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TERRY AS THE TOUCHSTONE FOR UNLIMITED AIRPORT SEARCHES AND SEIZURES

THE GOVERNMENT ANTI-HIJACKING SECURITY SYSTEM

In an effort to combat the hijacking¹ menace, the United States Government, with the cooperation of the airline industry, has instituted a two-part security procedure designed to prevent would-be hijackers from boarding aircraft within the United States. The principal elements in this program are the deployment of the "hijacker behavioral profile" and the magnetometer. Under the present program, certain airline personnel are charged with screening out potential perpetrators. Selected airline employees are made privy to the contents of the "hijacker behavioral profile," which consists of a set of behavioral characteristics believed to be common to all potential hijackers. These characteristics, which were first compiled by a special task force instituted by the Federal Aviation Administration in 1969, are updated periodically as new information, concerning more recent hijackings, becomes available. This screening procedure and the use of the magnetometer — a mechanical metal detecting device — are currently the mainstays of the airport security program.

As part of the security program in many airports, a magnetometer is installed in the boarding passageway leading to the aircraft so that all passengers must pass through it. The magnetometer is designed to flash a warning light when a metal object of magnetic force equal to or greater than an average .25 caliber pistol is brought within its operational range.² At the

¹ The terms air hijacking, air piracy, and skyjacking are herein used interchangeably.

² In *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971) the district court described the processes which underlie the use of the magnetometer as follows:

Its operation is based upon the physical fact that the earth is surrounded by a relatively constant magnetic field composed of lines of flux. Steel and other ferromagnetic metals are much better conductors than the air. As a result, when any such metal moves through an area, nearby magnetic lines of flux are distorted to some degree as they tend to converge and pass through the metal while seeking the path of least resistance. Such distortions occurring near a 'fluxgate magnetometer' create a signal which can be amplified and calibrated to detect magnetic disturbances. See *e.g.*, Chapman, *The Earth's Magnetism*, 10-12, 17-19, 27, 28 (2d ed. 1951); J. Jaquet, *No-Touch Frisk Electronic Weapons Detection paper presented at Conference on Electronic Crime Countermeasures, Univ. of Ky., April 22, 1971*; Marshall, *An Analytic Model for Fluxgate Magnetometer*, *IEEE Transactions on Magnetics*, Vol. MAG-3, No. 3 (Sept. 1967); Geyger, *Fluxgate Magnetometer Uses Toroidal Core, Electronics* (June 1, 1962); Geyger, *The Ring-Core Magnetometer—A New Type of Second-Harmonic Flux-Gate Magnetometer*, *Communication and Electronics* (Mar. 1962).

Id. at 1085.

same time, if a prospective passenger exhibits traits contained in the hijacker behavioral profile³ and activates the magnetometer in the process of boarding the plane, he is interviewed by airline personnel. Apparently, "if he provides satisfactory identification he is permitted to board [without impediment]."⁴ On the other hand, if the airline personnel are not satisfied with the interview, the potential passenger is not allowed to board until a deputy United States Marshall is summoned. The marshall once again will request identification from the passenger. If the passenger still fails to furnish acceptable identification, the "selectee" is requested to pass through the magnetometer once more. Prior to going through the magnetometer again, the selectee is asked if he has any metal object in his possession. If he replies in the negative and still activates the magnetometer, he is requested to undergo a voluntary search before he is permitted to board the aircraft. If he refuses to undergo a voluntary search, he may be merely denied the right to board the craft,⁵ although he may be subjected to an involuntary search.

In *United States v. Lopez*,⁶ the district court, in order to determine the effectiveness and accuracy of the magnetometer and of its adjunct, the hijacker behavioral profile, reviewed several sample studies and reported their results. One sample study consisting of 500,000 screened passengers produced the following results: only 1,406, or .28 percent, of the passengers screened exhibited "selectee behavior." Of those exhibiting "selectee" traits, 694 were nevertheless permitted to board the aircraft, having failed to activate the magnetometer; leaving 712 or .14 percent to be interviewed. Of the 712 passengers interviewed, only 283, or twenty percent of those originally exhibiting "selectee" behavior, were frisked. Of the 283, only twenty persons were denied boarding and, of these, a mere sixteen were arrested.⁷ In another sample of 226,000 screened passengers,

³ Informed discussion about the profile is difficult because the characteristics are secret. However, these characteristics are ostensibly based on the behavioral characteristics of embarking passengers rather than on inherited or social characteristics. *Id.* at 1086-87. See interview with Dr. John T. Dailey, Chief Psychologist of the FAA, for a discussion of the basic theory of the profile, in J. AREY, *THE SKY PIRATES* 240-41 (© 1972 James A. Arey).

⁴ 328 F. Supp. at 1083.

⁵ *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Moore*, 483 F.2d 1361 (9th Cir. 1973); *but cf.*, *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973). *Contra*, *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973); *United States v. Miller*, 480 F.2d 1008 (5th Cir. 1973); *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973); *United States v. Fern*, 484 F.2d 666 (7th Cir. 1973).

⁶ 328 F. Supp. 1077.

⁷ *Id.* at 1084.

.57 percent exhibited "selectee" traits, and of these only half or .28 percent were interviewed and only .13 percent were searched. Of those searched, only twenty-four persons were denied boarding.⁸ In a third study, of a total of 441,000 persons screened, 303 fit the hijacker behavioral profile, but only nine arrests were made.⁹

The basic objective of the preflight passenger surveillance system and, indeed, of the entire FAA anti-hijacking program is deterrence.¹⁰ This is based on the assumption that the average American skyjacker has a "loser" or "failure" personality, and will be easily discouraged from commandeering an aircraft if faced with a series of obstacles and problems such as the mysterious psychological profile, a scientific electronic search, an interrogation, and a physical search.¹¹

With respect to whether the profile is actually able to detect potential criminals, Mr. Frank Cardman, Director of Security of Pan American World Airways, has said:

The profile is not a psychological measurement. It simply qualified the person by age and characteristics of ticket purchase — not as somebody who is a potential hijacker, but as somebody who should be looked at further. This is what it does.¹²

Indeed, it would appear that the profile is not based on what

⁸ *Id.*

⁹ *Id.*

¹⁰ See J. AREY, *THE SKY PIRATES* 49 (© 1972 James A. Arey) at 234-42 [hereinafter cited as AREY].

¹¹ Interview with Frank Cardman, Director of Security, Pan American World Airways, quoted in AREY at 242. Dr. Dailey, speaking of the profile and the anti-hijacking procedures in general, has stated:

'One common denominator among [skyjackers] is that they are losers, unsuccessful people. They've never done anything very well. They're failure-prone. They tend to give up when they run up against an obstacle. And they're not very clever. This is the reason we thought, at first, that we would be able to scare them off—some of them, at least—by making them believe that hijacking is a very difficult thing to do. The thing that we faced when we started to fight the epidemic was this public image of hijacking being the simplest thing in the world to do, that anybody could do it without risk or failure.'

AREY at 99.

'This is like anti-submarine or anti-aircraft warfare. What you try to do is put as many obstacles as possible there to raise the risk of failure as high as you can. Then, in addition—and I want to stress this—through the use of public information to make this as vivid as possible to the right people so they would perceive these obstacles as maximally discouraging.'

AREY at 270.

Dr. Dailey also said:

Our thought here is that if we are really successful in this we will never catch anybody, because they'll be afraid to try and therefore won't try; but that if they do try, to make every effort to catch as many as possible . . . knowing that we can't catch all of them. Some are bound to slip through the screen. No matter what, even if your policy were one hundred percent search, after a couple of weeks people would let down and be careless and there would still be some of them that would get through.'

AREY at 270.

¹² AREY at 241.

might generally be considered the suspicious behavior of passengers, such as perspiration, heavy breathing, confusion, and the like. Rather, the profile is predicated upon the manner in which a passenger presents himself for boarding.

Statistics¹³ would indicate that the number of successful and attempted skyjackings since the anti-hijacking procedures have been implemented have dropped significantly. This data suggests that present anti-hijacking procedures have been quite successful in their primary objective of deterring many of the failures and losers from attempting to skyjack an aircraft, but there remains a fairly significant number of potential skyjackers who either do not show similar patterns of behavior or do not come within the profile. Accordingly, the latter are not being deterred or detected by the present procedure.

SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT

The fourth amendment to the United States Constitution guarantees all individuals freedom from "unreasonable searches and seizures." The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁴

A search is deemed reasonable if conducted pursuant to a search warrant issued upon probable cause.¹⁵ A search is not necessarily unreasonable if conducted in the absence of a warrant. The courts have long recognized a limited number of exceptions to the warrant requirement. As long as an arrest is lawful, a warrantless search incident to that arrest is permitted.¹⁶ Moreover, warrantless searches are deemed reasonable if made with the consent of an accused,¹⁷ or if made in "hot

¹³ N. Thimmesch, *Clamps on Hijacking Are Proving Effective*, Chicago Tribune, Feb. 10, 1974, § 2 (Perspective), at 6; McGinley and Downs, *Airport Searches and Seizures — A Reasonable Approach*, 41 *FORD. L. REV.* 293, 295 (1972).

¹⁴ U.S. CONST. amend. IV.

¹⁵ See, e.g., *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949); *United States v. Di Re*, 332 U.S. 581 (1948); *Carroll v. United States*, 267 U.S. 132 (1925).

¹⁶ See, e.g., *United States v. Robinson*, 94 S. Ct. 467 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Trupiano v. United States*, 334 U.S. 699 (1948); *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Co. v. United States*, 282 U.S. 344 (1931); *Marron v. United States*, 275 U.S. 192 (1927); *Agnello v. United States*, 269 U.S. 20 (1925); *Carroll v. United States*, 267 U.S. 132 (1925).

¹⁷ See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Stoner v. California*, 376 U.S. 483 (1964).

pursuit" of a suspect.¹⁸ Furthermore, the courts have recently sanctioned a "stop and frisk" procedure which permits a law enforcement official to conduct a limited search of an individual in a public place when the search is based upon a reasonable suspicion rather than probable cause.¹⁹

As a practical matter, no warrant can be obtained for an airport search. Even if facts sufficient to support a finding of probable cause were discovered at the airline boarding gate, time limitations would effectively preclude the obtaining of a search warrant.²⁰ The anti-hijacking security system mandates swift and effective police action and would be rendered ineffectual by compliance with the time-consuming warrant procedure.

Typically, airport searches cannot be justified on the basis of the long recognized exceptions to the search warrant requirement.²¹ Since these foregoing traditional exceptions to the warrant rule are not applicable to the airport search, the only justifiable exception is the protective "frisk" for weapons authorized by *Terry v. Ohio*.²² Accordingly, each case that has focused on the constitutional problems surrounding airport searches has utilized *Terry* as its touchstone.

THE *TERRY* DOCTRINE

In *Terry v. Ohio*, an experienced Cleveland detective observed Terry and two co-defendants walking repeatedly back and forth in front of a store, pausing to stare in the same store window, and conferring with each other at the completion of the route. The officer became suspicious, believing the men were "casing a job, a stick-up,"²³ and considered it his duty as a law enforcement officer to investigate further. The officer approached the defendants, identified himself, and asked their names. When the men mumbled something, the officer spun Terry around, patted down his outside clothing and felt a bulge in his coat pocket which proved to be a pistol. Terry was arrested and convicted of carrying a concealed weapon.²⁴

The Supreme Court affirmed the conviction over Terry's objection that the weapon was seized by means of an unreasonable search. The Court rejected the theory that a "stop-and-frisk" falls outside the category of searches subject to fourth

¹⁸ *Warden v. Hayden*, 387 U.S. 294 (1967).

¹⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁰ *United States v. Lopez*, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971).

²¹ See text accompanying notes 14-18, *supra*.

²² 392 U.S. 1 (1968).

²³ *Id.* at 6.

²⁴ *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

amendment limitations because it involves a lesser restraint than a traditional search.²⁵

Traditionally, the reasonableness of a search was controlled by the fourth amendment requirement of probable cause. In *Terry*, the Court introduced the new concept of reasonable suspicion and distinguished it from probable cause as an admittedly lesser standard justifying a lesser governmental intrusion into this constitutionally protected area. The Supreme Court explicitly rejected the contention that a protective weapons search could only be performed as incident to an arrest on "probable cause,"²⁶ but, at the same time, it refused to sanction frisks on mere "inarticulate hunches."²⁷ The Court concluded that governmental interest in the prevention of crime and the interest of the individual law enforcement officer in self-protection from attack by individuals, whom he reasonably suspects to be armed and whose conduct he is legitimately investigating, are sufficient to justify a limited search for weapons.²⁸

As a means of limiting the scope of stop-and-frisk and thereby avoiding the unreasonableness found in *Sibron v. New York*,²⁹ the *Terry* Court articulated three factors to be balanced in determining reasonable suspicion:

In order to assess the reasonableness of [the officer's] conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached,

²⁵ 392 U.S. at 31.

²⁶ *Id.* at 26-27.

²⁷ *Id.* at 22. Cf. *Sibron v. New York*, 392 U.S. 40 (1968).

²⁸ 392 U.S. at 30-31.

²⁹ 392 U.S. 40 (1968). In *Sibron*, a police officer had observed the defendant talking with a number of known narcotics addicts over a period of eight hours. Relying solely on these observations, the police officer confronted Sibron and said: "You know what I am after." Sibron mumbled a reply, and as he began to reach into his pocket, the officer intercepted his hand, reached into the same pocket and discovered envelopes containing heroin. Sibron was subsequently convicted of unauthorized possession of narcotics. *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966).

The Supreme Court reversed Sibron's conviction, finding that the police officer did not have probable cause to arrest, and that the frisk was unreasonable because the officer did not have sufficient facts to warrant a belief that Sibron was armed and dangerous. 392 U.S. 40 (1968).

neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.³⁰

Accordingly, in each airport search, one must examine (1) the governmental interest justifying the need to search, (2) the extent of invasion the search entails, and (3) the specific, articulable facts reasonably warranting the intrusion. With these *Terry* criteria as background, we turn now to a discussion of the cases³¹ that have considered the validity of the anti-hijacking screening system.

TERRY AND AIRPORT SEARCHES

Early Development

*United States v. Lopez*³² was the first case to consider the constitutionality of airport screening procedures. A thorough decision, highly descriptive of the screening procedures, *Lopez* has frequently been cited in subsequent cases in this area.³³

Defendant Lopez was designated a "selectee" at the time of the check-in and was about to board a flight when he activated a magnetometer. He was then requested to produce identification by the federal marshal on duty. Upon failing to produce satisfactory identification, Lopez' outer clothing was frisked and an envelope measuring approximately four inches by six inches by three-fourths of an inch was taken from him. He was thereupon arrested and charged with concealing and facilitating the transportation of heroin.³⁴

A motion to suppress the evidence was granted and the case dismissed because the airline had added, to the approved FAA profile, an ethnic characteristic and other criteria calling for an individual decision based on the personal judgment of an airline employee.³⁵ The court found that these changes destroyed the essential neutrality and objectivity of the approved profile.³⁶ Nevertheless, it upheld the current anti-hijacking system, properly supervised, as constitutional and sufficiently

³⁰ *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) (footnotes omitted).

³¹ Cases which involved searches by airline personnel, not within the anti-hijacking system, and subsequently held by the courts to be private searches not protected by the fourth amendment, will not be reviewed in this article, *i.e.*, *United States v. Winstanley*, 359 F. Supp. 146 (E.D. La. 1973) (search turned up marijuana); *United States v. Wilkerson*, 478 F.2d 813 (8th Cir. 1973) (search turned up marijuana). See also, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).

³² 328 F. Supp. 1077 (E.D.N.Y. 1971).

³³ *E.g.*, *United States v. Bell*, 464 F.2d 667, 669 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972); *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972); *People v. Erdman*, 69 Misc. 2d 103, 106-07, 108, 329 N.Y.S.2d 654, 658, 659 (Sup. Ct. 1972); *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973).

³⁴ 328 F. Supp. 1077, 1082.

³⁵ *Id.* at 1101.

