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Donald Applestein

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HISTORICALLY THE CONSTITUTIONAL RIGHT TO TRAVEL has arisen in two contexts. First, it has arisen within the context of the competing interests of the individual to travel internationally and the interest in national security. The other is that in which an individual wishes to travel to some area, and the government restricts that right in an effort to protect the persons in the area to which the individual wishes to travel.

However, under the current airport screening procedures the right to travel may be being restricted or interfered with in another context: prevention and detection of criminal activity. This note shall survey this constitutional right to travel, as it relates to airport searches. In addition, it also looks into such areas as governmental action, probable cause, waiver of fourth amendment rights, and the rule of exclusion.

After reviewing these areas, one reaches the inescapable conclusion that in order to maintain the vitality of the fourth amendment, courts must apply the rule of exclusion to seized contraband that could in no way be used to hijack an aircraft.

The Right to Travel

The right to travel domestically and internationally, though not specifically enumerated in the Constitution, has been found to be a fundamental right. Like many other such rights, it is not an absolute right. By using a balancing test which the Court has developed, the right to travel may be restricted in the face of a compelling governmental interest. In addition, the restrictions may not be arbitrary or capricious and must be reasonably applied.

In view of the fact that there is a high potential for loss of life and property in hijacking situations, it would appear that reasonable regulations to protect against hijacking would meet the test of a compelling governmental interest.

While the right to travel internationally arises from one or two sources, the right to travel domestically involves several sources.

Domestic Travel

Of the earlier cases dealing with the right of domestic travel, *Crandell v. Nevada*,[1] involved a state's power to tax persons when they left the state. Nevada argued that under the commerce clause,

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[1] 73 U.S. (6 Wall.) 35 (1867).

states had the power to act until Congress legislated in that particular area in such a way so as to exclude the states.[2] Relying on two earlier cases,[3] the Supreme Court of the United States found that the tax was not a regulation and did not constitute a violation of the commerce clause.[4]

However, the Court went on to find that the power of the federal government to raise armies required citizens to move from state to state and that such a tax would be a hindrance to the operation of the government.[5] Similarly, the Court also found that individuals had rights as national citizens and that in order to exercise those rights, individuals had the right to freely "pass and repass" through the states.[6]

A similar problem confronted the Court in *Edwards v. California*[7] in which the petitioner had violated a state criminal statute which made it unlawful for a person to bring an indigent into the state. The petitioner argued that the statute infringed upon the right to travel. The Court agreed and found that the right arose under the commerce clause.[8] Justice Douglas felt that the right to travel was protected from state interference by the fourteenth amendment, and that the right arose from our "national citizenship".[9]

Justice Douglas' use of the fourteenth amendment to establish a right to travel was not novel. In *Williams v. Fear*,[10] the petitioner was convicted under a state statute for failing to pay a tax on employing migrant workers, and appealed on the grounds that the tax was burdensome. The Court found in striking down the tax that it violated personal rights and liberties secured by the fourteenth amendment.[11]

More recently, another constitutional source for the right to travel has developed. In *Shapiro v. Thompson*,[12] the petitioner was denied federal welfare benefits on the grounds that he did not meet the state's residency requirements. Under the program, Congress gave the states

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[2] *Id.* at 41.

[3] *See* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[4] Crandell v. Nevada, 73 U.S. (6 Wall.) 35, 41 (1867).

[5] *Id.* at 44.

[6] *Id.* at 48-9. *See also* Smith v. Turner, 48 U.S. (7 How.) 283 (1849); Norris v. Boston, 48 U.S. (7 How.) 283 (1849).

[7] 314 U.S. 160 (1941).

[8] *Id.* at 172, *citing* Mitchell v. United States, 313 U.S. 80 (1940); United States v. Hill, 248 U.S. 420, 423 (1918); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 203 (1884).

[9] Edwards v. California, 314 U.S. 160, 177 (1941).

[10] 179 U.S. 270 (1900).

[11] *Id.* at 174. *See also* Twinning v. New Jersey, 211 U.S. 78 (1908).

[12] 394 U.S. 617 (1968).

the power to promulgate eligibility rules and regulations, and the petitioner asserted that this was violative of the equal protection clause and infringed upon their constitutional right to travel. The Court concluded:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[13]

Another significant aspect which distinguishes *Shapiro* from previous cases in this area is the direct involvement of the federal government in authorizing rules and regulations which unconstitutionally restrict travel.

In *United States v. Guest*,[14] the Court found that a citizen's right to travel was protected from state action, or one acting under color of state authority, by the equal protection clause of the fourteenth amendment.[15]

> The constitutional right to travel from one State to another, and necessarily *to use highways and other instrumentalities of interstate commerce* in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.[16] (emphasis added)

Foreign Travel

Cases dealing with the right to international travel do not utilize the variety of sources as do those cases dealing with domestic travel. Essentially, the first amendment, and the due process clause of the fifth amendment, are the sources from which the right to international travel arises. At the same time, it should be noted that there is a stronger governmental interest involved in international travel.

