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Fourth Amendment - The Ninth Circuit Court Allows the Government to Read International Airmail Absent a Warrant: *United States v. Seljan*

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**FOURTH AMENDMENT—THE NINTH CIRCUIT COURT
ALLOWS THE GOVERNMENT TO READ
INTERNATIONAL AIRMAIL ABSENT A WARRANT:
*UNITED STATES V. SELJAN***

NICOLE TONG*

IN THE RECENT case of *United States v. Seljan*, the Ninth Circuit held that customs inspectors may read documents contained within FedEx airmail absent a warrant where the airmail is sent internationally and where customs inspectors' initial searches are authorized by statute.¹ While the Ninth Circuit equates its reasoning with the plain view doctrine, postal statutes and regulations, as well as the United States Supreme Court's holding in *United States v. Ramsey*² suggest that the Ninth Circuit's holding violates the Fourth Amendment's guarantee of freedom from unreasonable search and seizure.³

At a FedEx facility on November 21, 2002, Customs Inspector Oliva searched a document sized package sent by defendant John Seljan.⁴ Within Seljan's airmail, Customs Inspector Oliva discovered return address labels, a \$100 bill in United States currency, a pamphlet for a Bangkok hotel, "a 500 peso note in Philippine currency," and a letter.⁵ Customs inspectors have a two-tier approach when inspecting documents such as Seljan's letter: "First, they scan, not read, any documents. If something during their scan gives them reasonable suspicion to suspect a violation of the law, the inspectors give a closer inspection to the

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¹ *United States v. Seljan*, 497 F.3d 1035, 1047 (9th Cir. 2007), *reh'g en banc granted*, 512 F.3d 1203 (9th Cir. 2008).

² *United States v. Ramsey*, 431 U.S. 606 (1977).

³ *Seljan*, 497 F.3d at 1047.

⁴ *Id.* at 1037.

⁵ *Id.*

contents of the package.”⁶ Inspector Oliva testified that he “was reading as [he] was scanning” when a couple of sentences caught his attention.⁷ “[A]t that time [he] reread the letter thoroughly to understand what the letter was saying.”⁸ Inspector Oliva discovered that Seljan’s letter “contained sexually suggestive language and appeared to be addressed to an eight-year-old girl.”⁹

Inspector Oliva’s search was conducted pursuant to 31 U.S.C. § 5316, “which prohibits cross-border transportation of undeclared currency” exceeding \$10,000.¹⁰ Additionally, a FedEx air waybill with Seljan’s signature was affixed to Seljan’s airmail, stating that “[y]our shipment may, at our option or at the request of governmental authorities, be opened and inspected by us or such authorities at any time.”¹¹

On October 2, 2003, Seljan was stopped prior to boarding a plane at Los Angeles International Airport.¹² “Seljan signed a Miranda waiver and made several incriminating statements.”¹³ At trial, Seljan moved to suppress all evidence discovered as a result of customs inspectors’ searches of his FedEx airmail packages, arguing a violation of his Fourth Amendment rights.¹⁴ He asserted that customs inspectors conducted “extended border searches,” which were not supported by reasonable suspicion, and that the scope of the searches was unreasonable.¹⁵

The District Court denied Seljan’s motion to suppress, holding: (1) customs’ inspections were “tantamount to an inspection at the international border;”¹⁶ (2) Seljan consented to the search when he signed the FedEx air waybills;¹⁷ and (3) the scope and manner of the searches were reasonable.¹⁸ The

⁶ *Id.* at 1043.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1037. Two subsequent airmail packages sent by Seljan were inspected on August 3, 2003 and on September 27, 2003 which also contained small amounts of U.S. currency and sexually explicit letters addressed to children. *Id.* at 1038. However, the Ninth Circuit’s analysis focused solely on the November 21 airmail package. *Id.* at 1039.

¹⁰ *Id.* at 1037–38 n.2.

¹¹ *Id.* at 1037.

¹² *Id.* at 1038.

¹³ *Id.*

¹⁴ *Id.* at 1039.

¹⁵ *Id.*

¹⁶ *United States v. Seljan*, 328 F. Supp. 2d 1077, 1083 (C.D. Cal. 2004).

¹⁷ *Id.* at 1085.