³⁶ *Id.*

accurate in detecting illegal conduct to warrant the type of temporary investigative detention and "frisk" deemed valid in *Terry v. Ohio*.³⁷

Moreover, in *Lopez*, Judge Weinstein went to great lengths to analyze the factors which must be taken into consideration in determining the reasonableness of the currently used anti-hijacking security system. Judge Weinstein stated:

A reviewing court must: (1) determine the objective evidence then available to the law enforcement officer and (2) decide what level of probability existed that the individual was armed and about to engage in dangerous conduct; it must then rule whether that level of probability justified the 'frisk' in light of (3) the manner in which the frisk was conducted as bearing on the resentment it might justifiably arouse in the person frisked (assuming he is not about to engage in criminal conduct) and the community and (4) the risk to the officer and the community of not disarming the individual at once.³⁸

However, in considering the utilization of the magnetometer, Judge Weinstein noted in *Lopez*:

Even the use of the magnetometer might be an objectionable intrusion were it not accompanied by an antecedent warning from the profile indicating a need to focus particular attention on the subject. 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.³⁹

Shortly after *Lopez*, an airport search situation arose which presented another court with the precise issue that had been avoided in *Lopez* — whether the use of the magnetometer is by itself a search under the fourth amendment. In *United States v. Epperson*,⁴⁰ a defendant was charged with attempting to board an aircraft while carrying a concealed weapon. Epperson handed his ticket to an airline employee at the gate and proceeded toward the plane, activating the magnetometer. Due to the activation, defendant was searched by a United States marshal who found a loaded pistol on his person.⁴¹ Since there had been no prior profile designation of defendant as a "selectee," the sole basis for stopping and frisking Epperson was his activation of the magnetometer. The court concluded that use of a magnetometer under these circumstances constituted a "search," but that the constitution protected only against unreasonable searches:

To require a search warrant as a prerequisite to the use of a magnetometer would exalt form over substance, for it is beyond belief

³⁷ 392 U.S. 1 (1968).

³⁸ 328 F. Supp. 1077, 1097.

³⁹ *Id.* at 1100.

⁴⁰ 454 F.2d 769 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972).

⁴¹ 454 F.2d at 770. It should be noted that all passengers were required to pass by the magnetometer to board the plane. *Id.*

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.

We think the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and precriminal events, fully justified the minimal invasion of personal privacy by magnetometer. . . .⁴²

As to whether the frisk was reasonable, the court held that once the magnetometer was activated, the personal frisk was justified because of the marshal's reasonable fear that his safety and the safety of other passengers was in danger.⁴³ The court, basing its decision on *Terry*, affirmed defendant's conviction, stating that:

Since the use of the magnetometer was justified at its inception, and since the subsequent physical frisk was justified by the information developed by the magnetometer, and since the search was limited in scope to the circumstances which justified the interference in the first place, we hold the search and seizure not unreasonable under the Fourth Amendment.⁴⁴

In another airport situation, *United States v. Slocum*,⁴⁵ wherein the defendant met the profile as well as activated the magnetometer, the court followed the rationale of *Epperson*. After defendant was unable to produce any identification, the marshal frisked him and found nothing which could have activated the magnetometer. The marshal then searched defendant's hand luggage in which he found a rolled-up sock containing a "definite foreign substance," which, upon inspection, proved to be cocaine.⁴⁶

The conviction of Slocum for the possession of narcotic drugs was affirmed. The court, relying on *Epperson*, held that a magnetometer search per se was justified "within the context of a potential hijacking."⁴⁷ The court, noting that the use of the profile should not be "considered as an attempt to establish probable cause and, therefore . . . subject to scrutiny according to Fourth Amendment standards,"⁴⁸ found the search to be reasonable in view of defendant's lack of identification and failure to explain what caused the activation of the magnetometer.⁴⁹

The above cases confirmed the constitutionality of the currently used airport anti-hijacking procedures. These decisions

⁴² *Id.* at 771 (citations omitted).

⁴³ *Id.* at 772.

⁴⁴ *Id.*

⁴⁵ 464 F.2d 1180 (3d Cir. 1972).

⁴⁶ *Id.* at 1181.

⁴⁷ *Id.* at 1182.

⁴⁸ *Id.* at 1183.

⁴⁹ *Id.*

readily display the growing liberal view with which the diverse circuits look upon this procedure. The courts have made a complete turnabout, since their *Lopez* decision, as to the grounds justifying the airport search. *Lopez* required a passenger to meet the "profile" before a magnetometer test or a frisk could be conducted. On the other hand, *Epperson* held the magnetometer search as reasonable within the requirements of the fourth amendment and allowed a frisk to be conducted if the magnetometer was activated.

There are at present essentially three major theories which are followed in the various circuits in order to justify the sometime extensive searches conducted under the guise of hijacking prevention. The following discussion will attempt to analyze those theories as developed by circuits⁵⁰ which have dealt with the question.

The Limited Airport Search in Light of TERRY :

The Second and Eighth Circuits

The Second Circuit has upheld the constitutionality of the current anti-hijacking procedure. However, it has insisted that the procedure be used within the "reasonable suspicion" guidelines announced in *Terry*, and has held that in the absence of such a basis the search would violate fourth amendment guarantees.

In *United States v. Bell*,⁵¹ Bell was convicted for failure to pay a narcotics tax.⁵² Bell met the "profile" and activated the magnetometer.⁵³ A federal marshal then approached him, and, after ascertaining Bell's lack of identification and his criminal background,⁵⁴ searched him and found a quantity of heroin.⁵⁵

⁵⁰ Note, however, that no airport search cases have been reported to date in the First, Sixth and Tenth Circuits.

⁵¹ 464 F.2d 667 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972).

⁵² *Id.* at 668, n. 1.

⁵³ *Cf.*, *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972) where the court upheld a search of the defendant's jacket based upon the activation of the magnetometer alone. As Epperson passed through the instrument it registered an unusually high reading. He was asked to put aside whatever metallic objects he possessed; but when the device was again activated, the United States Marshal searched his jacket and discovered a loaded pistol. In *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971) the level of suspicion which justified the frisk was concededly lower than that in *Terry*. Noticing Lindsey's anxious behavior as he entered the boarding lounge, the marshal requested to see an identification. The defendant produced four — each bearing a different name. The marshal noted two bulges in the defendant's coat and a subsequent frisk revealed two aluminum-wrapped packages later found to contain heroin. Noting the exigencies of the situation, a panel of the Third Circuit held that the level of suspicion was sufficiently high to justify the stop and frisk.

⁵⁴ Bell had two previous convictions, "and at the time of his arrest [by the marshal], stated that he was out on bail from the Tombs for attempted murder and narcotics charges. . . ." 464 F.2d at 672.

⁵⁵ *Id.* at 669.

Bell's motion to suppress the evidence was denied⁵⁶ and his conviction subsequently affirmed.⁵⁷

The district court, relying on *Lopez*,⁵⁸ found the anti-hijacking procedure constitutional.⁵⁹ The profile selection was held to have been applied properly and without any prejudices.⁶⁰

On the issue of the search, the district court stated it would have had some reservation had the search been based only on the magnetometer, inasmuch as the magnetometer was activated by nearly fifty percent of all passengers.⁶¹ However, the court concluded that "the magnetometer must be viewed within the context of the anti-hijacking system,"⁶² and "is only one of a series of screening procedures; a procedure that serves as much as a deterrent to air piracy as it does a detector."⁶³

Judge Mulligan, writing for a unanimous court, characterized as "baseless" Bell's contention that the use of the magnetometer constituted an unreasonable search, since "[n]one of the personal indignities of the frisk discussed by Chief Justice Warren in *Terry* [were] present."⁶⁴ The use of the magnetometer was considered to be a reasonable precaution in view of the magnitude of the crime sought to be prevented and the exigencies of time which clearly precluded the obtaining of a warrant.⁶⁵ The court further rationalized its decision by stating that: "Obviously the most appropriate point to conduct the in-

⁵⁶ 335 F. Supp. 797 (E.D.N.Y. 1971).

⁵⁷ 464 F.2d 667 (2d Cir. 1972).

⁵⁸ 328 F. Supp. 1077 (E.D.N.Y. 1971).

⁵⁹ 335 F. Supp. at 799.

⁶⁰ *Id.* at 800-01.

⁶¹ *Id.* at 802.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 464 F.2d at 673.

⁶⁵ *Id.*, Chief Judge Friendly, in his concurring opinion, opined that the limited airport search could be justified by the danger alone, as long as the defendant is aware of his ability to avoid the search by refusing to board the aircraft. *Id.* at 674-75. Chief Judge Friendly stated:

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

Id. at 675.

Judge Mansfield, although concurring in the result, cautioned:

If the danger to the public posed by the current wave of hijacking were held to constitute adequate ground for such a broad expansion of police power, the sharp increase in the rate of serious crimes in our major cities could equally be used to justify similar searches of persons or homes in high crime areas based solely upon the 'trained intuition' of the police. With the door thus opened, a serious abuse of individual rights would almost inevitably follow.

History reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. But the ultimate strength of our constitutional guarantees

quiry and to make the limited search of outer clothing is on the ground before takeoff.”⁶⁶

In *United States v. Ruiz-Estrella*,⁶⁷ the Second Circuit was called upon once again to determine the reasonableness of an airport search. Defendant was convicted in the district court of various firearms offenses.⁶⁸ Defendant met the “profile” and was requested to present identification at the check-in counter.⁶⁹ Ruiz-Estrella was designated a profile “selectee” and was requested to identify himself again, by the uniformed federal marshal, upon reaching the boarding gate.⁷⁰ The marshal was dissatisfied and informed defendant that he would have to go through a luggage search. Defendant turned over the shopping bag he was carrying, which appeared to be filled with toys.⁷¹ The marshal picked up one of the toy boxes for examination. After noting that the original cellophane wrapping had been retaped, and finding the box to be unexpectedly heavy, he opened it to find a sawed-off shotgun and several shells.⁷² At no time did the defendant pass through or activate a magnetometer.⁷³ Ruiz-Estrella was excluded from a significant part of his own suppression hearing, and his motion to suppress was denied.⁷⁴

The Court of Appeals reversed,⁷⁵ holding the exclusion of defendant from the suppression hearing to be inconsistent with the same court’s holdings in *United States v. Clark*⁷⁶ and *Bell*,⁷⁷ as well as in violation of defendant’s “rights of confrontation and public trial.”⁷⁸ As to the merits, the prosecution attempted to justify the search on the basis of consent. However, the court held that “the prosecution’s burden could not be met by only showing acquiescence to a claim of lawful authority,”⁷⁹ “[n]or can the posters (warning of the search procedures in the air-

lies in their unhesitating application in times of crisis and tranquility alike.

... No necessity exists for punching a hole in the Fourth Amendment in order to enable the FAA and airline authorities to deal effectively with the air piracy problem.

Id. at 675-76.

⁶⁶ *Id.* at 673-74.

⁶⁷ 481 F.2d 723 (2d Cir. 1973).

⁶⁸ *Id.* at 723.

⁶⁹ *Id.* at 724.

⁷⁰ *Id.*

⁷¹ *Id.* at 725.

⁷² *Id.*

⁷³ *Id.* at 729. There was apparently no metal-detecting device present in the particular gate where this incident took place. *Id.* n. 7.

⁷⁴ *Id.* at 724.

⁷⁵ *Id.* at 726.

⁷⁶ 475 F.2d 240 (2d Cir. 1973).

⁷⁷ 464 F.2d 667 (2d Cir. 1972).

⁷⁸ 481 F.2d 723, 725.

⁷⁹ *Id.* at 727; *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

port) be relied upon for . . . a showing"⁸⁰ of voluntary consent to the search. The court concluded that "it is clear that the posters do not alert passengers to their ability to avoid search by refusing to board"⁸¹ and are therefore insufficient to constitute implied consent.

Next the court considered whether the seizure could be justified on the less-than-probable cause standard of *Terry*.⁸² The court concluded in the negative, reasoning that "Ruiz-Estrella neither passed through nor activated a magnetometer, "he did nothing at all during the period in question that could be construed as suspicious in nature."⁸³ The defendant's conduct, the court reasoned, was insufficient to meet the "articulable facts" standard necessary under *Terry* in order to conduct a stop-and-frisk.⁸⁴ The court, once again, reiterated its holding in *Bell*,⁸⁵ emphasizing "that the use of a magnetometer is a 'reasonable caution' " in view of the magnitude of the societal interest involved and the absence of "the personal indignities of the frisk."⁸⁶ The court concluded that it would not condone any airport searches, in the absence of probable cause, unless the person was first exposed to the minimal invasion of privacy resulting from the use of the magnetometer,⁸⁷ activated it, and thereby produced some quantum of "specific and articulable facts" upon which a *Terry* "reasonable suspicion" search could be based.

The Eighth Circuit, in *United States v. Kroll*,⁸⁸ has decided to adhere strictly to the *Terry* rationale and reasoning as it applies to airport searches. In *Kroll*, defendant was designated a "selectee." After he identified himself satisfactorily, he passed through the magnetometer, which was activated by the metal hinges and locks on the attache case he carried.⁸⁹ Kroll was asked to open the attache case, which he did. A United States marshal working with security at the airport pulled out an ordinary white business envelope from the file section of the case.⁹⁰ It was light weight, had a very minute bulge at one end of the envelope and was otherwise limp and flat.⁹¹ Searching

⁸⁰ 481 F.2d 723, 728; *accord*, *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Moore*, 483 F.2d 1361 (9th Cir. 1973); *but cf.* *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973).

⁸¹ 481 F.2d 723, 728-29.

⁸² *Id.* at 729.

⁸³ *Id.* (footnote omitted).

⁸⁴ *Id.*

⁸⁵ 464 F.2d 667 (2d Cir. 1972).

⁸⁶ 491 F.2d 723, 729 (citations omitted).

⁸⁷ *Id.*

⁸⁸ 481 F.2d 884 (8th Cir. 1973).

⁸⁹ *Id.* at 885.

⁹⁰ *Id.*

⁹¹ *Id.*

for weapons, the marshal opened the envelope to find an amphetamine and a partly-consumed marijuana cigarette.⁹²

The district court granted defendant's pre-trial motion to suppress the evidence.⁹³ But that did not end Judge Collinson's inquiry since he realized that "[a] search which is reasonable at its inception may yet violate the Fourth Amendment by virtue of its intolerable intensity and scope."⁹⁴ In this case the district court found that the search of the envelope was unreasonable.⁹⁵ The Eighth Circuit affirmed, quoting extensively from the district court's decision.⁹⁶ On the issue of consent to the search, the court held:

Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent [*sic*] to the search when to do otherwise would have meant foregoing the constitutional right to travel.⁹⁷ Moreover, the court, relying on *Terry*, held that "inspection of the envelope's contents exceeded the scope of the search permissible under the circumstances."⁹⁸ It further limited the scope of the search by adopting the district court's language, stating that "an officer is limited at the initial stage by the probabilities of a situation and reasonable suspicion is required before the search may be expanded."⁹⁹

Thus, it may be concluded that in the Eighth Circuit express consent is necessary for an airport search or, in its absence, a search will be strictly limited by the rationale of *Terry*, requiring something more than "mere suspicion" in order for an officer to engage in an expanded search.

Other circuit courts of appeal however have not shown the concern the Second and Eighth Circuits have shown in keeping airport searches subject to the protection afforded by the fourth amendment.¹⁰⁰

*The Exigent Circumstances Doctrine:
The Fifth and Seventh Circuits*

The Fifth Circuit Court of Appeals has found airport security searches to be an "exceptional and exigent situation under

⁹² *Id.* at 885-86. The United States marshal opened the envelope due to his subjective belief, based on his limited military experience, that nitroglycerine or other explosives could have been placed in flat, limp envelope, which was carried in defendant's attache case. *Id.* at 884.

⁹³ 351 F. Supp. 148 (W.D. Mo. 1972).

⁹⁴ *Id.* at 153.

⁹⁵ *Id.*

⁹⁶ 481 F. 2d 884.

⁹⁷ *Id.* at 886 (footnote omitted). Also see note 151, *infra*.

⁹⁸ *Id.*

⁹⁹ *Id.* at 887.

¹⁰⁰ *E.g.*, *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States v. Fern*, 484 F.2d 666 (7th Cir. 1973); *United States v. Lindsey*, 451 F. 2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972).

the Fourth Amendment"¹⁰¹ and therefore not protected by it. In *United States v. Moreno*,¹⁰² the Fifth Circuit affirmed the conviction of defendant on a charge of unlawful possession of heroin.¹⁰³ On the day in question Moreno arrived by plane at the San Antonio Airport, where he was observed by a veteran federal marshal who noticed that defendant was unusually wary of the airport security guards.¹⁰⁴ Defendant left the airport and returned about two hours later, when he was observed once again by the same federal marshal.¹⁰⁵ The marshal kept defendant under observation while he was attempting to purchase a ticket at several different counters, until he finally purchased one.¹⁰⁶ After purchasing the ticket Moreno went into a restroom, followed by the federal marshal. Once inside, the marshal noticed a prominent bulge on the left side of Moreno's coat, which aroused his suspicion.¹⁰⁷ The marshal approached Moreno, identified himself, and requested Moreno to identify himself. After being dissatisfied with Moreno's identification, he removed him to the security office.¹⁰⁸ At the security office a pat down search was conducted, after which defendant was requested to remove his coat. The ensuing search yielded the heroin involved in the case.¹⁰⁹ Prior to trial, defendant made a motion to suppress. This was denied by the district court,¹¹⁰ on the ground that the arresting agents were reasonably justified in believing that Moreno might be armed and dangerous.