Kent v. Dulles[17] involved the denial of a passport by the Secretary of State on the grounds of the petitioner's affiliation with the Communist Party or a related organization. In finding the denial unconstitutional, Justice Douglas, writing for the majority, found that:

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[13] *Id.* at 629.

[14] 383 U.S. 745 (1966).

[15] *Id.* at 755.

[16] *Id.* at 757; *see* the opinion of Harlan, J., at 763 *et seq.* for a summary of the area.

[17] 357 U.S. 116 (1958).

> The right to travel is part of the "liberty" of which the citizen can not be deprived without due process of the law under the Fifth Amendment.[18]

The Court also found that the Secretary of State could not be given unbridled or discretionary authority to grant or withhold passports, and that whatever rules he used to govern his decisions would be narrowly construed.[19]

Governmental Interference

Like the area of domestic travel, the right to international travel is not absolute. In *Zemel v. Rusk*,[20] which involved the denial of a passport, the Court found that:

> . . . the fact that a liberty can not be inhibited without due process of law does not mean that it can under no circumstances be inhibited.[21]

In arriving at this and other decisions the Court indicated that it will use a balancing test between the interest of the government in protecting itself, and a citizen's right to travel.[22] In dissent, Justice Douglas argued that the right to travel is closely allied with the first amendment and that any restrictions should be narrowly construed, particularly in peacetime.[23]

With the Court's balancing approach in the field of international travel, it is not surprising that a similar approach is also used when dealing with questions involving domestic travel. In *Zemel,* this very problem was dealt with in the following manner:

> The right to travel *within* the United States is of course also constitutionally protected, *cf. Edwards v. California,* 314 U.S. 160, 86 L. Ed. 119, 62 S. Ct. 164. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that un-

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[18] *Id.* at 125.

[19] *Id.* at 129. *See also* Apthecker v. Secretary, 378 U.S. 500 (1964); Kraus v. Dulles, 235 F.2d 840 (D.C. Cir. 1956); Schachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Copeland v. Secretary of State, 220 F.Supp. 20 (S.D.N.Y.), *motion to advance denied, mem.,* 376 U.S. 967, *vacated* (in light of *Aptheker, supra*), 378 U.S. 588 (1964); Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955), *rev'd on other grounds,* 235 F.2d 532 (D.C. Cir. 1956); Bauer v. Acheson, 106 F.Supp. 445 (D.D.C. 1952); Hurwitz, *Judicial Control Over Passport Policy,* 20 CLEVE. ST. L. REV. 271 (1971).

[20] 381 U.S. 1, *rehearing denied,* 382 U.S. 873 (1965).

[21] *Id.* at 14.

[22] In *Zemel,* the petitioner asserted his right to travel on the ground that he wanted to be better informed about social and economic conditions in Cuba. The Court found the government's interest in protecting citizens to be controlling.

[23] Zemel v. Rusk, 381 U.S. 1, 26 (1965) (Douglas, J., dissenting).

> limited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.[24]

This balancing test has been used to restrict the domestic travel of a Japanese-American citizen during wartime[25] and that of citizens in a particular locale during periods of civil disorder.[26]

From this it becomes evident that with the dangers involved in hijacking there is clearly a compelling governmental interest to justify the current airport security searches.

Private or Governmental Action?

The current set of FAA regulations providing for passenger screening procedures is the method by which the government seeks to protect life and property. However, under the procedures, independent contractors to the airlines conduct the searches and therefore the question arises as to whether there is true governmental action or whether the searches are private action. Regardless of the theory used, the current screening procedures are conducted as a result of government order and regulation, and therefore establish the requisite government involvement to make these searches and seizures governmental activity.

It is basic to the fourth amendment that the rights secured are a bar to government interference. This doctrine was illustrated in the Court's 1927 decision in *Burdeau v. McDowell.*[27] Here the government obtained incriminating evidence only after it had been seized by a private person acting on his own accord. The Court found no government involvement and Justice Day concluded that:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon activities of sovereign authority . . . .[28]

By the same token, purely private action is not subject to the constitutional restraints of the fourth amendment. Cases involving searches and seizures by private individuals, where there is no government involvement or encouragement, have resulted in the courts' refusing to recognize fourth amendment restraints and suggesting that any redress would have to be sought through private litigation.[29]

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[24] *Id.* at 15-16.

[25] Korematsu v. United States, 323 U.S. 214 (1944).

[26] United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

[27] 256 U.S. 465 (1921).

[28] *Id.* at 475.

