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Firearms, the Fourth Amendment, and Air Carrier Security

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FIREARMS, THE FOURTH AMENDMENT, AND AIR CARRIER SECURITY

STEPHEN P. HALBROOK*

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INTRODUCTION

FROM MEMBERS of the Olympic shooting team to hunters, housewives, and business people, thousands of Americans legally transport firearms on air carriers every day. Media coverage of airline hijackings by armed terrorists obscures the fact that legitimate carriage of firearms in checked baggage is an ordinary part of air commerce. Numerous articles have been published and cases decided concerning the fourth amendment rights of suspected hijackers and drug couriers since the initiation of the screening of persons and carryon baggage in 1973. Issues concerning the carriage of weapons, searches and seizures, and air carrier security have been analyzed only in the context of wrongful conduct. This article analyzes airport security schemes and fourth amendment rights as they relate to the transportation of firearms for lawful purposes.

A comprehensive analysis of the development of the regulatory schemes for transporting firearms and for screening passengers and carryon baggage will serve two purposes. First, it will establish a historical perspective with which to view rapidly changing procedures for air carrier security. Second, an evaluation of the character and evolution of the regulatory scheme will assist in establishing some minimum guidelines in the new age of deregulation. Deregulation has spawned an alarming number of inadvertent security breaches by passengers fooled by the disappearance of traditional check-in counters. One major airline, for example, currently locates its baggage check-in counters inside the sterile area, x-rays baggage intended to be checked as well as carryon baggage, and will not transport firearms.¹ The fourth amendment issues and security issues these procedures raise will become increasingly decisive as deregulation continues to revolutionize air transportation.

The analysis begins with an overview of air transporta-

¹ See *infra* text accompanying note 24.

tion of firearms to assess the scope of the problem.² Complete legislative histories follow concerning the statutes which prohibit boarding an air carrier with a concealed weapon,³ establish an exception for carriage in inaccessible parts of the aircraft,⁴ provide for uniform screening procedures for carryon baggage,⁵ and prohibit carriage of loaded firearms.⁶ The analysis also addresses actions by Congress to implement civil penalties in lieu of criminal prosecution for boarding an aircraft with a concealed weapon, and to regulate the screening of baggage for explosives.⁷ Judicial construction of these provisions and of the fourth amendment issues they raise will be analyzed.⁸ Next, development of Federal Aviation Administration (FAA) regulations on the subject will be assessed.⁹ The restrictions imposed under the Gun Control Act of 1968, and the recent relaxation of restrictions under the Firearms Owners' Protection Act of 1986 will be considered.¹⁰ Finally, the article concludes with a look at whether the fourth amendment can survive future technologies in firearms and screening.¹¹

I. FIREARMS AND AIR CARRIER SECURITY IN AN AGE OF TERRORISM AND DEREGULATION

As dramatic terrorist attacks on air carriers abroad escalate in frequency and intensity, the lawful transportation of firearms in checked baggage quietly continues in the United States and on international flights. The transport of firearms in checked baggage has not been restricted or even questioned, simply because it poses relatively little risk of harm. However, deregulation has had a severe im-

² See *infra* notes 11-28 and accompanying text.

³ See *infra* notes 30-58 and accompanying text.

⁴ See *infra* notes 59-76 and accompanying text.

⁵ See *infra* notes 77-83 and accompanying text.

⁶ See *infra* notes 84-90 and accompanying text.

⁷ See *infra* notes 91-115 and accompanying text.

⁸ See *infra* notes 116-293 and accompanying text.

⁹ See *infra* notes 294-339 and accompanying text.

¹⁰ See *infra* notes 340-410 and accompanying text.

¹¹ See *infra* notes 411-427 and accompanying text.

pact on such transport and, more significantly, on the fourth amendment.¹²

The FAA has taken several measures to tighten air carrier security. Federal Air Marshals now travel on certain high risk flights.¹³ Special security coordinators monitor screening, access to airplanes, baggage and cargo acceptance, and boarding.¹⁴ Other measures include elimination of curbside baggage check-in for international flights, a rule that only ticketed passengers may check baggage, a one-day hold on unscreened cargo, and physical inspection of carryon baggage after it has been x-rayed.¹⁵

No further restrictions have been imposed on transportation of firearms because such transportation does not factor into the hijacking threat. The techniques used by terrorists to smuggle weapons onto aircraft simply have no relation to the lawful transport of firearms in checked baggage. Far from discouraging such transport, the United States government each year distributes rifled arms to thousands of civilians and pays their fare to the National Matches and other target and sportshooting competitions.¹⁶

The airlines keep no statistics on the number of passengers who declare and transport firearms. In 1979, after the FAA first prohibited firearms in the sterile area (*i.e.*, past the x-ray checkpoint), the FAA investigated almost seven hundred violations of the new rule. Violators investigated were 52% male and 48% female; 59% percent

¹² See *infra* notes 117-293 and accompanying text.

¹³ See 14 C.F.R. § 108.14 (1986).

¹⁴ See 50 Fed. Reg. 28,892 (1985) (background to amendments codified at 14 C.F.R. § 108 (1986)).

¹⁵ Washington Post, July 11, 1985, at A18, col. 1; Washington Post, June 26, 1985, at A18, col. 1.

¹⁶ This is done through the United States Division of Civilian Marksmanship. 10 U.S.C. §§ 4307-13 (1982). Section 4311 of the United States Code authorizes the Secretary of the Army to issue .22 and .30 caliber military rifles and ammunition to qualified individuals for use at rifle ranges established pursuant to section 4309. *Id.* at §§ 4309, 4311. A federal regulation promulgated under these statutes authorizes participants in the Civilian Marksmanship sponsored programs to carry issued firearms while traveling. 32 C.F.R. § 544.12(k) (1985).

were ticketed passengers, and 39% were nonpassengers.¹⁷ Although the violations did not involve firearms carried in checked baggage, it could be surmised that roughly half of those who transport firearms by air are male and half are female.

Twice each year the FAA reports statistics to Congress concerning firearms discovered on the persons or in the carryon baggage of passengers.¹⁸ As a recent report indicates, "airline passenger screening procedures which include 100 percent inspection of all passengers and their carryon items were initiated in 1973."¹⁹ In the first half of 1984 "[x]-ray inspection accounted for 1,265 (95 percent) of the firearms detected. . . . The total firearms detected is 9 percent higher than the average . . . detected during the preceding 8 reporting periods"²⁰ The report states that almost 5.5 billion passengers and almost seven billion pieces of "carry-on items" were inspected during 1973-84.²¹ In that period, over 30,000 firearms were detected, resulting in more than 12,000 related arrests.²² The number of weapons detected remained fairly constant through 1980, but a progressive increase began that year, coinciding with airline deregulation.²³

Much of the increase can be attributed to incidents that involved firearms in baggage intended to be checked and not in carryon baggage, making the FAA statistics unintentionally misleading. Many passengers who attempt to transport firearms legally become part of the statistics simply because they lack familiarity with new check-in procedures adopted by some airlines after deregulation

¹⁷ FAA, SEMIANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION PROGRAM 10 (July-Dec. 1979).

¹⁸ See 49 U.S.C. app. § 1356 (1982).

¹⁹ FAA, SEMIANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION PROGRAM 3 (Jan. - June 1984).

²⁰ *Id.* at 3-4.

²¹ *Id.* at Exhibit 6.

²² *Id.*

²³ See *id.* at Exhibit 7. The number of weapons detected rose from 1,020 in July through December of 1980, to 1,286 in January through June of 1982. *Id.*

began. The detected firearms frequently turn up in luggage far too large to be carryon.

The passenger confusion problem has been particularly acute for one major airline, People Express, because that airline locates its baggage check-in inside the sterile area and screens all baggage. FAA data from 1983-84 shows that at those airports where this airline had departure flights, its passengers accounted for 64% of all airline passengers alleged to have entered the sterile area with firearms.²⁴ Passenger responses to FAA investigatory letters and FAA letters closing the investigations demonstrate that the passengers were confused by the unusual screening procedure and were seeking to transport the firearms pursuant to established FAA guidelines.²⁵

The fourth amendment concerns and security implications of x-raying and introducing all baggage into the sterile area go far beyond the firearms issue. For instance, a screening activities report for the Melbourne, Florida airport in 1984 reveals the following:

Dangerous and Unauthorized Items Detected²⁶

	Provincetown Boston			
	<u>Delta</u>	<u>Eastern</u>	<u>Airline</u>	<u>People Express</u>
Bludgeons	12	38	2	645
Firearms	0	0	1	36
Knives	52	128	7	3,031
Toy Weapons	9	16	0	585

Authorities confiscated about half of the above items.²⁷

²⁴ A statistical summary and pertinent FAA records prepared pursuant to Freedom of Information Act requests are included in the comment of Stephen P. Halbrook concerning Docket No. 24171, a Petition for Rulemaking, and are available for public inspection at the FAA Rules Docket Room, Washington, D.C.

²⁵ See *id.* for sample letters.

²⁶ American Civil Liberties Union Amicus Curiae Brief at Appendix, Ruiz v. People Express Airlines, Inc., 802 F.2d 1508 (4th Cir. 1986), *petition for cert. filed*, Jan. 1987. The "bludgeons" referred to apparently would include golf clubs and other sporting equipment as well as items such as billy clubs.

²⁷ See *id.*

The data shows that only a few dozen passengers of airlines with normal check-in procedures were subject to a search and brief detention. Over four thousand passengers of People Express, the airline that does not allow baggage check-in before x-ray screening, were subject to physical search and detention. Half of these passengers had property confiscated.²⁸ Besides the effect on passengers, the security concerns of bringing non-carryon baggage into the sterile area are obvious from this data.

The following analysis tests the extent to which this product of deregulation comports with the overall regulatory scheme and the fourth amendment. More broadly, this analysis brings together for the first time the legislative history and jurisprudence of the delicate balance between transportation of firearms, privacy rights, and air carrier security.

II. FIREARMS CARRIAGE AND BAGGAGE SCREENING: A LEGISLATIVE HISTORY

A. *The Prohibition on Boarding an Air Carrier with a Concealed Weapon*

In 1961, for the first time in aviation history, Congress enacted legislation to prohibit carriage of an accessible concealed weapon aboard an aircraft.²⁹ Also for the first time, the suggestion surfaced that passengers and carryon baggage should be searched for weapons.

In the Senate hearings, discussion centered on fourth amendment problems with detecting concealed weapons and the legitimate need to transport firearms in checked baggage. One proposed bill would have required passengers to submit their persons to a search for concealed weapons by air carriers.³⁰ Senator Engle, who introduced

²⁸ See *id.*

²⁹ See Act of Sept. 5, 1961, Pub. L. No. 87-197 (amending section 902 of the Federal Aviation Act of 1958) (current version at 49 U.S.C. app. § 1472 (1982)).

³⁰ *Crimes Aboard Aircraft In Air Commerce, 1961: Hearings on S. 2268, S. 2370, S. 2373, and S. 2374 Before the Aviation Subcomm. of the Senate Comm. On Commerce, 87th Cong., 1st Sess. 2* (1961).

the original bill on crimes aboard aircraft (which eventually passed), argued that "digging through people's luggage and 'shaking them down' with reference to trying to find concealed weapons gets pretty close to the limit."³¹

Captain John Carroll of the Air Line Pilot's Association testified extensively on the subject of firearms.³² He argued that the word "concealed" should be deleted from the proposed prohibition and that openly carried weapons should be kept out of the passenger cabin as well.³³ Senator Engle's response shows how widespread the carriage of firearms was at that time and how airlines handled such carriage:

The duck hunters in my country, and the pheasant hunters, and the deer hunters, ride the specific airline, the one where the shooting occurred in Chicago recently [involving an extradited prisoner's seizure of a law officer's firearm] all the time. When they board an airplane you would think they had a guerrilla squadron of some sort with all the guns they are carrying to go shoot pheasants, duck, or deer in northern California.

I can imagine the roar that would come out of the sport-

³¹ *Id.* at 46.

³² *Id.* at 49-56.

³³ *Id.* at 50. Mr. Carroll continued,

At that same time we also urged the adoption of a Federal regulation that would make it illegal for any but authorized persons to carry firearms or dangerous weapons of any sort into the passenger cabin. We believed then and we believe now that firearms or other dangerous weapons, regardless of type, should be carried only in the baggage compartments. This specifically includes hunting rifles, shotguns, and other so-called sporting arms that are ordinarily carried in cases as part of a passenger's hand baggage.

To bar the carrying of concealed weapons is not enough. Anyone bent upon forcefully taking over an aircraft can accomplish his purpose just as easily with a sporting rifle or shotgun as he can with a pistol.

In short, we feel that the only complete answer is to keep all lethal weapons out of the passenger cabin. However, it appears impractical to search every passenger who boards an airliner anywhere in the United States. Therefore, we feel one logical step is to provide a maximum deterrent by passing and enforcing rigid Federal laws which provide grave penalties.

ing people of this country if we tell them they can't take a gun on an airplane.

But it seems to me that the last time I tried to take a gun on an airplane I notified the company that I had a gun, and they told me I had to break it down or take the bolt out of it. Some shotguns you can break down, as you know. You can take them apart, and they cannot be fired. Others can't be broken down, such as automatics. And the automatics themselves can't be broken down.³⁴

Senator Engle went on to inquire whether the FAA already had power to require firearms safety measures on aircraft. Mr. Carroll replied,

I believe as of the day before yesterday the FAA passed a special regulation which dealt with the carrying of concealed weapons. . . . These sportsmen on the Pacific airlines might very well be able to check their case equipment with the hostess, put it in the coat department, and in other cases they may lend themselves to the baggage compartment.

In addition to the pheasant hunters in California, there is extensive travel in Alaska, to which there is substantial transportation of arms. These are frequently in smaller aircraft.

Our proposal . . . would not preclude arrangements being made with the airline to handle these guns in a way that was deemed safe by the airline and the captain of the airplane.³⁵

Senator Engle then pressed his position on the issue of whether or not the second amendment of the United

³⁴ *Id.* at 51-52.

³⁵ *Id.* at 52. Mr. Carroll continued,

As you understand, Senator, one of the best ways now for someone to take over one of these airplanes is simply to buy himself a hunting outfit and have this unloaded rifle in the case and a package of small arms ammunition for personal use when packed in the original package. . . .

As of the day before yesterday, I believe that the FAA regulations prohibit the carrying of concealed weapons, but does not do anything about this sporting equipment.

Id.

States Constitution guarantees the right to transport arms and to carry arms openly. He stated,

You know that the Constitution of the United States guarantees to every American citizen the right to bear arms. There isn't anything on earth to keep me from getting out my 30.06 and walking right down Pennsylvania Avenue that I know of, because the Constitution of the United States says that American citizens shall have the right to bear arms.

We can prohibit concealed weapons, and the law does prohibit them. But I am just not so sure that we cannot go too far with this.

I think it is proper for the CAB or the FAA to require that guns be broken down where they can be. Guns should always be unloaded and separated from their ammunition, and guns should be carried in the baggage compartment and not with the passenger.³⁶

Senate debate on the bill centered on the clarification of terms and, to a limited extent, objections to the lack of definition of certain terms. The greatest concern was that the bill not interfere with the transportation of firearms for lawful purposes. Senator Case of South Dakota began the debate with the following:

The language is not objectionable, but for the purpose

³⁶ *Id.* When Mr. Carroll reiterated his opinion that the prohibition should not be restricted to "concealed" weapons, Senator Engle replied,

I would prefer not to put detailed regulations of this character in this bill which is general in character, and where it is not necessary to enact a law because the matter can be handled by regulation.

I am sure FAA and Mr. [FAA Administrator Najeeb] Halaby are just as interested in making everything as safe as it can be, and nothing would embarrass them more than to have a hunter show up with a shotgun in his hand and taking over one of their airlines, where they could have prevented it by requiring him to keep his gun in a case, separate his ammunition, [and] unload the gun. My recollection is that a passenger supervisor inspected my rifle when I carried it the last time on an airline to be sure that it was unloaded. And I want to be just as sure as he was, too. Nevertheless, I noted that they watched that matter with considerable care. Not that they expected me to shoot anybody, but sometimes the guns go off when they don't want them to.

Id. at 53.

of legislative history I should like to ask a question. Some of my colleagues on the floor have come to South Dakota and have brought with them deadly weapons to be used to shoot pheasants. I want them to be welcome to come to South Dakota to shoot pheasants. I believe the language in the bill is broad enough to cover the taking of weapons aboard aircraft if they are to be used for the purpose I have indicated. I would like to have the Senator from California, as the author of this bill, state what his interpretation is.

