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Airport Freight and Passenger Searches: Application of Fourth Amendment Standards

AIRPORT FREIGHT AND PASSENGER SEARCHES: APPLICATION OF FOURTH AMENDMENT STANDARDS

The systematic employment of searches to prevent aircraft hijackings and the shipment of contraband has become a common practice in the nation's airports. These searches, arising in a somewhat unusual context, present a novel challenge to traditional liberties. Because of the possibilities for abuse, it is necessary to determine the extent to which such practices threaten an abridgement of the fourth amendment rights of individuals utilizing the services of the airlines industry. In examining this question, this Note will focus upon the justifications and criticisms of freight and passenger searches. Since different considerations apply to each type of search, they will be discussed separately.

AIRPORT FREIGHT SEARCHES

The fourth amendment to the United States Constitution was adopted in response to the use of general warrants and writs of assistance by British authorities.[1] To prevent the recurrence of such practices, the Constitution established the basic standard for a permissible search. To be valid under the Constitution, a search must be reasonable and, with limited exceptions, pursuant to a warrant based upon probable cause.[2]

1. *See* Byars v. United States, 273 U.S. 28, 33-34 (1927). *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 51-78 (1937); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

The fourth amendment 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." U.S. CONST. amend. IV.

2. There are two theories of the relationship between the "reasonableness" and "warrant" clauses of the fourth amendment. One theory suggests that the clauses are complementary; i.e., that a warrant is a necessary condition of "reasonableness" except in unusual circumstances. Adherents of the other theory treat the clauses as severable and argue that warrantless searches should be judged only by the standard of reasonableness. It has been suggested that with respect to searches, as opposed to seizures, the Supreme Court has adopted the first position. Player, *Warrantless Searches and Seizures*, 5 GA. L. REV. 269 (1971). *See also* MCCORMICK ON EVIDENCE § 171 (2d ed. 1972) [hereinafter cited as MCCORMICK]. This view is supported by the language of several recent Supreme Court decisions. For example, the court has stated that "except 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), and that "searches conducted outside the judicial process . . . are per se unreasonable under the Fourth Amendment—subject only

The exceptions to the warrant requirement are narrowly defined and strictly construed to ensure fidelity to the fundamental right against unreasonable searches and seizures.[3] The Supreme Court has declared that the principles of the fourth amendment, "so carefully embodied in the fundamental law, [are] not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the Constitutional right." [4]

To the extent that airport searches proceed without judicial authorization by warrant, there is a possibility of infringement upon fourth amendment rights.[5] In the context of airport searches of baggage and freight not categorized as carry-on luggage, consideration must be given to the applicability of the fourth amendment and the concomitant rule of exclusion of illegally-obtained evidence, the concept of state action, and the warrant requirement and its relevant exceptions. Throughout the discussion, an attempt will be made to delineate the standards by which the validity of airline freight inspections should be judged in order to balance the interests of the airlines, law enforcement authorities, and the individual.[6]

Application of the Fourth Amendment and the Exclusionary Rule to Airline Inspections

Until *Weeks v. United States*,[7] it was accepted at common law and under the Constitution that the admissibility of evidence at trial was unrelated to any illegality of the means by which it was acquired.[8] Al-

to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

3. *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Katz v. United States, 389 U.S. 347 (1967); Jones v. United States, 357 U.S. 493, 499 (1958); Boyd v. United States, 116 U.S. 616, 635 (1886).

4. Byars v. United States, 273 U.S. 28, 33-34 (1927).

5. National attention recently has been focused upon airport security measures. *See* note 145 *infra*. The issue represents an area of national concern as well as a constitutional challenge. *See generally* Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).

6. The goal, of course, should be to provide the citizen with protection of provisions of the fourth amendment where applicable, while providing adequate protection to the rights of the airlines to control the types of goods which they ship. It is also necessary to bear in mind the law enforcement problems which arise in the context of procedures designed by the airlines to protect themselves.

7. 232 U.S. 383 (1914).

8. MCCORMICK, *supra* note 2, § 165; 8 WIGMORE ON EVIDENCE § 2183 (McNaughton rev. 1961); 29 AM. JUR. 2d *Evidence* § 408 (1967).

though in *Weeks*, the Supreme Court declared that evidence obtained by federal officials in violation of the fourth amendment was inadmissible in federal prosecutions, this rule of exclusion was not applicable in state prosecutions nor could it be used to exclude from federal prosecutions evidence illegally obtained by state officials. Moreover, since a historic analysis of the Constitution indicated that the fourth amendment was intended as a limitation upon sovereign authority[9] rather than a restraint on the private activities of individuals, it was held that the exclusionary rule could not be applied to searches and seizures conducted by private citizens.[10]

The *Weeks* rule, however, subsequently was extended to include conduct of state as well as federal officials in both state and federal prosecutions.[11] A significant step in this evolution was the development of the "silver platter" doctrine[12] and its ultimate repudiation in *Elkins v. United States*.[13] Under the "silver platter" doctrine, evidence acquired by state officers, even though under conditions violative of the fourth amendment, was admissible in a federal court as long as federal authorities had not taken part in the unreasonable search and seizure. In applying this theory, the courts were forced to develop tests to determine the degree of federal involvement necessary to convert an illegal state search into a federal search and thus justify the imposition of the rule of exclusion.[14]

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9. "The Fourth Amendment gives protection against unlawful searches and seizures... its protection applies to governmental actions." Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

10. Burdeau v. McDowell, 256 U.S. 465, 475 (1921); *accord*, Barnes v. United States, 373 F.2d 517, 518 (5th Cir. 1967) (per curiam); United States v. Goldberg, 330 F.2d 30, 35 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964); *cf.* United States v. Blum, 329 F.2d 49, 52 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

11. Wolf v. Colorado, 338 U.S. 25 (1949), extended fourth amendment standards to searches conducted by state officials but did not require the states to employ the exclusionary rule in their own trials. Elkins v. United States, 364 U.S. 206 (1960), applied the rule of exclusion to federal trials where the evidence had been improperly obtained by state officials. Finally, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court, relying on both the fourth and fourteenth amendments, applied the exclusionary rule to state trials.

12. The term was first used in Lustig v. United States, 338 U.S. 74, 79 (1949), by Justice Frankfurter.

13. 364 U.S. 206 (1960). For a discussion of the "silver platter" doctrine see Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).

14. *See, e.g.*, Byars v. United States, 273 U.S. 28 (1927) (where government participation in a state search is enough to make it a joint operation, it is as if search were conducted solely by sovereign authority); Gambino v. United States, 275 U.S. 310 (1927)

Although it has been argued that fourth amendment standards should apply to searches conducted by private parties,[15] the courts,[16] in the absence of a Supreme Court mandate to the contrary, have continued to admit evidence under circumstances which, if federal or state officials had participated, would require exclusion of such evidence.[17] Consequently, in order to hold current airline inspection procedures subject to the requirements of the fourth amendment, it is necessary to find that such procedures constitute more than mere private searches. The most obvious way to do so is to find sufficient government involvement in airline inspections to warrant the conclusion that the airline is acting as an agent of the government.[18] Despite the demise of the "silver platter" doctrine,[19] the tests developed thereunder with regard to federal participation in state searches may be applicable by analogy to government involvement in private searches. In both situations, the inquiry concerns a determination of the degree of government participation necessary to invoke the standards of the fourth amendment.

Direct Government Involvement in Airline Inspections

The leading federal case on government participation in an airport freight search is *Corngold v. United States*,[20] which involved unusually direct government action. Customs agents had placed the defendant under surveillance. Employing a radiation detector and determining that a package delivered by the defendant to Trans World Airlines (TWA) for shipment probably contained illegally imported watch movements, the government agents assisted an airline employee in opening the package. Although an inspection clause in the TWA tariff gave the airline the right to inspect shipments "to determine their acceptability and to

(where search is solely in aid of the enforcement of a federal statute and fourth amendment standards are not met, the fruits of the search are inadmissible).

15. United States v. Goldberg, 330 F.2d 30, 35 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964). *See* McCormick, *supra* note 2, § 168, at 372.

16. Hostility to the exclusionary rule on the part of state courts may be inferred from the Supreme Court's discussion in Elkins v. United States, 364 U.S. 206 (1960).

17. McCormick *supra* note 2, § 168, at 372. *See* United States v. McGuire, 381 F.2d 306, 313 n.5 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); United States v. Goldberg, 330 F.2d 30, 35 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964).

18. *See* United States v. Cangiano, 464 F.2d 320 (2d Cir. 1972); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); United States v. Averell, 296 F. Supp. 1004 (E.D.N.Y. 1969); People v. McGrew, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).

19. *See* notes 12-14 *supra* & accompanying text.

20. 367 F.2d 1 (9th Cir. 1966).

determine proper charges thereon," [21] the court determined that absent the request by government agents, the package would not have been opened.[22] From these factual determinations, the court further concluded that the airline inspection was conducted "[s]olely to serve the purposes of the government." [23] As a matter of law, it was held that:

> The fruits of a search conducted solely in aid of the enforcement of a federal statute, as this one was, are inadmissible when the search fails to meet Fourth Amendment standards. The 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.[24]

Although characterizing the activity as a federal search, the court declared that the evidence would have been excluded even if the airline employee had not acted solely to satisfy the government interest. Active government participation in the search rendered it a joint operation between the airline and the government. Evidence uncovered during a joint operation is excludable "even though the search would have been lawful had the federal agents not participated." [25] The court, however, distinguished the situation in which a carrier inspects packages for its own purposes, discovers contraband, and thereafter notifies appropriate authorities who secure a search warrant and conduct a search; under such circumstances, according to the court, the search would suffer no constitutional infirmities.[26] This dictum presumably encompasses the police search as well as the airline search entailed in such a situation.[27] Invalidation of the search in *Corngold* was consistent with the purposes

21. *Id.* at 4 n.3.

22. *Id.* at 5.

23. *Id.*

24. *Id.* (citation omitted). The court relied on Gambino v. United States, 275 U.S. 310 (1927).

25. 367 F.2d at 5-6. For this proposition, the court relied on tests for government participation announced in "silver platter" cases. *See* Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28 (1927).

26. 367 F.2d at 6. A state court subsequently applied the court's dictum in determining when the fourth amendment applies to airline inspections. People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972). A more detailed discussion of independent airline purposes appears at notes 42-52 *infra* & accompanying text.

27. For a discussion of some of the problems posed by a double search situation see notes 116-23 *infra* & accompanying text.

underlying the exclusionary rule.[28] Subsequent cases indicate that the decision had its desired effect by deterring similar government action.[29]

In determining whether there has been sufficient governmental involvement to characterize a private search as "a federal search, cast in the form of a carrier inspection,"[30] it is necessary to ascertain whether the search was the result of explicit sovereign inducement, instigation, or request, and whether government officials participated directly in the search. *Corngold* indicates that if, but only if, either of these elements is present, fourth amendment requirements are applicable. Except in the Second Circuit,[31] subsequent cases have applied the *Corngold* test in determining whether the actions of airline employees should be characterized as those of the government.[32]

Two years prior to *Corngold*, the Court of Appeals for the Second Circuit decided *United States v. Blum*,[33] in which a Railway Express Agency (REA) agent in California became suspicious of a package delivered to the express agency by a "Mexican" who had shipped a similar package the previous day.[34] The suspicious REA employee notified cus-

28. The policy basis for applying the rule of exclusion is to compel "respect for the Constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). In Mapp v. Ohio, 367 U.S. 643, 656 (1961), the Supreme Court confirmed that the principal purpose of the exclusionary rule is to deter unconstitutional practices. Justice Black's concurring opinion in *Mapp* suggested that fifth amendment rights against self-incrimination are violated when evidence procured in violation of the Constitution is admitted. *Id.* at 661, *criticized in* Bender, *The Retroactive Effect Of An Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 664-68 (1962).

29. *See* United States v. Cangiano, 464 F.2d 320 (2d Cir. 1972); Gold v. United States, 378 F.2d 588 (9th Cir. 1967). In neither of these cases did government agents repeat the mistake of requesting the airline to make a search. Instead, the FBI agents involved merely informed the airline of waybill discrepancies. Since the airline inspections were not the result of a government request but were deemed by the courts to be pursuant to independent airline interests, the evidence was not excluded. Both cases may properly be viewed as governmental reaction to *Corngold*.

30. 367 F.2d at 5.

31. *See* notes 33-38 *infra* & accompanying text.

32. *E.g.*, Gold v. United States, 378 F.2d 588 (9th Cir. 1967); Chaires v. State, 480 S.W.2d 196 (Tex. Crim. App. 1972).

33. 329 F.2d 49 (2d Cir.), *cert. denied*, 377 U.S. 993 (1964).

34. It is questionable whether the fact that the shipper was "Mexican" could provide probable cause to search. In United States v. Lopez, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971), the court based exclusion of evidence obtained by a search of the defendant on the grounds that there was no statistical evidence indicating a proclivity of the defendant's race towards hijacking. One of the reasons the defendant had been subjected to a search was his Latin-American descent. *See* note 249 *infra* & accompanying text.

toms agents, who, using an electronic device, determined that the contents of the package had been misdeclared on the waybill. The package was opened to expose illegally imported watch movements. Customs agents in New York were informed, and the previously shipped package was located. When electronic tests indicated the possible existence of contraband, the customs agents secured REA permission to open the package. Notwithstanding the existence of government instigation and direct participation, the validity of the search was upheld, the court basing its decision upon the right of inspection reserved in the REA tariff.