[29] *See, e.g.,* Sackler v. Sackler, 229 N.Y.S.2d 61, *aff'd,* 255 N.Y.S.2d 83 (App. Div. 1962).

Not all fact patterns fall neatly into either the "governmental action" or the "non governmental action" category, which raises the question of how extensively the government must be involved before the courts recognize governmental action in a given search and seizure situation. In those cases which have presented this question, courts have in general broadly defined the concept of governmental action in an effort to maintain the vitality of the fundamental rights involved. In *Byars v. United States*,[30] state police with a proper search warrant confiscated illegal liquor. Before leaving to seize the liquor, the state officers asked a federal agent to accompany them. The federal agent did not have a search warrant nor did he have any reason for not obtaining one before he went with the state officers. In reversing the petitioner's conviction, the Court concluded that:

> The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is 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.[31]

Thus, it is apparent that courts will not allow strained arguments by the government that individuals were acting on their own, made in an effort to avoid a finding of governmental action and the consequent restraints of the fourth amendment.[32]

More specifically, *United States v. Lopez*[33] involved an airline employee who altered a federal hijacker profile in such a way so as to destroy the profile's objectivity. The profile was the creation of the government, through the FAA; it purported to set out objective criteria, to aid airline employees and U.S. Marshals in identifying potential hijackers.

> While the abuse in this case was by airline officials, not the government, these employees were acting as government agents insofar as they designated "selectees" and alerted Marshals.[34]

However, under current FAA regulations, the profile is no longer in use, and a reassessment of the area is therefore necessary. Under

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[30] 273 U.S. 28 (1926); *see also* Gambino v. United States, 275 U.S. 310, 317 (1927).

[31] Byars v. United States, 273 U.S. 28, 33-34 (1926).

[32] *See, e.g.*, Stoner v. California, 376 U.S. 483, 488 (1964); Jones v. United States, 362 U.S. 257, 266-67 (1960).

[33] 328 F. Supp. 1077 (E.D. N.Y. 1971).

[34] *Id.* at 1101.

the statutes which provide for the regulations requiring airport screening,[35] each airline must be certified. This certification may be revoked for failure to comply with the FAA's regulations.[36] The effect is clear. The airlines have no other course to follow but to comply with the regulations or lose their certificates to operate.

The history of these regulations is one of *reaction,* in that they were put into effect sooner than planned because of increasing incidents of hijacking.[37] The current regulations require the airlines to establish search procedures and submit the plans for approval by the FAA.[38] The approved plans call for the inspection of *every* person's carry-on luggage and their being required to pass through a magnetometer which detects quantities of metal which the person may be carrying. Subsequently, the FAA promulgated regulations requiring the presence of armed law enforcement officers during the screening process.[39] It is significant that in announcing this regulation, the FAA acknowledged its own involvement in what was termed a "framework of shared responsibility."[40] The officers are to be armed, in uniform with a badge and "other indicia of authority," and vested with the power to arrest under federal, state, and local laws.[41] On February 27, 1973, the FAA further delineated the duties of the law enforcement officers by announcing that the officer's presence was to "provide immediate response to actual or suspected violations of the law."[42]

Because the airlines must comply with these regulations in order to continue in business, they and their employees and agents are forced into the position of becoming government agents carrying out procedures required and approved by the government.

Cases dealing with airport searches and specifically with the question of whether such searches and seizures constitute governmental action are not of great assistance. In *Corngold v. United States,*[43] an airline employee opened cartons which contained stolen merchandise. This was done at the request of a federal agent who did not have a search warrant and had no apparent reason for not getting one. In reversing the conviction the court found that:

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[35] 49 U.S.C. §1301 *et seq.* 1970).

[36] 49 U.S.C. §1371(g). *See also* 49 U.S.C. §1472(a) for criminal sanctions *Hearings on Aircraft Hijacking Before the House Committee on Foreign Affairs,* 91st Cong. 2d Sess., at 101 (1970).

[37] *See* 14 C.F.R. §121.538 (1972).

[38] *Id.*

[39] 14 C.F.R. §107.4 (1973).

[40] *Id.*

[41] *Id.*

[42] 14 C.F.R. §107.1(e) (1973).

[43] 367 F.2d 1 (9th Cir. 1966).

> 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 failed to meet Fourth Amendment standards. (Citations omitted) 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.[44] (emphasis added)

In another case, *United States v. Small,*[45] a private individual was following the request of a federal agent. Here, the private individual changed the lock on a traveler's locker so that its user would be unable to open it. When the user could not open the locker he reported it to the company and was subsequently arrested. The court granted a motion to suppress the evidence on the grounds that it was not in the employee's normal scope and course of employment to change locks, and that he did so only because of the request by the government.[46]

From this it becomes apparent that the requisite governmental action arises wherever a private individual acts upon a government "request" or order, or if a government agent oversees the procedure.