Mr. Engle. We went into that very carefully. The section applies to concealed weapons. In the State of California, as in the State of South Dakota and in other States, airplanes, such as Pacific Airlines, take deer hunters and duck hunters and pheasant hunters to various places in the State for hunting purposes. We have no intention of stopping that kind of transportation of weapons. Of course there are rules and regulations in connection with putting firearms on airplanes. For instance, they have to be carried in the baggage compartment, and the ammunition must be kept separate, and the weapons must be unloaded, of course. Those are current regulations. But this section applies only when one has a concealed weapon. It does not apply to the duck hunter, the pheasant hunter, the deer hunter who in carrying his rifle complies with the usual regulations—and it is so intended.

Mr. Case of South Dakota. The first part of the description of the weapons provision I think is perfectly clear on that. The question might arise in the clause which reads “or attempts to board such an aircraft carrying such a weapon.” But I understand the author of the bill now to say that that carrying of such a weapon means carrying a concealed weapon, and would not affect weapons which are carried aboard aircraft openly and which are properly broken down or properly encased and delivered to the people in charge of the aircraft, placed in their custody.

Mr. Engle. The Senator is correct.³⁷

At that point the bill provided for a maximum punishment

³⁷ 107 CONG. REC. 15,243-44 (1961).

of imprisonment of five years and a \$5,000.00 fine.³⁸ Senator Carroll supported a misdemeanor penalty and then objected to the lack of a definition for "concealed weapon": "We seek to stop a person who is carrying a gun from boarding a plane. The Senator from California is an able lawyer and a former prosecutor. I ask him: What is a concealed weapon? A knife with a 3-inch blade?"³⁹ The following exchange then occurred:

Mr. Engle. We assume that the general definition of "concealed weapon" would apply. We are not proposing anything special in the bill.

Mr. Carroll. Weapons concealed where, and by whom? Where in the bill is the Federal concealed weapons statute? We know what the definition of "concealed weapons" is at common law and in the States.⁴⁰

Senator Carroll actually oversimplified the matter, because carrying concealed weapons was not an offense at common law.⁴¹ Moreover, many states list specific weapons which may not be carried concealed.⁴² As Senator Carroll stated,

Will not the Senator from California agree that each State might have a different concept of "concealed weapons" in its statutes? There are all kinds of judicial definitions of "concealed weapons". . . . We seek to reach a person who carries a loaded gun onto a plane. . . . I commend the able Senator from California, who said yesterday that this item had reference to concealment rather than to the guns of some duck hunters or pheasant hunters who were flying on a commercial plane. . . . However, I believe there must be some refinement of the language.⁴³

³⁸ *Id.* at 15,427.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See, e.g.*, *State v. Huntley*, 25 N.C. (3 Ired.) 284 (1843).

⁴² *See, e.g.*, CAL. PENAL CODE § 12020(a) (West 1982) (prohibiting carriage of sandbags, metal knuckles, firearms, and other specified weapons); ILL. ANN. STAT. ch. 38, § 24-1 (Smith-Hurd 1977) (outlawing concealed pistols, revolvers, and other firearms).

⁴³ 107 CONG. REC. at 15,427. Carroll repeated, "I do call attention to the fact that there should be an explanatory statement in the Record about the meaning of

The remarks came to no avail and the bill passed the Senate. As will be seen, some passengers carrying pocketknives have been ensnared by this lack of definition.⁴⁴

Shortly before the House hearings on its antihijacking bills, the FAA issued an emergency regulation which provided that "no person, while a passenger aboard an aircraft being operated by an air carrier in air transportation, shall carry on or about his person a concealed deadly or dangerous weapon."⁴⁵ After FAA Deputy Administrator James T. Pyle inserted the regulation into the hearing record, Committee Chairman John Bell Williams asked,

Would that cover the carrying of a firearm aboard an aircraft in a suitcase? The baggage compartment?

Mr. Pyle. No, it would not sir.

Mr. [Daggett H.] Howard [FAA General Counsel]. The answer to that Mr. Chairman, is "No," and this was done with intent, the purpose being to keep the enplaning passenger from his firearm, so to speak, but not prevent him from bringing hunting weapons or other weapons aboard the aircraft.

Mr. Williams. It would cover the situation where a person might have a gun in a briefcase aboard the aircraft?

Mr. Howard. The wording is "carry on or about his person," as well defined by the law, and would cover the ready access problem you are speaking of.⁴⁶

Much of the discussion in the hearings centered on penalty provisions and what kind of intent would be required to commit a violation. Certain crimes during flight carried a possible punishment of twenty years or \$10,000, while carrying a concealed weapon was punishable by a maximum of one year or \$1,000.⁴⁷ Congressman Peter H.

a concealed weapon, and whether it means any knife, or a knife with a 3-inch blade, or what the extent of the blade must be. I think there ought to be some clarification of the meaning." *Id.* at 15,430.

⁴⁴ See *infra* notes 181-188 and accompanying text.

⁴⁵ Special Civil Regulation, 26 Fed. Reg. 7009 (1961).

⁴⁶ *Crimes on Board Aircraft, 1961: Hearings on H.R. 8370 Before a Subcomm. of the House of Representatives Comm. on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 27-28 (1961).*

⁴⁷ See *id.* at 2-4.

Dominick explained,

We did put in the lower penalty on the carrying of the concealed weapons on the basis that what we are doing here is referring to someone who is simply carrying a weapon on him and not necessarily threatening to use it. With the number of people that you have in the United States who are going on trips, [of] one sort or another, and many times carry sidearms with them, for no purpose as far as the plane is concerned, but simply to use when they get to their destination for shooting of some kind, either target practice or actual small game shooting, this is made minor compared to the other penalties.

It is my own feeling that that section should be modified in order to put in "intent," which is not in there at this point.⁴⁸

Congressmen Dominick, Koffsky, and Williams en-

⁴⁸ *Id.* at 9. At a later point, Congressman Dominick asked, "Do you not think we should have an element of intent to do some harm with the concealed weapon in order to make it a crime for which you get shoved in the jug for a year?" *Id.* at 44. To this FAA General Counsel Howard responded,

The availability of a weapon on or about a person, even innocently, if it is known to a person who may have evil intentions toward the aircraft, could be dangerous. He could take the weapon from the other person and use it for his ends. That was why we did not want to get into the question of whether the person who took it aboard was the person with the evil intent. It was felt that just having the weapon around and accessible to people, especially anyone who is mentally deranged or under the influence of alcohol, could be a source of trouble, just having it in the cabin.

Mr. Dominick. I want to say that I do not agree with you, Mr. Howard, because I think that your only possibility of getting anybody put in jail or fined on this basis [is] if they have a wrongful intent. This is part of our whole criminal code and if they do not have any wrongful intent, I do not think that you should be entitled, or would be entitled to put them in jail or fine them.

Mr. Howard. If I may say so, the carrying of a concealed weapon is a crime, which it is in most States, and does not have any—

Mr. Dominick. It is in certain States.

Mr. Howard. Well, in certain States. It does not carry with it an intention of evildoing with the weapon. The mere carrying of it as a concealed weapon is a crime in some States, a number of States.

Mr. Dominick. In some States.

Mr. Williams. That I believe has been upheld by the Supreme Court.

Id. at 44-45.

gaged in lengthy discussion of intent, willfulness, and punishment under the bill. Would carrying a concealed weapon with intent to do harm be punished, or only intentionally carrying a concealed weapon? The complete text of that dialogue, which clarifies congressional intent on many issues with which the courts would later grapple, follows:

Mr. Dominick. Although I wrote the bill on the recommendation of the FAA, I would have some concern about that subsection because it does not have anything to do with intent. I expressed this yesterday. Would there be any opposition by the Justice Department to requiring an element of intent before he was subjected to penalty for simply carrying on board a weapon of some kind?

Mr. Koffsky. First, (j) is punishable as a misdemeanor. It is not of the category of a felony. It is classified not more than 1 year and a thousand dollars.

Mr. Williams. The Senate bill provided not more than \$5,000 or more than 5 years.

Mr. Koffsky. I would rather address myself to Mr. Dominick's bill on that.

Since it is 1 year and less than a thousand, it is not quite the category of a crime that requires intent. How would we prove intent?

In this particular type of crime if we put intent in I would be troubled by that. Somebody sees that somebody, that a passenger has a gun and tries to board the airplane. The intent I guess would be intent to do some bodily harm aboard the aircraft or do something to lessen the safety aboard the airplane. If that is the intent, we would have to prove under that it would be an impossible task. All we have is a man with a gun.

Mr. Dominick. This is exactly the point I am making. If all you have is a man with a gun, why should you put him in the "jug" for a year?

....

Mr. Koffsky. If you put anything more on it, that you can only put him in jail if he has certain intent to do some bad thing aboard the ship, we cannot prove that at that point.

Mr. Dominick. You prove intent all the time.

Mr. Koffsky. Yes, we do.

Mr. Dominick. An overt act, and it seems to me that perhaps the bill as drawn does not take into consideration many of the things that happen at least in the Western States, where a fellow is going to go on a geological expedition or a uranium hunt or into the mountains or do anything of this kind where he simply carries along a briefcase and a gun in the briefcase he has taken from home and gets out of the airplane and changes into his old clothes and he is ready to go.

He does not even have a suitcase with him on many occasions. I strongly suspect that this particular type of bill here would be at least extremely inconvenient so far as a lot of people who are doing this type of work in the West.

Mr. Koffsky. I would assume that the airlines could post a notice that they have the facilities for checking it and bring it to the attention of the passenger that he is just not allowed to have a gun aboard that airplane. That certainly would give the passenger enough knowledge of what is forbidden. Then I would have no trouble with the "not more than a year."

Mr. Dominick. Suppose this were amended in accordance with the Senate bill where it becomes a felony and you have 5 years?

Mr. Koffsky. I would have considerably more difficulty in saying that no intent is necessary.

Mr. Williams. With respect to what the gentleman asked about, the term "willfully," is that used in here?

Mr. Dominick. It is not.

Mr. Williams. However, if a person declared his gun would that take it out of the category of being a concealed weapon?

Mr. Koffsky. I don't know. It could very well because he no longer is concealing the weapon.⁴⁹

The above discussion was limited to guns, but Congressman Williams pointed out that the bill referred "not to guns, but a deadly or dangerous weapon. Now a dan-

⁴⁹ *Id.* at 55-56.

gerous or deadly weapon, does that have a statutory definition?"⁵⁰ The following remarks ensued:

Mr. Koffsky. It does not under Federal law.

Mr. Williams. If a man on board an aircraft had a switchblade knife, that of course could be a dangerous weapon. As a matter of fact, a penknife could be a dangerous weapon. In trying to wrestle with this legislation I can see any number of problems that the committee is confronted with. . . . What constitutes a dangerous weapon?

Mr. Koffsky. Perhaps we could leave that to a judge to decide the context.

Mr. Williams. If a person boards an aircraft with a fountain pen tear gas dispenser and while that would not be considered a dangerous weapon on the ground possibly in flight it would most certainly be a dangerous weapon. In the drafting of this legislation I am inclined to feel we should try to eliminate as many points of law that would be raised as possible.⁵¹

Despite this perceived need to define "weapon," the committee failed to do so, and reported the above without change. However, discussion concerning passenger screening suggests that ordinary pocket knives were not considered deadly and dangerous weapons. Congressman Frank Chelf proposed that passengers should be required to pass through a metal detector "which would reveal any steel, iron, or other metal on the body of a passenger. If the detector showed a strong impression, indicating the location of a greater amount of metal than ordinarily carried in a pocket knife or pocket change — such person should be searched, then and there."⁵²

House debates centered on the meaning of "on or about his person." Congressmen wanted to make it quite clear in the legislative record that the bill would not inter-

⁵⁰ *Id.* at 56.

⁵¹ *Id.*

⁵² *Id.* at 11. However, FAA's James Pyle noted that metal detectors "are rather difficult to control. They will show a belt buckle, a tie clip, or a penknife, and this would mean that in effect you would be searching every passenger." *Id.* at 30.

fere with transportation of firearms in checked baggage. Congressman Gross of Iowa first raised the subject:

Mr. Gross. I am not opposed to this legislation, but suppose I wanted to go duck hunting in Florida or Alabama and wanted to take a shotgun aboard a plane. Am I permitted to do so under this legislation?

Mr. Harris. Yes. The gentleman would not be interfered with at all if he is going duck hunting in Florida and carries a gun for that purpose.

Mr. Gross. Would that apply to any other citizen?

Mr. Harris. The gentleman would not be singled out.

Mr. Gross. . . . What provision is there in the bill to the exception for firearms used for hunting, or is the exception already in the law?

Mr. Harris. The provision in the bill does not make the exception, but the provision of the bill is clear as to what is intended. It does not intend to reach legitimate traveling, as the gentleman inquires about.⁵³

In a clause-by-clause explanation, Committee Chairman Williams read from the committee report,

It is intended that a person shall be considered to have a weapon "about his person" if the weapon is in a bag or other container which he is holding or which will be readily accessible to him while he is on the aircraft. However, if the weapon is in a piece of luggage stored at a place on the aircraft so located that he will not have access to it during the flight, it is not to be deemed to be "about his person."⁵⁴

Congressman Harvey of Indiana asked "whether a person who might be taking some of his hunting equipment on a trip or something of that sort might be charged with having been guilty by reason of the fact that he had some guns with him aboard the plane?"⁵⁵ Again, Chairman Williams responded,

⁵³ 107 CONG. REC. 16,546 (1961).

⁵⁴ *Id.* at 16,548. See also H.R. REP. NO. 958, 87th Cong., 1st Sess. 15, reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2563, 2575.

⁵⁵ 107 CONG. REC. 16,550 (1961).

The committee gave considerable consideration to the question of whether or not this applied to a person who might have a gun in his suitcase which was checked on the aircraft in the baggage compartment. The language of the bill provides that he must have it "on or about his person" and it must be concealed. Now, "on or about his person," as we interpret that language and as we intend to apply it, would cover a person who had a weapon either on his immediate person or in a carry-on bag or briefcase.

Mr. Harvey of Indiana. I assumed that this contingency had been foreseen by the committee, but I have also had some experience in seeing how what we thought was a very properly worded provision, can be perverted; and I thought it was a good idea to bring it out in this colloquy to make sure there is no mistake about it in connection with this bill.⁵⁶

Congressman Devine noted that state laws clearly define the terms used in the bill and linked the right to transport firearms with the right to bear arms:

Mr. Speaker, in the matter of carrying arms on airplanes, many people wonder sometimes what a hunter may do, or perhaps a man who shoots in contests, but so long as the arms are not concealed on his person or in his carry-on luggage where he has easy access to them, they can be shipped.

The Constitution guarantees the citizen the right to bear arms. This is recognized in various States, but they must not be concealed. For instance, in my particular jurisdiction a man may drive a car with a gun on the seat beside him and be within the law, but if he hides it under the seat, puts it in the glove compartment, or in his pocket, he is guilty of a violation of the Concealed Weapons Act.

He could not carry a concealed weapon aboard a plane and be within the law, but if it was checked in the baggage compartment so he did not have access to it the law would not apply.⁵⁷

⁵⁶ *Id.*

⁵⁷ *Id.*

The only other issue raised concerned the meaning of the term "deadly or dangerous weapon." In contrast to the extended but unsuccessful Senate effort to define the term, the House discussed the term only once without further comment. Reading from the committee report, Chairman Williams explained that the term meant the same as when used in the provision concerning threatening or assaulting airline crew members with a weapon, about which he said,

Consideration was given to attempting to define the term "deadly or dangerous weapon." However, this is not practicable. These terms have been used without definition in other provisions of title 18, United States Code, and in many State criminal laws. The courts will determine in each case, as it arises, whether the weapon in question was deadly or dangerous.⁵⁸

The advent of the age of airline hijackings committed by a handful of desperate or deranged persons against a minuscule number of passengers forced Congress to enact legislation which would affect millions of passengers. In doing so, Congress balanced the protection of potential hijacking victims against the rights of the large number of passengers who transport firearms for lawful purposes, by prohibiting the transportation of firearms concealed about the person which would be accessible in flight.

B. *The 1974 Legislation: The Sportsman's Exemption and Uniform Screening Procedures*

1. *The Antihijacking Act*

In 1969 and 1970, legislators introduced bills to require x-ray screening of carryon baggage and to change the status of the prohibition against boarding with a concealed weapon from misdemeanor to felony.⁵⁹ In a hearing

⁵⁸ *Id.* at 16,547-48; H.R. REP. NO. 958, 87th Cong., 1st Sess. 15, reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2563, 2575.

⁵⁹ See *infra* notes 62-76 and accompanying text.

before a House Committee, Congressman John Dingell insisted that Congress should enact an explicit exception for firearms in checked baggage, but Assistant Attorney General Will R. Wilson and Congressman Donald G. Brozman contended that such an exception was unnecessary:

Mr. Dingell. Mr. Wilson, you have been discussing here the problem that you have with the carrying on of the firearms and the provisions of the existing laws. As a sportsman, I am somewhat troubled about this.