Although the Ninth Circuit rationale in *Corngold* draws the validity of *Blum* into question, decisions in the Second Circuit have continued to cite *Blum* with approval.[35] Indeed, in *United States v. Averell*, a New York federal district court explicitly indicated that *Corngold* was not followed in the Second Circuit.[36] In *Averell*, airline employees, suspicious of the contents of several trunks delivered to them for shipment, opened one trunk in the presence of Federal Bureau of Investigation (FBI) agents, who later opened the other trunks themselves. The crucial evidence in the case was gained from the contents of the trunks opened by the government agents.[37] In a jurisdiction applying the tests set forth in *Corngold*, the evidence obtained through government participation would have been excluded.[38]

The divergent holdings in the Second and Ninth Circuits appear to result from a conflict as to the vitality of tests employed by the Supreme Court in the "silver platter" cases. In those cases, the Court was concerned with the degree of federal influence permissible in a state search before that search could be characterized as one by the federal government. For example, in *Lustig v. United States*,[39] the Court commented:

35. In United States v. Cangiano, 464 F.2d 320, 324 (2d Cir. 1972) the Court of Appeals for the Second Circuit relied on *Blum* in holding that the carrier inspection at issue "was not so infused with governmental participation as to constitute a federal search. . . ."

36. 296 F. Supp. 1004, 1010 (E.D.N.Y. 1969) (citing *Blum* as authority).

37. *Id.*

38. *See, e.g.*, United States v. Rubin, 312 F. Supp. 950 (C.D. Cal. 1970), in which the court suppressed as evidence four cartons, which, however, were not necessary to conviction, while admitting into evidence two others. FBI agents, without a search warrant, had participated in opening the four cartons which were suppressed. The other two cartons were admitted because airline employees had opened them without the assistance of federal agents.

39. 338 U.S. 74 (1949).

> [A] search is a search by a federal official if he had a hand in it . . . . The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted solely by state officers. Evidence secured through such federal participation is inadmissible for the same considerations as those which made *Weeks v. United States* the governing principle in federal prosecutions.[40]

Although *Lustig* and the other "silver platter" cases have been overruled, the Court of Appeals for the Ninth Circuit in *Corngold*, in determining the degree to which the government may be involved in a private search before that search becomes subject to the commands of the fourth amendment,[41] referred to and employed tests similar to those applied in *Lustig*. In light of the similarity of analysis in the "silver platter" and private search cases, it is submitted that the application of such tests by analogy has merit. However, the Second Circuit, by continuing to follow *Blum*, apparently has rejected any such analogy.

Even courts adopting the position of the Ninth Circuit have been unwilling to find a violation of the fourth amendment and to apply the exclusionary rule where government officials have not directly instigated or participated in the private search.[42] This trend is consistent with the tests employed in the "silver platter" cases and has developed, in part, from the Ninth Circuit's limitation of *Corngold* in *Gold v. United States*.[43] In *Gold*, FBI agents informed the airline customer service manager that they had reason to believe that the contents of certain packages delivered to the airline were not accurately declared on the waybill and that the address the defendant had given was fictitious. The government agents neither divulged what they thought the packages to contain nor were present when the packages were searched by the airline man-

40. *Id.* at 78-79 (citation omitted).

41. *See* notes 20-27 *supra* & accompanying text.

42. *See, e.g.*, United States v. Burton, 341 F. Supp. 302, 305 (W.D. Mo. 1972); Chaires v. State, 480 S.W.2d 196, 198 (Tex. Crim. App. 1972).

43. 378 F.2d 588 (9th Cir. 1967).

ager and found to contain pornographic films. In permitting introduction of the films as evidence, the court noted that the search was "an independent investigation by the carrier for its own purposes" and "the discretionary action of the airline's manager." [44]

Thus, it is clear from *Corngold* and *Gold* that the purpose for which the airline undertakes the search may be an important factor in determining whether the inspection can be characterized as a "federal search cast in the form of a carrier inspection." Inferentially, it would appear that a search conducted by an airline solely to discover contraband to be used as evidence in a criminal prosecution is unrelated to any airline purpose. Consequently, because the airline is merely fulfilling a government purpose (prosecution), such a search should be required to meet fourth amendment standards. It should be noted, however, that an airline usually will have independent grounds upon which to inspect packages entrusted to it.[45] There is no dispute that an airline inspection undertaken at the initiative of airline employees, for independent airline purposes, and without government participation, is a private search and is not subject to the requirements of the fourth amendment.[46] Independent airline purposes for such inspections apparently include detection of insurance frauds,[47] detection of rate cheating through improper declaration of contents,[48] ensuring that airline facilities are not being used in the commission of a crime,[49] protection of the aircraft and other freight,[50] identification of the owner of unclaimed luggage,[51] and the insulation of the airline from criminal liability for transporting certain items.[52]

Moreover, the fact that government authorities previously have requested airline employees to watch for and notify the police of suspicious

44. 378 F.2d at 591.

45. *See* People v. McKinnon, 7 Cal. 3d 899, 913-14, 500 P.2d 1097, 1107, 103 Cal. Rptr. 897, 907 (1972).

46. *See, e.g.*, Gold v. United States, 378 F.2d 588 (9th Cir. 1967); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

47. *See* People v. McGrew, 1 Cal. 3d 404, 407, 462 P.2d 1, 3, 82 Cal. Rptr. 473, 475 (1969).

48. *See* United States v. Averell, 296 F. Supp. 1004, 1009 (E.D.N.Y. 1969).

49. *See* People v. McKinnon, 7 Cal. 3d 899, 914, 500 P.2d 1097, 1107, 103 Cal. Rptr. 897, 907 (1972).

50. *Id.*

51. *See* United States v. Echols, 348 F. Supp. 745 (E.D. Mo. 1972); State v. Larko, 6 Conn. Cir. 564, 280 A.2d 153 (1971).

52. *See* United States v. Averell, 296 F. Supp. 1004, 1011 (E.D.N.Y. 1969).

It also has been held that an airline inspection resulting from an attempt to protect luggage which has sprung open is a search for the independent purposes of the airline. *See* Andreu v. State, 124 Ga. App. 793, 186 S.E.2d 137 (1971)

individuals or packages does not necessarily create a police agency relationship which requires application of fourth amendment standards.[53] One court, however, has noted that a close working relationship between law enforcement authorities and an airline employee "may be tantamount to joint action and make the freight agent's action in opening suspicious baggage police action." [54] Furthermore, the Supreme Court has stated that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency." [55]

Because of the frequency of prosecutions resulting from airline freight searches,[56] airline employees should be familiar with the constitutional standards relating to searches and seizures.[57] Therefore, if it is determined that there was sufficient contact with the police to establish an agency relationship and that the search by airline employees did not comply with constitutional standards, the exclusionary rule should apply. If the searchers are aware of the constitutional requirements, they presumably will modify their behavior as necessary to secure convictions.[58] Hence, the deterrent purpose of the exclusionary rule would be accomplished.

The courts, however, may face the necessity of weighing the beneficial effects of applying the exclusionary rule against the airlines' legitimate interests in knowing what they are transporting. Extensive application of the exclusionary rule might inhibit needed airline inspections and allow obvious criminal activity to go unpunished. It is arguable that an individual's civil remedies provide adequate redress for violation of his fourth amendment rights and that the exclusionary rule should be given a more limited application in order to aid the successful prosecution of criminal activity.[59] The Supreme Court, however, has not been

53. People v. McKinnon, 7 Cal. 3d 899, 914, 500 P.2d 1097, 1107, 103 Cal. Rptr. 897, 907 (1972).

54. State v. Birdwell, 6 Wash. App. 284, 492 P.2d 249 (1972).

55. Stoner v. California, 376 U.S. 483, 488 (1964).

56. One writer has characterized such searches as "institutionalized private searches." Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 614-16 (1967).

57. *See* People v. McKinnon, 7 Cal. 3d 899, 904-05, 500 P.2d 1097, 1100-01, 103 Cal. Rptr. 897, 900-01 (1972), in which an airline freight agent testified that he followed a certain procedure to ensure that any evidence uncovered would not be excluded in a subsequent criminal prosecution. This airline employee not only was aware of constitutional limitations, but also was interested in the defendant's conviction.

58. *See* notes 28-29 *supra* & accompanying text.

59. In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971), the Supreme Court declared that there is a private remedy for violations of fourth amendment rights. Although a discussion of civil remedies with respect to airline inspections is beyond the scope of this Note, it should be noted that individuals alleging abuse of their

hospitable to such arguments, declaring that the inability to prosecute some guilty individuals may be the price of preserving constitutional rights.[60]

The Airlines' Right to Inspect and the Concept of State Action

In many of the cases involving airline inspections, the right to inspect was reserved to the airlines by tariff regulations approved by the Civil Aeronautics Board (CAB).[61] It appears that in most such cases, the airline's right to inspect on such a basis has been conceded.[62] To the extent, however, that inspection clauses contained in shipping contracts incorporating airline tariff regulations do not make provision for consent by the shipping party meeting constitutional standards,[63] there may be a constitutional basis for attacking airline inspections even where there is no direct government involvement.[64]

It is arguable that an airline inspection based upon government-approved tariff regulations or a state or federal statute cannot be considered a strictly private search. The argument is based not upon an agency theory but upon the concept of state or government action under which the government "should be held responsible where private organizations operate pursuant to a scheme of statutory regulation and encourage-

constitutional rights with respect to their "papers and effects" may be able to recover damages on theories of trespass or interference with chattel. *See* RESTATEMENT (SECOND) OF TORTS § 217 (1964).

60. Mapp v. Ohio, 367 U.S. 643, 659-60 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960).

61. *E.g.*, United States v. Pryba, 312 F. Supp. 466, 472 (D.D.C. 1970); People v. McGrew, 1 Cal. 3d 404, 411 n.3, 462 P.2d 1, 5 n.3, 82 Cal. Rptr. 473, 477 n.3 (1969); Chaires v. State, 480 S.W.2d 196, 199 n.3 (Tex. Crim. App. 1972).

The tariff involved in *Corngold* provided that "[s]hipments are subject to inspection by carriers to determine their acceptability and to determine proper charges thereon." 367 F.2d at 4 n.3. In *Averell*, the applicable tariff provided that "[s]hipments shall be subject to inspections by the carrier." 296 F. Supp. at 1009.

62. *See, e.g.*, Wolf Low v. United States, 391 F.2d 61, 62 n.1 (9th Cir. 1968). In United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970), the court seemed to beg the constitutional question by characterizing the airline's inspection as a private search to which the Constitution does not apply. The constitutional issue is whether a private search can be based on a government regulation which does not require conformity with the fourth amendment. *See* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

63. The consent issue is discussed at notes 124-33 *infra* & accompanying text.

64. If the inspection clauses were not based upon government-approved tariffs, there could be a private remedy for such inspections, since the Supreme Court has held that in the absence of statutes conferring the right to inspect, or in the absence of reasonable

ment." [65] The obvious response to this argument is that the government is not approving or encouraging unconstitutional activities on the part of the airlines; rather, it is merely affirming private practices which are permissible under the fourth amendment. This suggestion, however, appears to ignore recent decisions concerning state action,[66] in which private activity has been so involved with that of the government as to require the imposition of constitutional restraints.[67]

Government involvement in the airline industry is pervasive. Airlines operate pursuant to certificates granted by a government agency, their routes and rates are regulated by government agencies, and certain of their policies affecting the public are subject to Federal Aviation Administration (FAA) or CAB approval. Specifically, the airlines' right to inspect shipments is derived from a CAB tariff regulation.[68] To the extent that constitutional limitations are ignored when airlines inspect shipments on the basis of such government-approved tariff provisions, concepts of state action may provide a sufficient basis for invoking the exclusionary rule as a safeguard of fourth amendment rights since, for constitutional purposes, where sufficient state action is found, what otherwise would be private activity is treated as government activity.[69]

The mere fact that the airlines are public carriers regulated by a government regulatory agency might be sufficient to constitute the requisite state action. In *Public Utilities Commission v. Pollak*,[70] for example, the

grounds to suspect the offered goods are of a dangerous or illegal nature, a common carrier may not condition shipment upon a right to inspect. Parrot v. Wells, Fargo & Co., 82 U.S. (15 Wall.) 524 (1872). *See* 13 AM. JUR. 2d, *Carriers* § 238 (1964).

65. Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1044 (1971). *See generally* Note, *A Comment on The Exclusion of Evidence Wrongfully Obtained by Private Individuals*, 1966 UTAH L. REV. 271, 274.

66. As used in this discussion, "state action" comprehends the activity of the federal government as well as that of state governments.

One theory of state action suggests that corporations, which would include airlines, should be subject to constitutional limitations since they are created by the state and have sufficient economic powers to invade individuals' constitutional rights. *See* Berle, *Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942-43 (1952).

