential air commerce and passenger lives.¹³⁴

To demand a warrant each and every time the antihijack profile or the magnetometer alerted federal officials to the possibility of a hijack attempt would

129 *Id.* at 61-62.

130 *Id.* at 62.

131 Federal authorities estimate that during the year 1971 between 50 million and 100 million air passengers were screened. Close to 180 million flew. *N.Y. Times*, Nov. 2, 1971, at 1, col. 4.

132 464 F.2d 667 (2d Cir. 1972).

133 *Id.* at 675.

134 *United States v. Epperson*, 454 F.2d 769, 772 (4th Cir. 1972). The other reported cases stressed the necessity of the system:

The anti-hijacking system can be a valuable and effective method of protecting millions of air travellers from the threat of violence and sudden death in the air. Properly supervised it is also constitutional.

United States v. Lopez, 328 F. Supp. 1077, 1102 (E.D.N.Y. 1971);

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.

United States v. Bell, 464 F.2d 667, 674 (2d Cir. 1972);

[T]he indignities of such a search will not stand against the potential for terror, death and destruction which, absent a search, could readily be carried aboard any airplane by any passenger.

United States v. Kroll, 351 F. Supp. 148, 152 (W.D. Mo. 1962).

be unreasonable. As in the border search, "special" and "peculiar" problems are presented, and the "difficult[y] in controlling" hijacking is evident from the dangerously high number of successful attempts made prior to the initiation of the antihijack system. The airplane—with possible hijacker aboard—does not wait for a warrant to be delivered before takeoff and, like the automobile, is easily removed from the given area. As in the case of political assassination, it is essential that law enforcement officers be allowed to "take fast action in their endeavors to combat such crimes."

The use of the magnetometer clearly constitutes a search.¹³⁵ An argument can be made that if search by magnetometer is preceded by the use of the FAA hijacker "profile," in which the individual to be "searched" has been found to "meet" the profile, the federal law enforcement official can reasonably be suspicious and thus apply the magnetometer search as a less intrusive facsimile of the *Terry* search.¹³⁶ If both the profile and magnetometer readings give rise to police suspicions, these warnings would constitute the "articulable" facts which the officer would need to justify a full-fledged *Terry* "stop and frisk." The search by the magnetometer, whether or not preceded by a profile "warning," is hardly the "annoying, frightening and perhaps humiliating experience" proscribed by *Terry*.¹³⁷ In many cases, the person scrutinized could be unaware that he is being examined. A search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering contraband, fully justifies the minimal invasion of personal privacy by the magnetometer. As was said by the court in *Epperson*:

To require a search warrant as a prerequisite to the use of a magnetometer would exalt form over substance, for it is beyond belief that any judicial officer would refuse such a warrant with or without a supporting affidavit. The danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances.¹³⁸

VII. Conclusion

As previously noted, President Nixon's directive of December 1972 requires the search by hand of all carry-on baggage. Such a search differs little from

135 *United States v. Epperson*, 454 F.2d 769, 772 (4th Cir. 1972):

We agree that the use of the magnetometer . . . was a "search" within the meaning of the Fourth Amendment. By this device a government officer, without permission, discerned metal on Epperson's person. That he did so electronically rather than by patting down his outer clothing or "frisking" may make the search more tolerable and less offensive—but it is still a search. Indeed, that is the very purpose and function of a magnetometer: to search for metal and disclose its presence in areas where there is a normal expectation of privacy.

See also *United States v. Slocum*, 464 F.2d 1180, 1182 (3d. Cir. 1972).

136 This is, of course, the basic finding of the court in *Lopez*. The *Lopez* court expressed some doubt as to whether the search by the magnetometer could be found valid *without* the preceding positive "profile reading":

We do not now decide whether, in the absence of some prior indication of danger, the government may validly require any citizen to pass through an electronic device which probes beneath his clothing and effects to reveal what he carries with him.

328 F. Supp. at 1100.

137 *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972).