In those cases where no government action is found, the distinguishing factor is that the private individual acts out of personal suspicion or out of a contractual relationship which creates the right to inspect.[47] In *Gold v. United States,*[48] the same court which decided *Corngold* found that the inspection was motivated by personal suspicion. Here, the government agent told the carrier that he suspected that certain boxes contained obscene film. The boxes were opened by the carrier after the government agent left and at no time did the agent request that they be opened.[49] This search was upheld, but can easily be distinguished from the current airline searches because the latter are not conducted at the airline's discretion.

Since the current screenings were not instituted until required by the FAA, the conclusion compelled by the facts is that such searches are ". . . solely in aid of the enforcement of a federal statute . . ."[50] or regulations. Therefore, it would be difficult to understand how there could be a denial of governmental action.

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[44] *Id.* at 5.

[45] 297 F. Supp. 582 (D. Mass. 1969).

[46] *Id.* at 585.

[47] *See* United States v. Blum, 329 F.2d 49 (2d Cir.), *cert. denied,* 377 U.S. 993 (1964).

[48] 378 F.2d 588 (9th Cir. 1967). *See also* United States v. Burton, 341 F. Supp. 302 (W.D. Mo. 1972).

[49] Gold v. United States, 378 F.2d 588, 591 (9th Cir. 1967).

[50] Corngold v. United States, 367 F.2d 1, 5 (9th Cir. 1966).

Additionally, the Court has found that the fourteenth amendment bars private individuals, acting under the color of state law, from depriving others of their constitutional rights.[51] Congress has sought to enforce this with legislation.[52] However, it is not the states' regulations, but those of the federal government, which are being carried out. The problem presented is that the federal government may be committing acts which federal legislation or the Constitution prohibit the states from doing.

For a possible solution, some guidance may be obtained from *Bolling v. Sharpe*[53] which involved school segregation in the District of Columbia. The argument advanced by the District of Columbia was that since it was under the authority of the federal government and was not a state, the fourteenth amendment would not apply. The Court concluded, in an unanimous opinion written by Chief Justice Warren, that:

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.[54]

The Court found that to impose such a lesser duty would constitute a violation of the due process clause of the fifth amendment. Therefore, since the fourteenth amendment prohibits individuals acting under color of state authority from committing unconstitutional acts, the fifth amendment should have the same effect on persons acting under color of federal authority.

Waiver of Fourth Amendment Rights and Consent Searches

The rights secured by the fourth amendment are certainly fundamental to our national heritage, and they should not be discarded even in the face of high potential risk of loss of life and property. To insure their vitality and continued existence, every effort should be made to guarantee that acts which constitute a waiver of those rights should be freely, voluntarily, and intelligently given. Also, in order to guarantee that those rights are not subordinated to other fundamental constitutional freedoms, there should be a required warning much like those given for the fifth and sixth amendments. This is particularly important where two such fundamental and conflicting interests collide in the setting of the current screening procedures. Under those procedures, though, it is impossible to find that such searches are consent searches or that there is a waiver of rights.

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[51] *See* United States v. Guest, 383 U.S. 745 (1966).

[52] 42 U.S.C. §1983 (1970).

[53] 347 U.S. 497 (1954).

[54] *Id.* at 500. *See also* Hurd v. Hodge, 334 U.S. 24 (1948).

Courts have indulged in a heavy presumption against consent searches. This presumption against consent was firmly established in *Johnson v. Zerbst.*[55] Mr. Justice Black wrote:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of *a known right* or privilege.[56] (emphasis added)

In *Weed v. United States,*[57] the petitioner was faced with a situation wherein the police had drawn their guns, taken the petitioner into custody and told him that they did not have a search warrant, but could get one. The Court held that ". . . under these circumstances, the alleged consent was not freely and intelligently given."[58] One wonders how a person can intelligently give consent to a search unless he has been informed of his right to insist upon a warrant.

Of interest is *Johnson v. United States,*[59] wherein a federal agent smelled burning opium coming from under the petitioner's hotel door. After knocking on the door and having the petitioner open it, the agent told her, "I want to talk to you a little bit." The petitioner then stepped aside and the agent entered the hotel room. The agent told her to consider herself under arrest and proceeded to search the room. In reversing the conviction, Justice Jackson said:

> Entry to defendent's living quarters, which was the beginning of the search, was demanded *under color of office.* It was granted in submission to authority rather than as an *understanding and intentional waiver of a constitutional right.*[60] (emphasis added)

The Court went further to develop this doctrine of effective consent in saying that to permit this type of consent would allow the undermining of the basic thrust of the fourth amendment.[61]

It becomes clear that in order for a consent search to be effective, it must be freely, voluntarily, and intelligently given. Nor can there

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[55] 304 U.S. 458 (1938).