67. An excellent review of state action decisions may be found in Commissioner Johnson's dissent in In re Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242, 253-65 (1970). *See generally*, Downs & McGinley, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972).

68. CAB No. 96, Rule No. 24 (Nov. 8, 1967), *cited in* People v. McGrew, 1 Cal. 3d 404, 411 n.3, 462 P.2d 1, 5 n.3, 82 Cal. Rptr. 473, 477 n.3 (1969).

69. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1950).

70. 343 U.S. 451 (1952).

court determined that action by a privately owned public transportation facility was to be considered government activity for constitutional purposes. The requisite state action was found in the direct supervision of the corporation by a regulatory agency authorized by Congress.[71] Another court has noted that there "is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates 'state action.' " [72]

It may be argued that the landmark state action decision in *Shelly v. Kraemer*[73] provides a basis for extension of the exclusionary rule to private action. The Supreme Court held that judicial enforcement of a racially discriminatory restrictive covenant constituted state action within the meaning of the fourteenth amendment. Applying this rationale by analogy to airline inspections and fourth amendment principles, the mere searching for and discovery of contraband would not be prohibited; however, the use of that evidence in a criminal prosecution would be proscribed.

The decision of the Supreme Court in *Burton v. Wilmington Parking Authority*[74] also may find application in the airline inspection cases. It was held that where a state leased space in a public building to a privately operated restaurant and permitted operation of the restaurant on a racially discriminatory basis, the state had "elected to place its power, property and prestige behind the admitted discrimination." [75] Thus, the Court found sufficient state action in the state's acquiescence in the discriminatory policies to apply constitutional restraints on the operation of the restaurant. The same reasoning could be applied in cases involving airline inspections which do not meet fourth amendment standards, where

71. *Id.* at 462.

72. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 652 (D.C. Cir. 1971), *cert. granted*, 92 S. Ct. 1174 (1972).

73. 334 U.S. 1 (1948). *See* Note, *A Comment on the Exclusion of Evidence Wrongfully Obtained by Private Individuals*, 1966 UTAH L. REV. 271, 274.

It has been suggested that the *Shelly* rationale is too broad and should not be employed as a basis for extending the exclusionary rule to private searches. Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 614 (1967). This argument is based on the conclusion that the deterrent function of the exclusionary rule would not be served by extending the rule to private searches. However, in the context of airline inspections where freight agents constantly engage in inspections and later testify in court, it would appear that application of the exclusionary rule might deter practices which do not conform to constitutional standards. *See* note 57 *supra* & accompanying text.

74. 365 U.S. 715 (1961).

75. *Id.* at 725.

the airport involved was constructed with public funds and the airline conducting the search is a state or municipal lessee.[76]

Although there have been no cases involving airline inspections which specifically have considered the state action issue, the court in *United States v. Burton*[77] considered the agency implications of a federal statute[78] imposing criminal liability on airlines which shipped firearms with reasonable cause to believe such shipment would violate federal law. The court reasoned that since the statute did not require an airline inspection, no agency relationship was involved when airline employees did institute a search and that a search by airline employees under such circumstances was for airline purposes.[79] It is submitted, however, that an analysis of state action should be applicable where statutes impose criminal liability for the transport of contraband or other illegal shipments. The fact that a statute provides the impetus for the search ought to be sufficient for a finding of state action. For the search to be constitutionally valid, it would have to conform to the standards of the fourth amendment, and, where such conformity is lacking, evidence secured by the search should be excluded.[80]

The Constitutional Standards

Having considered the theories upon which freight inspections by airline employees may be subjected to the requirements of the fourth amendment, it is necessary to examine those requirements. A constitutionally valid search must be reasonable and, in most cases, pursuant to a warrant issued on the basis of probable cause.[81] Although necessity has required the development of limited exceptions to the warrant require-

76. *See* Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM L. REV. 1039, 1045. Many airports are constructed with public funds and operated by public agencies, which lease space to airlines.

77. 341 F. Supp. 302 (W.D. Mo. 1972).

78. 18 U.S.C. § 922(f) (1970).

79. The "airline purposes" discussed by the court were the protection of passengers and aircraft. 341 F. Supp. at 306. In view of the statutes, however, it would appear that another purpose of the search was to protect the airlines from criminal liability.

80. Where a statute imposes liability on an airline for making a shipment which it has "reasonable cause to believe" would be in violation of the law, the probable cause standard of the fourth amendment is not vitiated by the statute. *See* MCCORMICK, *supra* note 2, § 170, at 377 (probable cause synonymous with reasonableness). An airline search consistent with the standard of "reasonable cause to believe" that shipment of the goods would violate the law thus would have to meet only the warrant requirement or an exception thereto. *See* notes 81-84 *infra* & accompanying text.

81. *See* note 2 *supra*.

ment, even a warrantless search must be based upon probable cause.[82] As a general rule, however, probable cause for conducting a search does not justify a search without a warrant.[83] Assuming that the fourth amendment is applicable to airline inspections, either on the basis of direct government involvement or under a theory of state action, evidence discovered in such inspections must be excluded unless the search was founded upon probable cause. Moreover, the search may be valid without a warrant only if the surrounding circumstances were within one of the recognized exceptions to the warrant requirement.[84] It is thus necessary to examine several of the exceptions to the warrant requirement which may be relevant to airline inspections.

Exigent Circumstances

The exigent circumstances exception to the warrant requirement is applicable where "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." [85] However, mere inconvenience to law enforcement officials resulting from the minor delay involved in submitting the issue of probable cause to a magistrate is not sufficient to justify invoking the exception.[86] The exigent circumstances exception is generally applicable only where a search or seizure with a warrant would be impossible.[87] Where a warrantless search is conducted, the burden is upon the prosecution to justify the search by demonstrating the exigent cir-

82. *See* 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); United States v. Jeffers, 342 U.S. 48 (1951); Brinegar v. United States, 338 U.S. 160 (1948); Carroll v. United States, 267 U.S. 132 (1925).

83. Chapman v. United States, 365 U.S. 610, 613 (1961). The general rule is subject to various exceptions. *See* note 84 *supra*. For example, in Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court held that where a police officer has reasonable grounds to fear for his safety or that of others, he may conduct a limited search for weapons.

84. The limited exceptions to the warrant requirement may be classified as follows: search incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); imminent destruction of known evidence, Schmerber v. California, 384 U.S. 757 (1966); plain view, Harris v. United States, 390 U.S. 234 (1968); protective weapons search, Terry v. Ohio, 392 U.S. 1 (1968); customs or border search, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966).

85. Johnson v. United States, 333 U.S. 10, 14-15 (1948).

86. *Id.* at 15.

87. *See* United States v. Ventresca, 380 U.S. 102, 107 n.2, *citing* Carroll v. United States, 267 U.S. 132, 156 (1925).

cumstances.[88] Once it is shown that the circumstances justified dispensing with a search warrant, the test is whether the search itself was reasonable.[89]

It is the "exigencies of time and the possible removal of the contraband to another state [which create] an emergency—'an exigent circumstance.' " [90] In the context of airline inspections, however, removal of suspected contraband is not always imminent; moreover, in those instances in which removal is imminent, transport to another jurisdiction may not always be involved. In *Corngold*, for example, the government failed to carry its burden of showing that the packages in question might be removed before customs agents could obtain a search warrant.[91] Moreover, even if the government had introduced evidence that shipment of the packages was imminent, the court could still have justified a refusal to apply the exigent circumstances exception. Since the law enforcement officials involved were federal customs agents and since the planned shipment was to New York, the goods were not being shipped beyond the jurisdiction in which the agents had authority.

Where, however, state officials have probable cause to believe that a package containing contraband is about to be flown to another state, they should be able, without obtaining a warrant, to search and seize that article if removal appears sufficiently imminent.[92] In such a situation, the exigent circumstances exception should apply, since the airline is under no obligation to delay shipment in order to afford police an opportunity to secure a search warrant[93] and since the rationale underpinning the exigent circumstances exception is to allow a constitutional search without a warrant in situations where a search with a warrant would be impossible.[94]

The question of how imminent removal must be before the exigent circumstances exception is applicable appears to be unsettled. For example, in *People v. McGrew*[95] it was held that removal was not sufficiently imminent where the shipment was to be on a space available basis. In

88. *See* United States v. Jeffers, 342 U.S. 48, 52 (1951).

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

90. Clayton v. United States, 413 F.2d 297, 298 (9th Cir. 1969), *cert. denied*, 399 U.S. 911 (1970).

91. 367 F.2d at 3.

92. *See* Chaires v. State, 480 S.W.2d 196 (Tex. Crim. App. 1972).

93. *Id.* at 199.

94. *See* note 87 *supra* & accompanying text.

95. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).

People v. McKinnon,[96] however, the California Supreme Court overruled its decision in *McGrew*,[97] holding that there is sufficient danger of imminent removal to justify a warrantless police search based on probable cause whenever articles have been delivered to an airline for shipment. The court relied on *Chambers v. Maroney*,[98] in which the Supreme Court held that the mobile character of an automobile creates an exigent circumstance justifying a warrantless search for suspected contraband in that automobile.[99]

Application of the exigent circumstances exception to permit a warrantless search based upon probable cause would appear justified where the objects of the search are aboard an aircraft awaiting departure, where the time for shipment is uncertain, or where the goods have reached their destination and are subject to removal by the owner or consignee. If, however, it is found that removal is not sufficiently imminent to justify application of the exigent circumstances exception, a warrantless search could still be based on another of the exceptions to the warrant requirement.

Search Incident to a Lawful Arrest

A frequently applied exception to the requirement of a warrant as the mark of a reasonable search arises in the context of a search incident to an arrest.[100] Although a search, in order to be constitutionally reasonable, must generally be accompanied by a warrant, an arrest in many instances does not.[101] The validity of a warrantless search incident to an arrest is based upon the right of an arresting officer to protect himself and upon the need to prevent destruction of evidence.[102] The search may extend to the area within the subject's control from which he might procure a weapon or within which he might destroy evidence.[103] A valid search incident to an arrest, however, requires compliance with the arrest standard of probable cause.[104] Probable cause is established "if the

96. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal Rptr. 897 (1972).

97. The *McKinnon* court also overruled Abt v. Superior Court, 1 Cal. 3d 418, 462 P.2d 10, 82 Cal Rptr. 379 (1969), a decision similar to *McGrew*.

98. 399 U.S. 42 (1970).

99. *Chambers* also was relied upon in Chaires v. State, 480 S.W.2d 196 (Tex. Crim. App. 1972), where the suspect luggage was aboard an aircraft due to depart momentarily.

100. *See generally* McCormick *supra* note 2, § 173; Player, *supra* note 2, at 278.

101. *Id.*

102. Preston v. United States, 376 U.S. 364 (1964).

103. Chimel v. California, 395 U.S. 752 (1969).

104. *See, e.g.*, 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).

facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." [105]

Information from an airline agent that certain luggage or freight contains contraband may provide a police officer with probable cause to arrest the individual in possession of that luggage or freight.[106] Thereafter, a warrantless search of the articles containing the contraband could be justified as a search incident to an arrest if there is danger, for example, that the subject may destroy the evidence.[107]

Probable Cause

Even though the circumstances surrounding a search justify application of one of the exceptions to the warrant requirement, there must be probable cause to search in any instance where the requirements of the fourth amendment are applicable. Probable cause to search requires more than mere suspicion and must be determined in light of all the circumstances in any particular situation.[108] In the context of airport searches, the following factors have been found to establish probable cause to search: the shape and design of a package and manner in which it is carried;[109] an odor emanating from the package or suitcase;[110] unusual weight of the luggage;[111] nervous behavior of the person offering the article for shipment;[112] traits and circumstances similar to previous incidents involving the shipment of contraband;[113] and general peculiar circumstances surrounding the receipt of the shipment.[114]

The existence of facts establishing probable cause to search will, at some point, be objectively scrutinized by a judge. When application is made for a search warrant, the objective determination is made before the search. When the search is conducted without a warrant, the judicial

105. Henry v. United States, 361 U.S. 98, 102 (1959). *See* Beck v. Ohio, 379 U.S. 89 (1964).

106. *See, e.g.*, People v. Hankin, – Colo. –, 498 P.2d 116 (1972); People v. Hively, 173 Colo. 485, 480 P.2d 558 (1971).

107. However, the search must be contemporaneous with the arrest. Preston v. United States, 376 U.S. 364 (1964).

108. Chambers v. Maroney, 399 U.S. 42, 51 (1970); Henry v. United States, 361 U.S. 98, 104 (1959); Brinegar v. United States, 338 U.S. 160, 176 (1949).

109. *E.g.*, People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

110. *E.g.*, Chaires v. State, 480 S.W.2d 196 (Tex. Crim. App. 1972).

111. *E.g.*, Wolf Low v. United States, 391 F.2d 61 (9th Cir. 1968).

112. *E.g.*, State v. Birdwell, 6 Wash. App. 284, 492 P.2d 249 (1972).

113. *E.g.*, Hernandez v. United States, 353 F.2d 624 (9th Cir. 1966).