The issue presented to the Fifth Circuit in this case was the constitutional propriety of an airport search and seizure.¹¹¹ The court held that the disposition of this case was controlled by the rationale of *Terry v. Ohio*.¹¹² Judge Gewin, writing for the court, found that searches based on *Terry* are reasonable when the officer feels that either his safety or the safety of others is jeopardized. In this case the court found the safety of "others" to be the prime concern of the officer.¹¹³ The court went on to say that "[d]ue to the gravity of the air piracy problem, we

¹⁰¹ *United States v. Moreno*, 475 F.2d 44, 48 (5th Cir. 1973); *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973). Note Judge Goldberg's concurring opinion on the exception announced by the court *Id.* at 414; *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973); *But cf.* *United States v. Garay*, 477 F.2d 1306 (5th Cir. 1973).

¹⁰² 475 F.2d 44 (5th Cir. 1973), *cert. denied*, 414 U.S. 840 (1973).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 45.

¹⁰⁵ *Id.* at 46.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Moreno* district court decision unreported.

¹¹¹ 475 F.2d at 45.

¹¹² *Id.* at 46.

¹¹³ *Id.* at 47.

think that the airport, like the border crossing,¹¹⁴ is a critical zone in which special fourth amendment considerations apply."¹¹⁵ In fact the court found airport security searches to be an "exceptional and exigent situation under the Fourth Amendment."¹¹⁶

Although ostensibly relying on the rationale of *Terry*, the court finds it necessary to extend *Terry* in order to justify its holding. The court concludes that limiting the airport search to a "pat down" as required by *Terry*, would be "self-defeating"¹¹⁷ and upholds the more extensive search conducted in the case. It rationalizes the extension of *Terry*, stating:

[T]he hijacker can conceal explosives or weapons in places which might be overlooked in the course of a cursory pat down. It should be emphasized that such a search is not primarily for the investigating officer's protection, but rather for the protection of a distinct and uniquely threatened class — this nation's air carriers, their crews and passengers.¹¹⁸

No mention is made by this court of the absence of the recognized anti-hijacking devices, the "profile" and the magnetometer. Nor does the court discuss the fact that defendant was stopped in the airport restroom,¹¹⁹ not while attempting to board an aircraft. This case seems to clearly violate the settled principle that searches are not to be justified by what they turn up.¹²⁰ It may be concluded from this case that in the Fifth Circuit, an airport search, like a border search, may be initiated without any probable cause.¹²¹ Inasmuch as the Fifth Circuit has made airport searches another exemption, heretofore not recognized,¹²² from the usual fourth amendment requirements that searches be based on probable cause, it would seem that an airport search within the Fifth Circuit would be held constitutionally reasonable if based on any kind of suspicious conduct by a ticketed would-be passenger, present in any of the environs of an airport.¹²³

Although the Fifth Circuit imposes a limitation on its

¹¹⁴ Customs officials conducting border searches have always been exempt from the usual fourth amendment requirement that searches be based on probable cause. Aside from the historical argument that this exception has always been recognized, it is also justified by the vital national interest in preventing illegal entry and smuggling, particularly of narcotics. Although under some circumstances searches can be conducted away from the border crossing area, all persons searched must be shown to have come through that critical zone to make this exception to the warrant requirement applicable. The mere suspicion of possible illegal activity is enough cause to justify a border search. See *United States v. Warner*, 441 F.2d 821, 832 (5th Cir. 1971); Annot., *Validity of Border Searches and Seizures by Customs Officers*, 6 A.L.R. FED. 317 (1971).

¹¹⁵ 475 F.2d at 51.

¹¹⁶ *Id.* at 48.

¹¹⁷ *Id.* at 51.

¹¹⁸ *Id.*

¹¹⁹ See note 107, *supra*.

¹²⁰ *Beck v. Ohio*, 379 U.S. 89 (1964).

¹²¹ *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973).

¹²² See notes 14-18 and 113, *supra*.

¹²³ *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States*

exigent circumstances doctrine in *United States v. Garay*,¹²⁴ it abandoned it shortly thereafter in *United States v. Cyzewski*.¹²⁵

In *United States v. Garay*, a conviction of possession of marijuana, uncovered pursuant to a warrantless search of defendant's checked luggage, (which was already aboard the plane) was reversed and remanded.¹²⁶ The court did not find the case to be within the "exigent circumstances" exception.¹²⁷ The court reasoned:

While the exigencies of the situation may well have justified the warrantless detention of appellants, they cannot validate the search of the suitcases made at a time when appellants were under restraint, if not under formal arrest. At that point, appellants were incapable of concealing or destroying the suitcases or their contents.

. . . .

In short, the officers could and should have held the bags until they obtained a warrant authorizing an examination of their contents.¹²⁸

Three months later, in *United States v. Cyzewski*,¹²⁹ the Fifth Circuit distinguished *Garay* as being "unrelated to the security problem."¹³⁰ In *Cyzewski*, the district court suppressed five pounds of marijuana discovered by an airport security search of the retrieved checked luggage of the defendants.¹³¹ The Court of Appeals reversed, reasoning that the warrantless search of the checked luggage was reasonable¹³² "[i]n the context of the exigent circumstances . . . and the plight of American aviation."¹³³ In this case, defendants were designated "selectees" and upon arriving at the boarding area were requested to identify themselves.¹³⁴ When they failed to produce satisfactory identification, claiming it was in their checked luggage, the deputy United States marshal requested that defendants' luggage be retrieved in order to confirm their identification. Defendants were removed to the marshal's office, where they produced identification which revealed they were traveling under assumed names.¹³⁵ When the luggage arrived, defendants were requested to pass through the magnetometer with their luggage. When

v. Legato, 480 F.2d 408 (5th Cir. 1973); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973); *United States v. Miller*, 480 F.2d 1008 (5th Cir. 1973); *United States v. Cyzewski*, 484 F.2d 509, 515 (5th Cir. 1973) (Thornberry, J., dissenting); *but cf.*, *United States v. Soriano*, 482 F.2d 469 (5th Cir. 1973); *United States v. Garay*, 477 F.2d 1306 (5th Cir. 1973).

¹²⁴ 477 F.2d 1306 (5th Cir. 1973).

¹²⁵ 484 F.2d 509 (5th Cir. 1973).

¹²⁶ 477 F.2d at 1307-08.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1308.

¹²⁹ 484 F.2d 509 (5th Cir. 1973) (Thornberry, J., dissenting).

¹³⁰ *Id.* at 512.

¹³¹ *Id.* at 509.

¹³² *Id.*

¹³³ *Id.* at 511.

¹³⁴ *Id.* at 510.

¹³⁵ *Id.*

the magnetometer was activated by one of the defendants, the marshals decided to search that suitcase despite the defendant's explanation as to what metal object activated the device.¹³⁶ As a result of said search the marshal discovered the marijuana concealed in defendant's laundry.¹³⁷

The Court of Appeals, Judge Roney writing for the majority, was well aware that it was expanding the heretofore recognized scope of airport searches. In his opening statement, Judge Roney noted:

In this case, an airport security search goes one step further than any to which this court has previously given constitutional approbation.¹³⁸

The court found that a search based on mere or unsupported suspicion of the person, analogous to a border search, as upheld in *United States v. Skipwith*,¹³⁹ was too restrictive. Nor was the court satisfied with the decisions of *United States v. Moreno*¹⁴⁰ and *United States v. Legato*,¹⁴¹ upholding searches on mere suspicion, without search warrants, in the airport restroom and parking lot, respectively, as constitutionally permissible despite the Fourth Amendment. Nor was the court deterred by decisions in other circuits limiting the scope of airport searches, reasoning that they all sustained airport security procedures just the same.¹⁴²

The court went on to announce the new scope of an airport search:

The search may continue until the law enforcement official satisfies himself that no harm would come from the passengers boarding the plane. To be effective, the security efforts must focus not on a single aircraft or tangible item, but on the suspect himself, his demeanor and possessions during the entire course of his airport presence.¹⁴³

This court specifically rejected the argument that an investigation need be curtailed if the passenger elects not to board, thereby rejecting the right-to-leave argument announced in *United States v. Meulener*.¹⁴⁴ The court set forth the limits of the search:

Only when it becomes unreasonable for the suspect's innocence to be further questioned does the security search itself become unreasonable.

. . .

The limits of a constitutional search are not necessarily defined by

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 482 F.2d 1272 (5th Cir. 1973).

¹⁴⁰ 475 F.2d 44 (5th Cir. 1973).

¹⁴¹ 480 F.2d 408 (5th Cir. 1973).

¹⁴² 484 F.2d 509, 513 (5th Cir. 1973).