[56] *Id.* at 464.

[57] 340 F.2d 827 (10th Cir. 1965).

[58] *Id.* at 829. *See also* Wren v. United States, 352 F.2d 617 (10th Cir. 1965), *cert. denied,* 384 U.S. 944 (1966).

[59] 333 U.S. 10 (1947).

[60] *Id.* at 13.

[61] *Id.* at 17.

be an effective waiver of one's constitutional rights as a condition precedent to the exercise of another constitutional right such as the right to travel.[62] Therefore, by merely presenting oneself at the boarding gate, there can not be an implied waiver of fourth amendment rights, nor can there be such a waiver as a condition precedent to the right to travel.

Of interest in the area of consent searches, particularly in view of the close interaction between the fourth and fifth amendments, is the theory of the necessity of a verbal or written warning[63] in order for there to be an effective consent to the search. This exact issue, in an airport search situation, arose in *United States v. Muellener*.[64] Here, a defendant's motion to suppress evidence obtained during a pat-down search was granted on the grounds that the defendant was not warned that he had a choice of being searched or not being permitted to board the aircraft.

> To meet Fourth Amendment guarantees, the prospective passenger must be advised that he has to submit to a search if he wants to board the plane, but that he can decline to be searched if he chooses not to board the aircraft.[65]

The basis of the argument requiring a warning is that to intelligently waive a right, one must be aware of its existence.[66] *Miranda v. Arizona*[67] provided that a person could effectively waive his constitutional rights, ". . . provided the waiver is made *voluntarily, knowingly, and intelligently.*"[68] (emphasis added) More importantly, the Court also found that in order for there to be an intelligent waiver, the person had to be informed of his constitutional rights.

In those cases which have recognized the claim that in order for a consent to be effective there must be a warning, the basic issue was whether the person felt that he was in custody, *i.e.*, that his freedom was restricted to a significant degree. In *United States v. Blalock*[69] the court was faced with this exact problem where the de-

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[62] Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 595 (1926); United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1971); United States v. Lopez, 328 F. Supp. 1077, 1092-3 (E.D. N.Y. 1971).

[63] *See* Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967); Comment, *Constitutional Law — Miranda v. Arizona and the Fourth Amendment*, 46 N.C. L. REV. 142 (1967).

[64] 351 F. Supp. 1284 (C.D. Cal. 1972).

[65] *Id.* at 1289-90.

[66] *See* Johnson v. United States, 333 U.S. 10, 13 (1947); Johnson v. Zerbst, 304, U.S. 458, 464 (1938); Weed v. United States, 340 F.2d 827, 829 (10th Cir. 1965).

[67] 384 U.S. 436 (1966).

[68] *Id.* at 444. *See also* Orozco v. Texas, 394 U.S. 324 (1969).

[69] 255 F. Supp. 268 (E.D. Pa. 1966).

fendant was approached by law enforcement officers in a hotel lobby. After escorting him to the men's room where he was frisked, they took him to his room. Upon entering the room the agents asked if they could look around, and in doing so found incriminating evidence. In granting the defendant's motion to suppress the evidence because of the failure of the agents to warn the defendant that he did not have to consent, the court said:

> The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. *The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth.*[70] (emphasis added)

The court went on to find that the government had failed in its burden of proving that there was an intelligent waiver and consent.[71]

With regard to the standard to be used as to whether a person feels his liberty has been restricted, one court found that the standard should be a subjective personal one.[72] It would seem, however, that such a standard would be unenforceable because of the almost limitless range of personal feelings involved in freedom of movement and the belief as to when that freedom is restricted. Even the reasonable man standard would be difficult to employ because a jury would have difficulty understanding the psychological pressures inherent during custody situations. Studies have shown that persons who are knowledgable about the law are subject to this type of custodial pressure.[73] One court has gone so far as to find custody where the defendant was *asked* to come to an Internal Revenue office to answer some questions.[74] Another court has ruled that a defendant is entitled to a warning where postal inspectors asked the defendant to go to his home to get some items which later proved to be incriminating. Upon his return to the authorities he was given the traditional *Miranda* warning, but the court found the warning to be ineffective.[75]

This emerging doctrine has also gained some recognition in state courts. Two cases decided by the California Supreme Court have approved this theory. One case involved early morning "raids" by welfare workers to investigate homes which were receiving Aid to

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[70] *Id.* at 269.

[71] *Id.* at 270.

[72] United States v. Gower, 271 F. Supp. 655, 661 (M.D. Pa. 1967).

[73] *See Survey — Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519, 1591 (1967). *See also* Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman J. James,* 69 MICH. L. REV. 1259, 1299 (1971); Johnson, *The Supreme Court of California 1967-1968,* 56 CAL. L. REV. 1612, 1617 (1968).