¹⁸ *Id.*

Court of Appeals for the Ninth Circuit affirmed, holding: (1) the customs search at the FedEx facility was the functional equivalent of a border search;¹⁹ and (2) Custom Inspector Oliva's search of international airmail was reasonable in scope and manner because he "scanned" documents, rather than reading them.²⁰

The Ninth Circuit followed its holding in *United States v. Abbouchi*²¹ when it concluded that customs searches at hubs like the FedEx facility "take place at the functional equivalent of the border."²² The FedEx sorting facility "represents the last practicable opportunity for customs officers to inspect international packages before [FedEx] places them in [locked] containers for departure from the United States."²³

Next, the Ninth Circuit held that the search of Seljan's airmail "was reasonable in manner and scope," fulfilling the border search requirements under the Fourth Amendment.²⁴ Searches at the border are "not subject to the warrant provisions of the Fourth Amendment."²⁵ "Rather, [a border search] comports with the fourth amendment unless it violates 'reasonableness.'"²⁶ In the context of a border search, "reasonableness" requires consideration of "[t]he scope of the intrusion, the manner of its conduct, and the justification for its initiation."²⁷ In finding that Inspector Oliva's search was reasonable, the Ninth Circuit first determined that initiation of the search was justified under 31 U.S.C. § 5317(b).²⁸ Section 5317(b) provides that "a customs officer may stop and search, at the border and without a search warrant . . . any envelope or other container" to determine whether undeclared currency of more than \$10,000 is being transported internationally in violation of 31 U.S.C. § 5316.²⁹ Next, the Court determined that the manner in which the search was conducted was reasonable because the customs inspector's "method of 'scanning,' even though it included

¹⁹ *Seljan*, 497 F.3d at 1040.

²⁰ *Id.* at 1045.

²¹ *United States v. Abbouchi*, 502 F.3d 850 (9th Cir. 2007).

²² *Seljan*, 497 F.3d at 1039–40.

²³ *Abbouchi*, 502 F.3d at 855.

²⁴ *Seljan*, 497 F.3d at 1045.

²⁵ *United States v. Ramsey*, 431 U.S. 606, 617 (1977) (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

²⁶ *United States v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982).

²⁷ *Id.*

²⁸ *Seljan*, 497 F.3d at 1040–41.

²⁹ 31 U.S.C.A. § 5317(b) (West 2003).

reading a few words by necessity, was reasonable under the Fourth Amendment.”³⁰ Finally, the Court concluded that the scope of the intrusion was reasonable because Oliva had authority under 31 U.S.C. § 5317(b) to open the envelope and because “no more than a glance was necessary to detect evidence of pedophilia.”³¹

The Court supported its conclusion with “precedents involving the plain view doctrine.”³² The plain view doctrine states that where a government official conducts a search pursuant to a warrant or to one of the exceptions to the warrant requirement and discovers incriminating evidence in plain view, this evidence is admissible even if it is unrelated to the initial justification for the search.³³ The Ninth Circuit extended this reasoning, and held that “the search was legitimate at the outset because it had independent justification and ‘did not exceed in scope what was permissible under [31 U.S.C. § 5317(b)].’”³⁴ The Court therefore determined that the search of Seljan’s air-mail was reasonable.³⁵

Circuit Judge Pregerson concurred that the searches “took place at the functional equivalent of the border,” but dissented that “the Fourth Amendment [does not permit] federal customs inspectors acting without reasonable suspicion to read what is obviously a person’s letters or papers merely because the inspector finds those items in a package destined to cross the U.S. international border.”³⁶ Additionally, Judge Pregerson argued that the misconduct in the letter was not “immediately apparent” as the majority stated.³⁷ “Only by reading the individual lines carefully can the reader find any hint of wrongdoing or base intentions. What *was* immediately apparent is that the paper was personal correspondence.”³⁸ As such, Judge Pregerson concluded that “[w]hether we label what [customs inspector] Oliva did next as ‘reading’ or ‘scanning’—and Oliva uses both labels (in the same sentence, no less) . . . the conclusion is the

³⁰ *Seljan*, 497 F.3d at 1043.

³¹ *Id.*

³² *Id.*

³³ *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

³⁴ *Seljan*, 497 F.3d at 1044–45 (quoting *United States v. Soto-Camacho*, 58 F.3d 408, 412 (9th Cir. 1995)).

³⁵ *Id.* at 1045.

