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Airport Security Systems and the Fourth Amendment

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AIRPORT SECURITY SYSTEMS AND THE FOURTH AMENDMENT

The first skyjacking of a commercial airliner within the United States occurred in 1961. As a result of more than 150 successful hijackings[1] of domestic flights in the next eleven years, a massive national airport security system was instituted.[2] The security procedure has undergone substantial metamorphosis since its inception in 1972. Presently, all passengers are required to undergo an inspection procedure prior to boarding the aircraft. Typically, a passenger is required to empty the contents of his pockets into a transparent plastic bag which, together with his carry-on baggage, is visually inspected. He is then required to pass through a metal detection device (magnetometer) commonly situated in a portal. Should he activate the magnetometer, he is usually allowed a second test after removing any metal object inadvertently left on his person. Should the magnetometer again register a positive reading, he is required to produce identification and an explanation; should either be unsatisfactory, a more thorough and intrusive search may be conducted.[3]

The prohibition against unreasonable searches and seizures guaranteed by the fourth amendment is enforced by an exclusionary rule which bars from use in a subsequent criminal prosecution evidence obtained in violation of the amendment.[4] There can be no doubt that the security procedure currently being employed constitutes a search within the meaning of the fourth amendment. The United States Supreme Court, in *Katz v. United States*,[5] demonstrated that the fourth amendment protects not merely property rights, but personal privacy, and that such privacy could be invaded by electronic means.[6]

The amendment has been interpreted by the Supreme Court to

1. An excellent summary of these events can be found in McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORD L. REV. 293 (1972).

2. For law review commentary on the skyjacking problem see Abramovsky, *The Constitutionality of the Anti-Hijacking Security System*, 22 BUFFALO L. REV. 123 (1972); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORD L. REV. 293 (1972); Wright, *Hijacking Risks and Airport Frisks: Reconciling Airline Security with the Fourth Amendment*, 9 CRIM. L. BULL. 491 (1973); Comment, 71 COLUM. L. REV. 1039 (1971); Note, 39 TENN. L. REV. 354 (1972).

3. *See* Wright, *Hijacking Risks and Airport Frisks: Reconciling Airline Security with the Fourth Amendment*, 9 CRIM. L. BULL. 491 (1973).

4. The exclusionary rule applies to both federal and state courts. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

5. 389 U.S. 347 (1967).

6. Technological subtleties regarding the nature of the magnetometer as an entirely passive instrument emitting no radiation or other emanation are entirely irrelevant.

be a restriction on governmental power[7] rather than that of private individuals[8]; thus any application of the fourth amendment to an airport security system must be predicated on a showing of "state action." The specter of the federal government in the airline industry is undeniable and ubiquitous. The fact that an airline is a public carrier regulated by the federal government may, by itself, be sufficient to warrant application of the fourth amendment[9]; but, in addition, a federal charter is a prerequisite to airline operation, tariffs and flight paths are prescribed, and airline policy is subject to F.A.A. and C.A.B. approval. Similarly, the imposition of airline security measures by federal statute[10] and regulation[11] should suffice to justify application of the constitutional prohibition.[12]

A strong argument for the application of the fourth amendment to the airport search can be made by analogy to Supreme Court decisions in the area of racial discrimination. In *Burton v. Wilmington Parking Authority*,[13] the Court found sufficient state action to warrant application of the fourteenth amendment in the placing of state "power, property, and prestige behind the admitted discrimination"[14] in the leasing of a public building to a racially discriminatory restaurant. The significance of this decision lies in the fact that most airlines lease space in public airports which are owned and operated by state or federal agencies. Further, in *Shelley v. Kraemer*[15] state

7. "[I]ts protection applies to government action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . ." Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

8. Burdeau v. McDowell, 256 U.S. 465 (1921); United States v. McGuire, 381 F.2d 306, 313 n.5 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); Barnes v. United States, 373 F.2d 517, 518 (5th Cir. 1967); United States v. Goldberg, 330 F.2d 30, 35 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964); United States v. Blum, 329 F.2d 49, 52 (2d Cir.), *cert. denied*, 377 U.S. 993 (1964).

9. *See* Public Util. Comm. v. Pollack, 343 U.S. 451 (1952).

10. *See* 49 U.S.C. §1511 (1970).

11. *See* 14 C.F.R. §121.538 (1972).