114. *E.g.*, United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970).

scrutiny necessarily must take place after the search. In either case, the searcher "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." [115]

The Subsequent Search

Many of the cases which have considered the issue of exclusion of evidence procured through airport freight inspections have involved a search by law enforcement authorities who were notified by airline employees after an initial inspection. The courts have taken two approaches in determining the status of the second search.

In *People v. McGrew*[116] and *Abt v. Superior Court*[117] the California Supreme Court found it unnecessary to decide whether the airline inspection was subject to the requirements of the fourth amendment, since it based exclusion of the evidence on the ground that the subsequent police search was subject to fourth amendment requirements which it had failed to meet. Subsequently, in *People v. McKinnon*[118] the same court, after declining to rule on the validity of the airline inspection in the absence of evidence on the question of agency, held that the subsequent search by police met fourth amendment standards.

The Court of Appeals for the Ninth Circuit, however, employed a different approach in *Clayton v. United States*[119] and *Wolf Low v. United States*.[120] In *Wolf Low*, after concluding that the discovery of the contraband by airline employees was the result of a private search not subject to constitutional limitations, the court held that since the evidence already was uncovered, subsequent acts of the police did not constitute a search and that the evidence, therefore, was admissible. The court's reasoning was less clear in *Clayton*, a per curiam decision. Although relying on *Wolf Low* in holding that "the subsequent acts of the police did not constitute a search," [121] the court noted that there had been "exigent circumstances" surrounding the subsequent acts of the police. It is not clear why the court found it necessary to discuss one of the exceptions to the requirement of a warrant for a constitutionally

115. Terry v. Ohio, 392 U.S. 1, 21 (1968). *See* notes 171-88 *infra* & accompanying text.

116. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).

117. 1 Cal. 3d 418, 462 P.2d 10, 82 Cal. Rptr. 481 (1969).

118. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

119. 413 F.2d 297 (9th Cir. 1969), *cert. denied*, 399 U.S. 911 (1970).

120. 391 F.2d 61 (9th Cir. 1968).

121. 413 F.2d at 298.

valid search after determining that the activity in question did not constitute a search in the first instance.

The Supreme Court stated in *Terry v. Ohio*[122] that a search which initially is valid may become illegal as its scope broadens unless all the steps taken can be independently reconciled with the fourth amendment. It is submitted that a court considering a case involving a police search subsequent to an airline inspection should test both searches against the requirements of the Constitution.[123] If the airline inspection is found to have been subject to the requirements of the fourth amendment, either on an agency theory or under concepts of state action, and if it is found that such inspection was constitutionally defective, then there is no need to examine the subsequent police action, since the evidence already is tainted. If, however, the initial search met constitutional requirements or was valid as a mere private search, the validity of a subsequent search by law enforcement personnel should be examined independently. Under such circumstances, the question should be whether the police search was broader in scope than the airline inspection. If the subsequent search went no further than the airline inspection, it would be possible to apply the *Wolf Low* rationale that the police activity was not a search in the constitutional sense. In conformity with the statement of the Supreme Court in *Terry*, however, if the scope of the police search extended beyond that of the valid airline inspection, the subsequent activity must be independently reconciled with the standards of the fourth amendment.

Consent or Waiver

Finally, it is necessary to consider the circumstances under which an individual will be considered to have waived his fourth amendment rights by consenting to a search. If a waiver is found, neither a warrant nor probable cause is required to validate a search.[124] The Supreme Court has stated that a valid waiver of fundamental constitutional rights must

122. 392 U.S. 1, 17-20 (1968).

123. *See* Cash v. Williams, 455 F.2d 1227, 1230 (6th Cir. 1972).

The question does not arise in cases similar to *Corngold* in which the airline inspection and government search take place simultaneously with respect to the same article. Except in those courts following the rationale of the Second Circuit (*see* notes 33-38 *supra* & accompanying text) the validity of such activity will be dependent upon compliance with fourth amendment requirements.

124. *See generally* McCormick, *supra* note 2, § 175; Note, *Effective Consent to Search and Seizure*, 113 U. Pa. L. Rev. 260 (1964); Note, *Third Party Consent to Search and Seizure*, 1967 Wash. U.L.Q. 12.

constitute "an intentional relinquishment or abandonment of a known right or privilege." [125]

Airline tariff provisions reserving to the airline the right to inspect have provided the basis for consent arguments in the airline inspection cases.[126] The question has not been considered, however, whether the existence of such provisions in a shipment contract results in the informed consent which the Supreme Court traditionally has required for an effective waiver of constitutional rights. In *People v. McGrew*,[127] for example, a receipt given the defendant for the goods which he attempted to ship contained a paragraph located on the reverse side in gray type stating that the shipment was subject to governing tariffs. There was no direct reference to the CAB-approved inspection clause which was incorporated into the tariffs and thus into the shipment contract.[128] In holding that the invalidity of a police search was unaffected by the presence of this provision, the court stated that consent to a search by the airline was not consent to a police search unrelated to airline purposes.[129] It is arguable that the court could have reached the same result on the basis of the failure of the inspection clause to meet the traditional requirements for a waiver of constitutional rights.

An issue involved in *Corngold v. United States*[130] was the effect on the rights of an individual of an airline's consent to a police search of that individual's goods. Noting that fourth amendment rights are personal to the individual whose effects are searched, the court stated that such rights can be waived only by the individual, either directly or through an agent. It was held that although the consent may have been valid as to the airline's limited purposes, the tariff authorized inspection only by the carrier and that the defendant had neither expressly nor impliedly authorized the carrier to consent to a search by government officials.

A different approach to the consent question was employed in *United States v. Averell*,[131] in which, as in *Corngold*, government agents partici-

125. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although *Johnson* dealt with the right to counsel, there is no dispute that fourth amendment rights are fundamental.

126. *E.g.*, United States v. Pryba, 312 F. Supp. 466, 472 (D.D.C. 1970); People v. McGrew, 1 Cal. 3d 404, 411 n.3, 462 P.2d 1, 5 n.3, 82 Cal. Rptr. 473, 477 n.3 (1969); Chaires v. State, 480 S.W.2d 196, 199 n.3 (Tex. Crim. App. 1972).

127. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).

128. Arguably, the inspection clause was not even incorporated into the contract, there being no direct reference to it.

129. 1 Cal. 3d 404, 413, 462 P.2d 1, 6, 82 Cal. Rptr. 473, 479 (1969).

130. 367 F.2d 1, 7-8 (9th Cir. 1966).

131. 296 F. Supp. 1004 (E.D.N.Y. 1969).

pated in opening the articles consigned to the airline for shipment. The court determined that the government participation was at the request and in the interest of the airline in order to prevent damage to the articles and to determine whether those articles contained contraband for the shipment of which the airline would incur liability. In distinguishing *Corngold*, the court noted that the tariff involved in *Averell* limited neither the purpose nor the extent of the inspection. Furthermore, the tariff provided that the shipper comply with all applicable laws, customs regulations, and other government regulations. Despite the seemingly unambiguous language of the tariff and the apparent validity of the court's reasoning, however, it nowhere appears that the defendant intentionally or knowledgeably waived his fourth amendment rights with respect to the search by the government agents.

Thus, resolution of consent questions may depend upon the wording of the particular airline's inspection clause. Consent to an inspection by airline employees is not necessarily consent to a search by third parties. Moreover, even if it is determined that an inspection clause included consent to a search involving government agents, a valid waiver of fourth amendment rights requires that the consent have been given intentionally and with knowledge of those rights.

Because the airlines have legitimate reasons to inspect shipments entrusted to them,[132] it is arguable that constitutional consent standards should not apply to searches related to limited airline purposes. Moreover, ineffective consent problems as to searches beyond those limited purposes could be avoided by requiring all shippers, as a condition of carriage, to sign an agreement with the airline which explains fourth amendment rights and permits the airline to authorize a search by law enforcement officials in appropriate circumstances. There is no constitutional right to ship freight without meeting the carrier's lawful conditions. However, to the extent that such an agreement is required of persons shipping articles incident to their own travel, it is subject to the argument that the exercise of the constitutional right to travel may not be conditioned on the relinquishment of another constitutional right.[133]

Conclusion

The frequency with which state and federal prosecutions result from evidence secured through airline freight inspections suggests the exist-

132. *See* notes 47-52 *supra* & accompanying text.

133. *See* notes 202-35 *infra* & accompanying text.

ence of an informal scheme of cooperation between the government and the airline industry. Although society, government, and the airline industry have an interest in preventing the airlines from being used as vehicles for crime, the interests of all segments of society are best served when constitutional safeguards are incorporated into law enforcement activities. As Justice Brandeis remarked:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. . . .[134]

Agency theories which developed during the evolution of fourth amendment safeguards as well as more recently developed theories of state action provide a rational basis for imposing the requirements of the fourth amendment on airline inspections. Fourth amendment standards should certainly be applicable in many cases to government activity subsequent to airline inspections. In light of the exigent circumstances exception to the warrant requirement of the fourth amendment as well as the possibility of obtaining shippers' consent to search, the constitutional requirements are not unduly burdensome to effective law enforcement. Compliance with fourth amendment principles adequately protects the interests of the individual citizen, the airlines, officials charged with law enforcement, and society generally.

The more publicized search activity in the nation's airports involves the federal anti-hijack security system. The searching of individuals about to board airplanes also involves a challenge to fourth amendment rights, with many of the issues being distinct from those involved in freight searches.

Airport Passenger Searches

The current federal anti-hijacking program, with which all licensed operators in air transportation and commerce must comply, presents serious challenges to the fourth amendment rights of air travelers as well as to their right to travel freely throughout the United States and

134. Boyd v. United States, 116 U.S. 616, 635 (1886).

abroad.[135] Designed to prevent and deter aircraft hijacking through a weapons detection system,[136] the program also serves to uncover evidence of criminal acts which already have taken place, since it is unlawful to attempt to board a commercial aircraft while carrying a concealed dangerous weapon.[137] The program was prompted by what the courts have conceded to be a compelling interest on the part of the airlines, the public, and government in air safety.[138] Juxtaposed against this substantial government interest, however, are the constitutional rights of individual passengers to travel[139] and to be free from unreasonable searches and seizures.[140]

There has not yet been a satisfactory resolution of these conflicting fundamental interests. However, since the factual basis giving rise to the problem is relatively novel[141] and since there are indications that the

135. After Feb. 6, 1972, each licensed common carrier was required to adopt and employ a screening system acceptable to the FAA, "to prevent or deter the carriage aboard its aircraft of any sabotage device or weapon in carry-on baggage or on or about the persons of passengers." 14 C.F.R. § 121.538 (1972). This regulation later was amended to provide more explicit instructions as to the requirements for an acceptable security system, to provide the FAA Administrator with the power to approve such systems, and to provide for emergency amendment of such systems by the Administrator. 14 C.F.R. § 121.538, *as amended*, 37 Fed. Reg. 7151 (1972).

136. It is a federal crime for unauthorized persons to carry arms or other dangerous and deadly weapons aboard "an aircraft being operated by an air carrier in air transportation," to have such items about their persons, or to attempt to board such an aircraft with such items. Federal Aviation Act, 49 U.S.C. § 1472(L) (1970).

137. *Id.*

138. *See, e.g.*, United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

139. The Supreme Court has stated:

> The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . . [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

United States v. Guest, 383 U.S. 745, 757-58 (1966).

140. *See* note 1 *supra*.

141. It was not until October 1968 that a Task Force representing the Federal Aviation Administration, the Department of Justice, and the Department of Commerce, among others, was appointed to consider means of stemming the increasing tide of aircraft hijackings. This task force began the efforts that resulted in the "Federal Aviation Administration System for Discouraging and Apprehending Potential Hijackers." *See* United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971). The FAA did not mandate

screening procedures are being used for purposes other than limited weapons searches,[142] there has been a considerable amount of activity in the courts concerning airport passenger searches. The evolution of substantive standards has been slow because of the changing nature of the industry-government approach to the problem of airplane hijackings and because of the high degree of interest in creating and allowing an effective response to a problem which has reached emergency proportions.

The Constitutional Issues

Not surprisingly, the pre-boarding passenger search entails legal problems very different from those encountered in airline freight searches. In passenger searches, for example, there can be little dispute that government or state action, rather than private action, is involved. An amendment to the Federal Aviation Regulations requires that airport operators provide at least one law enforcement officer "vested with a police power of arrest under Federal, State, or other political subdivision authority [to be present during the] final passenger screening process prior to boarding." [143] It is, therefore, likely that pre-boarding searches in the immediate future will be conducted by persons vested with the police powers of the state; consequently, the strictures of the fourth amendment clearly are applicable. Moreover, as was indicated in the discussion on cargo searches, direct participation of federal or state officials in "private" searches may not be necessary to require application of fourth amendment standards. Passenger searches are conducted pursuant to prescribed procedures embodied in statutory mandates,[144] for which non-compliance by either the airline or airport may result in the im-

the use of anti-hijacking screening systems by private carriers until Feb. 6, 1972. *See* note 135 *supra.*

142. One commentator has noted that "civil libertarians . . . fear that 'weapons searches' are being used by some law enforcement authorities as a pretext to search for narcotics and other contraband unrelated to hijacking. They point out that of 6,000 persons arrested in the 22 months since screening has been introduced, about one-third have involved possession of drugs." Dershowitz, *Stretching the Fourth Amendment*, N.Y. Times, Dec. 24, 1972, § 4 (The Week in Review), at 2, col. 1.