For example, I know there are a large number of hunters from your own country in Texas who would go hunting in Wyoming or Colorado. If under the plain reading of this statute they carry their pet deer or elk or moose rifle on that aircraft, they are subject to a criminal prosecution. If the new legislation goes through, they would be charged with the commission of a felony.

What consideration would you afford under these particular statutes to the sportsmen of this Nation, innocent, law-abiding citizens who are probably more anxious to avoid criminal use of firearms than anybody in our society, yet they are afflicted with the fact of carrying a case with a rifle on an aircraft or a shotgun going to a trap shoot or registered trap shoot may constitute a felony? Their innocent actions may charge them with a felony or misdemeanor. You have a very large net here with fine mesh and I want to know how these innocent fish are going to get caught or swim around it.

Mr. Wilson. I am a deer hunter, and I have gone through the process of getting a rifle onto a plane a number of times. First, when you buy your ticket, you tell them that you are taking it, and then the stewardess takes it away from you and puts it somewhere. Then you get it back when you are ready to get off. They have an established process for that.

Mr. Dingell. The statute, as I read it—and you are a lawyer of some experience—does not make any exception to that. . . .

Mr. Wilson. That is a concealed weapon. The prohibition is against a concealed weapon. . . .

Mr. Brotzman. I just wanted to point out it says "concealed, deadly or dangerous weapon." I think that is the difference from on your person.⁶⁰

Further hearings held in 1973 culminated in new comprehensive legislation a year later.⁶¹ Confusion over whether a firearm was not concealed if declared was expressed in the first House hearing on the reform legislation:

The Chairman. I am glad you differentiated on weapons; you used the word concealed weapons. Out in my country, people take airlines to go hunting sometimes and their weapons are not concealed, they just have them in a bag there. Tell them I have got a shotgun in there, I am going to hunt ducks, and that is not included in this at all; is it?

Senator Cannon. Yes; it is.

The Chairman. Is it included? They can't get aboard with shells? There was two guys Sunday going over to Montana hunting; they had an awful time.⁶²

⁶⁰ *Aviation Safety and Aircraft Piracy: Hearings Before the House Comm. on Interstate and Foreign Commerce and the Subcomm. on Trans. and Aeronautics*, 91st Cong., 1st & 2nd Sess. 78 (1970). David D. Thomas, Acting FAA Administrator, continued,

Mr. Dingell, I might say we have made provision for sportsmen. Most of the pilots are sportsmen and we do carry rifles. The law on piracy says "concealed." Our regulations say "concealed or unconcealed on or about the person." They are checked with the stewardess. We carry them, and we have a large traffic in sportsmen carrying guns.

Mr. Dingell. Different airlines tend to treat sportsmen very differently. I had one major airline return a cased firearm in totally damaged condition.

Id. at 87-88.

⁶¹ See *infra* note 63 and accompanying text.

⁶² *The Administrations Emergency Antihijacking Regulations: Hearings Before the Subcomm. on Aviation of the House Comm. on Commerce*, 93rd Cong., 1st Sess. 89 (1973). The following remarks of FAA General Counsel John W. Barnum prompted this discussion:

In the absence of a State statute specifically permitting State law enforcement officials to enforce a Federal law, there is, of course, the simple fact that in many of the acts with which we are dealing, carrying a concealed weapon is in fact a State offense. And the State official is obviously empowered to enforce his own State law with respect to carrying concealed weapons. One of the things which the bill we proposed will do will be to raise from a misdemeanor level to

When reenacted as the Antihijacking Act of 1974,⁶³ the prohibition on carrying a concealed weapon on the aircraft included an explicit provision that the prohibition "shall [not] apply to persons transporting weapons (other than loaded firearms) contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier."⁶⁴ The Senate Report explained,

The Committee has provided explicit provisions under which sportsmen may transport weapons aboard aircraft in air transportation. We feel that the right to bear arms is also the right to transport arms for legitimate purposes and, accordingly, have set forth procedures to be followed.

The bill provides that persons may transport weapons for sporting purposes if the presence of such weapons in luggage or baggage is publicly declared prior to the passengers boarding the aircraft and is checked as baggage and carried in the cargo hold of the aircraft.⁶⁵

The Air Transport Association of America (ATAA) had expressed the need for an explicit provision on transporting firearms legally:

The airlines are concerned that the section prescribing "Criminal Penalties" for "Carrying Weapons Aboard Aircraft" would prohibit the carrying of firearms in stowed baggage. Such a procedure would cause great problems for persons who for legitimate reasons, must transport arms. To correct the language, we have submitted an amendment which would permit the FAA Administrator to

a felony level the carrying of a concealed weapon onto an aircraft. And that in itself, I am informed by the Justice Department, will enable additional States to have their State law enforcement officials enforce the State law, there being the distinction in some States that State law enforcement officials may enforce a Federal felony, but may not enforce a Federal misdemeanor.

Id. at 87.

⁶³ Pub. L. No. 93-366, 88 Stat. 409 (codified as amended in scattered sections of 49 U.S.C.).

⁶⁴ 49 U.S.C. app. § 1472(l)(3) (1982).

⁶⁵ S. REP. NO. 13, 93d Cong., 1st Sess. 21 (1973).

prescribe regulations for the necessary transportation of firearms in the aircraft.⁶⁶

Accordingly, ATAA recommended a rule that one may not board or attempt to board an aircraft if he has "on or about his person or his property *intended to be carried into the aircraft cabin* a concealed deadly or dangerous weapon."⁶⁷ ATAA also suggested a provision that the prohibition would not "apply to persons transporting weapons for hunting or other sporting activities *under regulations prescribed by the Administrator*."⁶⁸

According to the House Conference Report,⁶⁹ the original Senate bill

provided an exemption for the transportation of weapons for sporting purposes if the presence of the weapons in luggage or baggage was publicly declared before boarding and was checked as baggage and carried in the cargo hold of the aircraft. Such baggage or luggage could not be opened within the airport confines.⁷⁰

The House added an amendment which "required the CAB to issue regulations requiring air carriers to make insurance policies available (for a reasonable charge) conditioned to pay for loss or damage to property of a passenger which he cannot lawfully carry in the passenger compartment and must be transported as baggage."⁷¹ The conference substitute omitted the prohibition against opening baggage with firearms within the airport.⁷² While their report does not mention it, the conference

⁶⁶ *Antihijacking Act of 1973: Hearings Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 390 (1973).

⁶⁷ *Id.* at 391 (emphasis in original).

⁶⁸ *Id.* at 392 (emphasis in original). Congressman Dingell, presiding in the same hearing, made a comment which relates to articles not prohibited: "I have a pocketknife that turns them [magnetometers] on all the time." *Id.* at 456. Pocketknives apparently were not intended to be classified as deadly and dangerous weapons.

⁶⁹ H.R. CONF. REP. NO. 1194, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 3996.

⁷⁰ *Id.* at 4011.

⁷¹ *Id.* This provision passed and is codified at 49 U.S.C. app. § 1516 (1982).

⁷² *Id.* at 4011.

managers also omitted the language "for sporting purposes," probably because firearms also could be transported for business, self-defense, or other lawful purposes.

Congress amended the general prohibition against carrying a concealed weapon to include boarding or attempting to board an aircraft while having "on or about his person or his property a concealed deadly or dangerous weapon which is, or could be, accessible to such person in flight."⁷³ Transporting a firearm in checked baggage, whether declared or not, clearly could not be a violation of this provision. As passed, the exception states that the prohibition "shall [not] apply to persons transporting weapons (other than loaded firearms) contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier."⁷⁴

This exception is in part a truism implied by the prohibition. The reference to declared firearms ignores the fact that failure to declare a firearm transported in checked baggage is not an element of the substantive offense. Congress apparently intended the exception to prevent a passenger from being charged with attempting to board an aircraft with a concealed weapon if he did not check the firearm but declared it to carrier personnel, intending that it be surrendered at the loading gate or even inside the aircraft. Under the exception, one presumably could even carry the declared firearm onto the aircraft as long as the firearm is not accessible *in flight*. That procedure appears to have been routine at one time, particularly for very valuable firearms.⁷⁵ Finally, the exception makes it clear that a declared firearm cannot be considered concealed, even if hidden from view, if located in in-

⁷³ 49 U.S.C. app. § 1471(l)(1) (1982).

⁷⁴ *Id.*

⁷⁵ See, e.g., *Randall v. Frontier Airlines, Inc.*, 397 F. Supp. 840, 845 (W.D. Ark. 1975); see generally 14 C.F.R. § 159.175(c)(3) (1986) (one may carry unassembled or cased firearms in mobile lounges at Dulles International Airport).

accessible baggage during the flight, or in the accessible baggage before the flight commences.⁷⁶

2. *The Air Transportation Security Act*

When it reenacted the Antihijacking Act in 1974, Congress also enacted the Air Transportation Security Act.⁷⁷ The latter for the first time authorized screening for weapons in carryon baggage, and required that screening procedures be uniform for all airlines.⁷⁸ Authorization for screening appears in 49 U.S.C. § 1356(a), which provides,

The Administrator shall prescribe or continue in effect reasonable regulations requiring that all passengers and *all property intended to be carried in the aircraft cabin* in air transportation or intrastate air transportation *be screened by weapon-detecting procedures or facilities* employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation. One year after August 5, 1974, or after the effective date of such regulations, whichever is later, the Administrator may alter or amend such regulations, requiring a continuation of such *screening only to the extent deemed necessary to assure security* against acts of criminal violence and aircraft piracy in air transportation and intrastate air transportation.⁷⁹

Under this provision, only carryon baggage may be screened for weapons, and it may be screened only to the extent necessary to prevent hijacking or similar crimes. The statute does not confer authority to screen baggage that the passenger intends to check rather than carry into the aircraft cabin.

⁷⁶ In companion legislation, Congress passed the Hazardous Materials Transportation Act of 1974, 49 U.S.C. app. §§ 1801-12 (1982). It provides in part, "Nothing in this title shall be construed to prohibit or regulate the transportation by an individual, for personal use, of any firearm . . . or any ammunition therefor, or to prohibit any transportation of firearms or ammunition in commerce." *Id.* at § 1806(c).

⁷⁷ 49 U.S.C. app. §§ 1356-58 (1982).

⁷⁸ *See id.* at §§ 1356(a), 1357(a)(2)(c).

⁷⁹ *Id.* at § 1356(a) (emphasis added).

Section 1357(a) of the same Title provides,

(1) The Administrator of the Federal Aviation Administration shall prescribe such reasonable rules and regulations requiring such practices, methods and procedures . . . as he may deem necessary to protect persons and property aboard aircraft operating in air transportation or intrastate air transportation against acts of criminal violence and aircraft piracy.

(2) In prescribing and amending rules and regulations under paragraph (1) of this subsection, the Administrator shall —

. . . .

(C) to the maximum extent practicable, *require uniform procedures for the inspection, detention, and search of persons and property* in air transportation and intrastate air transportation to assure their safety and to assure that they will receive courteous and efficient treatment, by air carriers, their agents and employees, and by Federal, State, and local law enforcement personnel engaged in carrying out any air transportation security program established under this section⁸⁰

Recognizing that baggage screening constitutes a search under the fourth amendment, Congress obviously sought to make such screening as uniform and non-intrusive as possible. An explanation of the need for the above provision appears in the House Conference Report:

Because of the high incidence of aircraft hijacking and the gravity of these offenses, the conferees have reluctantly approved *a security system which does allow routine searches of passengers in contradiction to our cherished constitutional freedom*. At best such a search is unpleasant. Regrettably, there have been numerous complaints from citizens throughout the country and a number of complaints based on the experiences of members of Congress themselves as to rude and even hostile treatment by police and security employees. Because of this, the conferees agreed to the provision which requires *uniform procedures* for the inspection, detention and search of persons under conditions which will as-

⁸⁰ *Id.* at § 1357(a) (emphasis added).

sure that they receive "courteous and efficient treatment". It is the intent of the conferees that the Secretary shall give extremely careful attention to this provision and any regulations and actions under this provision. *The legalization of these searches is a serious inroad into our basic individual right to privacy.* Since Congress has determined that this inroad must be made, we should do all within our power to assure that the unpleasant aspect of *personal searches be minimized to the fullest degree possible* consonant with the insurance of air safety.⁸¹

The right to expect uniform weapons screening and the right to be warned of screening by conspicuous notice also found expression in the Senate Report, which noted that persons who activate the metal detector should be given an opportunity to be screened again after removing objects from their pockets:

If, at this time, the passenger still evokes a positive response from the device, then and only then is he subject to a search or frisk, but only if he first voluntarily consents. If such consent is denied, then the individual shall forfeit his opportunity on that occasion to be transported and the air carrier shall deny his passage.⁸²

The Senate Committee deplored abusive searches by law officers, "abhorrent to individual freedom and the Bill of Rights," and stressed the need for notice and standardization:

Currently, the Department of Transportation has posted notices at many airports informing passengers that they and their hand baggage are subject to search. We . . . believe that they should also inform the passenger of *his ultimate right to refuse to permit a search* of his person or possessions. . . . Furthermore, we recommend that the current screening and search process now being required by regulation, be standardized in accord with the intent of this bill and that appropriate notices be provided at airports notifying passengers of the procedures to be followed and of

⁸¹ H.R. REP. NO. 1194, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 3996, 4010 (emphasis added).

⁸² S. REP. NO. 13, 93d Cong., 1st Sess. 9 (1973).

the passenger's right to refuse to be searched. If this is done, it . . . will provide further safeguards to individual liberties and freedom.⁸³

The authority to screen only "property intended to be carried in the aircraft cabin" under section 1356(a), and the requirement that "uniform procedures" for screening be followed under section 1357(a)(2)(C), mandate that a passenger be given an opportunity to check baggage before screening, that the baggage check-in area be located before the x-ray screening system, and that only carry-on baggage be screened for weapons. Declaration and check-in of firearms in inaccessible baggage form another part of the uniform procedures mandated by the overall regulatory scheme.

C. *Loaded Firearms, Civil Penalties, and Screening Checked Baggage for Explosives*

1. *The Prohibition on Loaded Firearms*

In 1980 Congress amended the Antihijacking Act to prohibit carrying loaded firearms in checked baggage.⁸⁴ As amended, the statute makes it a misdemeanor for anyone to place or attempt to place "a loaded firearm aboard [an] aircraft in baggage or other property which is not accessible to passengers in flight."⁸⁵ Congress also amended the section of the statute which provides an exception for transporting declared firearms in baggage not accessible in flight, by adding the parenthetical "(other than loaded firearms)."⁸⁶ Finally, Congress added a new subsection:

(A) [T]he term "firearm" means any starter gun and any weapon which is designed to or has been converted to expel any projectile by the action of an explosive; and

(B) the term "loaded firearm" means any firearm which

⁸³ *Id.* (emphasis added).

⁸⁴ See 49 U.S.C. app. § 1472(l)(1)(B)(1982).

⁸⁵ *Id.*

⁸⁶ *Id.* at § 1472(l)(3).

has a cartridge, a detonator, or powder in the chamber, magazine, cylinder, or clip of such firearm.⁸⁷

Congresswoman Schroeder of Colorado sponsored the amendments because, she explained, a baggage handler in Denver had been killed when a loaded weapon in checked baggage discharged.⁸⁸ The passenger could not be prosecuted in the absence of any criminal prohibition.⁸⁹ In the only comment on the provision both in the hearings and on the floor, Congresswoman Schroeder explained,

The language of the bill makes it impossible for a gun to go off, accidentally or otherwise. A firearm will be considered loaded if a cartridge, a detonator or powder is found in the chamber, magazine, cylinder, or clip of the weapon. Keeping ammunition completely separate from the firearm is the best way I know of to keep it from going off. This is no burden on a gun owner, collector or dealer carrying firearms while traveling. Gun clubs and organizations, as a safety measure, teach the practice of carrying ammunition outside the firearm when it is not in use.

Since the focus is on prevention, implementation of the provision would be easy. Imposing notices displayed at ticket counters would make gun toters think twice and then step out of line to empty their guns. In addition, anyone who issues hunting licenses or permits, or sells guns and ammunition, could easily inform their customers about the new law.⁹⁰

While the definition of "loaded firearm" seems fairly clear, a literal reading of the statute may suggest that a loaded magazine or clip not even inserted into a firearm could make the firearm "loaded." Congresswoman Schroeder's explanation, however, indicates that a loaded clip or magazine "completely separate from the firearm"

⁸⁷ *Id.* at § 1472(l)(4).