¹⁴³ *Id.* at 513.

¹⁴⁴ 351 F. Supp. 1284 (C.D. Cal. 1972); 484 F.2d 509, 513, n. 4.

the perimeter of a particular security system. The marshals' specified authority should not bar further investigation if, in the exercise of their professional judgment, their reasonable suspicions had not been allayed by the routine security check.¹⁴⁵

Under the above test the court upheld the search of the retrieved checked luggage, reasoning that "at no point in the authorized security procedure did defendants' innocence become clear to the marshals."¹⁴⁶ Moreover, the court found that a "pat down" is not an inflexible preliminary requirement for a search under *Terry*,¹⁴⁷ thereby finding *Terry* really not controlling in airport searches.

Judge Thornberry, in his dissent,¹⁴⁸ summarizes the Fifth Circuit's position regarding airport searches:

In our Circuit not even reasonable suspicion is required to search passengers in the preboarding area. In *United States v. Skipwith*, 5th Cir. 1973, 482 F.2d 1272, we held that 'those who actually present themselves for boarding on an air carrier . . . are subject to a search based on mere or unsupported suspicion.' *Id.* at 1276. Consent is not required; the individual has no right to leave to avoid the search. *Id.* at 1277.¹⁴⁹

The sole reason given by the court for paring back the individual's right under the fourth amendment is "the magnitude of the perils created by air piracy"¹⁵⁰ and their inhibiting effect on citizens' exercise of the constitutional right to travel.¹⁵¹ It would be well to note the analogy the dissent makes which places the ruling in this case in the proper perspective:

Even a probable-cause arrest of a suspect would not legitimate a search of his checked luggage as incident to the arrest. *Chimel v. California*, 1969, 395 U.S. 752.¹⁵²

The dissent further reasons:

The screening procedures prescribed by the Federal Aviation Administration are designed to thwart the carry-on threat and do not provide for searching or magnetometer testing of checked luggage.

Unless the nexus between the checked luggage and the danger of air piracy is established, the 'protective search' rationale cannot properly be used to uphold a checked luggage search.¹⁵³

¹⁴⁵ *Id.* at 514.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 515.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 516, n. 1.

¹⁵⁰ See note 122, *supra*.

¹⁵¹ The right to travel was early recognized as one of the privileges and immunities enjoyed by American citizens. See *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823); see also *Edwards v. California*, 314 U.S. 160 (1941) (Douglas & Jackson, J.J., concurring); and *Twining v. New Jersey*, 211 U.S. 78 (1908). Recent constitutional jurisprudence has established that the right to travel emanates from the due process clause of the fifth amendment to the United States Constitution. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958).

¹⁵² 484 F.2d at 517.

¹⁵³ *Id.* at 518.

The dissenting judge concludes that he can see no substantial skyjacking threat presented in the checked luggage and would therefore hold that the search went beyond its legitimate "protective" scope.¹⁵⁴ Such a decision would have been in line with the same court's earlier holding in *Garay*,¹⁵⁵ which seems to be inapposite to the holding in this case. It would be well to heed the warning issued by Judge Goldberg in his concurring opinion in *Legato*,¹⁵⁶ which is quoted by Judge Thornberry in this dissenting opinion:

The exigencies of skyjacking and bombing, however real and dire, should not leave an airport and its environs an enclave where the Fourth Amendment has taken its leave. It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding.¹⁵⁷

The only Seventh Circuit case to date dealing with an airport search, *United States v. Fern*,¹⁵⁸ follows the exigent circumstances doctrine of the Fifth Circuit. In *Fern*, while defendant was sitting in a lounge in the boarding area pretending to read a newspaper, he was noticed by a United States marshal who determined that he met the "profile" characteristics.¹⁵⁹ Defendant was not subjected to a magnetometer test. A search of defendant's person produced nothing. Next the marshal searched defendant's flight bag in which he discovered a plastic bag filled with heroin and two bricks of smoking opium.¹⁶⁰ The district court convicted Fern of knowingly possessing heroin and opium, and the Seventh Circuit affirmed.¹⁶¹

The sole issue presented to the court on appeal was whether the airport search of defendant violated the Fourth Amendment prohibition against unreasonable searches and seizures. The court answered in the negative. The court, relying on *Moreno*,¹⁶² found that airport security searches should be treated as an exceptional and exigent situation under the Fourth Amendment.¹⁶³ The court also held, relying on *United States v. Lindsey*,¹⁶⁴ that "the use of a magnetometer is not an absolute prerequisite to an airport-boarding search."¹⁶⁵

It can be clearly concluded from this case that something less than the *Terry* level of suspicion necessary for a stop-and-

¹⁵⁴ *Id.*

¹⁵⁵ 477 F.2d 1306 (5th Cir. 1973).

¹⁵⁶ 480 F.2d 408, 414 (Goldberg, J., concurring).

¹⁵⁷ 484 F.2d 509, 515.

¹⁵⁸ 484 F.2d 666 (7th Cir. 1973) (Gordon, J., dissenting).

¹⁵⁹ *Id.* at 667.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 666.

¹⁶² 475 F.2d 44.

¹⁶³ 484 F.2d at 669.

¹⁶⁴ 451 F.2d 701 (3d Cir. 1971).

¹⁶⁵ 484 F.2d at 668.

frisk is required in the Seventh Circuit in order to initiate an airport search. In fact, such a search will not be limited to a pat-down as required by *Terry*,¹⁶⁶ and it may be initiated on the sole ground that defendant met the "behavioral profile."¹⁶⁷

Judge Gordon, in his dissenting opinion, concludes that the *Terry* type "stop-and-frisk" is inapplicable in this case, a conclusion with which this author fully agrees.¹⁶⁸ The dissent further cautions that there exists a need to resist the pressure of official expedience against the protection of the Fourth Amendment.¹⁶⁹

The Implied Consent Doctrine: The Ninth Circuit

Cases dealing with airport searches within the Ninth Circuit have been decided on either of two bases: consent¹⁷⁰ or implied consent¹⁷¹ to be searched. *United States v. Meulener*¹⁷² was the first case to announce the theory that voluntary consent to be searched was necessary. It stated that a passenger had to be apprised of his choice of either undergoing the search or declining to board. *Meulener* also held that "the government [cannot] condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights."¹⁷³ Subsequent cases and their interpretation of these holdings will be the subject of the following discussion.

In *Meulener*, defendant was designated a "selectee" and activated the magnetometer when he passed through it with his suitcase.¹⁷⁴ A marshal then *ordered* defendant to open his suitcase, in which he found some marijuana.¹⁷⁵ Prior to the time the suitcase was searched, no attempt had been made to search the defendant's person.¹⁷⁶

The district court held:

[T]he defendant's Fourth Amendment rights were violated when he was not told at the time the search was initiated that he had a

¹⁶⁶ *Id.* at 669.

¹⁶⁷ The only reason for initiating the search in this case was the determination by the United States marshal that defendant met the "behavioral profile." *Id.* at 667.

¹⁶⁸ *Id.* at 669-70.

¹⁶⁹ *Id.* at 670.

¹⁷⁰ *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Crain*, 485 F.2d 297 (9th Cir. 1973); see also, *United States v. Moore*, 483 F.2d 1361 (9th Cir. 1973); *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972).

¹⁷¹ *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973).

¹⁷² 351 F. Supp. 1284, 1286 (C.D. Cal. 1972); also see note 98, *supra*. *Contra*, *United States v. Skipwith*, 482 F.2d 1272, 1277 (5th Cir. 1973); *United States v. Winstanley*, 359 F. Supp. 146, 153 (E.D. La. 1973).

¹⁷³ 351 F. Supp. at 1288. *Accord*, *United States v. Lopez*, 328 F. Supp. 1077, 1092-93 (E.D.N.Y. 1971); *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973); see also note 151, *supra*.

¹⁷⁴ 351 F. Supp. at 1285.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1286.

right to refuse to submit to the search provided he did not board the airline.¹⁷⁷

As to the issue of whether defendant consented to the search, the court held "the government [cannot] condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights."¹⁷⁸ The court also held, relying on *Terry*:

[T]he failure of the marshal to make an initial pat-down of the defendant's outer clothing before searching his suitcase prevents the search from coming within the Terry penumbra and makes it violative of the Fourth Amendment. A limited pat-down search which reveals the metal object responsible for the positive magnetometer reading obviates the necessity for a search of the suitcase.¹⁷⁹

The court reasoned that while there was a governmental interest justifying the search of passengers who actually board the plane, no such interest existed with respect to persons who merely appear at the boarding gate and do not board, and accordingly a search of the latter would be held unreasonable under the Fourth Amendment.¹⁸⁰

In the subsequent case of *United States v. Davis*,¹⁸¹ the Ninth Circuit followed the rationale of *Meulener* and held that a preboarding screening of all passengers and their carry-on luggage to detect the presence of weapons and explosives is reasonable under the Fourth Amendment, if the person is given the right to avoid search by electing not to board the aircraft.¹⁸² The court reasoned that the regulations establishing the airport screening program did not authorize nor require compelled searches.¹⁸³ However, it should be noted that the *Davis* court

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1288.