143. Federal Aviation Regulations, 14 C.F.R. § 170.1-4. Even prior to the issuance of these regulations, most of the passenger searches were conducted by marshals of the federal Anti-Hijacking Task Force, composed of Justice Department, Federal Aviation Administration, and airline industry personnel, or by other law enforcement personnel. *See, e.g.*, United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971).

144. Federal Aviation Regulations, 14 C.F.R. § 121.538, *supra* note 135.

position of fines.[145] The exclusionary rule should apply whenever searches are conducted at the instigation of government authorities or pursuant to a statutory scheme of enforcement.[146] Thus, even if the entire preboarding screening procedure was carried out by agents of the airlines or airport officials not formally vested with the police power of the state, fourth amendment limitations should apply.

Accepting the premise that passenger searches are not merely private searches, the application of fourth amendment standards must be analyzed in terms of the traditional exceptions to the warrant requirement[147] and within the factual contexts of particular intrusions. The Supreme Court in *Carroll v. United States*,[148] a case involving a warrantless search of an automobile, stated: "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." [149] The standard, therefore, is reasonableness; as such, it is not capable of precise definition.

The Supreme Court has recognized the difficulty of such a standard, noting that "there is no ready test for determining reasonableness other

145. The problem facing the airlines is illustrated in the following newspaper account of a well-publicized incident:

> The Federal Aviation Administration is considering levying $1,000 fines against two airlines that permitted Sen. Vance Hartke (D-Ind.) to board planes without undergoing security screenings . . . . Hartke refused to go through security procedures . . . . Transportation Department officials said $1,000 fines have been levied against airports and airlines in a few instances where federal anti-hijacking security rules have been violated.

The Washington Post, Jan. 28, 1973, § A (General News), at 25, col. 1.

Even prior to the adoption of specific regulations, the airlines were under a duty of reasonable care to assure that firearms were not introduced aboard aircraft. The United States Code provides: "It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or *reasonable cause to believe* that the shipment, transportation or receipt thereof would be in violation of the provisions of this Chapter." 18 U.S.C. § 922(f) (1970) (emphasis supplied).

146. One commentator has argued:

> The exclusionary rule should apply then in cases where government officials *directly instigate* or supervise searches and seizures committed by private parties *for the purpose of acquiring evidence for a criminal prosecution.* If the courts do not apply a rule of exclusion in these cases, government officials will be permitted to conduct improper searches by simply employing a private party to commit the physical search.

Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 613 (1967) (emphasis supplied).

147. *See* United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972).

148. 267 U.S. 132 (1925).

149. *Id.* at 147.

than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails." [150] Attempting to delineate a more definite standard, the Court in an earlier case had posited: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends on the facts and circumstances—the total atmosphere of the case." [151] In *Chimel v. California*,[152] however, the Court amended that test, which it considered to be overly pragmatic and subject to abuse, stating: "Although the recurring questions of the reasonableness of searches depends upon the facts and circumstances—the total atmosphere of the case, those facts and circumstances must be viewed in the light of established fourth amendment principles." [153]

The facts and circumstances surrounding a particular intrusion are of prime importance in determining the reasonableness of that intrusion. In considering the question of reasonableness, the specific factual situation will provide the necessary basis for balancing the need which compels the search against the extent of the invasion of individual rights which such a search entails.[154] Therefore, in order best to delineate the specific factors to be recognized in balancing the conflicting interests, airport passenger searches should be examined in light of their distinctive characteristics.

The passenger search cases have involved two basic types of searches. In a "selective search," airline or government personnel utilize either objective[155] or subjective[156] criteria to select from the mass of passengers

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

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

152. 395 U.S. 752 (1969). The Court, noting that the tests enunciated in *Rabinowitz* and Harris v. United States, 331 U.S. 145 (1947), had been the subject of a great deal of critical commentary, specifically overruled those decisions insofar as they were inconsistent with the test the Court enunciated in *Chimel*.

153. 395 U.S. at 765.

154. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523, 534-537 (1967); United States v. Bell, 464 F.2d 667, 674 (2d Cir. 1972), *aff'g* 335 F. Supp. 797 (E.D.N.Y. 1971).

155. The court in United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) described the purportedly objective "Federal Aviation Administration System for Discouraging and Apprehending Potential Hijackers." Briefly, the system provides for:

1. *Heavy Penalties.*

2. *Notice* to the Public of the applicable law and penalties, and a notice that passengers and their baggage are subject to search.

3. *Profile* based on a compilation of 25 or 30 characteristics which purportedly distinguish the potential hijacker from the mass of passengers. The court noted that these characteristics could be easily observed without exercising judgment.

boarding an airplane *certain* persons deemed appropriate to search. The "mass search" involves varying degrees of intrusion upon the privacy of *each* prospective passenger[157] and may amount only to a relatively innocuous screening by a metal detection device known as a magnetometer. Despite the minimal intrusion, at least one court has held the use of such a device to be a search within the meaning of the fourth amendment.[158]

4. *Magnetometer*—a metal detector device which is set to indicate the presence of metal of equal or greater amount than that found in an average 25 caliber gun.

5. *Interview* by airline personnel to determine if an individual selected out, using the profile and magnetometer, can produce satisfactory identification.

6. *Interview* by a marshal whereby the individual is asked to identify himself and explain the magnetometer reading. At this point the "selectee" may be asked to submit to a "voluntary" search.

7. *Frisk.* The marshal subjects the selectee to a carefully limited pat down search of the external clothing to detect the presence of weapons.

156. A passenger's apparent nervousness was deemed sufficient grounds for his selection for search in United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971). There was testimony that the defendant was "looking about" and perspiring. The court upheld the validity of the pat down search, stating: "The use of four different names, defendant's extremely anxious behavior and the very hard bulge in the coat pocket provided a sufficient basis in the context of an airline boarding, to stop defendant and conduct a limited pat down. . . . [T]he justifiable bases for the search were largely independent of the profile." *Id.* at 704.

157. Federal Aviation Regulations provide that, "[e]ach certificate holder shall prepare in writing and submit for approval by the Administrator its security program, including the screening system." 14 C.F.R. § 121.538(c); 37 Fed. Reg. 4904 (1972). These regulations further grant to the Administrator the power to amend previously approved programs if "he determines that safety in air transportation or in air commerce, in the case of a commercial operator, and the public interest require the amendment." 14 C.F.R. § 121.538(g) (1972). Pursuant to this power, the FAA Administrator recently has amended those programs to require the following procedures:

> The certificate holder shall not permit any passenger to board its aircraft unless:
>
> A. The carry-on baggage items are inspected to detect weapons, explosives, or other dangerous objects, and
>
> B. Each passenger is cleared by a detection device without indication of unaccounted for metal on his/her person . . . , or
>
> C. In the absence of a detector, each passenger has submitted to a consent search prior to boarding.

Telegram from the Department of Transportation, Federal Aviation Administration, to all FAA Regional Directors for distribution to Certificate Holders, Dec. 5, 1972.

The problems presented by such a mass customs-like search are obvious. The use of the word "consent" in the provision for a personal search of each passenger evidences the FAA's concern with the reasonableness of such searches. However, even a passenger's consent in such a situation would not obviate the problems raised by forcing him to undergo such a procedure insofar as the constitutional right to travel is thereby impaired.

158. United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972). The court stated that by using a magnetometer, "a government officer, without

Other courts, however, have treated the use of a magnetometer not as a search, but rather as one step in an investigatory scheme which may provide the basis for sufficient probable cause to justify a more serious invasion of the right to privacy and the right to travel.[159] Regardless of the degree of intrusion,[160] an obvious characteristic of a mass search is the lack of probable cause. Clearly, the sole justification for such intrusions is the state interest involved.[161]

As a practical matter, warrants cannot be obtained for airport preboarding searches. Although the exigencies of time preclude advance judicial determination of the reasonableness of the intrusion,[162] mass passenger searches represent precisely the type of general search which the fourth amendment was designed to prevent.[163] Lack of a warrant, however, is not always fatal to the lawfulness of a search. The fourth amendment contains *two* prohibitions—one relating to the requirements for a warrant, the other to unreasonable searches and seizures. The importance of this dual protection was noted in *Terry v. Ohio*,[164] in which Chief Justice Warren, speaking for the Court, stated that "the police must, *whenever practicable*, obtain advance judicial approval of searches

permission, discerned metal on Epperson's person . . . . Indeed, that is the very purpose and function of a magnetometer: to search for metal and disclose the presence where there is a normal expectation of privacy." *Id.* at 770.

159. *See, e.g.*, United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

160. A much more serious type of intrusion which recently has been introduced is the search of all carry-on baggage without any basis of selection. *See* People v. Smith, 29 Cal. App. 3d 106, 105 Cal. Rptr. 280 (1972).

161. People v. Smith, 29 Cal. App. 3d 106, 105 Cal. Rptr. 280 (1972), represents the only case that has dealt with many of the issues raised by a customs-type mass search which is not based upon probable cause.

162. In the context of an airport pre-boarding search, the court in United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971), stated that "[n]o warrant was obtained for the search in this case, nor, as a practical matter could one have been expected. . . . Exigencies of time precluded the Marshals obtaining a warrant in this situation."

163. The Court in Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), noted:

> The second clause [of the fourth amendment] declares: "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." This prevents the issue of warrants on loose, vague or doubtful bases of fact. *It emphasizes the purpose to protect against all general searches.* Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty.

Id. at 357 (emphasis supplied). *See* Chimel v. California, 395 U.S. 752 (1969).

164. 392 U.S. 1 (1968).

and seizures through the warrant procedure." [165] Thus, under certain circumstances, a warrantless search may be upheld if it meets the standard of reasonableness. The general presumption, however, is that warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." [166]

Exceptions to the Warrant Requirement

In the context of airport passenger searches, there are three pertinent exceptions to the warrant requirement which have received general recognition by the courts: the existence of probable cause to arrest; consent to the search; and a limited search for weapons.[167] A fourth possible exception which has not yet received widespread judicial recognition was implied by Chief Judge Friendly in his concurring opinion in *United States v. Bell*,[168] in which he suggested that because of the compelling necessity for some degree of intrusion, there should be a general lowering of standards in allowing pre-boarding searches.[169] Although it is conceivable that situations may arise in which other exceptions to the warrant requirement prove worthwhile, the classic pre-boarding search probably must be justified under one of the exceptions discussed herein, if it is to be justified at all.[170]

165. *Id.* at 20 (emphasis supplied). *Accord,* Katz v. United States, 389 U.S. 347 (1967); Beck v. Ohio, 379 U.S. 89, 96 (1964); Chapman v. United States, 365 U.S. 610 (1961).

166. Katz v. United States, 389 U.S. 347, 357 (1967).

167. *See* United States v. Meulener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972).

168. 464 F.2d 667, 674 (2d Cir. 1972).

169. This, in effect, is the rationale for allowing general searches without probable cause by custom officials.

170. *See* United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). In dealing with the pre-boarding search in terms of a limited search for weapons and dismissing the possibility of a consent search for weapons, the *Lopez* court stated, in ruling out other possible exceptions:

> The search cannot be justified as one "incident" to an arrest. . . . [A]rrests were not made until after the frisk had been completed and the contraband seized. . . . [T]here is no evidence of "hot pursuit" . . . or danger of imminent destruction of any known evidence. . . . No apparent offense was observed being committed in the presence of these officers which would have justified the search. . . . The contraband was certainly not in "plain view". . . . Thus, the only exception to the warrant rule under which the search of this defendant can be justified is the protective "frisk" for weapons authorized by *Terry v. Ohio* . . . .

Id. at 1093.

Probable Cause for Arrest: Search Incident to Arrest

The Supreme Court in *Carroll v. United States*, in a general discussion of the fourth amendment, noted: "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." [171] In *Chimel v. California*, the Court stated: "There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." [172] Thus, it is clear that the Court has approved the principle yet carefully limited the scope of the contemporaneous search exception. Consistent with sound judicial policy, the intrusion allowed is no greater than that necessary to make an effective arrest. Obviously, then, in order for the exception to apply in the airport situation, the search must occur within the penumbra of a lawful arrest. It is interesting to note that the contemporaneous search in *Chimel* apparently lacked that ingredient, for the search took place in the context of an arrest pursuant to an invalid warrant. The Supreme Court, however, accepted for the purposes of its decision the California Supreme Court's holding that the arrest was nonetheless valid "since the arresting officers had procured the warrant 'in good faith', and since in any event they had sufficient information to constitute *probable cause* for the petitioner's arrest." [173] Absent a warrant, then, the initial arrest must be based upon reasonable grounds or probable cause in order for the contemporaneous search exception to apply.[174]

171. 267 U.S. 132, 158 (1925). *Carroll* dealt with the question whether there was probable cause to believe a vehicle was carrying contraband rather than with a contemporaneous search. However, the principle there enunciated is applicable to the contemporaneous search exception to the warrant requirement.