⁸⁸ 125 CONG. REC. 29,037 (1979). The firearm involved, a .357 revolver (probably a single action), was designed so that the hammer resting on a loaded chamber could cause a discharge. *See id.*

⁸⁹ *See id.*

⁹⁰ *Id.* at 29,036.

or "outside the firearm" would not make the firearm loaded.

2. *Civil Penalty in Lieu of Criminal Prosecution*

Besides the prohibition on loaded firearms, another proposed amendment in 1980 would have allowed civil penalties in lieu of criminal prosecution for attempting to board an aircraft with a concealed firearm. This amendment did not pass that year, but was later enacted in 1984.⁹¹

Testimony at the 1979 hearings before the House Subcommittee on Aviation revealed that the screening program and provision for carriage of firearms in checked baggage passed in 1974 achieved excellent results.⁹² FAA Administrator Longhorne Bond testified that most foreign air carrier hijackings stemmed from lack of or defective screening: "In contrast to the foreign experience, no U.S. hijacking since 1973 has involved real firearms or explosives passing undetected through passenger screening points."⁹³

In the period 1973-78, over two billion persons and over three billion carryon items went through screening.⁹⁴ Seventeen thousand firearms were detected, the majority by x-ray inspection.⁹⁵ FAA Security Chief Richard Lally noted,

The figures for that period indicate that of the 17,000 firearms detected, 6,000 were detected under circumstances that caused the arrests of the persons involved. The remainder would have been what you might call an innocent-type firearm, that is, a firearm in the possession of someone who had a license and was authorized to carry it, but who failed to declare it before going through the

⁹¹ See 49 U.S.C.A. § 1471(c),(d) (West Supp. 1986).

⁹² See *Aircraft Piracy, International Terrorism: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 96th Cong., 1st Sess. 58 (1979).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 65.

system.⁹⁶

He might have added that many of the arrested persons also had possession of firearms which did not require licenses under state law, and that authorities ultimately dismissed many of the charges.⁹⁷

Until 1984, the maximum criminal fine under federal law for boarding or attempting to board an aircraft with an accessible firearm stood at \$1,000.⁹⁸ In that year Congress raised the maximum criminal fine under 49 U.S.C. § 1472(1)(1) to \$10,000.⁹⁹ Moreover, Congress amended section 1471 by adding a new subsection (d), which provides for a civil penalty in the same amount:

⁹⁶ *Id.* Given the widespread possession of firearms, particularly in certain parts of the country, it is amazing that only 17,000 firearms were detected out of over two billion passengers and their carryon baggage screened. The following exchange occurred between FAA spokesmen Bond and Lally and Congressman Snyder:

Mr. Bond. Mr. Chairman, one of the phenomena that we encounter is people who just are accustomed to carrying firearms. And in some of the frontier areas of the United States—Texas and Kentucky come to mind—we find people who would go right on the airplane with their gun, just as they carry it around out on the ranch —

Mr. Snyder. Have you read Fishbait Miller's book?

Mr. Lally. I have, yes, sir.

Mr. Snyder. He mentions in there I was one of the few Members he ever knew who was known to carry a gun on the floor of the House. I have since ceased to do that.

Mr. Bond. Do you carry them in committee, Mr. Snyder?

Mr. Snyder. We are going to see how you do with those FAA regs.

[Laughter.]

Id. at 70.

⁹⁷ Although it did not pass, the House bill would have established a civil penalty for boarding or attempting to board an air carrier with a concealed weapon on or about one's person or accessible property. The committee report explained,

Testimony at our hearings indicated that prosecutors and juries have been reluctant to impose criminal penalties in certain hijacking-related cases, including cases involving misguided attempts at humor, inebriated passengers, or attempts to board aircraft carrying concealed weapons where no further illegal activity is contemplated. Civil penalties may be more acceptable in such cases, and adding this sanction will help discourage these dangerous activities.

H.R. REP. NO. 424, 96th Cong., 2d Sess. 14 (1979).

⁹⁸ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1837, 2189 (to be codified at 49 U.S.C. § 1472(1)(1)).

⁹⁹ See *id.*

Except for law enforcement officers of any municipal or State government or officers or employees of the Federal Government, who are authorized or required within their official capacities to carry arms, or other persons who may be so authorized under regulations issued by the Administrator, whoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to a civil penalty of not more than \$10,000 which shall be recoverable in a civil action brought in the name of the United States.¹⁰⁰

The foregoing provision includes two notable exceptions. First, *any* law enforcement officer, including auxiliary sheriff's deputies, is exempt if he or she is officially authorized to carry arms at any time.¹⁰¹ Second, "other persons who may be so authorized under regulations issued by the Administrator" could be interpreted to include persons who attempt to carry firearms in checked baggage, but who inadvertently introduce it into the sterile area because an airline has no baggage check-in before x-ray screening.¹⁰² Certainly such a person would not be attempting to board the aircraft with the firearm.

Congress added the civil penalty because criminal prosecution may not be warranted when a passenger innocently forgets to declare a firearm later detected in carryon baggage.¹⁰³ The Senate report states,

It should be noted that, taken together, subsections 4(a) and 4(c) of the bill increase the range of punishments available for a person who boards or attempts to board an aircraft with a firearm or other dangerous weapon. At the lower end of the spectrum is a civil penalty of up to \$10,000. A civil penalty of some amount could be appropriate, for example, for a businessman who has a firearm

¹⁰⁰ 49 U.S.C.A. § 1471(d) (West Supp. 1986).

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See* S. REP. NO. 619, 98th Cong., 2d Sess. 6-7 (1984).

in his briefcase but, in spite of signs clearly reminding him to do so, forgets to declare it and turn it over to the airline for shipment as is required by 18 U.S.C. 922(e).^[104] At the opposite end of the scale is a criminal penalty of up to five years' imprisonment and a \$25,000 fine for a person who willfully or recklessly carries a weapon aboard a plane. Such a penalty would be appropriate if the person, for example, displayed the weapon in the course of an altercation with a fellow passenger or with a flight attendant. In between is a criminal misdemeanor penalty of a \$10,000 fine and one year's imprisonment which might be an appropriate level of punishment for a person's second offense of "forgetting" to transfer his personal firearm to the flight crew for shipment with him or for a person who consciously decided to carry a firearm with him in the cabin of a plane with no intention of using it but merely to see if he is clever enough to defeat the airport security system.¹⁰⁵

3. *Screening Checked Baggage for Explosives*

After the hijacking of a TWA flight from Athens, Greece, and the unexplained explosion of an Air India flight, both in 1985, Congress held hearings on bills to improve air carrier security abroad.¹⁰⁶ A number of comments were made concerning baggage screening for explosives, and legislators also discussed the subject of firearms in carryon baggage. Through the course of these hearings, the adequacy of the domestic security program became immediately clear. Senator Daniel Patrick Moynihan began the testimony by recalling the hijacking epidemic before the 1974 legislation mandating the

¹⁰⁴ Actually, 18 U.S.C. § 922(e) (1982) does not explicitly require a passenger to declare or turn over a firearm to the airline for shipment. Although section 922(e) does require a nonpassenger who ships a firearm in a container to declare it to the carrier, an exception exists for a passenger traveling with a firearm who delivers it to the carrier. A passenger who carries a firearm on his person without delivering it to the carrier is not regulated by this provision. See *infra* notes 340-97 and accompanying text for an extensive analysis of section 922(e).

¹⁰⁵ S. REP. NO. 619, 98th Cong., 2d Sess. 6 (1984) (footnote added).

¹⁰⁶ See *infra* note 107.

screening of carryon baggage: "After 1974 it stopped. The airport security measures have worked to a degree that I do not know anyone could have expected. It has just put an end to that."¹⁰⁷

Senator Paul Simon pointed out that plastic explosives cannot be detected by the usual mechanical devices, but that vapor detection was reaching a breakthrough for screening both persons and checked baggage.¹⁰⁸ Vapor detection appears to be far less intrusive for fourth amendment purposes than x-ray, because the operator does not actually see the objects in the luggage. By contrast, Congressman Norman Y. Mineta pointed out that El Al physically searches both carryon and checked baggage and strip-searches passengers.¹⁰⁹

Those attending the hearings discussed in some detail the feasibility of x-ray searches. Billie H. Vincent, Director of FAA Civil Aviation Security, did not want to discuss the subject in a public hearing, but made clear that x-ray screening "is being done in certain circumstances. . . . [B]ut again, do we want to keep the pink elephants away?"¹¹⁰ He apparently viewed routine x-ray searches of checked baggage as necessary only for certain international flights.

When asked whether screening personnel presently do an adequate job of keeping guns from being carried on board, Mr. Vincent gave this revealing response:

First let me add, on an annual basis in the U.S. domestic system, the security system's preboard screening by the air carriers pick [sic] up somewhere around 2,800 handguns a year, and there are a substantial number of arrests as a result. Generally, those people who are identified are not people with evil intent but rather, frequently people accompanying a passenger to the airport who forget they

¹⁰⁷ *International Airport Security and Antihijacking Measures: Hearings on S. 1321, S. 1326, and S. 1343 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 23 (1985).

¹⁰⁸ *Id.* at 28.

¹⁰⁹ *Id.* at 49.

¹¹⁰ *Id.*

have a weapon in their purse or on their person, and frequently it is in their purse for protection.¹¹¹

Karen Lantz of the International Federation of Flight Attendants proposed limits on carryon baggage as a deterrent to hijackings.¹¹² Even physical inspection of carryon baggage leaves room for human error: "A more effective measure would be simply to limit the number of carryon bags permitted on board the aircraft, thereby limiting the means by which terrorists may smuggle weapons and explosives on board."¹¹³ Ms. Lantz maintained that the increased baggage load allowed by expanded baggage racks and overhead bins pose a security risk.¹¹⁴

Doyle Reed of the Airport Operators Council International noted that equipment currently in use does not screen baggage and cargo adequately, and that sophisticated bomb detection equipment must be utilized. He stated, "The objective of this initiative is the eventual capability of 100 percent baggage screening for explosives when deemed appropriate for certain high risk flights."¹¹⁵

Clearly, unloaded firearms in checked baggage pose no danger and no one in Congress has suggested elimination of this kind of carriage. Moreover, the coming use of vapor detection equipment to screen checked baggage for explosives promises to be far more effective, yet less intrusive under the fourth amendment, than the use of x-ray.

¹¹¹ *Id.*

¹¹² *Id.* at 85.

¹¹³ *Id.* at 83.

¹¹⁴ *Id.* at 87.

¹¹⁵ *Id.* at 94.

III. JUDICIAL CONSTRUCTION OF THE ANTIHIJACKING ACT
AND THE AIR TRANSPORTATION SECURITY ACTA. *Attempting to Board an Aircraft With a Deadly Weapon
Concealed on or about One's Person or Accessible
Property*

Hijackings and willful, reckless acts involving firearms are beyond the scope of this article. This analysis concerns the elements of the *malum prohibitum* offense of carrying or attempting to carry a firearm aboard an aircraft. 49 U.S.C.A. § 1472(1) provides,

(1) With respect to any aircraft in, or intended for operation in air transportation or intrastate air transportation, whoever—

(A) while aboard, or while attempting to board such aircraft has on or about his person or his property a concealed deadly or dangerous weapon which is, or could be, accessible to such person in flight;

(B) has placed, attempted to place, or attempted to have placed a loaded firearm aboard such aircraft in baggage or other property which is not accessible to passengers in flight; or

(C) has on or about his person, or who placed, attempted to place, or attempted to have placed aboard such aircraft any bomb or similar explosive or incendiary device;

shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

(2) Whoever willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, shall commit an act prohibited by paragraph (1) of this subsection, shall be fined not more than \$25,000 or imprisoned not more than five years, or both.

(3) Paragraph (1)(A) of this subsection shall not apply to law enforcement officers of any municipal or State government, or officers or employees of the Federal Government, who are authorized or required within their official capacities to carry arms, or to persons who may be authorized, under regulations issued by the Secretary of Transportation to carry deadly or dangerous weapons in air transportation or

intrastate air transportation; nor shall it apply to persons transporting weapons (other than loaded firearms) contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier.

(4) For purposes of this subsection—

(A) the term "firearm" means any starter gun and any weapon which is designed to or has been converted to expel any projectile by the action of an explosive; and

(B) the term "loaded firearm" means any firearm which has a cartridge, a detonator, or powder in the chamber, magazine, cylinder, or clip of such firearm.¹¹⁶

Although this analysis concerns primarily the offense stated in (1)(A), the complete subsection is set forth to demonstrate the overall scheme. Offenses under (1) vary in danger but include only victimless crimes *per se*; offenses under (2) involve willful and reckless misconduct which would be *mala in se*.

1. Knowledge, Intent, and Concealment

The courts stand divided on the extent to which knowledge and intent constitute elements of the offense. The problem revolves in part around a determination of whether or not concealment should be determined by an objective or a subjective standard. In *United States v. Lee*¹¹⁷ the government obtained conviction of a defendant who attempted to board an aircraft with a .38 caliber pistol in a briefcase which also contained money receipts.¹¹⁸ He testified that after arriving late for his flight, he forgot about the pistol. The court held that defendant would not be guilty if he was "ignorant of the fact that the pistol was in his briefcase."¹¹⁹ The court stated,

It has long been held that concealment of contraband in a

¹¹⁶ 49 U.S.C.A. § 1472(l) (West Supp. 1986).

¹¹⁷ 383 F. Supp. 1033 (E.D. Tenn. 1974), *rev'd*, 539 F.2d 606 (6th Cir. 1976).

¹¹⁸ *Lee*, 383 F. Supp. at 1034. The Sixth Circuit ultimately reversed the conviction, but agreed with the district court's interpretation of section 1472. *See* 539 F.2d at 608.

¹¹⁹ *Lee*, 383 F. Supp. at 1034-35.

legal sense is a knowing concealment and not the mere fact that the contraband is found in the possession of the defendant. . . .

Moreover, a serious question of due process of law would be raised if a person could be convicted under subsection (l) on the theory that any person presenting himself and his carry-on luggage for boarding inspection would be held strictly accountable for whatever may have been inadvertently left in his carry-on luggage or even might have been surreptitiously placed there by the act of another, for whatever reason.¹²⁰

Following the above reasoning, *United States v. Pou*¹²¹ dismissed an information for attempting to board with a .45 automatic because the information failed to allege "that the defendant had knowledge that the weapon was 'on or about his person and his property'. Knowledge of the presence of a concealed dangerous weapon is an element of the offense codified in 49 U.S.C.A. § 1472."¹²² Without alleging knowledge, the information charged defendant "with the strict liability crime of attempting to board a commercial aircraft while in possession of a weapon someone else has knowingly concealed."¹²³

The United States Court of Appeals for the Eighth Circuit discussed subjective intent to conceal and objective concealment in *United States v. Brown*,¹²⁴ reversing a conviction for submitting for inspection a flight bag containing a tear gas pistol.¹²⁵ The court held that submission of property for routine search may negate both intent to conceal and concealment per se:

In examining what constitutes "concealment", we are cognizant that the circumstances surrounding preflight boarding procedures of aircraft have been drastically al-

¹²⁰ *Id.* at 1035.

¹²¹ 484 F. Supp. 972 (S.D. Fla. 1979).

¹²² *Id.* at 974.

¹²³ *Id.* at 975. *But see* *United States v. Harris*, 381 F. Supp. 1095, 1101 (E.D. Pa. 1974) (dictum confuses knowledge with specific intent and states that knowledge is not necessary for conviction).

¹²⁴ 508 F.2d 427 (8th Cir. 1974).

¹²⁵ *Id.* at 434.

tered between the time of the passage of § 1472(1) in 1961 and the time of the incident before us in August 1972. In 1961, prior to the institution of compulsory pre-flight boarding examination of luggage and person, any nondisclosure to airline personnel of an object considered to be a deadly or dangerous weapon could properly constitute a concealment of the weapon within the purview of the statute. . . . However, by August 1972, according to the stipulation, passengers intending to board commercial aircraft at the Kansas City airport were required, as a precondition for air travel, to present their carry-on luggage to airline personnel for a routine search and to present themselves for magnetometer detection. . . .

The institution of these preflight boarding procedures, such as those carried out during the incident in question, requires a court to consider whether a passenger who voluntarily tenders his hand luggage to a qualified inspector is concealing any item which will be observed upon routine inspection. Ordinarily, the act of a passenger presenting his hand luggage to responsible airline personnel for inspection suggests an intent to disclose rather than to conceal those items within the bag which will come into view on ordinary inspection.¹²⁶

Concealment may exist even though a passenger tenders the baggage for screening.¹²⁷ If a passenger denies that he is carrying a weapon, this denial "may imply an intent to conceal."¹²⁸ (It also could imply objective concealment.) "A potentially dangerous object may be hidden in a false bottom or secret compartment; a knife or gun may be wrapped in a wet diaper; or other evidence may exist indicating concealment."¹²⁹

While these observations concern hand searches of carry-on baggage, similar principles apply to other screening procedures. For example, objective concealment from x-ray would occur if a person encased a weapon in lead or disassembled and positioned it in such a manner as to

¹²⁶ *Id.* at 431-32 (citations and footnote omitted).