[74] *See* United States v. Gower, 271 F. Supp. 665 (M.D. Pa. 1967).

[75] United States v. Pellegrini, 309 F. Supp. 250, 256-7 (S.D. N.Y. 1970).

Dependent Children.[76] The appellant welfare worker refused to take part in these raids on the grounds that they were unconstitutional. After refusing, the appellant was discharged for insubordination and brought suit on the ground that he could not be discharged for refusing to take part in an unlawful activity. Justice Tobriner, speaking for the majority, said:

> We need not determine here whether a request for entry, voiced by one in a position of authority under circumstances which suggest that some official reprisal might attend a refusal, is itself sufficient to vitiate an affirmative response by an individual who has not been apprised of his Fourth Amendment rights . . . . These circumstances nullify the legal effectiveness of the apparent consent secured by the . . . searchers.[77]

In *People v. Arnold*,[78] the same court found a need for a warning of fourth amendment rights on the grounds that the defendant's freedom of movement had been restricted; the court attempted to define custody in the following manner:

> [W]hether defendant is placed in a situation in which he *reasonably* believes that his freedom of movement is restricted by pressures of official authority . . . .
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> . . . [H]e may reasonably believe that if he attempts to leave the interrogation chamber the authorities will impose immediate detention.[79] (emphasis added)

In those cases which reject the need for a warning of fourth amendment rights, the court has either refused to accept the defendant's contention that his freedom of movement has been restricted,[80] or has found that the search was incident to a lawful arrest.[81] In one of the latter cases, the court found that a warning requirement for a search would degrade the required warnings for the fifth and sixth amendments.[82] However, implicit in such an argument is that the rights secured by the fourth amendment are somehow "below" or less important than those secured by the fifth and sixth amendments. Such reasoning is unsound and untenable, and must be rejected.

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[76] Parrish v. Civil Service Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

[77] *Id.* at 266-67, 425 P.2d at 229-30, 57 Cal. Rptr. at 629-30.

[78] 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967).

[79] *Id.* at 443, 426 P.2d at 520, 58 Cal. Rptr. at 120.

[80] *See, e.g.*, Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

[81] United States v. Gorman, 380 F.2d 158 (1st Cir. 1967).

[82] *Id.* at 164.

Probable Cause to Search

Essentially, the current procedures for airport searches consist of a search of each person's carry-on luggage and then requiring the person himself to pass through a magnetometer. Merely approaching the boarding gate can hardly be sufficient probable cause for either the luggage search or the magnetometer scan. With a high reading on the magnetometer, there may be sufficient suspicion for a strictly limited pat-down search *for items that could be used in a hijacking.*

Historically over the past fifty to fifty-five years, various decisions have been handed down in an effort to define probable cause. In *Carrol v. United States,*[83] Chief Justice Taft found that where an officer knew that an individual had a history of lawbreaking and was presently conducting himself in the same manner, the officer had probable cause to conduct a search.[84] However, the Court cautioned that:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop *every* automobile on the *chance* of finding liquor and thus subject *all persons* lawfully using the highways to the inconvenience and indignity of such a search.[85] (emphasis added)

A year later, in 1925, the Court found that probable cause required more than a mere belief that contraband was concealed in a particular location.[86] The question as to what was required remained open, and what eventually developed was a "reasonably prudent man" doctrine. In its application, this doctrine is dependent upon the particular fact pattern. Justice Rutledge said:

> The substance of all the definitions of probable cause is a reasonable ground for belief. . . . (citations omitted)
>
> . . . [T]he rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.[87]

The majority of the Court found that under the reasonably prudent man doctrine, the officer's belief would have to arise out of personal observation or knowledge,[88] or arise from a reliable informant's giv-

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[83] 267 U.S. 132 (1924).

[84] *Id.* at 159-62. *See also* Ker v. California, 374 U.S. 23 (1962).

[85] Carrol v. United States, 267 U.S. 132, 153-4 (1924).

[86] Agnello v. United States, 269 U.S. 20 (1925).

[87] Brinegar v. United States, 338 U.S. 160, 175-76 (1948). Rutledge, J., was speaking of the interest of the citizen in his privacy and the interest of the government in good, effective law enforcement.

[88] *Id.*

ing information which was subsequently corroborated.[89] Once these suspicions were aroused beyond the point of mere belief[90] or good faith,[91] the officer was to act in the manner of a reasonable man. He would not be required to be a legal technician.[92] Under this line of reasoning, unless the officer had prior information regarding an individual, there could hardly be probable cause for either a luggage or magnetometer search resulting from the approach of a prospective passenger at a boarding gate.