¹⁷⁹ *Id.* at 1292. *Contra*, *United States v. Cyzewski*, 484 F.2d 509, 515 (5th Cir. 1973).

¹⁸⁰ 351 F. Supp. at 1290.

¹⁸¹ 482 F.2d 893 (9th Cir. 1973). Note the excellent review of the history of hijacking and measures taken to prevent it by the FAA and the airlines given in the opinion by Judge Browning.

¹⁸² *Id.* at 912. *Accord*, *United States v. Allen*, 349 F. Supp. 749, 752 (N.D. Cal. 1972); *cf.* *United States v. Bell*, 464 F.2d 667, 675 (Friendly, J., concurring) (imposing requirement that passengers have "advance notice" of liability to search).

¹⁸³ 482 F.2d at 911. The FAA directive is explicit: the right to board is conditioned upon submission to a "consent" search. No more is permitted by statute. 49 U.S.C. § 1511 authorized air carriers "to refuse transportation to a passenger or to refuse to transport property" if the transportation would be "inimical to safety of flight" (emphasis added). And see, *Hearings on Aviation Safety and Aircraft Piracy Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess., at 106 (1970) (testimony of Acting FAA Administrator David D. Thomas).

The proposed Air Transportation Security Act of 1973, basically a codification of the relevant aspects of the present airport screening search program, also stresses that such searches are "consent" searches. See S. REP. No. 93-13, 93d Cong., 1st Sess., at 9 (1973) (discussing section 316(a)(1) of the proposed Act): even after a passenger activates the magnetometer, he is subject to a search or frisk "only if he first voluntarily

did not rely on *Terry* to justify airport searches. Rather, the court found the airport search program to be analogous to an "administrative search" and looked to cases involving such searches to find the appropriate standards for evaluating an airport search.¹⁸⁴

To pass constitutional muster, an administrative search must meet the Fourth Amendment's standard of reasonableness:

[A]n administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.¹⁸⁵

This court also limited the second holding in *Meulener*, regarding the constitutional right to travel.¹⁸⁶ In *Davis* the court stated:

[E]xercise of the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right (here, the Fourth Amendment right to be free of unreasonable search), absent a compelling state interest.¹⁸⁷

Thus it would appear that this court would condition the right to travel upon the relinquishment of the Fourth Amendment right if the state could show a compelling state interest for so doing.

Moreover, although the court ruled out implied consent in this case, it did not rule out the possibility that implied consent could be the basis for an airport search when the nature and scope of airport searches become widely known.¹⁸⁸ In fact, in

consents. If such consent is denied then the individual shall forfeit his opportunity on that occasion to be transported and the air carrier shall deny his passage."

In a statement before the Subcommittee on Aviation of the Senate Commerce Committee on January 10, 1973, Secretary Volpe "identif[i]ed the features which our program has in common with S.39," the above proposed Act, as follows:

Specifically, the regulations recently issued by FAA follow S.39 by requiring the screening of passengers by weapon-detectors. Additionally, the FAA regulations direct the air carriers to deny boarding to any person who is not cleared by a detection device, or if such equipment is not available, *does not consent* to the search of his person for a weapon and to refuse to permit any person to carry aboard any property which he *does not consent* to have inspected.

(emphasis added).

Assistant Attorney General Will R. Wilson testified before the House Committee on Interstate and Foreign Commerce as follows:

My feeling is that a general surveillance of the public in the way of a search or otherwise, in getting on a plane, must be done administratively some way and probably the nearest way that that can be made constitutional is through a consent procedure in the buying of a ticket or something like that.

Hearings on Aviation Safety and Aircraft Piracy Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess., at 82 (Feb. 5, 1970).

¹⁸⁴ 482 F.2d at 908 and n. 40.

¹⁸⁵ *Id.* at 910-11.

¹⁸⁶ 351 F. Supp. at 1288 (footnote omitted).

¹⁸⁷ 482 F.2d at 913 (footnote omitted).

¹⁸⁸ *Id.* at 914.

United States v. Doran, the Ninth Circuit using the above conclusions from *Davis*, held that consent in fact to a search of defendant's carry-on bag at an airport could be inferred from the fact that signs and public address warnings announced that all passengers were subject to search.¹⁸⁹

It may thus be concluded that in the Ninth Circuit, now that airport searches are widely known and mandatory throughout the country, a passenger attempting to board an aircraft has impliedly consented to have his carry-on luggage searched. It might also be concluded that under the rationale and reasoning of the above cases, a search following refusal to permit a passenger to board an aircraft will not be constitutional without at least some "articulable facts" which *Terry* held necessary to justify a stop-and-frisk. Mere suspicion would not be sufficient.¹⁹⁰

CONCLUSION

The cases discussed above have upheld the anti-hijacking system only by employing increasingly broad interpretations of the *Terry* doctrine. The courts, in many of the cases, faced the problem of whether the airport marshal, at the time he stopped the embarking passenger to frisk him, had knowledge of "specific and articulable facts" warranting the particular search, as required by *Terry*,¹⁹¹ or whether the frisk was based on nothing more than a series of "inarticulate hunches."¹⁹² Statistics indicate that less than twenty percent of the arrests stemming from the anti-hijacking system have been for offenses related to aircraft security.¹⁹³ It would, therefore, seem not unreasonable to characterize the circumstances relied upon to justify these searches as hunches. A continuation of this procedure may lead to the obvious danger "that the screening of passengers and their

¹⁸⁹ 482 F.2d 929, 932 (9th Cir.1973).

¹⁹⁰ *United States v. Moore*, 483 F.2d 1361 (9th Cir. 1973).

¹⁹¹ 392 U.S. at 21.

¹⁹² *Id.* at 22.

¹⁹³ See N.Y. Times, Nov. 26, 1972, at 1, col. 2. The record is not entirely comforting in this respect. Over 33% of the arrests have been for possessory drug offenses, and the remainder for such miscellaneous charges as parole violation and illegal entry into the United States.

A report of the Commerce Committee on the U.S. Senate states: [I]t has been reported that certain classes of individuals, such as young people and oddly attired individuals have been harassed and intimidated by general frisks or shakedown without any prior indication or probable cause that such persons were unlawfully carrying weapons. We find this a deplorable practice, abhorrent to individual freedom and the Bill of Rights of the U.S. Constitution. See S. REP. No. 93-13, 93d Cong., 1st Sess., at 9 (1973).

General Benjamin O. Davis, Ass't Secretary of Transportation, has also expressed some concern: "I think it's true that some people have been doing some searching for narcotics violations. And I think there is a danger in

carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crimes."¹⁹⁴

The *Lopez* court sustained the constitutionality of the anti-hijacking system by relying heavily on the profile to provide some factual basis on which to hinge the magnetometer search and the subsequent stop-and-frisk. But as already noted, the profile does not purport to identify potential hijackers; it is merely a compilation of innocuous characteristics. The profile is simply a means of classifying a person "as someone who should be looked at further."¹⁹⁵

Later cases like *Epperson* and *Slocum* appear to have abandoned the need for a factual basis insofar as the magnetometer search is concerned. These cases justify the magnetometer search as "reasonable" in view of the exigent circumstances and the minor inconvenience to travelers, and further sustain the reasonableness of the subsequent stop-and-frisk on the basis of the magnetometer. However, cases in the Third Circuit have found the stop-and-frisk to be reasonable despite the absence of a prior magnetometer search,¹⁹⁶ while cases in the Second Circuit found a stop-and-frisk to be unreasonable in the absence of a prior magnetometer search.¹⁹⁷ Some of the recent cases in the

this form of civil rights standpoint that has me worried." N.Y. Times, Nov. 26, 1972, at 1, col. 1.