¹²⁷ *See id.* at 432.

¹²⁸ *Id.*

¹²⁹ *Id.*

conceal its shape. FAA security investigators use the test of whether a defendant has "artfully concealed" the weapon, in determining whether or not a passenger intentionally introduced a firearm into a sterile area.¹³⁰

The Eighth Circuit rejected the intent to conceal standard in favor of an objective concealment test in *United States v. Flum*.¹³¹ After purchasing a ticket, defendant immediately proceeded through the security gate because the passengers were already boarding.¹³² Authorities found a butcher knife wrapped in loose clothing in a suitcase, and a switchblade knife "inside a small gray box which was on the counter with other belongings."¹³³ This language suggests that the box had been on defendant's person and placed on a counter while he underwent metal detector screening. Holding that "intent to conceal is not an essential element of the offense,"¹³⁴ the court commented, "To the extent that any dicta [in our opinion in *Brown*] may impliedly suggest that intent is a necessary ingredient of the element of concealment, we decline to follow it, in light of our en banc holding today."¹³⁵ The court further concluded that intent to use a weapon to commit a crime on board is not required.¹³⁶ The court did not question the need to prove knowledge of the weapon's existence, but noted that "[n]o issue of scienter is present in this case. It is undisputed that defendant knew the nature and approximate location of each of the knives."¹³⁷

The *Flum* court did agree with the *Brown* holding that "the fact of concealment is an essential element and must be proved beyond reasonable doubt."¹³⁸ Submission of articles for inspection may or may not negate conceal-

¹³⁰ FAA letters to passengers, 1983-84, pursuant to 14 C.F.R. § 107.21(a) (1986), made available to author under the Freedom of Information Act.

¹³¹ 518 F.2d 39 (8th Cir.), cert. denied, 423 U.S. 1018 (1975).

¹³² *Id.* at 41.

¹³³ *Id.* (footnote omitted).

¹³⁴ *Id.* at 45.

¹³⁵ *Id.* at 44 n.9.

¹³⁶ *Id.* at 44.

¹³⁷ *Id.* at 44-45 n.10.

¹³⁸ *Id.* at 45.

ment, depending upon the other circumstances of the case:

We do not intimate that the weapon must in all cases be in open view prior to inspection. The trier of the fact could consider, for example, evidence offered on behalf of the defendant that he had informed the inspector of the presence and location of a deadly or dangerous weapon among his belongings. The obviousness of the weapon is a factor to be taken into consideration under all of the relevant facts and circumstances. . . . The inspection process in a particular case may be an objective fact to be considered with other objective facts on the issue of concealment. Not every inspection will uncover a concealed weapon, and no congressional purpose to let the fact of a security inspection operate as an absolute defense to the charge can be found in either the statute or its legislative history. Each case must stand upon its own facts.¹³⁹

Flum perhaps exaggerates the distinction between intent to conceal and the fact of concealment, for the fact exists often because of intent. Moreover, the court does not dispute that one must know he has a concealed weapon on or about his person or accessible property. Practically, the key to the concealment issue in most cases appears to be whether or not the weapon has been artfully disguised or positioned. A firearm laying flat in a suitcase may not be concealed from the x-ray operator, but the same firearm laying in a position where its outline is not immediately evident may be concealed. The old test of whether a weapon may be seen by the naked eye appears outdated in this age of x-ray vision.

2. *On or about the Person and Accessible in Flight*

To constitute a violation, a weapon must not only be concealed, but must be "on or about [the passenger's] person or his property" in such manner as "is, or could be, accessible to such person in flight."¹⁴⁰ This encom-

¹³⁹ *Id.*

¹⁴⁰ 49 U.S.C.A. § 1472(l)(1)(A) (West Supp. 1986).

passes weapons on one's body or worn inside clothing as well as in carryon baggage, and excludes weapons in checked baggage. When an airline maintains no baggage check-in prior to x-ray screening, or directs a late passenger to proceed directly to the boarding area, apparently no violation would occur if the passenger intended to check the baggage. This seems particularly true with baggage too large to be carried aboard by the passenger, since such baggage would not be accessible in flight.

No federal judicial opinions analyze the meaning of "on or about" one's person or property. However, the reported decisions do seem to follow the intent of Congress by applying the terms to weapons in clothing or carryon baggage and not to those in checked baggage.¹⁴¹ The decisions have applied the prohibition to weapons found in pockets,¹⁴² briefcases,¹⁴³ and hand luggage.¹⁴⁴ As noted in the congressional hearings and debates in 1961, Congress took the terms "on or about his person" from state law provisions which had a well defined meaning.¹⁴⁵ It has long been the rule that a traveler who carries luggage containing a firearm does not carry the firearm "on or about his person."¹⁴⁶ Statements from a sampling of court opinions illustrate this point: "The evidence shows that the defendant did not carry about his person . . . the pistol, but that the pistol was taken about and placed in his satchel or suit case."¹⁴⁷ "It seems to us that when the statute prohibits the concealing of a weapon 'on or about

¹⁴¹ See *infra* notes 142-144 and accompanying text.

¹⁴² See, e.g., *United States v. Ware*, 315 F. Supp. 1333, 1334-35 (W.D. Okla. 1970); *United States v. Brown*, 305 F. Supp. 415, 417-18 (W.D. Tex. 1969).

¹⁴³ See, e.g., *United States v. Lee*, 539 F.2d 606, 607 (6th Cir. 1976); *United States v. Davis*, 482 F.2d 893, 896 (9th Cir. 1973).

¹⁴⁴ See, e.g., *United States v. Harris*, 381 F. Supp. 1095, 1096-97 (E.D. Pa. 1974).

¹⁴⁵ See *supra* notes 53-57 and accompanying text.

¹⁴⁶ See *infra* note 147 and accompanying text.

¹⁴⁷ *State v. Weston*, 108 S.C. 383, —, 94 S.E. 871, 871 (1918). *Accord Carr v. State*, 34 Ark. 448, 450 (1879) (pistol "in good faith being transported"); *Boles v. State*, 86 Ga. 225, —, 12 S.E. 361, 362 (1890) (carrying pistol in a basket for transportation purposes only did not constitute carriage of concealed weapon); *State v. Parker*, 152 N.C. 790,—, 67 S.E. 35, 36 (1910) ("carrying a pistol in his suit case" not equivalent to carrying a concealed weapon).

his person' that it means the weapon must be actually concealed on the person, or in such close proximity that it can be readily used as though on the person."¹⁴⁸ A pistol encased in a scabbard inside saddlebags is not carried "about the person," but a pistol carried in a shoulder bag or a large handbag is "about the person."¹⁴⁹ "About the person' must mean that it is so connected with the person as to be readily accessible for use or surprise if desired."¹⁵⁰

Under a federal regulation adopted in 1962, just a year after FAA spokesmen explained the term "on or about his person" to exclude checked baggage, the FAA promulgated the following regulation for National and Dulles Airports in Washington, D.C.: "No person . . . may carry any weapon . . . on or about his person, openly or concealed, on the Airport without the written permission of the Airport Manager."¹⁵¹ In *United States v. Moore*¹⁵² the defendant entered the screening area with a loaded revolver in his briefcase.¹⁵³ The Fourth Circuit affirmed the conviction, agreeing that the defendant committed the act willfully and with knowledge.¹⁵⁴ In dictum the court added, "Seemingly there would have been a violation even if the weapon had been in the suitcase which was checked for shipment in the baggage compartment, for the regulation proscribes bringing such a weapon on to the airport

¹⁴⁸ *People v. Liss*, 406 Ill. 419, —, 94 N.E.2d 320, 322 (1950) (pistol under elevated seat not "on or about" driver's person). *Accord* *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (question of whether pistol under car seat was "on or about" driver's person was a question for the jury); *cf.* *Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) (weapon in glove compartment held not "on or about" the person); *but cf.* *Schraeder v. State*, 28 Ohio App. 248, —, 162 N.E. 647, 649 (1928) (revolver hidden in car door beside the driver found to be "about" his person).

¹⁴⁹ *Schaaf v. Commonwealth*, 220 Va. 429, 430-31, 258 S.E.2d 574, 575 (1979).

¹⁵⁰ *Id.*

¹⁵¹ 27 Fed. Reg. 9446 (1962) (codified as amended at 14 C.F.R. § 159.79 (1986)).

¹⁵² 586 F.2d 1029 (4th Cir. 1978).

¹⁵³ *Id.* at 1031.

¹⁵⁴ *Id.* at 1033.

and is not confined to the embarkation area."¹⁵⁵ This reasoning mistakenly equates "possession" (here, constructive possession) with "on or about his person."¹⁵⁶

Prosecutions for carrying concealed weapons past x-ray devices usually proceed under state or local law rather than the Antihijacking Act.¹⁵⁷ In the Florida case of *State v. Molins*,¹⁵⁸ for example, "the defendant, about to board a plane, placed his carry-on luggage, a closed, zippered canvas bag on the conveyor belt at a security checkpoint" at an airport, revealing a loaded pistol inside a smaller zippered bag.¹⁵⁹ The court did not even consider whether the gun was "on" the person, but considered whether it was sufficiently accessible to be "about" the person.¹⁶⁰ The Florida appellate court reversed the trial court's dismissal, which had been based on "the bare bones allegation . . . that the firearm was doubly encased."¹⁶¹ But the appellate court added, "It may be that it can be shown at trial, or even beforehand through a more detailed motion

¹⁵⁵ *Id.* at 1032 n.2. The court added, "Moreover, the regulation's proscription of all weapons, whether or not concealed, suggests that its drafters were not so concerned with illicit motivations as with absolutely excluding all guns from the airport." *Id.* at 1033.

¹⁵⁶ The FAA has acted to rectify the problem through a recent notice of rulemaking, 51 Fed. Reg. 41,290 (1986), which states,

Many passengers, although aware of these security regulations, are unaware that they may be prosecuted if they fail to have the airport manager's permission to carry weapons in securely packed baggage onto any area of Washington National Airport or Washington Dulles International Airport, including the terminals, for the purpose of checking them in an inaccessible part of the aircraft. It should be noted that historically the rule has not been used to prosecute individuals who are carrying a weapon to be checked as baggage and who do not otherwise enter a secured area

Persons carrying weapons properly prepared for air transportation do not pose a threat to the security of the airport because their weapons are unloaded and carried in containers which are suitable for air transportation. Weapons prepared in this manner are not immediately accessible. Therefore, the FAA is considering clarifying the existing rule to make it explicitly inapplicable to these persons.

¹⁵⁷ See *infra* notes 158-162 and accompanying text.

¹⁵⁸ 424 So. 2d 29 (Fla. Dist. Ct. App. 1983).

¹⁵⁹ *Id.* at 30.

¹⁶⁰ See *id.*

¹⁶¹ *Id.*

to dismiss, that the firearm was not 'readily accessible.'"¹⁶²

The California case of *People v. Dunn*¹⁶³ determined, contrary to the general rule, that a pistol in a locked suitcase was "upon his person."¹⁶⁴ Defendant was a non-passenger who took his suitcase through x-ray screening intending to store it in an airport locker.¹⁶⁵ The only authority cited by the *Dunn* court held no more than that a loaded firearm in a zippered briefcase in defendant's hands was "upon his person."¹⁶⁶ The only opinion ever to cite *Dunn* rejected the *Dunn* analysis, reasoning that "upon his person" requires that the prohibited object be "actually upon or attached to the person, or carried or held in actual physical possession, — such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, or property held or carried in the hands." "¹⁶⁷

The above cases shed some light on state law interpretations of "on or about his person," but the federal prohibition differs because it also includes weapons in one's

¹⁶² *Id.* The dissenting opinion notes,

The requirement that the firearm in question be on the person of or 'readily accessible' to the defendant is imposed because the very purpose of forbidding carrying a *concealed* weapon is to prevent its being suddenly produced in an ambush-like manner to the surprise of another who was previously unaware that his antagonist was armed. . . . I entirely agree with the trial court that, as a matter of law, a firearm which can be secured only by unzipping two separate containers could not possibly be employed in this fashion and thus does not fall within the statutory definition.

Id. (emphasis in original).

¹⁶³ 61 Cal. App. 3d Supp. 12, 132 Cal. Rptr. 921 (Cal. App. Dep't Super. Ct. 1976).

¹⁶⁴ 132 Cal. Rptr. at 922.

¹⁶⁵ *Id.*

¹⁶⁶ See *People v. Pugach*, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1965).

¹⁶⁷ *People v. Squadere*, 88 Cal. App. 3d Supp. 1, —, 151 Cal. Rptr. 616, 618 (Cal. App. Dep't Super. Ct. 1978) (construing alcohol prohibition in vehicle) (quoting *People v. McElroy*, 116 Cal. 583, 586, 48 P. 718, 719 (1897)). The *Squadere* court stated, "[The prohibition] was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner" 151 Cal. Rptr. at 618 (quoting *McElroy*, 116 Cal. at 586, 48 P. at 719).

property if accessible during flight. In the absence of federal precedent, the majority rule enunciated by the state courts seems dispositive, especially since it accords with congressional intent.

3. What is a "Deadly or Dangerous Weapon"?

Aside from loaded firearms, the meaning and scope of "deadly or dangerous weapon" under the statute is not always clear. As predicted in Congress,¹⁶⁸ lack of a sufficient definition has led to confusion and unfair prosecutions. Courts have found that unloaded firearms constitute deadly or dangerous weapons because they still can be used for hijacking, and they can be loaded instantly.¹⁶⁹ Distinguishing objects that are weapons per se from the many objects which may be used as weapons, the Ninth Circuit in *United States v. Dishman*¹⁷⁰ found that "a starter pistol is in no different position than a toy gun or candy gun or pair of scissors."¹⁷¹ Thus, only weapons per se, and not objects which are merely usable as weapons, fall within the prohibition. This excludes the following: "A starter pistol, toy or candy pistol useable [sic] as a lookalike real thing; a razor useable as a knife; a businessman's letter opener useable as a dagger; a fountain pen useable to assimilate a pistol in the course of a robbery."¹⁷² Since *Dishman*, Congress has defined firearm to include starter guns.¹⁷³

Under the *Dishman* rationale, the Eighth Circuit in *United States v. Brown*¹⁷⁴ found a tear gas pistol to be a dangerous weapon per se, but submission to search meant that it was not concealed.¹⁷⁵ The court suggested that the

¹⁶⁸ See *supra* note 58 and accompanying text.

¹⁶⁹ See, e.g., *United States v. Dishman*, 486 F.2d 727, 732 (9th Cir. 1973); *United States v. Ware*, 315 F. Supp. 1333, 1334-35 (W.D. Okla. 1970).

¹⁷⁰ 486 F.2d 727 (9th Cir. 1973).

¹⁷¹ *Id.* at 732.

¹⁷² *Id.* at 732 n.4.

¹⁷³ See 49 U.S.C. app. § 1472(l)(4)(A) (1982).

¹⁷⁴ 508 F.2d 427 (8th Cir. 1974).

¹⁷⁵ *Id.* at 430, 432.

following persons might be prosecuted erroneously under the statute: a woman with knitting needles or scissors, a boy scout with a hunting knife or hatchet in his backpack, and a mother with a toy gun in her child's toy bag.¹⁷⁶ In 1973 the FAA circulated to air carriers and law enforcement personnel (but did not announce to the public) guidelines for determination of objects as weapons.¹⁷⁷ The weapons list in the guidelines included firearms, starter pistols, flare pistols and air guns; sabers, swords, hunting knives, and knives considered illegal by local law; bludgeons, billy clubs, blackjacks and similar instruments; and ice picks, straight razors, elongated scissors, and toy weapons.¹⁷⁸

In *United States v. Margraf*¹⁷⁹ the government secured conviction of a musician passenger for carrying a pocket knife he used as a tool.¹⁸⁰ Carrying the pocket knife did not violate the local laws in either the state of departure or the state of destination.¹⁸¹ A strong dissent argued that the majority of the court applied the statute in a discriminatory manner, and that the prosecution violated due process because the passenger did not receive notice that the knife would be considered a dangerous weapon.¹⁸² The government confessed error on appeal to the Supreme Court because of the FAA guidelines "that only large knives or those considered illegal under state law should be considered weapons for this regulatory purpose."¹⁸³ The complaint was remanded to the district court to allow the government to dismiss the charges.¹⁸⁴

The Eighth Circuit in *United States v. Flum* determined that a switchblade knife with a 3 and 3/4 inch blade and a

¹⁷⁶ *Id.* at 431.