The "balancing of interests" of which Justice Rutledge spoke in *Brinegar*[93] was the determining factor in the Court's decisions involving the warrantless searches in *Terry v. Ohio*[94] and *Sibron v. New York*.[95] In these cases, the Court found that two criteria had to be met *before* a "protective pat-down search" could take place. First, there had to be a reasonable fear on the part of an officer for his safety or for the safety of others,[96] and second, the invasion had to be limited in scope and nature.[97]

Several courts have attempted to apply *Terry* and *Sibron* to airport searches.[98] In *United States v. Lopez*,[99] the defendant's motion to suppress was granted because an airline employee had altered the hijacker profile, making it invalid. However, before granting the motion, the court found that, but for the alteration, the search would have been justified in light of the circumstances. The defendant had triggered the magnetometer and had failed to produce satisfactory identification. With specific regard to the magnetometer, the court found that it was merely one in a number of steps in selecting people to be frisked but indicated that without prior justification, the use of the magnetometer might be objectionable.[100] This is particularly important inasmuch as the profile is no longer being used.

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[89] *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1966); Draper v. United States, 358 U.S. 307 (1959).

[90] Agnello v. United States, 269 U.S. 20 (1925).

[91] Henry v. United States, 361 U.S. 98, 102 (1959).

[92] Brinegar v. United States, 338 U.S. 160, 175 (1948).

[93] *Id.*

[94] 392 U.S. 1 (1967).

[95] 392 U.S. 40 (1967).

[96] Terry V. Ohio, 392 U.S. 1, 27 (1967).

[97] Sibron v. New York, 392 U.S. 40, 65 (1967).

[98] It should be noted that no cases have been found under the procedures that require every person to be searched; this will be discussed *infra*.

[99] 328 F. Supp. 1077 (E.D. N.Y. 1971). *See also* United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972).

[100] United States v. Lopez, 328 F. Supp. 1077, 1100 (E.D. N.Y. 1971).

A "tip" from an airline employee, bulging pockets, failure to produce satisfactory identification, and extremely anxious behavior were sufficient probable cause for a U.S. Marshal to stop and frisk a passenger in *United States v. Lindsey.*[101]

In *United States v. Epperson,*[102] the court upheld the defendant's conviction based on evidence seized in an airport search. *Epperson* differed from *Lopez* and *Lindsey* in that the frisk was based solely on a high reading on the magnetometer. There was no evidence of a profile raising any suspicion in the Marshal's mind, yet the court felt that the use of the magnetometer was not a violation of the fourth amendment.[103]

Though the case law is limited, it appears that some courts will approve searches only where there has been something in addition to or separate from a high reading on the magnetometer. As was pointed out in *Lopez,* the use of the magnetometer alone might very well be objectionable. Without some prior indication, it is unlikely that there are sufficient factors to establish probable cause, or the *Terry* requirement of suspicion of fear for one's safety, to warrant the use of a magnetometer to search a person.

With regard to searching carry-on luggage, in *People v. Sortina,*[104] the court granted defendant's motion to suppress on the ground that probable cause was lacking. Here, an airline employee was warned of possible hijackings and became suspicious of the defendant. The resulting search disclosed contraband. Because the employee was unable to explain his reasons for suspecting the defendant, the court found that there was no probable cause.[105]

In *People v. Erdman,*[106] the court rejected the government's claim that there was probable cause. Here, there was no use of the magnetometer, or a profile, nor was there any unusual behavior. The sole justification for the search was a bulge in the defendant's pocket. The court held that this alone was not enough to satisfy the requirements under *Terry.*[107]

Even where the search was justified at its inception the courts have found that under the *Terry* guidelines, the search must be strictly limited to its "objectives." Two cases demonstrate this principle in the airport screening situation.

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[101] 451 F.2d 701 (3d Cir.), *cert. denied,* 405 U.S. 995 (1971).

[102] 454 F.2d 769 (4th Cir. 1972).

[103] *Id.* at 771.

[104] 325 N.Y.S.2d 472 (Sup. Ct. 1971).

[105] *Id.* at 476.

[106] 329 N.Y.S.2d 654 (App. Div. 1972).

[107] *Id.* at 659.

In *United States v. Kroll*,[108] the court found that the search exceeded reasonableness when a Marshal insisted on finding out what was creating a one-fourth inch bulge in a white business envelope. The court concluded that the search had to be limited to those items which could *reasonably* conceal weapons.[109] Similarly, in *United States v. Meulener*[110] a search of a person's carry-on luggage was justified only after a pat-down failed to disclose any weapons.

> Under the Fourth Amendment, the Marshal does not have a blank check to search anything in the suspect's possession, and may not search the suitcase without an initial pat-down search for weapons that falls within *Terry*.[111]

From this brief review it would appear there is no probable cause or suspicion for either a magnetometer or luggage search, either by hand or by x-ray machine, merely as a result of a prospective passenger's arrival at a boarding gate.