³⁶ *Id.* at 1047–48 (Pregerson, J., concurring in part and dissenting in part).

³⁷ *Id.* at 1048.

³⁸ *Id.*

same: Oliva's inspection impermissibly invaded Seljan's privacy."³⁹

While the Ninth Circuit was correct in holding that the search at the FedEx facility took place at the functional equivalent of a border, the search of Seljan's airmail was not reasonable in manner or in scope. Specifically, while 31 U.S.C. § 5317(b) justified the initial search of Seljan's airmail, customs inspector Oliva's "scanning" and reading of Seljan's letter was unreasonable in scope and in manner. The statute that authorized customs inspectors' initial search of Seljan's airmail, 31 U.S.C. § 5317(b), states that "[f]or the purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and without a search warrant, . . . any envelope or other container. . . ."⁴⁰ Section 5316 requires any person transporting "monetary instruments of more than \$10,000 at one time" across the United States border to file a report.⁴¹ Therefore, under § 5317(b), customs inspectors were permitted to open Seljan's airmail, including any envelope, to determine whether monetary instruments exceeding \$10,000 were contained within.

The Ninth Circuit is correct in stating that "there is no . . . prohibition [on reading correspondence] under 31 U.S.C. § 5317(b), which authorized the search."⁴² Indeed, the statute is silent on whether customs may read correspondence contained within airmail; however, this is likely because it is unnecessary to read correspondence to determine whether monetary instruments exceeding \$10,000 are contained within airmail. For this reason, the Ninth Circuit was incorrect in concluding that, because Inspector Oliva scanned documents rather than reading them, Customs Inspector Oliva's search was reasonable in manner. First, the distinction between reading and "scanning" is strained, and, as Judge Pregerson pointed out, "Oliva uses both [scanning and reading] labels (in the same sentence, no less) to describe his actions."⁴³ Second, even if Oliva initially "scanned" Seljan's letter, the manner of his search was unreasonable because neither reading nor "scanning" is necessary to determine whether monetary instruments exceeding \$10,000 are contained within international airmail. Therefore, the man-

³⁹ *Id.*

⁴⁰ 31 U.S.C.A. § 5317(b) (West 2003).

⁴¹ 31 U.S.C.A. § 5316 (West 2003).

⁴² *Seljan*, 497 F.3d at 1043.

⁴³ *Id.* at 1048 (Pregerson, J. concurring in part and dissenting in part).

ner in which Oliva conducted his search for monetary instruments exceeding \$10,000 was unreasonable.

The Ninth Circuit also erred in concluding that, because "inspector Oliva was authorized to open the FedEx package and 'any' particular envelopes contained within," then "Oliva's search of the letter inside the second envelope was not unreasonably intrusive in terms of its scope."⁴⁴ While Inspector Oliva was authorized to open the FedEx airmail and any envelope contained within, Inspector Oliva's search unreasonably exceeded what was permissible under 31 U.S.C. § 5317(b) when he read the letter. Section 5317(b) only authorizes customs officers to search "any envelope or container" being sent internationally to determine whether monetary instruments exceeding \$10,000 are contained within.⁴⁵ Once Customs inspectors have ensured compliance with § 5316, their authority under § 5317(b) comes to an end.

The Ninth Circuit reasoned that because "no more than a glance [at the letter] was necessary to detect evidence of pedophilia," Oliva's discovery was supported by the plain view doctrine.⁴⁶ However, Oliva's testimony suggests that quite a bit more than a glance was necessary. Oliva stated that he "was reading as [he] was scanning" when he caught a couple of sentences that raised his suspicion.⁴⁷ "[A]t that time [he] reread the letter thoroughly to understand what the letter was saying."⁴⁸ If "no more than a glance" was necessary, as the court suggests, then Oliva would not have had to initially read as he scanned nor would he have had to "reread the letter thoroughly to understand what the letter was saying."⁴⁹ As Judge Pregerson points out, "[o]nly by reading individual lines [of the letter] carefully can a reader find any hint of wrongdoing or base intentions."⁵⁰ As such, the scope of the search was unreasonable because the evidence of pedophilia was not immediately apparent, and because 31 U.S.C. § 5317(b) does not authorize the reading of correspondence.

While 31 U.S.C. § 5317 is silent on the question of reading airmail sent internationally, there is statutory and regulatory au-

⁴⁴ *Id.* at 1045.