¹⁷⁷ *Id.* at 433 n.4.

¹⁷⁸ *Id.*

¹⁷⁹ 483 F.2d 708 (3d Cir.) (en banc), *vacated and remanded*, 414 U.S. 1106 (1973), *remanded for dismissal*, 493 F.2d 1206 (3d Cir. 1974).

¹⁸⁰ *Id.* at 712-13.

¹⁸¹ *Id.* at 715.

¹⁸² *Id.* at 714, 722-23.

¹⁸³ *Margraf*, 493 F.2d at 1207.

¹⁸⁴ *Id.*

butcher knife with a 7 and 7/8 inch blade were prohibited weapons.¹⁸⁵ As in many cases, the passenger intended to check his bag but was late for the flight.¹⁸⁶ While most of the opinion concerned the intent to conceal issue,¹⁸⁷ the dissenting opinion argued that

[t]he decision of the majority permits imposition of criminal liability upon the housewife who carries scissors in her sewing bag; the fisherman who carries a scaling knife in his tackle box; the professional who carries a letter opener in his briefcase; the doctor who carries scalpels in his medical bag; and the tradesman who carries a hammer in his tool kit.¹⁸⁸

Almost any object can be put to use as a weapon. Aside from firearms, many objects used in sports, work, and recreation serve capably as weapons. BB guns, knives, golf clubs, martial arts equipment, bows and arrows, and shish kebab skewers are only a few items which could result in an arrest. In fairness to the public, the FAA should post signs at screening checkpoints listing items it considers prohibited.

B. *Baggage Screening and the Fourth Amendment*

Like other members of the general public, persons transporting firearms must submit their persons and carryon baggage for screening to detect weapons.¹⁸⁹ When the federal government initiated this program, the courts had to consider the serious fourth amendment problems these searches raised. At common law, warrantless searches were not conducted of anyone except suspected felons, and then only incident to arrest.¹⁹⁰ "The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest

¹⁸⁵ 518 F.2d 39, 41 (8th Cir.), *cert. denied*, 423 U.S. 1018 (1975). See *supra* notes 131-139 and accompanying text for additional discussion of the *Flum* case.

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* at 41-45.

¹⁸⁸ *Id.* at 48.

¹⁸⁹ See 49 U.S.C.A. § 1356(a) (West Supp. 1986).

¹⁹⁰ T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28, 39 (1969).

warrant.”¹⁹¹ As one law review commentator notes, “mass passenger searches represent precisely the type of general search which the fourth amendment was designed to prevent.”¹⁹² The same writer concluded 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.”¹⁹³ If under deregulation an air carrier locates its baggage check-in on the wrong side of the x-ray, no opportunity exists to check baggage before screening. The following discussion analyzes judicial opinions concerning the fourth amendment issues related to the screening of carryon and checked baggage.

1. *The Opportunity to Check Baggage and Avoid a Search*

Perhaps the strongest reason why the search of carryon baggage may be said not to violate the fourth amendment is that one has an opportunity to check baggage first, and authorities do not search checked baggage for weapons. Baggage that one does not want searched may be checked, subject to the proviso that such baggage may be screened for explosives or incendiary devices.¹⁹⁴

In *United States v. Edwards*¹⁹⁵ the passenger had been warned of a search with a metal detector by “two large printed signs” at the boarding gate.¹⁹⁶ The court noted that “in order to bring itself within the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search, that he is at liberty to proceed no further.”¹⁹⁷ The concurring opinion noted that being able to check bag-

¹⁹¹ *Id.* at 39.

¹⁹² Comment, *Airport Freight and Passenger Searches: Application of Fourth Amendment Standards*, 14 WM. & MARY L. REV. 953, 981 (1973).

¹⁹³ *Id.* at 1002.

¹⁹⁴ See 14 C.F.R. § 108.9 (1986). See *supra* notes 107-115 and accompanying text for a discussion of the screening of checked baggage for explosives.

¹⁹⁵ 498 F.2d 496 (2d Cir. 1974).

¹⁹⁶ *Id.* at 499.

¹⁹⁷ *Id.* at 501.

gage before undergoing screening makes the search consistent with the fourth amendment:

Here, however, there was no such coercion. All baggage is not generally subject to search according to the FAA's directives; rather, only carry-on baggage is generally subject to search. Thus, one is not forced to choose between flying to one's destination and having one's baggage searched. Rather one may merely consign any baggage he does not want searched to the baggage compartment. The only imposition upon the passenger then is not having the bag during the flight and, perhaps, a little wait at the destination for his luggage. Clearly this is not the same case involved when the only way to avoid search is to forego flying. The conclusion, therefore, must be that a carry-on luggage search, unlike the personal search, may be justified on a consent basis.¹⁹⁸

No authority exists for conducting weapons screening of baggage checked or to be checked.¹⁹⁹ In *United States v. Williams*²⁰⁰ the Second Circuit stated, "[W]e hold that there was implied consent to search the carry-on baggage by virtue of the fact that baggage which one does not want to have searched may be consigned to the baggage compartment."²⁰¹ Similarly, the Alaska Supreme Court has noted, "The passenger has the choice of checking the baggage for shipment rather than hand carrying it. Checked baggage is not subject to the inspection procedures authorized by the Air Transportation Security Act of 1974."²⁰²

Absent probable cause and exigent circumstances, an unconsented search of checked baggage for weapons violates the fourth amendment.²⁰³ In *United States v. Cyzew-*

¹⁹⁸ *Id.* at 504.

¹⁹⁹ Checked baggage, of course, can be screened for explosives and incendiary devices. See *supra* note 194 and accompanying text.

²⁰⁰ 516 F.2d 11 (2d Cir. 1975).

²⁰¹ *Id.* at 12.

²⁰² *State v. Salit*, 613 P.2d 245, 254 n.28 (Alaska 1980).

²⁰³ See *infra* notes 204-213 and accompanying text. See also *Florida v. Royer*, 460 U.S. 491, 497 (1983) (consent to search checked baggage must be freely and voluntarily given); *United States v. Palazzo*, 488 F.2d 942, 947 (5th Cir. 1974) (re-

*ski*²⁰⁴ the majority upheld a warrantless search of checked luggage belonging to suspected hijackers, because exigent circumstances justified the search.²⁰⁵ Authorities conducted the search for passenger identification, not weapons, and the court recognized "the airborne passenger's inability to fetch any weapon that might be concealed in his checked baggage."²⁰⁶ The court's opinion is fully consistent with the following statement from the dissenting opinion of Judge Thornberry: "The screening procedures prescribed by the Federal Aviation Administration are designed to thwart the carry-on threat and do not provide for searching or magnetometer testing of checked luggage. . . . This seems to indicate that the FAA does not consider checked luggage to present a significant skyjacking danger."²⁰⁷

In *Torres v. Puerto Rico*²⁰⁸ the United States Supreme Court considered a Puerto Rican statute²⁰⁹ which authorized police to "inspect the luggage . . . of passengers . . . who land in the airports . . . and search those persons whom the Police have ground to suspect of illegally carrying firearms."²¹⁰ The statute did not "require the police to have probable cause to believe that they [would] find contraband before they search[ed] baggage."²¹¹ The Supreme Court found that a search conducted under the statute violated the fourth amendment.²¹²

Based on the *Torres* precedent, the Ninth Circuit upheld the right to bring an action for damages and to enjoin in-

trieval of checked baggage of "narcotics profile" passenger for warrantless search violated the fourth amendment); *United States v. Garay*, 477 F.2d 1306, 1308 (5th Cir. 1973) (per curiam) (warrantless search of suitcases violated fourth amendment; government failed to sustain burden of demonstrating exception to warrant requirement).

²⁰⁴ 484 F.2d 509 (5th Cir. 1973), *cert. dismissed*, 415 U.S. 902 (1974).

²⁰⁵ *Id.* at 515.

²⁰⁶ *Id.* at 514.

²⁰⁷ *Id.* at 518.

²⁰⁸ 442 U.S. 465 (1979).

²⁰⁹ P.R. LAWS ANN. tit. 25 § 1051 (1979).

²¹⁰ 442 U.S. at 466 n.1.

²¹¹ *Id.* at 467.

²¹² *Id.* at 474.

spections of baggage transported by air if plaintiffs could show that "the asserted administrative need to search [for plant quarantine purposes in this case] is simply a pretense employed to justify a warrantless search for criminal law enforcement purposes."²¹³ At common law an illegal search, whether committed by a government agent or private person, gave rise to an action in trespass or other appropriate tort action.²¹⁴ Damages and injunctive relief remain appropriate remedies for illegal searches and seizures committed both by police²¹⁵ and agents of common carriers acting in a quasi-official capacity.²¹⁶

X-ray screening of carryon baggage for weapons is a search under the fourth amendment, but is not unreasonable because it serves to prevent hijackings.²¹⁷ However, an air carrier who locates its baggage check-in inside the sterile area searches *all* baggage (including baggage to be checked) for weapons at the x-ray screening point. Yet the x-ray screening of non-carryon baggage, without passenger consent, appears to violate the fourth amendment.²¹⁸

The x-ray search of carryon baggage should be conducted voluntarily and with the passenger's consent. Passengers, not skycaps, carry their own carryon baggage to the x-ray device, where they see conspicuous warning signs. They remain free to avoid this search by checking their baggage. This freedom of choice does not exist for passengers flying airlines who locate baggage check-in inside the sterile area, particularly when the procedure confuses passengers or when the passengers use a sky cap to

²¹³ *Barusch v. Calvo*, 685 F.2d 1199, 1200 (9th Cir. 1982).

²¹⁴ *See Boyd v. United States*, 116 U.S. 616, 625-29 (1886).

²¹⁵ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (action for damages against federal officers); *Dorsey v. Community Stores Corp.*, 346 F. Supp. 103, 105 (E.D. Wis. 1972) (injunction against seizure).

²¹⁶ *Nashville Cent. and St. Louis Ry. v. Crosby*, 183 Ala. 237, 62 So. 889, 893 (1913) (damages for assault and illegal search by agent of common carrier).

²¹⁷ *See, e.g., United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972).

²¹⁸ *See supra* notes 192-193 and accompanying text.

carry baggage they intend to check and they do not see the warning signs in time.

2. *Private and Border Searches of Checked Baggage*

Consistent with the mandate that carriers adopt uniform procedures and screen carryon baggage, Congress enacted 49 U.S.C. § 1511 to require air carriers to refuse transportation of

(1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this Appendix, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.²¹⁹

Subsection (b) goes on to provide that agreements to transport property shall include the stipulation that carriage shall be refused if the passenger or shipper does not give the described consent.²²⁰

The Sixth Circuit in *United States v. Rodriguez*,²²¹ refusing to suppress narcotics seized by an air carrier, offers some insight not found in the sparse legislative history of section 1511:

The recently enacted federal statute which governs the authority of air freight carriers to inspect parcels for dangerous items does not convert the search from a private to a governmental search. The new statute in fact limits the carrier's private, common law authority to open packages. The statute provides that any "agreement for the carriage of . . . property . . . by an air carrier . . . shall be deemed to include an agreement that such carriage shall be refused when consent . . . to inspect such property . . . is not given."

The new federal statute in no way expands this tradi-

²¹⁹ 49 U.S.C. app. § 1511(a)(1982).

²²⁰ *Id.* at § 1511(b).

²²¹ 596 F.2d 169 (6th Cir. 1979).

tional, common law authority of carriers to open and inspect packages. Indeed, it seems to limit this authority by permitting inspection only after the shipper has been notified that the carrier might open the shipment.²²²

In a similar case involving narcotics seizures, *United States v. Gumerlock*,²²³ the Ninth Circuit discussed the connection between section 1511, requiring consent searches of persons and property, and section 1356, requiring screening of passengers and carryon baggage: "The search referred to in subsection (a) of section [1511] is the screening search required by [49 U.S.C. § 1356(a)] which, as we have seen, is limited to passengers and their carryon possessions. . . ." ²²⁴ The court concluded that "Congress did not intend to require that air freight shipments be subjected to the security screening process mandated by the government for passengers and their carryon possessions."²²⁵

Although it does not refer to section 1511, *United States v. Freeland*²²⁶ upheld a consent search of a bag to be checked.²²⁷ A sign posted at the ticket counter stated that one could withdraw the bag or refuse to board and that checked baggage could be examined.²²⁸ Freeland placed his suitcase on the weight scale next to the ticket counter to be checked through to his destination.²²⁹ Since he fit the "hijacker profile" (paid in cash, one way ticket, no identification), the agent told him his bag would have to be x-rayed.²³⁰ Freeland acquiesced without objection, and the screening agents discovered a gun.²³¹ The court ruled the search to be private and consensual, upholding the conviction for delivering a firearm to a common car-

²²² *Id.* at 172-73.

²²³ 590 F.2d 794 (9th Cir.) (en banc), *cert. denied*, 441 U.S. 948 (1979).

²²⁴ *Id.* at 797.

²²⁵ *Id.* at 796.

²²⁶ 562 F.2d 383 (6th Cir.), *cert. denied*, 434 U.S. 957 (1977).

²²⁷ *Id.* at 386.

²²⁸ *Id.* at 385.

²²⁹ *Id.* at 384.

²³⁰ *Id.*

²³¹ *Id.*

rier without written notice, in violation of 18 U.S.C. § 922(e).²³² The court did not explain how the passenger's offering of the bag to be checked amounted to actual delivery rather than tender for delivery without acceptance.

In *United States v. Keuylian*²³³ the Second Circuit upheld x-ray screening of baggage checked through from California to Jordan, because the search was private.²³⁴ Twelve handguns and two rifles had not been declared at check-in, and the government charged defendant with a violation of 18 U.S.C. § 922(e).²³⁵ All checked luggage for Air France going overseas was x-rayed.²³⁶ Police were called when the firearms were seen with the x-ray.²³⁷ The court stated, "Federal law . . . does not mandate any screening of checked luggage by Air France, much less x-raying of such baggage."²³⁸ The court noted that, according to an FAA representative, "the x-ray screening of checked baggage was not part of the formal security plan filed by Air France with the F.A.A. and that as far as the relevant F.A.A. guidelines were concerned Air France could discontinue x-raying checked luggage at any time."²³⁹ This made the search a private search not prohibited by the fourth amendment.²⁴⁰

Screening checked baggage on international flights apparently has been utilized for some time. The Second Circuit in *United States v. Edwards*²⁴¹ noted, "We are not here required to and do not consider what circumstances may justify the search of checked baggage, a procedure routinely followed by at least some airlines on interna-

²³² *Id.* at 384-86.

²³³ 602 F.2d 1033 (2d Cir. 1979).

²³⁴ *Id.* at 1034.

²³⁵ *Id.* at 1037. See *infra* notes 340-397 for a complete discussion of section 922(e).

²³⁶ *Keuylian*, 602 F.2d at 1037.

²³⁷ *Id.*

²³⁸ *Id.* at 1040.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ 498 F.2d 496 (2d Cir. 1974).

tional flights from the United States.”²⁴² The x-ray screening and physical search of a suspected firearms violator on a flight to Nigeria, revealing a dozen undeclared revolvers, was upheld in *United States v. Udofot*²⁴³ because “it [fell] within the well-recognized ‘border exception’ to the warrant requirements.”²⁴⁴

3. *May the Right to Travel be Conditioned on Consent to Search?*

The right to travel²⁴⁵ and the right of privacy against unreasonable searches and seizures²⁴⁶ have long been regarded as fundamental. Several courts have addressed the issue of whether or not consent to search may be required for air travel so as to make the search valid under the fourth amendment.²⁴⁷ The seminal opinion for the majority rule on this issue appears in *United States v. Lopez*.²⁴⁸ The *Lopez* court stated, “Nor can the government properly argue that it can condition the exercise of the defendant’s constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights. . . . Implied consent under such circumstances would be inherently coercive.”²⁴⁹

²⁴² *Id.* at 498 n.4.

²⁴³ 711 F.2d 831 (8th Cir.), *cert. denied*, 464 U.S. 896 (1983).

²⁴⁴ *Id.* The “border search exception,” which is premised upon the government’s sovereign authority to safeguard the nation’s borders, “justifies a warrantless search without probable cause of persons crossing the United States border.” *Id.*

²⁴⁵ “There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.” 49 U.S.C. app. § 1304 (1982).

²⁴⁶ The fourth amendment of the United States Constitution provides, The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

²⁴⁷ See *infra* notes 248-54 and accompanying text.

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

²⁴⁹ *Id.* at 1093. *Accord* *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973); *United States v. Meulener*, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972).