172. 395 U.S. 752, 763 (1969). The principle announced in *Chimel* had previously been elaborated by the Court in Preston v. United States, 376 U.S. 364 (1964), which held inadmissible evidence obtained in a warrantless search of defendant's car, which was in police custody after defendant's arrest. The Court in *Preston* outlined the scope of contemporaneous searches incident to a lawful arrest, stating that such searches are justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapons or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." *Id.* at 367.

173. 395 U.S. at 754 (emphasis supplied).

174. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

What constitutes probable cause in a given situation eludes exact definition. Courts appear to be willing to alter the meaning of either term in order to accommodate competing interests. In *Locke v. United States*, John Marshall defined "probable cause" as meaning something "less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion." [175] The Court has long since departed from that standard, and it is clear that "probable cause" has come to mean more than bare suspicion. There have been numerous attempts by the Court to draw a definitional line between mere suspicion and probable cause. In *Brinnegar v. United States*,[176] for example, Mr. Justice Rutledge stated: "Probable cause exists where 'the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." [177]

Apparently, then, probable cause lies in a twilight zone between proof sufficient to convict and facts which give rise to mere suspicion. A federal district court has described this gray area in the following terms:

> Implied in such terms as "probable cause" or "reasonableness" is a continuum of probability that the subject has been, is, or is about to be, engaged in criminal activity; it begins with no evidence of such conduct and extends to almost certainty. Ranked along this continuum are various degrees of probability justifying different types of intrusion upon the privacy of the individual. . . .
>
> An investigative "stop" requires one degree of probability, while a "frisk" in many cases requires a higher level. At other points on the scale are levels of probability justifying the various exigent circumstance intrusions typified by border searches, automobile searches, those occasioned by hot pursuit and the like. Finally at the practical end of the continuum we find the classic "probable cause" levels which will justify the issuance of search warrants, and searches incidental to arrest with or without a warrant.[178]

In applying this "continuum theory" to the degrees of cause involved in airport searches, it is obvious that there is no probable cause, as such,

175. 11 U.S. (7 Cranch) 339, 348 (1813).

176. 338 U.S. 160 (1949).

177. *Id.* at 175-76, *citing* Carroll v. United States, 267 U.S. 132, 162 (1925).

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

involved in the initial intrusions. Mass searches are not purported to be made pursuant to a particularized cause. Justification is urged solely in terms of the public interest in controlling what passengers may bring onto an airplane. In each instance there is only a very slight possibility that any given passenger may have a weapon; yet, it is this possibility which is deemed sufficient to justify a search. The degree of cause is not much higher in a selective search based upon a superficial and often quite subjective procedure. Indeed, it may be argued that there is no greater an invasion of personal liberties where a search is made indiscriminately of each passenger with no probable cause than where a search is made of selected individuals based upon the modicum of cause supplied by such criteria. It is, therefore, difficult to find that probable cause for arrest or search exists in the typical pre-boarding search situation.

Moreover, the pre-boarding search cannot be justified as a search incident to a lawful arrest because the subject is not under arrest when such searches occur; although he clearly is not free to leave, it cannot be said that a formal arrest has been made.[179] The Supreme Court has noted that "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." [180] The contemporaneous search exception to the warrant requirement, therefore, does not pertain to the initial intrusion in most airline searches, and little attempt has been made to so argue.

Finding that the initial intrusion cannot be justified as a contemporaneous search, however, does not end the applicability of that doctrine to airport pre-boarding searches. If the "stop and frisk" exception to the warrant requirement announced in *Terry v. Ohio*[181] is used as justification for the initial intrusion,[182] a greater degree of flexibility, vis-a-vis the grounds for that intrusion, is provided. However, the scope of such a search is extremely limited.[183] Thus, in the area of selective searches,

179. *See, e.g.*, United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); United States v. Meulener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972).

180. Sibron v. New York, 392 U.S. 40, 63 (1968). *See* Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10, 16-17 (1948).

181. 392 U.S. 1 (1968).

182. The Court in *Terry* held that in "appropriate circumstances" a police officer may make an investigatory stop of an individual "for the purpose of investigating possible criminal behavior" and conduct a carefully limited protective pat-down search for weapons prior to finding any probable cause for arrest. 392 U.S. at 22, 27. *See* notes 236-61 *infra* & accompanying text.

183. *See* notes 244-47 *infra* & accompanying text.

conformity to the hijacker profile and a positive magnetometer reading may provide sufficient grounds to stop the individual and request identification.[184] This interview may, in turn, provide a basis for a properly circumscribed pat-down search.[185] The result, therefore, is a pyramid of progressively more serious intrusions, each lesser intrusion providing some objective basis for one more serious.[186]

This progressive series of intrusions is the essence of the federal hijack program. As has been noted: "The program is designed to speed passengers who are unlikely to present danger and to isolate, with the least possible discomfiture or delay, those presenting a substantial possibility of danger. At each successive screening stage an attempt is made to permit as many as possible to complete boarding." [187] While expediency is never a justification for unwarranted intrusions upon fundamental rights, proper application of this program has been upheld by most courts. Whether strict adherence to FAA guidelines will be required may depend upon the balance a particular court strikes between the competing interests.[188] In any event, however, if the initial limited search is upheld as constitutional, the contemporaneous search exception may provide an important after-the-fact justification for a more thorough search once an arrest has been made.

184. *See, e.g.*, United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); United States v. Muelener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972).

185. United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). *Contra*, United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); United States v. Meulener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972).

186. United States v. Bell, 464 F.2d 667 (2d Cir. 1972). The court held that conformance to the hijacker profile and a positive magnetometer reading, indicating the presence of a considerable amount of metal on the person of a prospective passenger, justified the marshal in stopping that passenger and requesting identification. Failure to produce any identification, plus the other factors already mentioned, justified a protective pat down search. The results of the pat down search provided sufficient probable cause for arrest and a more thorough search incident to arrest. In United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972), arising in an almost identical situation, the court held that the same facts justified a search of defendant's carry-on baggage after the protective pat-down search failed to produce any weapons or explosives.

187. United States v. Lopez, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971).

188. In United States v. Meulener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972), one of the two independent grounds for excluding the evidence seized in the search of the passengers was the overly broad scope of the initial search. In United States v. Lopez, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971), the evidence uncovered in the search was suppressed because the initial search was grounded on a profile that had been updated in a manner which raised equal protection problems as well as questions as to its objectivity.

Consent

Once constitutional analysis is brought to bear on the airport search situation, the determinative issue often may be that of consent. In this context, "consent" amounts to a waiver of the fundamental right to privacy guaranteed by the fourth amendment. The classic definition of waiver is "an intentional relinquishment or abandonment of a known right or privilege." [189] One problem therefore presented is whether consent may be inferred from the actions of a passenger who continues the boarding process after he passes conspicuously posted signs stating that all passengers and baggage are subject to search.

Two federal district courts have dealt with this issue recently. In *United States v. Lopez*,[190] the theory that consent could be implied on such grounds was rejected explicitly. The court felt that consent must be express. It was reasoned that since a passenger is not free to leave the boarding area after an initial confrontation with searching authorities, consent to the search could not be characterized as voluntary or express. Even if it was voluntary, the court reasoned that such consent was an unconstitutional condition on the right to travel. Similarly, in *United States v. Allen*, it was noted that "any doctrine of 'implied consent' would be at odds with the strict standards of waiver enunciated by the Supreme Court." [191]

In *Lopez* and *Allen*, a waiver of the right to privacy was sought to be implied from passenger conduct. This implication is at odds with the standard set forth by the Supreme Court in *Bumper v. North Carolina*: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." [192] The consent in *Bumper* was acquiescence by the petitioner to a search of his home. Presumably, individuals in their homes are more conscious of their right to privacy than are passengers boarding at an airport flight gate.[193] Therefore, it seems that the *Bumper* standard should be modified accordingly.

189. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

190. 328 F. Supp. 1077 (E.D.N.Y. 1971).

191. 349 F. Supp. 749, 752 (N.D. Cal. 1972). The court in *Allen*, however, held that consent could be imposed as a condition to boarding the aircraft.

192. 391 U.S. 543, 548 (1968).

193. In Miranda v. Arizona, 384 U.S. 436, 449-50 (1966), the Supreme Court noted that an individual is likely to be more acutely aware of a right of privacy while at home than under other circumstances—in that case in a prosecutor's office.

A collateral issue is raised by a passenger's acquiescence to demands that he consent to a search once he has been selected for closer scrutiny. The Court in *Bumper* noted that the prosecutor's burden of showing that consent was given freely and voluntarily "cannot be discharged by showing [mere] acquiescence to a claim of lawful authority." [194] This holding has found considerable support in the airport search cases that have dealt with the issue. Once the person is no longer free to leave, consent to a search is inherently coercive.[195] Whether a full explanation of rights similar to the warning required under *Miranda v. Arizona*[196] is required in order to avoid the taint of coercion is problematic. It is certain that under *Johnson v. Zerbst* a waiver must be knowledgeable. It is also logical to assume that a waiver of fourth amendment rights must be examined in that light. The court in *United States v. Blalock* shed some light on this issue, stating: "The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves . . . to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd." [197] Therefore, a "*Miranda*-type" warning might provide the individual with sufficient knowledge to constitute an effective waiver.[198] Moreover, by assuring the individual that the authorities are willing to accept a refusal to waive, the warning would tend to dispel the atmosphere of coercion.[199] It should be noted, however, that such warnings would be meaningless unless the passengers also were given an option to leave the area.

It is clear that consent by mere acquiescence or implication is contrary to the overwhelming weight of authority. Such circumstances should not be said to give rise to a waiver of constitutional freedoms. It

194. 391 U.S. at 548-49.

195. In United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972), the defendant's consent to an airport search was obtained at a time when he believed his only options were to open his suitcase or be arrested. The court held that such "consent did not constitute an 'intentional relinquishment . . . of a known right' to refuse to open the bag in the absence of a search warrant." *Id.* at 752. In a similar case, United States v. Meulener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972), it was held: "It is clear that in the instant case, the defendant did not give consent to a search of his suitcase. He opened it only after he was ordered to do so by the marshal at a time when he was not free to leave or to avoid the search. Under such circumstances the search was inherently coercive." *Id.* at 6.

196. 384 U.S. 436 (1966).

197. 255 F. Supp. 268, 269 (E.D. Pa. 1966).

198. *See* Miranda v. Arizona, 384 U.S. 436, 468 (1966).

199. It is doubtful, however, whether many individuals could fully comprehend all the legal consequences of a waiver.

is for precisely this reason that in those few cases where the issue was raised, the doctrine of implied consent has been rejected.[200] However, very few cases dealing with the pre-boarding search have considered consent a determinative factor. In at least three cases where the issue was considered tangentially, consent obtained at the boarding gate was not found to be inherently coercive.[201]

Assuming that in an advanced society air travel may be the only effective means of exercising the right to travel in certain circumstances, any limitation placed on that right is seemingly coercive. The issue therefore raised is whether the exercise of one constitutional right ever can be conditioned on the relinquishment of another constitutional right. This is precisely the problem presented in the "express consent" situation. Recently three district courts in *United States v. Lopez*,[202] *United States v. Meulener*,[203] and *United States v. Allen*[204] have considered the ramifications of an express consent to a pre-flight search, and in so doing have developed divergent approaches to the question.

In each case, the first problem considered was whether the consent which was given expressly could be held to be an effective waiver of a constitutional right. The determinative factor in all three cases was whether the individual had a right to refuse to waive, and hence freedom to leave. The court in *Allen* noted that "in order to be a valid waiver of Fourth Amendment rights a passenger must be aware of his option to avoid the search by not boarding." [205] The court in *Meulener* emphasized this point by stating that the passenger must be *advised* of his right to avoid the search by declining to board the airplane.[206] These cases, however, did differ in one important aspect. The *Allen* court asserted that it had "no doubt" that airline authorities have an absolute

200. *See* note 195 *supra*.

201. The district court decision in United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir. 1972) indicated that the airport frisk could have been upheld on the grounds of consent; however, the court preferred to base its opinion on the premise that sufficient grounds existed for a protective frisk. A California court of appeals in People v. De Strulle, 28 Cal. App. 3d 477, 104 Cal. Rptr. 639 (1972) held that the issue of whether a search at a boarding ramp was voluntary was a question of fact. The court also held that it was not necessary to advise a passenger of his *Miranda* rights before seeking a waiver of his right to privacy. *See* People v. Smith, 29 Cal. App. 3d 106, 105 Cal. Rptr. 280 (1972).

202. 328 F. Supp. 1077 (E.D.N.Y. 1971).

203. Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972).

204. 349 F. Supp. 749 (N.D. Cal. 1972).

205. *Id.* at 752.