12. The Ninth Circuit has held fruits of a search conducted by airline officials solely in enforcement of a federal statute inadmissible when the search fails to meet the fourth amendment standards. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). The court concluded that such a search "was in substance a federal search cast in the form of a carrier inspection to enable the officers to avoid the requirements of the Fourth Amendment." *Id.* at 5. *See also* Gambino v. United States, 275 U.S. 310, 316-17 (1927); Gold v. United States, 378 F.2d 588 (9th Cir. 1967). The Second Circuit has explicitly rejected the *Corngold* rationale. *See* United States v. Blum, 329 F.2d 49 (2d Cir.), *cert. denied*, 377 U.S. 993 (1964); United States v. Averell, 296 F. Supp. 1004, 1010 (E.D.N.Y. 1969).

13. 365 U.S. 715 (1961).

14. *Id.* at 725.

15. 334 U.S. 1 (1948).

action was found in judicial enforcement of a racially restrictive covenant. Thus, even should the airport search be regarded as the action of a private entity, employment in an ensuing criminal prosecution of the fruits of such a search might invoke the fourth amendment prohibitions.[16]

The fourth amendment contains two clauses, the warrant clause and the reasonableness clause. The exact relationship between these two clauses has been a subject of some controversy, the traditional view being that the clauses are complementary; that is, searches conducted without warrants are per se unreasonable except under narrowly prescribed circumstances.[17] Although there has been the development of limited exceptions to the warrant requirement, probable cause[18] has generally been a necessary ingredient of a constitutionally permissible search, whether conducted with or without a warrant.[19] The probable cause concept is an elastic one but there are certain appurtenances to the formula about which there can be no doubt; more than mere suspicion[20] or good faith[21] on the part of the

16. A more esoteric justification has been proposed by Professor Adolph Berle, suggesting that, under certain circumstances, corporations should be directly subject to constitutional mandates irrespective of governmental involvement. *See* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952).

17. "[E]xcept in certain carefully defined classes of cases, a search of private property without consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara v. Municipal Ct., 387 U.S. 523, 528-29 (1967).

"[S]earches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967)(Footnotes omitted.)

18. The generally accepted definition of probable cause was given in *Stacey v. Emery*, 97 U.S. 642, 645 (1878) and quoted in *Carroll v. United States*, 267 U.S. 132, 161 (1925): "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." Probable cause is the most commonly used term, but the Supreme Court has indicated that substantially similar terms have the same meaning. *See* Ker v. California, 374 U.S. 23, 25 (1963)(reasonable belief); Wong Sun v. United States, 371 U.S. 471, 478 n.6 (1963)(reasonable grounds). The standard is the same for state and federal activities. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Ker v. California, 374 U.S. 23 (1963).

19. Chambers v. Maroney, 399 U.S. 42, 51 (1970); Chimel v. California, 395 U.S. 752 (1969); Schmerber v. California, 384 U.S. 757 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Draper v. United States, 358 U.S. 307 (1959); United States v. Jeffers, 342 U.S. 48 (1951); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

20. Wong Sun v. United States, 371 U.S. 471, 479 (1963)(mere suspicion); Henry v. United States, 361 U.S. 98, 101 (1959)(strong reason to suspect).

21. Beck v. Ohio, 379 U.S. 89, 97 (1964); Henry v. United States, 361 U.S. 98, 102 (1959).

investigating officer is exacted. In the light of these requirements it is patent that an indiscriminate search of *all* who wish to travel by air falls far short of the probable cause standard and that no valid warrant could be issued.

However, certain exceptions to the warrant requirement have developed: searches incident to arrest[22] or in "hot pursuit"[23]; evidence discovered in plain view[24]; searches conducted with the consent of the suspect[25]; and those under exigent circumstances.[26] Typical airport security measures can hardly be justified as searches incident to arrest, since no arrest is made until the search has been completed and contraband discovered.[27] However, should a passenger be singled out by the magnetometer and fail to properly identify himself or provide a satisfactory explanation, it is arguable that an arrest[28] occurs at this point since rarely would airport officials permit such an individual to walk freely away, and that a subsequent search might thus qualify as a search incident to arrest. Such an argument, however, disregards the fact that the exception is predicated on the existence of a *valid* arrest based on probable cause.[29] Clearly, the requisite probable cause element cannot be furnished retrospectively by evidence unearthed in a post-arrest search.[30]

That a search conducted with the consent of the subject is an exception to *both* the warrant and probable cause requirements is well established.[31] A passenger's consent to be searched might con-

22. Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964); Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132 (1925).

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

24. Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23, 36-37 (1963).

25. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); Stoner v. California, 376 U.S. 483 (1964).

26. Schmerber v. California, 384 U.S. 757 (1966).

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

28. Arrest is customarily defined as the taking of a person into custody. Characteristically, there is a requirement of some actual restraint of the person (*i.e.*, that mere words are insufficient) or submission by the person to the custody of the arresting officer. Nevertheless, for purposes of the *Miranda* requirements, Chief Justice Warren has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way*." Miranda v. Arizona, 384 U.S. 436, 444 (1966). (Emphasis added.)