Determining that the test should be the reasonableness of the search and not consent to search, the Second Circuit in *United States v. Albardo*²⁵⁰ stated that while other forms of transportation are often available, "it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all."²⁵¹ By analogy, if the government tapped all telephones to counter kidnapping, public knowledge of this procedure and the availability of alternate means of communication would not show that one consented to have a telephone tapped. The necessity of flying on a commercial airliner should not coerce one into waiving fourth amendment rights.²⁵²

Another opinion which argues that freedom to avoid search in the air travel context amounts to no choice at all appears in *United States v. Davis*²⁵³:

Although the right to travel is not absolute, and its scope and limitations remain uncertain, it is firmly settled that freedom to travel at home and abroad without unreasonable governmental restriction is a fundamental constitutional right of every American citizen. . . . Moreover, exercise of the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right (here, the Fourth Amendment right to be free of unreasonable search), absent a compelling state interest.²⁵⁴

Only the Fourth Circuit seems to have based a consent to search theory on one's option not to travel by air. In

²⁵⁰ 495 F.2d 799 (2d Cir. 1974).

²⁵¹ *Id.* at 807.

²⁵² *Id.* at 807 n.14.

²⁵³ 482 F.2d 893 (9th Cir. 1973).

²⁵⁴ *Id.* at 912-13. The court quotes *Shapiro v. Thompson*, 394 U.S. 618 (1969) as follows:

"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 status, rules, or regulations which unreasonably burden or restrict this movement."

Davis, 482 F.2d at 912 (quoting *Shapiro*, 394 U.S. at 629).

United States v. DeAngelo,²⁵⁵ before noting that a passenger voluntarily entered the screening process after passing by warning signs, the court pointed out that he "had a choice of traveling by air or by some other means."²⁵⁶ This was needless dictum, for the case involved a search of carryon baggage and the passenger could have avoided the search by checking the baggage in question without foregoing air travel.

The rule adopted by most courts is that the search of carryon baggage is not based on a coerced, subjective consent. The net effect may be the same in that the same baggage gets screened under either theory. Moreover, the option of checking baggage is a very real choice which minimizes interference with the right to travel without being searched.

4. Does Notice Make the Search Consensual?

Courts have divided on the question of whether or not conspicuous notice of searches of carryon baggage and of the person justifies the searches on the basis of consent. Some courts have held that notice alone does not make consent free and voluntary; others contend that it suffices.²⁵⁷ In *United States v. Lopez*²⁵⁸ clearly observable signs stated, "Passengers and Baggage Subject to Search."²⁵⁹ In the court's view, the notice did not provide a basis for finding implied consent, because "consent to search involves a relinquishment of fundamental constitutional rights and should not be lightly inferred."²⁶⁰

*United States v. Davis*²⁶¹ involved a pistol in a briefcase submitted on request for inspection by a passenger running late for his flight.²⁶² The passenger, engaged in drug

²⁵⁵ 584 F.2d 46 (4th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

²⁵⁶ *Id.* at 47.

²⁵⁷ See *infra* notes 258-265 and accompanying text.

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

²⁵⁹ *Id.* at 1092.

²⁶⁰ *Id.* Accord *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973).

²⁶¹ 482 F.2d 893 (9th Cir. 1973).

²⁶² *Id.* at 896.

rehabilitation work at the time, obtained the firearm for self-protection after twice being exposed to sniper fire.²⁶³ The Ninth Circuit concluded that the passenger exhibited an actual expectation of privacy by relying "on the privacy of his briefcase to conceal his gun."²⁶⁴ Moreover, this expectation proved reasonable despite general notice of searches at the airport:

This requirement does not mean that any kind of governmental intrusion is permissible if it has occurred often enough. The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched. "Airport searches" are not outside the Amendment simply because they are being conducted at all airports.²⁶⁵

The content of a warning notice may make a difference. The Second Circuit noted in *United States v. Ruiz-Estrella*²⁶⁶ that signs currently in use at most airports typically "do not alert passengers to their ability to avoid search by refusing to board."²⁶⁷ In *United States v. DeAngelo*²⁶⁸ the

²⁶³ *Id.* at 896 n.2.

²⁶⁴ *Id.* at 905. The court applied the two-pronged reasonable search test enunciated in *Katz v. Ohio*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Under this test, a warrantless search contravenes the fourth amendment if (1) the defendant exhibited an actual, subjective expectation of privacy; and (2) the defendant's expectation is objectively reasonable. *Id.*

²⁶⁵ *Davis*, 482 F.2d at 905.

²⁶⁶ 481 F.2d 723 (2d Cir. 1973).

²⁶⁷ *Id.* at 728 n.4. The *Ruiz-Estrella* court ultimately reversed the trial court's denial of a motion to suppress a sawed-off shotgun seized from the defendant after an airport search. *Id.* at 727-30. The government argued, *inter alia*, that the search and seizure of the shotgun was "justified on the less-than-probable cause standards of *Terry v. Ohio* [392 U.S. 1, 21 (1968)]." *Id.* at 729. The court acknowledged that their earlier opinion in *United States v. Bell*, 464 F.2d 667, 673-74 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972), employed a *Terry* rationale to justify an airport seizure of narcotics from a suspect who met the "hijacker profile," activated a magnetometer, and admitted to officials on the scene that he had just been released on bail for attempted murder and narcotics charges. *Ruiz-Estrella*, 481 F.2d at 729. The court found the *Bell* case distinguishable from the situation at hand, in which the defendant "neither passed through nor activated a magnetometer, and . . . did nothing at all during the period in question that could be construed as suspicious in nature" (although the defendant did fit the "hijacker profile"). *Id.* See *infra* notes 275-286 for a discussion of the *Terry* "stop and frisk" doctrine and the applicability *vel non* of that doctrine in an airport setting.

warning signs stated, "X-RAY BAGGAGE INSPECTION. CARRY ON BAGGAGE IS BEING INSPECTED BY X-RAY. . . . PHYSICAL INSPECTION MAY BE REQUESTED."²⁶⁹ When the defendant submitted his briefcase for inspection and the x-ray screen showed a suspicious object, security officers opened the briefcase over defendant's objection and found drugs.²⁷⁰ The Fourth Circuit affirmed his conviction on the following grounds:

DeAngelo had a choice of traveling by air or by some other means. The signs in the terminal gave him fair notice that if in [the] course of the total screening process a physical inspection of his hand baggage should be considered necessary to assure the safety of the traveling public, he could be required to submit it for that purpose. When he then voluntarily entered upon the screening process DeAngelo acquiesced in its full potential scope as represented to him. . . . We therefore conclude that having consented to the search, DeAngelo could not withhold permission after the first step of the process disclosed that he was attempting to carry aboard the aircraft articles that were concealed from x-ray.²⁷¹

The Supreme Court has not ruled on the extent to which the posting of notice effects consent for the search of luggage. However, in *Florida v. Royer*,²⁷² the Court suppressed evidence obtained from a search of checked airline luggage.²⁷³ A plurality of the Court noted that "where the validity of the search rests on consent, the State has the burden of proving that the necessary con-

²⁶⁸ 484 F.2d 46 (4th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

²⁶⁹ *Id.* at 49.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 47-48. *United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980), involved more than just signs. In *Haynie* the defendant "voluntarily entered the screening process," and his "repeated expressions of his desire to be admitted to the boarding area through a security check point employing an x-ray scanner [could not] be construed as other than a knowing consent to the full scope of the search conducted." *Id.* at 230.

²⁷² 460 U.S. 491 (1983) (plurality opinion).

²⁷³ *Id.* at 497.

sent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."²⁷⁴ In sum, the mere posting of a sign should be considered insufficient, without more, to show consent. Contrariwise, the absence of conspicuous notice may be one circumstance indicating lack of consent.

5. *Withdrawal From the Search*

A passenger may begin a search process and then withdraw. When this occurs, courts have been unable to agree on the extent to which suspicious conduct warrants a stop and frisk.²⁷⁵ In *United States v. Epperson*²⁷⁶ passengers were screened by a magnetometer. This minimal invasion of privacy was justified "for the sole purpose of discovering weapons and preventing air piracy."²⁷⁷ The magnetometer disclosed an unusually high reading on the defendant.²⁷⁸ The air marshal asked him if he was carrying a large amount of metal, and the defendant produced several metal objects, but still gave a positive reading on the magnetometer.²⁷⁹ The marshal then frisked the defendant and found a pistol.²⁸⁰ The Fourth Circuit found the frisk reasonable under the Supreme Court's 1968 ruling in *Terry v. Ohio*.²⁸¹

Rejecting the *Epperson* reasoning, the district court in

²⁷⁴ *Id.* Justice Brennan concurred in the decision to suppress, but believed the initial stop was illegal and that it was not necessary to address the consent issue. See *id.* at 509-13.

²⁷⁵ See *infra* notes 276-286 and accompanying text. See also *supra* note 267.

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

²⁷⁷ *Id.* at 771.

²⁷⁸ *Id.* at 770.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 772 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The *Terry* opinion held that the fourth amendment does not forbid limited "stop and frisk" procedures without a warrant or probable cause, if the officer making the stop has a reasonable and articulable suspicion that criminal activity is afoot and that the defendant poses a threat to the safety of the officer or others nearby. See 392 U.S. at 25-27.

*United States v. Meulener*²⁸² pointed out that about half of all passengers activate the magnetometer, and that even a nail file will trigger it.²⁸³ Recognizing that if a passenger who activated the magnetometer did not board the plane he could be of no danger to the flight, the court held, "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."²⁸⁴

The *Terry* rationale has no application to airport searches unless specific articulable facts establish reasonable cause to believe one is armed and about to commit a crime.²⁸⁵ As the Ninth Circuit noted in *Davis*, "There is no reason to believe that the incidence of concealed weapons is greater among airline passengers than among members of the public generally, and *Terry* does not justify the wholesale 'frisking' of the general public in order to locate weapons and prevent future crimes."²⁸⁶

The above cases may be reconciled by emphasizing the requirement of articulable facts. The Ninth Circuit noted in *United States v. Homburg*²⁸⁷ that "a party may revoke his consent to be searched any time prior to boarding the plane, even when he has passed beyond the initial screening point, if he agrees to leave the boarding area."²⁸⁸ Although the passenger in *Homburg* indicated a desire to leave the boarding area rather than submit to a warrantless search, the security officers detained the passenger and proceeded to search his suitcase.²⁸⁹ To determine the

²⁸² 351 F. Supp. 1284 (C.D. Cal. 1972).

²⁸³ *Id.* at 1289.

²⁸⁴ *Id.* at 1289-90. *Accord* *United States v. Allen*, 349 F. Supp. 749, 752 (N.D. Cal. 1972) (airline may require search as a condition to board, but "a passenger must be aware of his option to avoid the search by not boarding.").

²⁸⁵ *See, e.g., Davis*, 482 F.2d at 907. *But see Bell*, 464 F.2d at 674-75 (Friendly, J., concurring and suggesting that airport security concerns alone justify limited airport searches conducted on a less-than-probable cause basis, even in the absence of the articulable suspicion otherwise required by *Terry*).

²⁸⁶ *Id.* at 907-08.

²⁸⁷ 546 F.2d 1350 (9th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977).

²⁸⁸ *Id.* at 1352.

²⁸⁹ *Id.*

reasonableness of the search, the court employed a balancing of interests approach similar to the approach taken in *Terry*.²⁹⁰ As in *Terry*, the facts in *Homburg* evidenced a reasonable and articulable suspicion that the defendant posed an immediate threat to others nearby. He acted in a highly suspicious and nervous manner, he attempted to conceal a rectangular bulge in his trousers, he disappeared into a restroom for several minutes, and authorities had recently received an anonymous bomb threat.²⁹¹ These factors gave the government a legitimate and compelling interest which outweighed the individual passenger's right to privacy from the search in question.²⁹²

The *Davis* opinion perhaps summarizes best the manner in which airport searches may be reconciled with the fourth amendment. After reviewing the various theories set forth to justify the searches, the court concluded,

These doctrines dictate a critical examination of each element of the airport security program to make certain that neither the passenger's right to travel nor his right to personal privacy is burdened beyond the clear necessities of current circumstances.

As we have seen, however, the need for some limitations upon these rights is clear. In light of that need, a screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly.²⁹³

²⁹⁰ See *id.* at 1351-52.

²⁹¹ *Id.* at 1353.

²⁹² See *id.* at 1353.

²⁹³ 482 F.2d at 913.

IV. FAA REGULATIONS ON CARRIAGE OF FIREARMS AND
SCREENING OF BAGGAGE

Federal regulations concerning screening procedures and transportation of firearms appear in parts 107 and 108 of the Code of Federal Regulations.²⁹⁴ These regulations prescribe security procedures at three stages: baggage check-in, entry into the sterile area (which includes the x-ray of carryon baggage), and behavior aboard the aircraft.²⁹⁵ Each air carrier must conduct screening "to prevent or deter the carriage aboard airplanes of any explosive, incendiary device, or a deadly or dangerous weapon on or about each individual's person or accessible property, and the carriage of any explosive or incendiary device in checked baggage."²⁹⁶ The regulations conspicuously omit authorization for screening checked baggage for weapons, since weapons are not accessible in flight.

A. *The Carriage of Unloaded Firearms in Checked Baggage*

The screening process begins at the area generally known as the ticket counter where passengers present non-carryon baggage for check-in. 14 C.F.R. § 108.11(d) provides,

No certificate holder [*i.e.*, commercial airline] may knowingly permit any person to transport, nor may any person transport or tender for transport, any unloaded firearm in checked baggage aboard an airplane unless —

- (1) The passenger declares to the certificate holder, either orally or in writing before checking the baggage, that any firearm carried in the baggage is unloaded;
- (2) The firearm is carried in a container the certificate holder considers appropriate for air transportation;
- (3) When the firearm is other than a shotgun, rifle, or other firearm normally fired from the shoulder position, the baggage in which it is carried is locked, and only the

²⁹⁴ 14 C.F.R. §§ 107-08 (1986).

²⁹⁵ *See id.*

²⁹⁶ 14 C.F.R. § 108.9(a).

passenger checking the baggage retains the key or combination; and

(4) The baggage containing the firearm is carried in an area, other than the flightcrew compartment, that is inaccessible to passengers.²⁹⁷

When rulemakers first proposed this subsection it did not contain the word "knowingly," leading to the objection that "since the prohibition would apply even if the certificate holder did not have knowledge of the existence of a weapon in checked baggage, it would necessitate a search by the certificate holder of every piece of checked baggage offered for air carriage."²⁹⁸ The FAA deleted "knowingly" because "[i]t was not the intent of the proposed regulation to require a search of every article of baggage checked for carriage."²⁹⁹

The "declaration" of a firearm "may consist of an oral or written statement, whichever the certificate holder deems appropriate."³⁰⁰ The FAA rejected a proposal that airlines inspect firearms to ensure that they are unloaded, agreeing that "it is more dangerous for the certificate holder to determine whether a gun is loaded, especially in the event that an employee of the certificate holder who is

²⁹⁷ *Id.* at § 108.11(d).

²⁹⁸ 40 Fed. Reg. 17,552 (1975).

²⁹⁹ *Id.*

³⁰⁰ 42 Fed. Reg. 42,874-75 (1977). In practice, most airlines have the passenger sign a bright orange tag declaring that the firearm is unloaded. An agent or the passenger places this tag on the baggage handle or inside the baggage. Placing the tag on the outside discloses the contents, thereby encouraging theft of the firearms and discouraging passengers from declaring them. Current Petition for Rulemaking, Docket No. 24969, 51 Fed. Reg. 18,600 (May 21, 1986) would prohibit air carriers from placing such tags on the outside of baggage. The Domestic Mail Manual, section 124.56, provides a similar rule. Airlines have been sued for negligence following the theft of tagged baggage. *E.g.*, *Randall v. Frontier Airlines, Inc.*, 397 F. Supp. 840 (W.D. Ark. 1975). It is well-established in common law that firearms may constitute "baggage" which a common carrier has a duty to transport and deliver back to the traveler undamaged. *See, e.g.*, *Little Rock and H.S.W. Ry. Co. v. Record*, 74 Ark. 125, —, 85 S.W. 421, 423 (1905) (trial court properly submitted question to jury as to whether shotguns were "baggage," and court did not err by entering judgment for plaintiff on an affirmative jury response to this question); *Woods v. Devin*, 13 Ill. 746, 747-51 (1852) (common carrier held liable for loss of carpet-bag containing a pocket pistol and a pair of dueling pistols).

unfamiliar with the use of firearms must perform the check, than it is to carry a loaded gun in checked baggage."³⁰¹

The regulation also requires that the container be approved as appropriate for air transportation. "It is the opinion of the FAA that requiring firearms to be carried in appropriate containers will reduce the likelihood of any loaded firearm in checked baggage discharging and causing serious injury to personnel of the certificate holder or to passengers."³⁰² Originally, all firearms had to be carried in locked containers, but the FAA deleted this requirement for shoulder weapons because "containers for firearms such as shotguns and rifles are frequently not equipped with locking devices and are difficult to lock in any other manner. Furthermore, they are not easily concealed and do not constitute a significant hazard to safety in air commerce."³⁰³

Ammunition also may be transported in checked baggage. Regulations on transportation of hazardous materials do not apply to "[s]mall-arms ammunition for personal use carried by a crewmember or passenger in his baggage (excluding carry-on baggage) if securely packed in fiber, wood, or metal boxes."³⁰⁴

Small-arms ammunition must be packed in pasteboard or other inside boxes, or in partitions designed to fit snugly in the outside container, or must be packed in metal clips. The partitions and metal clips must be so designed as to protect the primers from accidental injury. The inside boxes, partitions and metal clips must be packed in securely closed strong outside wooden or fiberboard boxes or metal containers.³⁰⁵

³⁰¹ 40 Fed. Reg. 17,552 (1975).