206. Crim. No. 10931-CD, 10 (C.D. Cal. Dec. 4, 1972).

right to require a passenger to submit to a search of his person and baggage *as a condition to* boarding the aircraft.[207] *Lopez* and *Meulener* indicated, on the other hand, that the government cannot "condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights." [208]

Arguably, the *Lopez* rationale is correct in a constitutional sense. Assuming, however, that the legislative enactment of the "anti-hijacking" statute evidences a compelling state interest, the problem becomes clear—under what circumstances is there sufficient basis to require a relinquishment of one's fourth amendment rights in order to exercise one's right to travel? The court in *Meulener* reached this issue tangentially in holding that "[t]he mere fact of meeting the profile and activating the magnetometer does not establish grounds for a forced search." [209] The *Allen* court seemingly concurred, stating that the selection of a passenger using the criteria developed in the anti-hijacking screening system does not alone constitute cause for a personal or baggage search. Both courts, however, did feel that a person conforming to the potential hijacker profile, having a positive magnetometer reading, and failing to produce adequate identification or to explain the magnetometer reading, could be denied passage *unless* he expressly waived his fourth amendment rights and submitted to a search. Although the objective facts generated by the selection process did not constitute sufficient probable cause to overcome fourth amendment rights in either *Allen* or *Meulener*, they did constitute sufficient cause to condition the right to travel on a waiver of those rights.

Although *Meulener* agreed in principle with the rationale of *Lopez*—that the exercise of the right of travel cannot be conditioned upon the waiver of other fundamental rights—it recognized the need to balance those rights against a compelling state interest. The result was to condition the right to travel only where the degree of probability would be sufficient to justify a protective search.[210] Thus, although *Lopez* never considered consent in determining the reasonableness of the search while *Meulener* seemingly concerned itself solely with that issue, the manner in which the two courts were able to reach the same result is readily apparent. *Allen*, on the other hand, seemingly refused to balance the respective interests, deeming the right to condition an individual's free-

207. 349 F. Supp. at 752 (dictum).

208. United States v. Meulener, Crim. No. 10931-CD, 7 (C.D. Cal. Dec. 4, 1972), *citing* United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971).

209. Crim. No. 10931-CD, 10 (C.D. Cal. Dec. 4, 1972).

210. *See* United States v. Bell, 464 F.2d 667 (2d Cir. 1972).

dom of travel as absolute. Arguably, the state interest should not be considered so compelling.

The FAA now requires either a magnetometer search or "consent" frisk of each passenger as well as a search of all carry-on luggage before any passenger may board an airplane. Despite the Supreme Court's statement that the fourth amendment protects people, and not simply areas,[211] the use of the magnetometer appears to have won judicial approval. In *Epperson v. United States*,[212] for example, the court conceded that scanning by use of a magnetometer was a search within the meaning of the fourth amendment. However, following what it believed to be the exception suggested by the Supreme Court in *Terry*, the court balanced the minimal degree of intrusion against the overwhelming national interest in favor of such searches and decided that the warrant requirement was excused by "exigent national circumstances."[213] By balancing the respective interests, the court in *United States v. Slocum* also found the magnetometer search justified, stating:

> Reasonableness is the ultimate standard. And, we conclude that within the context of a potential hijacking the necessarily limited "search" accomplished by use of the magnetometer *per se* is justified by a reasonable governmental interest in protecting national air commerce. . . . [E]mployment of the magnetometer does not violate the 4th Amendment.[214]

Consent, then, may not be an essential element in magnetometer searches.

Although wholesale use of the magnetometer appears to have met with easy acceptance, justification for the search of all carry-on luggage

211. Katz v. United States, 389 U.S. 347, 353 (1967). In *Katz*, the Court held:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Id.

212. 454 F.2d 769, 770 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

213. *Id.* at 771. *Accord*, United States v. Bell, 464 F.2d 667, 673 (2d Cir. 1972).

214. 464 F.2d 1180, 1182 (3d Cir. 1972). *Contra*, United States v. Lopez, 328 F. Supp. 1077, 1100 (E.D.N.Y. 1971). In *Lopez*, the court expressed doubts about the reasonableness of the use of the magnetometer on all passengers where such use is not based upon an application of the profile to determine which passenger's magnetometer reading should be monitored.

presents a more difficult problem. It must be determined whether, even in light of the degree of national interest involved, these searches should be grounded on an express consent guaranteed by an absolute right to leave. Moreover, it is necessary to determine the constitutionality of the option to leave as the sole alternative to a search.

The Supreme Court has stated that the fourth amendment "does not denounce all searches or seizures, but only such as are unreasonable." [215] Thus, it is clear that the mandates of the fourth amendment are not absolute. A determination of what is reasonable necessarily involves a balancing of individual interests against those of the state. The state interest in providing for airport passenger searches ostensibly is the prevention of airplane hijackings and the detection of possible hijackers. In order to provide such protection, the FAA has determined that all carry-on luggage of each passenger must be searched. Since an FAA determination, however, does not alone validate an otherwise unreasonable search, the courts have sought objective criteria upon which to determine "reasonableness."

The court in *United States v. Lopez*,[216] for example, attempted the seemingly impossible task of determining the degree of threat posed by each boarding passenger. By examining available statistics,[217] the court concluded that one out of 15, or approximately six percent, of the passengers selected to be searched after the screening procedure could be expected to have a weapon on his person. It was therefore held that a six percent "danger of arms" in the context of a potential hijacking justified a protective frisk.[218] Apparently aware of the possible ramifications of its decision, however, the *Lopez* court carefully limited its holding, noting:

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215. Carroll v. United States, 267 U.S. 132, 147 (1925).

216. 328 F. Supp. 1077 (E.D.N.Y. 1971).

217. One sample was based on a universe of 500,000 boarding passengers, of which 99.86 percent boarded without ever being asked a question and 99.95 percent boarded without a search. Only 16 of the 283 persons selected to be searched by the use of the screening system were arrested. Thus, .0032 percent of the total flight population were found to be carrying some form of contraband. A second sample, determined by the average monthly use of John F. Kennedy International Airport, had a universe of 441,000 prospective passengers. Nine persons or .00204 percent of the universe, were arrested out of a group of 303 who reportedly met the "profile" and were searched. 328 F. Supp. at 1084.

218. Two other cases have held that this level of probability only justified making a search a precondition to boarding. United States v. Meulener, Crim. No. 10931-CD (C.D. Cal. Dec. 4, 1972); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972).

> Mere statistical information as that generated in this case does not, by itself, justify "frisks." If, for example, reliable statistics were available that in a given community one person in fifteen (6%) regularly carried concealed weapons, the police would not be justified in arbitrarily stopping and frisking anyone on the street. . . . The Court is charged with the duty of balancing the competing interests of the individual and the society in each case presented. No single figure can provide a test for constitutional legitimacy.[219]

Assuming *arguendo* that there is a .003 percent chance of finding a weapon on any given passenger, a search of *every* passenger can hardly be justified on the basis that a reasonable threat is posed by a particular individual.[220] Even accepting the premise that a percentile determination of probability may provide sufficient grounds for an invasion of a constitutional right, a mere .003 possibility does not appear sufficient to condition the right to travel on the relinquishment of fourth amendment rights. Only on the basis of the incredible threat to life and property posed by that .003 percent, and the minimal degree of resentment aroused by such intrusions, could a mass search be considered reasonable.

A possible justification for the mass airport search may lie in cases which have upheld various administrative searches. An "administrative search" is one made in the public interest and, hence, justifiably held to a lower fourth amendment standard. There are striking parallels between this type of search and the pre-flight boarding search; both are conducted without express consent, probable cause, or a warrant. By indicating that an administrative search is held to a lower standard, it is not to be inferred that these searches are entirely immune from fourth amendment limitations. In fact, only in very limited circumstances have such searches been upheld. Those instances, however, typically involve many of the same considerations that exist with respect to an airline mass search.

One such circumstance has arisen in the context of quarantine enforcement. In *United States v. Schafer*,[221] the Court of Appeals for the Ninth Circuit held that the exclusionary rule does not apply to narcotics un-

219. 328 F. Supp. at 1097-98.

220. The Supreme Court in *Terry* remarked that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." 392 U.S. 1, 17 n.14 (1968). Thus, community standards as to expectation of privacy are highly relevant in balancing the degree of intrusion against the government interest involved.

221. 461 F.2d 856 (9th Cir. 1972).

covered in a warrantless search of passenger luggage made pursuant to an order of the Secretary of Agriculture as authorized by the Plant Quarantine Act.[222]

The search in *Schafer*—which appears to be similar to that authorized by the Federal Aviation Regulations[223]—was upheld because of the valid public interest concerned, because procurement of a warrant was not feasible, and because "a quarantine inspection is not a search 'which has as its design the securing of information . . . which may be used to effect a further deprivation of life, liberty or property.' " [224] Apparently, this holding was based on the premise that the " 'criminal' standard of probable cause would not be imposed upon administrative inspections," although a warrant would be required where its procurement was feasible.[225] Although it may be argued that the public interest in enforcing a quarantine is less significant than the prevention of hijacking, it is criminal conduct at which an anti-hijacking search is aimed. Therefore, the legality of such a search should not be based on a premise that the criminal standard of "probable cause" would not be imposed.

In another area of administrative searches, the Supreme Court has held that the warrantless inspection of the business premise of a federally licensed dealer in firearms, pursuant to the need to regulate the traffic in arms, was permissible.[226] The Court found exigent circumstances and substantial government interest in such regulatory inspections. Although the sanctions involved were criminal, this case also may be distinguished from the typical airline search. There is an obvious difference between one who procures a federal license to engage in arms dealing—an activity involving a high degree of government interest and a broad scheme of regulation—and one who merely chooses to exercise his constitutional right to travel. Arguably, the arms dealer has focused the attention of the government on his activities by his own deliberate actions. In effect, he may be said to have "consented" to a search. Thus, although the administrative search cases may appear to provide justification for a lowering of fourth amendment standards in the airline search situation, there are certain critical differences, either in the nature of the search or in the class of persons to be searched, between the two situations. Hence, the

222. Plant Quarantine Act, 7 U.S.C. § 161 (1970).

223. *See* note 135 *supra* & accompanying text.

224. 461 F.2d at 859, *citing* Frank v. Maryland, 359 U.S. 360, 365 (1959).

225. 461 F.2d at 858-59, *citing* Camara v. Municipal Ct., 383 U.S. 523, 1535 (1967).

226. United States v. Biswell, 92 S. Ct. 1593 (1972).

administrative search cases hold little precedential value for warrantless airport searches.

If, then, it is determined that there is no justification for conducting a warrantless search of carry-on luggage without obtaining the passenger's consent, it is necessary to determine the constitutionality of leaving the passenger with the sole option of not boarding should he refuse such consent. The Court in *Allen* seemed to indicate an absolute right in the airline authorities to condition boarding upon express consent to a search.[227] The *Lopez* and *Meulener* decisions, however, adhered to an opposite point of view, indicating that since denial of airline transportation frequently is tantamount to a frustration of the right to travel, consent obtained under such conditions is *inherently coercive*, thus vitiating the constitutional effectiveness of the waiver.[228] In *United States v. Jackson*,[229] however, the Supreme Court held that a "procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right" [230] and that a mere "chilling effect" on the assertion of a constitutional right could be sufficient to invalidate a provision of law if that provision had no other purpose or effect.[231]

Although the prevention of hijacking represents a substantial government interest, the existence of this interest should not authorize a practice which curtails basic freedoms where the means chosen to effect that end are imprecise. In this regard, the mass search situation may be analogized to the situation in *Aptheker v. Secretary of State*,[232] where the Supreme Court held unconstitutional an act which made it unlawful for any registered member of a Communist organization to apply for or use a passport. The Court in *Aptheker* reasoned that the provision was unconstitutional on its face, because of its broad and indiscriminate transgression of first amendment liberties. Similarly, imposing conditions upon the right to travel raises important due process problems. In *Kent v. Dul-*

227. *See* note 207 *supra* & accompanying text. In a concurring opinion in United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972), Chief Judge Friendly stated that a mass search of all passengers without their consent was justified in light of the hijacking emergency. He noted that, assuming the passengers have advance notice of the search procedures, they could avoid such search simply by choosing not to travel by air.

228. *See* note 208 *supra* & accompanying text.

229. 390 U.S. 570 (1968).

230. *Id.* at 583.

231. *Id.* at 581.

232. 378 U.S. 500 (1964).

les, another passport case, the Court held that the "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." [233] The freedom of movement may be limited by a narrowly drawn statute or regulation serving a compelling government interest;[234] however, imposition of a general condition upon the right to travel cannot be sustained. Thus, there are compelling reasons for holding unconstitutional any requirement of a voluntary waiver of fourth amendment rights as a condition of travel. This approach affords the individual at least a modicum of protection while allowing other means for achieving the government's valid interest. *Allen* and *Meulener*, for example, indicated that when a certain level of probable cause was reached, the right to travel could be conditioned on consent to a search. Although this level of cause might not be as high as that traditionally required for encroachments upon fourth amendment rights, it is submitted that the harm to the integrity of fourth amendment standards resulting from current practices in the nation's airports could be reduced through implementation of this approach.