See also, J. AREY, *THE SKY PIRATES* 242 (1972) (quoting Frank Cardman, Director of Security for Pan American World Airways):

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

And see the following testimony by FAA Administrator Schaffer:

We have law enforcement information now available. In other words, we are going to scrub down the manifest. People buy tickets on airlines and make reservations; once their name appears, we then start the process. Is this man evading the law? Is he a known international operator? Has he any record at all? And it is possible we will even find out about their medical record, meaning, have they a record of being in mental institutions, and so on, because a great many of our hijackings have involved mentally deranged people taking this as a way of getting recognition or a way of calling attention to themselves, or for whatever other purposes.

So, if we have all of this information being brought to bear, gathered from all the sources available to us, intelligence sources, law enforcement sources, airline security, local police, all of this, there is a good chance that we will really have an antiseptic passenger list, in time.

Aircraft Hijacking Hearings, note 183, *supra*, at 102. In another study, statistics indicated that fourteen out of every fifteen persons of those searched under the present anti-hijacking system were found not to be carrying weapons. *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

¹⁹⁴ *United States v. Davis*, 482 F.2d 893, 909 (9th Cir. 1973) (footnote omitted).

¹⁹⁵ AREY at 241.

¹⁹⁶ *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971).

¹⁹⁷ *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973).

Fifth and Seventh Circuits have gone so far as to hold airport searches, in general, *sui generis* under the fourth amendment, analogous to a "border search," and hence not burdened by the usual reasonableness requirements of most searches and seizures.¹⁹⁸

Since the results of either a personal "profile" or a magnetometer search can provide no more than a hunch as the basis for a subsequent frisk, searches based on them necessarily involve no more than "mere suspicion." By paring the need for specific articulable facts, the three-factor rule in *Terry* has been truncated to a two-factor rule whereby anyone may be stopped and frisked, provided the governmental interest is substantial and the personal intrusion slight, and regardless of whether there exists any "specific and articulable facts."

Moreover, recent decisions indicate a still further expansion of *Terry* by omitting considerations of the extent of invasion the search entails. In *Cyzewski*¹⁹⁹ the court went so far as to authorize the seizure and search of a passenger's checked luggage on the basis of suspicious conduct, rather than probable cause. No case had ever gone that far before. Judge Thornberry, in his dissenting opinion, was noticeably alarmed at the far reaching decision by the majority.²⁰⁰ Reviewing previous less than probable cause searches, he concluded:

None of them authorized retrieval and search of a distant piece of luggage or other distant property on the basis of facts creating only suspicion of wrongdoing.²⁰¹

He further compared the majority's holding with the holding in *Chimel v. California*²⁰² and concluded that "[e]ven a probable-cause arrest of a suspect would not legitimate a search of his checked luggage as incident to the arrest."²⁰³ Thus, using the rationale of the great danger which skyjacking represents, the court has upheld an unlimited search, heretofore unknown under circumstances presenting less than probable cause for search and seizure.

The *Terry* doctrine stands as the most significant exception to the probable cause requirement of the fourth amendment. It is not surprising, therefore, that courts have attempted to bring airport searches within its rationale. However, under the currently prevailing conditions at airports, *Terry* has been removed from its factual setting. For, if the reasonableness of a search

¹⁹⁸ *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973); *United States v. Fern*, 484 F.2d 666 (7th Cir. 1973).

¹⁹⁹ 484 F.2d 509 (5th Cir. 1973).

²⁰⁰ *Id.* at 515-18.

²⁰¹ *Id.* at 517.

²⁰² 395 U.S. 752 (1969).

²⁰³ 484 F.2d at 517.

is to be measured solely by the urgency of the government's interest, without requiring facts to warrant the intrusion, the concepts of reasonable suspicion and probable cause become dependent upon and defined by each new public crisis to the point where the protections afforded by the fourth amendment no longer exist.

I do not believe that *Terry* can constitutionally be expanded to cover the airport anti-hijacking situation, and attempts to do so can only lead to a potentially serious dilution of the protections embodied in the fourth amendment. *Terry*, anchored to the ability of the experienced police officer to recognize suspicious conduct, was not meant to be extended to the inarticulate hunches supplied by the behavioral profile and magnetometer as interpreted by airline personnel unschooled in the nuances of law enforcement. Nevertheless, if the present screening system is to be discarded, an alternative strategy must be devised to protect air commerce from the unacceptable risk of skyjacking.

The airline industry claims that policing the airports is a responsibility of the federal government.²⁰⁴ On the other hand, the federal government alleges that it is the responsibility of the airlines to provide the necessary funding for law enforcement at the airport.²⁰⁵ It is my opinion that law enforcement should not be left to the airlines, but rather should be put in the hands of experienced law enforcement officials who could perhaps, though not likely in light of past experience, operate within the constitutional limitations imposed on searches by the fourth amendment and on frisks by *Terry*.²⁰⁶ I would prefer a solution which would "not leave an airport and its environs an enclave where the Fourth Amendment has taken its leave."²⁰⁷

There have been various proposals offered for solving the threat of skyjacking.

Since fourth amendment constitutional rights may be waived by consent, as long as that consent is unequivocal and unambiguous, and not in any way the result of fraud, duress or coercion,²⁰⁸ it has been suggested that a passenger's right to air travel could be conditioned on his consenting to being searched prior to embarkation.²⁰⁹ Under the current system, the consent rationale advanced by the Government does not amount to consent freely and voluntarily given, inasmuch as the passenger

²⁰⁴ See 118 CONG. REC. 15, 622 (daily ed. Sept. 21, 1972).

²⁰⁵ See *Id.*

²⁰⁶ See in general, McGinley and Downs, *Airport Searches and Seizures — A Reasonable Approach*, 41 *FORD. L. REV.* 293, 320-21 (1972).

²⁰⁷ 480 F.2d at 414.

²⁰⁸ *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

²⁰⁹ *Cf. Airport Security Searches and the Fourth Amendment*, 71 *COLUM. L. REV.* 1039, 1046-47 (1971); 328 F. Supp. at 1093. *Contra*, *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972).

is unaware of his waiver. The current procedure thus falls outside the contours of the fourth amendment. However, if the airline ticket agent were to inform the passenger that he must consent to a weapons search before boarding the aircraft, the passenger's decision to board would operate as a valid waiver of his fourth amendment rights. A final assurance that the consent to search is freely and voluntarily given could be obtained by the execution of a written consent form at the time the ticket is purchased. Furthermore, the signs which now advise boarding passengers of a possible search should be retained. The consent procedure suggested above would satisfy the constitutional requirements that a consent to be searched must be knowingly and voluntarily given.

However, this general consent approach raises the question whether the constitutional right to travel may be predicated on the relinquishment of fourth amendment rights.²¹⁰ It is hardly persuasive to suggest that there are alternative modes of travel since, in many situations, flying may be the only practical means of transportation.

Another proposal has been to place airport searches in a *sui generis* position analogous to border searches.²¹¹ Border searches have been held to qualify as express exceptions to the reasonableness requirement of the fourth amendment — “‘unsupported’ or ‘mere’ suspicion alone is sufficient to justify [a border] search for purposes of customs law enforcement.”²¹²

Airport searches are arguably analogous to border searches in that the objective in each case is the discovery of contraband rather than the detection of past crime.²¹³ However, it must be recognized that, historically, border searches have applied only to persons entering the country, not to those traveling within or leaving it.²¹⁴ Placing airport searches in a special category would certainly be a more direct and effective approach to the problem than the present ineffective and unconstitutional expansion of the *Terry* rationale.

“Air hijacking will cease to be a problem when the nations of the world agree to refuse sanctuary and to return the sky-jacker to the prosecuting authorities in his own country.”²¹⁵ Although such an achievement is possible, it is highly improbable. Hence, we are left with no other alternative than imple-

²¹⁰ See *United States v. Guest*, 383 U.S. 745, 759 (1966).

²¹¹ See notes 114-16 and accompanying text, *supra*.

²¹² *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir. 1966), *cert. denied*, 385 U.S. 977 (1966).

²¹³ *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1050-51 (1971).

²¹⁴ *Boyd v. United States*, 116 U.S. 616 (1886).

²¹⁵ 41 FORD. L. REV. 293, 324.

menting a constitutional airport search procedure which could be applied uniformly throughout this country. The United States Supreme Court should take cognizance of the diversity of decisions within the several circuits and afford them guidance by deciding this airport search issue once and for all. It is submitted that only the Supreme Court can end the prevailing practice, engaged in by the various circuits, of justifying the unlimited searches at airports on the rationale of *Terry*.

However, until the day when international cooperation completely forecloses asylum to the skyjacker, the suggested consent procedure would substantially facilitate the attainment of the ultimate goal of protecting the passengers and crews of our nation's airlines, without curtailing any of their constitutional rights.

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