⁴⁵ 31 U.S.C.A. § 5317(b).

⁴⁶ *Seljan*, 497 F.3d at 1043.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1048 (Pregerson, J., concurring in part and dissenting in part).

thority suggesting that such an intrusion is impermissible. For example, 19 U.S.C. § 1583 states that a Customs officer may “stop and search at the border, without a search warrant” international mail which is being imported or exported by the United States Postal Service.⁵¹ However, no person “shall read, or authorize any other person to read, any correspondence contained in mail . . . unless prior to so reading—(A) a search warrant has been issued . . . ; or (B) the sender or addressee has given written authorization for such reading.”⁵² Although § 1583 only applies to airmail sent through the U.S. Postal Service, the legislative intent seems clear: international airmail should not be read absent a warrant or written authorization by the sender or addressee. Additionally, 19 C.F.R. § 145.3 prohibits customs officials from reading correspondence contained in “any letter class mail” absent prior authorization by search warrant or by written authorization of the sender or the recipient.⁵³ Indeed, in *United States v. Ramsey*, the Supreme Court of the United States declined to address whether customs inspectors could read correspondence because “the reading of letters is totally interdicted by regulation” that is today represented in 19 C.F.R. § 145.3.⁵⁴

In light of the restrictions 19 U.S.C. § 1583 and 19 C.F.R. § 145.3 place upon international airmail and the Supreme Court’s reliance on these restrictions, if the case at hand comes before the Supreme Court, the Court will likely hold that such an intrusion is impermissible. There is no reason to limit an individual’s Fourth Amendment privacy interest simply because the individual chooses to send international airmail by a private carrier, such as FedEx, rather than by the United States Postal Service. The distinction between public and private carrier is unnecessary with regards to reading of documents contained in international airmail, and customs should be required to obtain either a warrant or permission prior to reading such correspondence, regardless of the carrier employed.

⁵¹ 19 U.S.C.A. § 1583(a)(1) (West Supp. 2007).

⁵² 19 U.S.C.A. § 1583(c)(2).

⁵³ 19 C.F.R. § 145.3 (2007). “Letter class mail” is defined as “any mail article, including packages, post cards, and aerogrammes, mailed at the letter rate or equivalent class or category of postage.” 19 C.F.R. § 145.1. It is unclear whether airmail sent by private carrier would qualify as “equivalent class or category of postage.”

⁵⁴ *United States v. Ramsey*, 431 U.S. 606, 615 n.8 (1977).

It may be argued that Seljan had indeed given the requisite permission to read his airmail by signing the FedEx air waybill. However, by signing the air waybill, Seljan merely acknowledged that his shipment “may, at our option or at the request of governmental authorities, be opened and inspected by us or such authorities.”⁵⁵ 19 U.S.C. § 1583 states that “no person shall read . . . any correspondence contained in mail . . . unless prior to so reading . . . the sender or addressee has given written authorization *for such reading*.”⁵⁶ Seljan did not specifically authorize reading of his correspondence, as required by § 1583; his signature merely acknowledged that customs may inspect his airmail. Therefore, the air waybill did not give customs the freedom to read Seljan’s personal correspondence, as required by § 1583, and Inspector Oliva’s search impermissibly intruded upon Seljan’s Fourth Amendment rights.

The government has narrowed Fourth Amendment rights since at least the 1960s.⁵⁷ However, the government oversteps Fourth Amendment protections when it permits customs inspectors to read airmail simply because it is being sent internationally. Although 31 U.S.C. § 5317(b) is silent on whether such an intrusion is permissible, 19 U.S.C. § 1583 and 19 C.F.R. § 145.3 explicitly forbid it when mail is sent internationally by the United States Postal Service. As such, the statutory requirements of 19 U.S.C. § 1583 and regulatory requirements of 19 C.F.R. § 145.3 should be extended to protect not only personal correspondence contained within airmail sent by the United States Postal Service, but also to protect airmail sent by private carrier.

⁵⁵ *Seljan*, 497 F.3d at 1037.

⁵⁶ 19 U.S.C.A. § 1583(c)(2)(B) (West Supp. 2007) (emphasis added).

⁵⁷ Bob Barr, *Post-9/11 Electronic Surveillance Severely Undermining Freedom*, 41 VAL. U. L. REV. 1383, 1385 (2007).