Another approach was suggested by *Lopez*, *Bell*, and *Epperson*—the use of a selective search based upon minimal grounds uncovered during the preflight screening process. This procedure, however, might have a chilling effect on the exercise of the right to travel, since, once a selection is made, the individual apparently would have no right to leave.

Searches secured by "enforced consent" are far from consistent with the right to travel freely. "In such a case the citizen who has given no good cause for a belief that he is engaged in [criminal activity] ought to be able to proceed on his way without interference." [235] Despite a compelling government interest, the threat posed by any single passenger certainly does not justify a search of all carry-on luggage. The most attractive solution appears to be one that would allow passengers to check baggage which they do not want searched, rather than the present program, which effectively conditions the right to travel upon submission to a search.

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233. 357 U.S. 116, 125-26 (1958). The Court continued: "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . Freedom of movement is basic in our scheme of values." *Id.*

234. The Supreme Court has stated that "any classification which serves to penalize the exercise [of the right to travel within the United States], unless shown to be necessary to promote *compelling* governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

235. Brinegar v. United States, 338 U.S. 160, 176-77 (1949).

Protective Frisk

In most airport search cases, the search of prospective passengers based upon some form of selective criteria has been justified as a protective pat-down search, a procedure approved by the Supreme Court in *Terry v. Ohio*.[236] In order to uphold this intrusion, however, the courts have had to depart from the limited nature of the holdings in *Terry* and its companion case, *Sibron v. New York*.[237] Moreover, in two cases, the protective frisk rationale has been found inapplicable to the procedures now used to ferret out potential hijackers.[238]

The Court in *Terry* held that a pat-down search, to be reasonable, must have been justifiable at its inception. Moreover, the scope of the ultimate action must be reasonably related to the circumstances which justified the interference in the first place.[239] Thus, the extent of intrusion must be related to the cause of the intrusion. The grounds necessary to justify a carefully limited protective frisk are not as strict as those required for probable cause to arrest. The "probability of guilt" necessary for arrest is inapplicable to stop and frisk situations, where only a "probability of impending criminal activity" is necessary.[240] To justify a protective frisk, the police officer must have "reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." [241] Thus, the search must be motivated by self-protection or protection of others and must be based upon "rational inferences" drawn from "articulable facts." [242] Where an individual is engaged in suspicious behavior, a police officer may investigate and, when the facts and circumstances warrant, take certain protective action. The applicable test has been characterized as one of "substantial possibility." [243]

236. 392 U.S. 1 (1968).

237. 392 U.S. 40 (1968).

238. The courts in *Meulener* and *Allen* held that the *Terry* standards had not been met in the passenger searches involved in those cases and that consent was a necessary prerequisite to a pre-boarding search which was based on no more than a positive magnetometer reading, a fitting of the profile, and a failure to produce adequate identification. *See* note 209 *supra* & accompanying text.

239. Terry v. Ohio, 392 U.S. 1, 20 (1968).

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

241. 392 U.S. at 27. The Court in *Terry* continued: "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*

242. *Id.* at 21.

243. LaFare, *Street Encounter and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 87 (1968).

The Court in *Terry* carefully limited the scope of a permissible protective frisk. Since such a search is intended to protect the police officer and others by allowing reasonable methods based upon standards lower than normally are tolerated when fourth amendment rights are endangered, the permissible intrusion is "a carefully limited search of the outer clothing . . . in an attempt to discover weapons. . . ." [244] The admission of the seized evidence in *Terry* thus was justified by the high degree of interest in allowing reasonable criminal investigation with some margin of safety for the investigators and by the limited nature of the intrusion.

The limited nature of the protective frisk exception to the warrant requirement was underscored in *Sibron v. New York*,[245] in which evidence uncovered in circumstances similar to those in *Terry* was held inadmissible because the search was motivated by a desire to seize drugs rather than a need for self-protection. Moreover, *Terry* upheld the admission into evidence of weapons seized in a protective frisk but did not consider the admissibility of contraband other than weapons seized under similar circumstances. At least one commentator has suggested that the protective frisk exception should apply only to hidden weapons, in order to eliminate any temptation to abuse the exception by a general search for contraband.[246] Although this proposal would foreclose many of the doubts concerning the use of the *Terry* exception in airport search cases, it has not gained judicial acceptance. In *Peters v. New York*,[247] a companion case to *Terry* and *Sibron*, contraband other than weapons was held admissible where it was discovered in a valid weapons frisk and could have been mistaken for a weapon. The Court in *Peters* and *Terry* distinguished the situation in *Sibron* because in that case, the scope of the intrusion was not properly circumscribed. The police officer obviously was looking for narcotics and the search did not begin with a weapons frisk which might have justified further intrusion.

In light of the limitations on the purpose and nature of a protective frisk, the exclusion of all evidence except weapons would not be warranted. However, in the special context of airport searches, where the level of cause for protective search is lower than in street encounters, a rule limiting admissibility to concealed weapons only is justified and may represent an effective balance of the conflicting interests involved.

244. 392 U.S. at 30.
245. 392 U.S. 40, 64 (1968).
246. *The Supreme Court, 1967 Term, supra* note 240, at 185.
247. 392 U.S. 40 (1967).

There has been considerable disagreement among the courts in the application of the protective frisk exception to airport passenger searches. This divergence would appear to result from differing assessments of similar factual situations. For example, the courts are unable to agree on the reasonable implications to be drawn where a passenger fits the hijacker profile, yields a positive magnetometer reading, and fails to produce adequate identification.[248] Assuming a proper application of the "profile," the courts in both *Lopez* and *Bell* would uphold "a narrowly circumscribed protective weapons 'pat-down' or 'frisk' . . . of the limited number of passengers who fit all three criteria." [249] Both courts were reluctant to extend the *Terry* rationale; nevertheless, they were persuaded that the highly objective nature of the FAA selection process would provide sufficient protection against subjective whim or caprice of enforcement personnel. This rationale, however, has not been adopted unanimously by the courts dealing with the problem; as noted above, the *Meulener* and *Allen* courts did not feel that the selection of a passenger via the use of the screening system was sufficient to justify a forced search. Assuming, *arguendo*, that the figures in *Lopez* are valid, the difference between these two views is their divergent evaluation of the six percent mathematical probability that a passenger might be armed.[250] The *Meulener* and *Allen* evaluation is based on the premise that mere objectivity of selection and a percentage chance of criminal activity do not justify an invasion of fourth amendment rights. It does, however, justify a qualification to the right to travel. At the other end of the

248. Samples introduced in United States v. Lopez, 328 F. Supp. 1077, 1084, 1086 (E.D.N.Y. 1971), indicated that 90 percent of potential hijackers fit the profile as compared to less than one percent of the total traveling public. Of the total number of passengers, approximately .14 percent fit the profile as well as activated the magnetometer. Out of the total number of passengers, .05 percent fit all three criteria necessary for a search.

249. *Id.* at 1097. The court's refusal to consider such evidence in *Lopez* was based upon an improper application of the FAA profile. The airline in that case had "updated" the profile by adding two characteristics (one of which was based on an ethnic element) and deleting what the court considered to be an essential element of the scientifically supported profile. The court rejected the evidence because the addition of the ethnic element created equal protection problems, and the total effect of the changes was to eliminate the "objectively neutral" character of the profile and make its application dependent on subjective judgment. *Id.* at 1101. The court felt that there were disquieting implications in the use of statistical probability as an element of probable cause or even of substantial possibility. While it felt that the use of mathematical probability might be necessary in this area, it wished to underscore the judicial role in policing both the methods employed and the scope of their application.

250. *See* notes 216-18 *supra* & accompanying text.

spectrum, the court in *Slocum* found that the degree of probability available in these circumstances justifies not only a limited search of the passenger's person but also a full-blown search of his carry-on luggage. However, *Slocum* did not attempt to justify this search under the *Terry* exception. Rather, the court relied on the reasonable governmental interest involved.[251]

Arguably, the use of objective standards to select persons for a limited search—where it can be shown mathematically that there is a six percent chance that they are armed—is within the spirit of the protective frisk exception. At least this is true in the context of the compelling need to halt aircraft hijacking. However, the courts in *People v. Smith*[252] and in *Epperson* have stretched the protective frisk exception in this area beyond the limit of its reasonable interpretation. *Epperson* upheld the admission of evidence seized in a limited protective airport frisk which was conducted solely on the basis of an unexplained positive magnetometer reading. The magnetometer, it should be noted, shows a positive reading for about 50 percent of the persons who pass through its sensory area.[253] The district court decision in *Bell* indicated that it would have serious reservations about judicial acquiescence to a protective frisk based solely on such grounds.[254] However, *Epperson* held that the presence of unexplained metal on the person of a passenger sufficient in mass or quantity to register an abnormally high magnetometer reading was sufficient to warrant the belief of a reasonably prudent man that his life, or the lives of others, were in danger.[255]

The *Smith* court felt that a similar inference could be drawn where a person attempts to leave the boarding area after an announcement that all carry-on luggage would be inspected.[256] This holding directly contradicts the holdings in *Meulener*, *Allen*, and *Lopez*, where the right to leave was held to be an essential element of consent and where the high degree of government interest was held not to attach to the search of a person who chose not to board the airplane. The *Smith* holding—that a reasonable inference could be drawn from a desire not to be searched—raises grave constitutional problems, since the desire to exercise a constitutional right should not constitute grounds for an invasion of that

251. 464 F.2d at 1183.

252. 29 Cal. App. 3d 106, 105 Cal. Rptr. 280 (1972).

253. United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971).

254. 335 F. Supp. at 802.

255. 454 F.2d at 771.

256. 29 Cal. App. 3d 106, 105 Cal. Rptr. 280 (1972).

right. However, the *Smith* court, unlike the *Meulener* court, felt that under such circumstances the compelling government interest in the search did not end when a person chose not to take a flight.[257]

Finally, the court in *United States v. Lindsey*[258] proposed that the lower standards for a limited search approved in *Terry* be lowered still further to accommodate the anti-hijacking program. The court stated that:

> In the context of a possible airplane hijacking with the enormous consequences which may flow therefrom, and in view of the limited time in which [the Marshal] had to act, the level of suspicion required for a *Terry* investigative stop and protective search should be lowered. Therefore, despite the fact that it may be said that the level of suspicion present in the instant case is lower than in *Terry*, it was sufficiently high to justify [the Marshal's] acting.[259]

The basis for the search in *Lindsey* was the boarding passenger's "general indicia of extreme anxiety," his failure to produce adequate identification, and bulges in his pockets.[260] The bulges proved to be narcotics.

The view that the *Terry* standards should be lowered in this context was shared by Chief Judge Friendly in the court of appeals decision in *Bell*. In a concurring opinion, Judge Friendly endorsed a broad-based search of *all* airline passengers, irrespective of whether such passengers conform to the "hijacker profile" or other objective criteria. He noted that air piracy had reached such dangerous proportions that the only limitation on airline searches should be that they be conducted in good faith for the purpose of preventing hijacking. In this regard, he added: "I would thus have no difficulty in sustaining a search that was based on nothing more than the trained intuition of an airline ticket agent or a marshal of the Anti-Hijacking Task Force . . ." [261]

CONCLUSION

In an area of complex balancing of three critical interests—the right to privacy, the freedom to travel, and the interest in ending air piracy—there are no easy answers. The *Meulener* court has suggested one solu-

257. 105 Cal. Rptr. at 283.
258. 451 F.2d 701 (3d Cir. 1971).
259. *Id.* at 703.
260. *Id.*
261. 464 F.2d at 675.

tion that seems to accommodate all three interests most effectively. Undoubtedly, some degree of intrusion upon the right to privacy and the right to travel will be upheld in this area, due to the compelling government interest and the difficulty of serving that interest without imposing on the rights of air travelers. Under *Meulener*, the right to travel remains protected until some basis is established for limiting such right; then and only then may that right be conditioned. The right to privacy is protected by providing for an absolute right to leave when a passenger is confronted with a search as a condition to his boarding the airplane. Neither right can be infringed under *Meulener* without some factual basis. Of course, the government retains the right to search under the general exceptions created for protective frisks and searches incident to arrest when appropriate levels of probable cause are reached. The right to use the magnetometer on each passenger remains, and under a modified application of the *Meulener* and *Epperson* decisions, the authorities could use the detection of an unexplained amount of metal on the person of the passenger or in his carry-on luggage as the sole basis for conditioning the right to travel.

The one major interest that is sacrificed by such a solution is the claimed right of the FAA to require a search of all carry-on luggage. It is submitted that such a mass search would be constitutionally acceptable only if the passenger were given a final option of avoiding the search by placing such items in stowage. This would preserve both the right to travel and the right to privacy.

Another possible solution would be the creation of a new and limited exception based on the protective frisk exception, as was suggested in *Lindsey*. Such a plan should be qualified, however, by a proviso that all evidence seized, other than weapons, be subject to the exclusionary rule. A selective application of the exclusionary rule to the fruits of a particular search based on the nature of the items seized would be a novel approach. It would serve the purpose, however, of narrowing the scope of the invasion to the precise objective of the compelling government interest. This would serve to minimize the chilling effect of such searches on the right to travel; additionally, it would prevent the use of such searches as a general procedure to limit the flow of contraband in the United States.