Application of the Exclusionary Rule

In the final analysis the question arises whether those items seized during an airport search which could in no way be used to hijack an aircraft are admissible as evidence in a criminal proceeding. It would appear that the answer is "no," and that such evidence should be suppressed.

Under the rule established in *Weeks v. United States*,[112] items seized during an unlawful search can not be introduced into evidence in a federal criminal proceeding. The Court concluded that such a rule was necessary to protect the vitality of the fourth amendment.

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officers to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles . . . .[113]

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[108] 351 F.Supp. 148 (W.D. Mo. 1972).

[109] *Id.* at 153.

[110] 351 F.Supp. 1284 (C.D. Cal. 1972).

[111] *Id.* at 1292.

[112] 232 U.S. 382 (1914).

[113] *Id.* at 393.

In order to protect those great principles the Court concluded that exclusion of illegally obtained evidence was the only remedy.[114]

Since the exclusionary rule was established, it has survived the test of review and application and has tended to gain strength. In subsequent decisions it has been expanded to include the books of a corporation,[115] a person's "effects"[116] and evidence admitted in state courts.[117] Perhaps Justice Holmes gave the strongest statement supporting the doctrine shortly after its creation when he wrote:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.[118]

As indicated earlier, there are fundamental questions regarding the constitutional requisite of probable cause. In the absence of a profile as one of a number of indicators, it is doubtful whether a high reading on a magnetometer is sufficient probable cause for a *Terry* pat-down.[119] Without probable cause, and recognizing that it is all but impossible to establish a consent search under the circumstances, it is difficult to find a constitutional basis for sustaining such searches.

With regard to the other component of the airport searches, those of a prospective passenger's carry-on luggage, where there is no consent to search, and in the absence of "nervous" behavior, there would be no probable cause. Surely, by a passenger's approach at a boarding gate, probable cause can not be found for searching his carry-on luggage.[120] With the exception of *Terry,* without the requisite probable cause, the searches and resulting seizures of items that could not be used to hijack aircraft are illegal and must be suppressed under the *Weeks* doctrine.

As just noted, a search may be constitutional under *Terry.* However, *Terry* sets out the requirement that such a search will be permitted only when the officer reasonably fears for his own safety or for the safety of others. In addition, such a search must be limited to the objects of the search. The object of airport searches is the dis-

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[114] *See* Mapp. v. Ohio, 367 U.S. 643 (1961); Elkin v. United States, 364 U.S. 206 (1960).

[115] Silverthorne Lumber Co. v. United States, 251 U.S. 358 (1920).

[116] United States v. Jeffers, 342 U.S. 48 (1951).

[117] Mapp v. Ohio, 367 U.S. 643 (1961).

[118] Silverthorne Lumber Co. v. United States, 251 U.S. 358, 392 (1920).

[119] *See* United States v. Lopez, 328 F. Supp. 1077, 1100 (E.D. N.Y. 1971).

[120] *See* Carrol v. United States, 267 U.S. 132, 153-54 (1924).

covery and seizure of weapons used for hijacking aircraft. Anything else discovered and seized would be beyond the permissible scope of the search and must be suppressed.[121]

It becomes readily apparent that regardless of the justification for, or the doctrines used to support the current airport screening procedures, those items found and seized must be suppressed as evidence in a criminal proceeding.

Summary

On numerous occasions, the Supreme Court has found a constitutional right to travel. Like most other constitutional rights, the right to travel is not absolute, and under certain circumstances the government has been permitted to interfere with it, or restrict its exercise. Usually the interference is for the protection of the individual or the State. However, in the context of the current airport search procedures, the government's interference is premised upon the detection and prevention of potential serious criminal activity: hijacking. Ultimately, the question arises whether these procedures are constitutional under the fourth amendment.

In order for the question to arise under the fourth amendment, there must be governmental activity. Under the current case law it would seem that the procedures being used would constitute the requisite degree of governmental involvement. Moreover, there would appear to be no consent, either express or implied, by the airline passengers to such searches, and probable cause would appear to be lacking in that *every* piece of carry-on luggage and *every* passenger is searched.

As a result, the searches being conducted at airports do not meet constitutional standards, which places the courts in a dilemma. The courts can either find a new basis for searches without consent or probable cause, or they can continue to exclude such items that could not be used to hijack an aircraft, as evidence in a criminal proceeding. It is urged that in order to maintain and preserve the vitality of the fourth amendment, and the rights that it protects, courts should employ the latter of the two and exclude such evidence from a criminal proceeding.

Donald Applestein†

[121] *See* United States v. Kroll, 351 F. Supp. 148, 153 (W.D. Mo. 1972).

† Law Review Editor; third-year student, The Cleveland State University College of Law.