29. Wong Sun v. United States, 371 U.S. 471 (1963); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

30. *See* United States v. Lefkowitz, 285 U.S. 452, 467 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356 (1931).

31. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Vale v. Louisiana, 399 U.S.

ceivably be gleaned from his undertaking to board an airliner in the face of widespread public awareness of the existence of airport security measures and conspicuously posted signs advising that all passengers and baggage are subject to search. Traditionally, however, a consensual search must be based on the individual's unequivocal and specific consent, voluntarily and intelligently given, unadulterated by any innuendo of constraint[32]; and such stringent requirements would hardly permit an inference of a passenger's consent from his attempting to board a commercial airliner. In addition, under the doctrine of implied coercion, acquiescence to apparent lawful authority or consent given in impliedly coercive circumstances is invalid and evidence unearthed in such a search inadmissible.[33] Conceding that an officer's mere presence does not invalidate consent,[34] a request that a passenger submit to a search, when made by an airport security official, appears to be cloaked in the mantle of lawful authority.

Recently, however, the United States Supreme Court in *Schneckloth v. Bustamonte*[35] may have undermined the cornerstones of the traditional consent search edifice.[36] The Court confronted the question of what indicia of voluntariness will support a valid consent search, indicating that voluntariness is a question of fact to be determined from all the circumstances.[37] More specifically, the Court decided that an individual need not be apprised of his right to refuse consent,[38] and that proof of his subjective knowledge of his right to refuse consent is not an indispensable ingredient of a valid consent search.[39] The doctrine of implied coercion seems unimpaired by

30, 35 (1970); Katz v. United States, 389 U. S. 347, 358 (1967); Zap v. United States, 328 U.S. 624, 630 (1946); Davis v. United States, 328 U.S. 582, 593-94 (1946).

32. Bumper v. North Carolina, 391 U.S. 543, 548 (1969); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921); United States v. Smith, 308 F.2d 657 (2d Cir. 1962); United States v. Page, 302 F.2d 81, 83 (9th Cir. 1962).

33. Bumper v. North Carolina, 391 U.S. 543 (1968); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921).

34. *See* United States v. Rutheiser, 203 F. Supp. 891, 892 (S.D.N.Y. 1962).

35. 412 U.S. 218 (1973).

36. The word "may" is used advisedly. Although *Schneckloth* reflects an alarmingly severe departure from the traditional fabric of the consent search, the Court was far from unanimous. The opinion was written by Justice Stewart. Justice Blackmun filed a concurring opinion as did Justice Powell (in whose opinion Chief Justice Burger and Justice Rehnquist joined). There were three dissenting opinions (Justices Douglas, Brennan, and Marshall). In addition Justice Stewart described his holding as a narrow one. *Id.* at 248.

37. *Id.* at 248-49.

38. *Id.* at 229-30.

39. *Id.* at 234.

Schneckloth, but the full import of the case can only be clarified by subsequent decisions.

Although not specifically provided for in the constitution, freedom to travel has long been recognized as a fundamental right.[40] Quite obviously, a passenger is not compelled to travel by air, but in many situations there is no realistic alternative; therefore, may passage on a commercial airliner be conditioned on a waiver of the fourth amendment? Although, as a general rule, a *privilege* may be conferred contingently, such a procedure is constitutionally infirm if the suspensive condition is the renunciation of a federal constitutional right.[41] Thus predicating the exercise of the constitutionally guaranteed right to travel on relinquishment of the right to privacy cannot be sustained.

The other theory concerning the relationship between the warrant and reasonableness clauses of the fourth amendment is that the clauses are severable; that is, warrantless searches need only be judged by the standard of reasonableness. Support for this view can be found in *Terry v. Ohio*.[42] In upholding the validity of a limited search for weapons conducted without a warrant and in the absence of probable cause, the Supreme Court declared that "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[43] Reasonableness, however, was predicated on the existence of certain objective articulated criteria. An indiscriminate search of all passengers can scarcely be justified under this stop and frisk rationale. Considering the type of individual who has the inclination and financial resources to fly, such a search could be based on nothing more than inchoate and unparticularized suspi-

40. Although there have been some differences of opinion as to the sources of the right to travel, it has been firmly established as fundamental. The right has been held to derive from the privileges and immunities clause, the due process clause, the commerce clause, and general constitutional principles. *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958); Edwards v. California, 314 U.S. 160, 180-86 (1941); Twining v. New Jersey, 211 U.S. 78, 97 (1908).