138 *Id.* at 771.

customs searches at borders and airports presently excused from the warrant requirement. The search would be less "offensive" and "intrusive" were it, also, to be carried out through the use of electronic devices. In addition, searching officials would be less likely to discover contraband and illegal drugs, which are, in any case, not the proper subjects of the "good faith" search allowed by *United States v. Bell*.¹³⁹ Because the manner in which the search is conducted is a "vital part" of any inquiry into its legality,¹⁴⁰ the Government and the airline authorities should be required to search the carry-on baggage as they do the passenger himself, through the use of electronic or x-ray devices.¹⁴¹

The fact that the antihijacking search is reasonable and necessary under the "exigent circumstances" involved in protecting so large a number of persons from such grave danger does not lessen the need for it to be carefully and narrowly drawn. Each of the several exceptions to the warrant requirement is well defined and limited, and each demands the good faith of those who make the excepted search. The possibility of the antihijack search being abused is clear,¹⁴² and there is at least some indication that law enforcement officials are more interested in using the antihijacking system to discover evidence of criminal activity unrelated to airplane hijacking, rather than preventing air piracy.¹⁴³ Three federal courts have found the search to be legal, but only within certain limitations. In *Lopez*, the first court to find the antihijack search constitutional, the scope of such a search was limited and any intrusion by the authorities beyond the legitimate scope of a weapons search was clearly unjustified, the fruits of such an excessive search being inadmissible in a subsequent criminal proceeding.¹⁴⁴ In *United States v. Meulener*,¹⁴⁵ the court held that the prospective passenger must be advised that he has to submit to a search if he wants to board the plane, but that

139 464 F.2d 667, 675 (2d Cir. 1972).

140 392 U.S. at 28.

141 Several of the airlines have purchased special x-ray devices which allow the user to penetrate baggage and "see" what is within, or at least an outline of such. Pan-American World Airways purchased an undisclosed number of Bendix Ray portable x-ray devices to speed antihijack screening. Because the machine is portable, it can be taken to isolated ramps at airports for bomb checks on threatened aircraft. The Bendix Ray emits a 0.03 milliroentgen pulse that penetrates objects in 40 nanosec. A resulting fluoroscopic picture, invisible to the human eye, is amplified, stored and presented on a video monitor. The pulse can penetrate aluminum and some steel cases. AVIATION WEEK AND SPACE TECHNOLOGY, Sept. 18, 1972, at 26.

Eastern Airlines has employed a portable, short-pulse x-ray machine for weapons detection called "Safe-ray." The operator and authorities are enabled to view a silhouette of any metal items inside the luggage for as long as fifteen minutes. This eliminates the need for a physical search of baggage. AVIATION WEEK AND SPACE TECHNOLOGY, Aug. 21, 1972, at 28.

142 The court in *Lopez* disagrees: "[W]e need not fear such abuse in this case since it is patent that the antihijacking system is specifically designed to isolate potential hijackers and to seize weapons." 328 F. Supp. at 1099.

143 In this respect, see N.Y. Times, Nov. 2, 1971, at 1, col. 4:

An airport passenger screening system designed to identify potential hijackers has resulted in the arrest of about 1500 air travellers during the last year, most of them on charges unrelated to hijacking, Federal officers said yesterday. More than 400 were arrested for possession of illegal drugs or narcotics found when officials searched them for weapons; about the same number were arrested as illegal aliens; at least 300 were arrested for trying to board an airliner with a firearm . . . While the value of the anti-hijacking program for deterring hijackers is not yet clear, the authorities said that it has had significant effect in helping the authorities apprehend suspected criminals on other charges.

144 328 F. Supp. at 1098.

145 351 F. Supp. 1284 (C.D. Cal. 1972).

he can decline to be searched if he chooses not to board the aircraft.¹⁴⁶ A district court found, in *United States v. Kroll*,¹⁴⁷ that while an inspection search of an airline passenger's carry-on luggage is not unreasonable at its inception, such a search may yet violate the fourth amendment "by virtue of its intolerable intensity and scope."¹⁴⁸ To further help insure that the antihijacking search is used only for the purpose which justifies its exemption from the warrant requirement, the courts should exclude from evidence any nonweapon contraband seized during air passenger searches. The exclusionary rule has long been applied in both the federal and state courts in cases of illegally seized evidence.¹⁴⁹ The basis for such exclusion is both judicial integrity and the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized evidence was suppressed often enough to deprive the police of any benefits they might gain from their illegal conduct.¹⁵⁰ While contraband and other evidence of illegal activity unrelated to hijacking discovered in the course of the antihijack search are presently admissible, their exclusion would serve to deter law enforcement officials from using the antihijack system as a trap for suspects foolish enough to fly. The need for the warrantless antihijack search is clear. So, too, is the need for a careful regard for the reasonableness which would constitutionally allow such a search.

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146 *Id.* at 1289. *See also* *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972).

147 351 F. Supp. 148 (W.D. Mo. 1972).

148 *Id.* at 153.

149 *See e.g.*, *Weeks v. United States*, 232 U.S. 383, 392 (1914).

150 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971).