41. It has been declared unconstitutional to condition an assertion of a fourth amendment right on a waiver of the fifth amendment. *Cf.* Simmons v. United States, 390 U.S. 377 (1968). Also it is unconstitutional to condition other benefits on surrender of constitutional guarantees. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance benefits); Sherbert v. Verner, 374 U.S. 398 (1963)(unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemptions); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (public employment).

42. 392 U.S. 1 (1968). *See also* Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968).

43. 392 U.S. 1, 9 (1968).

cions, grounds unequivocally condemned in *Terry*.[44] *Terry* and its companion cases do, however, suggest what, when analogized to another species of search, may be the utlimate rationale under which the airport security system might be justified.

Border searches[45] have always been exempt from the probable cause requirement of the fourth amendment.[46] Any customs official may stop and search any vehicle, beast, or person arriving in the United States *on which or on whom he suspects* there is contraband.[47] Additionally, customs officials are authorized to search any vehicle or vessel at any place in the United States, and to use all necessary force to compel compliance.[48] Furthermore, immigration officials are authorized to conduct searches for illegally entered aliens within a reasonable distance from any external boundary of the United States.[49] These searches without probable cause have been justified as historical aberrations because the Act which sanctioned them was enacted by the same Congress which proposed the Bill of Rights. Thus, it is said, they were intended to be outside the prohibition of the fourth amendment.[50] Yet it is well established that more than mere suspicion is required to sustain border searches entailing seriously intrusive invasions.[51] It appears, therefore, that the explanation underlying the border search exception does not lie in a vague notion of contemporaneity with the passage of the fourth amendment, but in the fact that such searches, in light of the conditions under which they must be made, meet the reasonableness test.

This same justification may grant constitutional validity to the airport security system. The possibility posed by the skyjacking phenomenon of disaster and loss of life of catastrophic proportions

44. 392 U.S. 1, 26 (1968).

45. For more detailed information on border searches see Comment, 10 ARIZ. L. REV. 457 (1968); Comment, 53 CORNELL L. REV. 871 (1968); Comment, 77 YALE L.J. 1007 (1968).

46. *See* Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967); Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

47. 19 U.S.C. § 482 (1970).

48. *Id.* § 1581(a) (1970).

49. *Id.* § 1357(a) (1970).

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

51. *See* Ker v. California, 374 U.S. 23, 33-34. (1963)(for the proposition that special problems of enforcement should be given weight in determining the reasonableness of a search). For cases in which, because of the seriousness of the invasion of privacy, the courts have required something more than mere suspicion to sustain a border search, see United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

and the magnitude of the task of prevention seem to justify the rather inoffensive intrusion which the search procedure entails. An individual attempting to board an airliner should be aware that a search will be made, and since the relatively non-intrusive personal search at the airport is indiscriminately administered to a class of persons (who are not stigmatized by the classification), such searches arguably lack the quality of insult felt by an individual singled out for an intrusive search. The Supreme Court has said, "[t]here 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."[52] However, such a search becomes constitutionally impermissible when it exceeds the limits of reasonableness. The relatively minor intrusion, warranted by the danger of air piracy, would seem to exceed its permissible limits when the object of the search is something other than a weapon or other instrumentality which might be employed to commandeer an airplane.

The great majority of arrests arising from the anti-hijacking security system have been unrelated to the skyjacking problem: arrests for possession of narcotics outnumber those for possession of weapons by a ratio of more than two to one and more than one-third of the total arrests involve charges of illegal entry, parole violation, flight to avoid prosecution, and absence without leave from the armed services.[53] Admittedly, in a normal search situation, an officer legally searching for materials concerning one crime may validly seize evidence of a different offense which he happens upon;[54] but such searches already possess independent grounds for their validity, whereas the airport search is justified only by its reasonableness in light of its avowed purpose. The United States Supreme Court, in *Sibron v. New York*,[55] refused to condone a self-protective search for weapons where the circumstances failed to support a reasonable inference that the person searched was armed and dangerous. If the airport security system is to maintain its validity, the principle espoused in this decision must be applied with vigor and determination and the airport security system should be firmly re-directed to the accomplishment of the end for which it was created.

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52. Terry v. Ohio, 392 U.S. 1, 21 (1968).

53. *See* NEW YORK TIMES, Dec. 24, 1972, § 4, at 2, col. 1; NEW YORK TIMES, Nov. 26, 1972, § 1, at 1, col. 1.

54. Stanley v. Georgia, 394 U.S. 557 (1969); Harris v. United States, 331 U.S. 145 (1947), *overruled on other grounds*, Chimel v. California, 395 U.S. 752 (1969); Klor v. Hannon, 278 F. Supp. 359 (C.D. Cal. 1967).

55. 392 U.S. 40 (1968).