³⁰² 43 Fed. Reg. 11,976 (1978).

³⁰³ 42 Fed. Reg. 42,875 (1977).

³⁰⁴ 49 C.F.R. § 175.10(a)(5) (1985). Small arms ammunition includes a fixed metallic, plastic, or paper cartridge case with a primer and propelling charge, with or without a bullet, shot, or other projectile. *Id.* at § 173.100(b).

³⁰⁵ *Id.* at § 173.101(a). See *id.* at §§ 173.101(b)-(e), 173.107 (primers, primed cases, and percussion caps must be packed in the partitions and secured against movement to prevent an explosion of one portion from exploding others). Rules

B. *The Prohibition on Loaded Firearms*

14 C.F.R. § 108.11(c) provides,

No certificate holder may knowingly permit any person to transport, nor may any person transport or tender for transport, . . . a loaded firearm in checked baggage aboard an airplane. For the purpose of this section, a loaded firearm means a firearm which has a live round of ammunition, cartridge, detonator, or powder in the chamber or in a clip, magazine, or cylinder inserted in it.³⁰⁶

The definition of loaded firearm was added "to ensure that the intent of [the section] is clear," for "there are apparently some members of the public who do not interpret 'loaded' to include ammunition in a magazine or clip inserted into the weapon."³⁰⁷

Many people do not consider a semi-automatic pistol "loaded" if it has ammunition in the magazine or clip, but no cartridge in the chamber. Unless one pulls the slide back manually and releases it to insert a cartridge into the chamber, the pistol will not discharge either purposefully or accidentally, if in proper working condition. Accordingly, the FAA proposed a rule "to require the certificate holder to notify passengers with firearms in checked baggage of the definition contained in Section [108.11(c)]. This notification should help to eliminate uncertainty on the part of the public about what constitutes a loaded weapon for the purpose of this regulation."³⁰⁸ The FAA and the industry apparently recognized that, despite the formal definition of "loaded," a magazine with ammunition inserted into a pistol without a cartridge in the chamber does not present a real hazard to safety. The FAA withdrew the proposed rule with this comment: "Inasmuch as there is no evidence indicating a need for this added provision, and its implementation would impose an

for carriage of arms and ammunition are summarized in FAA, ADVISORY CIRCULAR 108-2, SECURITY RULES — CARRIAGE OF WEAPONS AND ESCORTED PERSONS (1981).

³⁰⁶ 14 C.F.R. § 108.11(c) (1986).

³⁰⁷ 45 Fed. Reg. 13,059 (1980).

³⁰⁸ *Id.* at 80,453.

additional unnecessary cost on certificate holders, this proposal is withdrawn."³⁰⁹

C. *Firearms in the Sterile Area and Beyond*

Baggage check-in is an essential first step of the uniform screening procedure, for it dispossesses passengers of weapons in checked baggage. After check-in occurs, a passenger may proceed to the second step. 14 C.F.R. § 107.12(a) provides that "no person may have a deadly or dangerous weapon . . . on or about the individual's person or accessible property — (1) when performance has begun of the inspection of the individual's person or accessible property before entering a sterile area; and (2) when entering or in a sterile area."³¹⁰ Violation of this regulation constitutes a civil, not a criminal, offense.³¹¹ Prohibited weapons include firearms and "such items as mace and certain knives."³¹²

As originally proposed, section 107.21(a) would have made it a federal violation for a person anywhere in an airport to have any weapon on or about his person or property in violation of any applicable state or local law.³¹³ Commenters objected that local laws already handled these situations adequately, that the wide variance in the laws would lead to lack of uniformity and would be unfair to unknowing passengers, that the FAA role should be limited to the terminal, and that "sterile" airports were unrealistic.³¹⁴ The FAA also concluded that it was unnecessary to make a state or local violation a federal violation as well:

The FAA agrees that the only place on the airport where, as a practical matter, illegal firearms, explosives, or incendiary devices in a person's possession are likely to be

³⁰⁹ 47 Fed. Reg. 13,314 (1982).

³¹⁰ 14 C.F.R. § 107.21(a) (1986) (as amended by an FAA final rule at 51 Fed. Reg. 1351 (Jan. 10, 1986)).

³¹¹ See 51 Fed. Reg. 1350 (1986).

³¹² *Id.* at 1351.

³¹³ See 43 Fed. Reg. 60,791 (1978).

³¹⁴ *Id.*

discovered is at the passenger screening point. Further, should a weapon be found at a point on the airport other than the screening point or within a sterile area, it would remain subject to any local laws prohibiting or limiting the carriage of weapons. . . .

For these reasons, the FAA has modified this section by prohibiting unauthorized carriage of firearms, explosives, or incendiary devices by persons in or entering sterile areas or presenting themselves for inspection at established passenger screening points. It should be noted that the rule does not prohibit the legal carriage of firearms for sporting or other purposes when those firearms are not accessible to unauthorized persons in a sterile area.³¹⁵

A few commenters objected that a prohibition of firearms even in the sterile area violated the right to keep and bear arms and the right to protect oneself. The FAA concluded that "while the Second Amendment protects the right of the people to bear arms, it does not confer an absolute right on the individual to carry a weapon at all times and in all places."³¹⁶

The purpose of creating a sterile area was to enforce a much older rule, the prohibition on possession of an accessible weapon in the airplane itself. 14 C.F.R. § 108.11(a) provides,

No certificate holder required to conduct screening under a security program may permit any person to have, nor may any person have, on or about his or her person or property, a deadly or dangerous weapon, either concealed or unconcealed, accessible to him or her while aboard an airplane for which screening is required³¹⁷

D. *X-Ray Screening of Baggage*

From the beginning of the airport screening program, only carryon items—"briefcases, purses, coats, etc."³¹⁸ —

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ 14 C.F.R. § 108.11(a) (1986).

³¹⁸ FAA, SEMIANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM 5 (Jan. - July 1975).

have been subject to routine screening. In 1971 the FAA first issued its rulemaking notice to require airlines to adopt procedures 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."³¹⁹ In 1974 the FAA issued an emergency order that required x-ray screening of all carryon baggage.³²⁰ Cognizant of fourth amendment concerns, however, the government forbade airlines from "using an X-ray system to inspect carry-on baggage or items, unless there is a sign posted in a conspicuous place which notifies passengers that such baggage and [its contents] are being inspected by an X-ray system."³²¹ The FAA noted in 1986 that "for the most part, the general public now accepts the screening of their person and carryon articles as a minor inconvenience."³²²

After a bomb exploded at La Guardia airport leaving eleven persons dead and dozens wounded, the FAA required airlines to screen checked baggage for explosives or incendiary devices.³²³ Particular methods of screening (*e.g.*, random dog sniffing or mechanical devices) are not mandated by regulation.³²⁴ Baggage entering into the

³¹⁹ 36 Fed. Reg. 19,174 (1971).

³²⁰ 39 Fed. Reg. 22,275 (1974).

³²¹ *Id.*

³²² 51 Fed. Reg. 1350 (1986).

³²³ 41 Fed. Reg. 10,911 (1976). After the first six months of such screening, the FAA reported, "Although no explosive devices have been found, a number of apparent criminal acts have been uncovered. Examples include detection of a large sum of currency and a stolen gun and varying amounts of narcotics in checked baggage identified in the screening process." FAA, SEMIANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM 14 (Jan. - July 1976). Fourth amendment concerns are immediately apparent.

³²⁴ Dog/handler teams are most efficient at explosive detection. "To date in actual detection missions, the canine teams have detected 48 explosive items in the course of 6,477 aircraft and airport searches." FAA, SEMIANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM 16 (Jan. - July 1982).

Research and development for detection in checked baggage continues with (1) x-ray absorption detection (performance "somewhat less than anticipated"), (2) thermal neutron activation (time consuming so more suitable for air cargo), and (3) nuclear magnetic resonance (tested and feasible). A walk-by explosive detector checks for explosives on individuals by vapor collection. *Id.* at 17-18.

sterile area undergoes screening via "cabinet X-ray systems designed primarily for the inspection of carry-on baggage."³²⁵ These x-ray systems must be designed to meet very specific technical requirements.³²⁶

Federal statutory language referring to the "duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest,"³²⁷ restates the common-law duty of common carriers. "Under the statute and regulations, an airline has at least a duty to conduct searches of the carry-on baggage of boarding passengers with the highest possible degree of care, and to prevent the carrying aboard of unauthorized weapons where such prevention can reasonably be achieved."³²⁸

Despite the fact that x-ray systems are designed to screen carryon baggage, the FAA amended 14 C.F.R. § 108.17(a) in 1986 to permit airlines to use x-ray systems to screen checked baggage as well.³²⁹ A new subsection adds, "No certificate holder may use an X-ray system to inspect carry-on or checked articles unless a sign is posted in a conspicuous place at the screening station and on the X-ray system which notifies passengers that such items are being inspected by an X-ray"³³⁰ This marks the first time the FAA has explicitly authorized use of x-ray systems to screen checked baggage without limiting the scope of the search to explosives or incendiary devices — *i.e.*, the new rule could be read to permit a search for firearms or other weapons in checked baggage. The announcement of the rule failed to discuss the purpose of x-raying checked baggage, and failed to address its effec-

³²⁵ 14 C.F.R. §§ 108.17(a)(1), (2) (1986).

³²⁶ See, *e.g.*, 21 C.F.R. §§ 1020.40(a), (b)(3), (c)(10) (1986).

³²⁷ See 49 U.S.C. app. § 1421 (1982).

³²⁸ *United States v. Ozark Air Lines, Inc.*, 419 F. Supp. 795, 798 (E.D. Mo. 1976). In *Ozark* the court found the airline negligent for failure to detect a pistol in a carryon bag. *Id.* at 799.

³²⁹ 14 C.F.R. § 108.17(a) (1986). The rule now provides that certificate holders may "use X-ray systems for inspecting carryon or checked articles under an approved security program." *Id.*

³³⁰ *Id.* at § 108.17(e).

tiveness in view of the fact that existing x-ray systems are designed to screen carryon baggage.³³¹

Some commenters proposed that the signs required by the rule not only should be posted in a conspicuous place, "but also at or near the x-ray systems and at the checked baggage stations as well."³³² Another commenter recommended that "the FAA should allow the use of X-ray systems at any location as long as they meet the current imaging requirements."³³³ In response, the FAA asserted its belief that "the regulation should continue to require only that the sign be 'posted in a conspicuous place.' It will continue to consider what locations are appropriate and so advise the air carrier."³³⁴

Posting signs in conspicuous places has important fourth amendment overtones because the signs advise passengers that a search will take place. This notice may be an element in establishing the passenger's consent to search.³³⁵ However, a notice against possession of firearms is not "posted in a conspicuous place" if one cannot see the notice until one already has violated the law.³³⁶

The author submits that government-authorized x-ray searches of checked baggage for explosives or incendiary devices do not encroach upon individual fourth amendment rights, at least in the absence of less intrusive alter-

³³¹ The notice of proposed rulemaking that preceded the new rule indicated simply that FAA sought

to extend application of Sections 108.17 and 129.26 to checked baggage as well as carry-on items since certificate holders from time to time utilize imaging X-ray systems to inspect checked baggage. The proposed amendment will require the air carriers to apply the rules which up to now they have been following voluntarily when using X-ray systems to process checked baggage.

49 Fed. Reg. 24,975 (1984).

³³² 50 Fed. Reg. 26,655 (1985). This comment came from a group of film manufacturers and photographers who urged that without effective notice, passengers with cameras might inadvertently expose their film to harmful x-rays. *See id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *See supra* notes 257-274 and accompanying text.

³³⁶ *United States v. Strakoff*, 719 F.2d 1307, 1309-10 (5th Cir. 1983) ("conspicuous place" means a place reasonably calculated to import the prohibitions of the notice).

natives (e.g., sniffing dogs), as long as the passenger receives conspicuous notice that his checked baggage may be searched for explosives or incendiary devices. On the other hand, if the screening of checked baggage involves a search for weapons which could not be used in a hijacking because packed in checked baggage, the search clearly violates the fourth amendment.

The FAA perhaps adopted the new rule to authorize x-ray screening of baggage intended to be checked and entering the sterile area because one airline maintains no area to check baggage before x-ray screening of carryon baggage.³³⁷ But such an arrangement presents a dilemma for passengers who travel with firearms in baggage they intend to check, particularly when they use a skycap to carry their baggage, because they do not receive conspicuous notice at an x-ray system set up for use *before* rather than *after* the baggage check-in counter. Fourth amendment concerns clearly arise if the recent FAA authorization to screen checked baggage is intended to sanction the screening of all baggage for weapons. For security reasons as well as fourth amendment reasons, the FAA instead should require all airlines to maintain a separate area to check baggage, and this checked baggage area should be located ahead of the screening area for carryon items.

An airline cannot conduct searches of carryon baggage with the highest possible standard of care when it searches *all* baggage with x-ray systems designed only for carryon baggage. Screening all baggage at the sterile area checkpoint obviously increases the volume of baggage screened, and adds an element of confusion that of necessity will detract from the thoroughness of the check and will increase the window of opportunity to a potential hijacker who does seek to smuggle a weapon aboard an aircraft. Having a baggage check-in area before the x-ray allows passengers with weapons in baggage to check them

³³⁷ See *supra* notes 24-25 and accompanying text.

for carriage in an inaccessible part of the aircraft, as contemplated by 14 C.F.R. § 108.11(d).³³⁸ "Depriving passengers of weapons is critical because it is only through possession of a weapon on board a plane in flight that a person can be a hijacker" ³³⁹ Not having a baggage check-in area before the x-ray increases the likelihood that some passengers will not be deprived of weapons before passing through the x-ray, and that weapons which go undetected into the sterile area will then be used for air piracy or other criminal acts.

In the interests of both the fourth amendment and air safety, the recent FAA authorization to screen checked baggage by x-ray should be interpreted to authorize x-ray screening only of baggage that already has been checked and even then the search should be limited to explosives or incendiary devices. The new FAA rule should not be interpreted to permit x-ray screening of baggage intended to be checked, at the entrance to the sterile area where only carryon baggage should be allowed.

V. TRANSPORTATION OF FIREARMS BY AIR CARRIER UNDER THE GUN CONTROL ACT OF 1968

The Gun Control Act of 1968³⁴⁰ includes the following provision concerning the shipment of firearms by common carriers:

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being trans-

³³⁸ 14 C.F.R. § 108.11(d) (1986).

³³⁹ *State v. Salit*, 613 P.2d 245, 250 (Alaska 1980).

³⁴⁰ 18 U.S.C. §§ 921-70 (1982).

ported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

(f) 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.³⁴¹

A. *The Passenger Exception in the Framer's Intent*

The exception for passengers did not exist in the original bill reported out of committee. The House report explained the original bill:

Section 922(e)—This subsection makes it unlawful knowingly to deliver to a common or contract carrier any package or other container in which there is a firearm or ammunition, without written notice to the carrier that such firearm or ammunition is being transported or shipped. This provision is designed to make more effective the succeeding subsection which prohibits a carrier from transporting or delivering a firearm in violation of the chapter.

Section 922(f)—This subsection makes it unlawful for a common or contract carrier to transport or deliver any firearm or ammunition in interstate or foreign commerce with knowledge that its transportation or receipt would be in violation of any provision of the chapter. It is the same as existing law except that it covers all ammunition.³⁴²

Because the passenger exception was not in the bill as reported, the above committee report contains no explanation of the exception and may not be good authority

³⁴¹ *Id.* at § 922(e)-(f).

³⁴² H.R. REP. NO. 1577, 90th Cong., 2d Sess. 10-11, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4410-21 (subsections relettered to conform to statute as codified).

now that the section has been modified. Congressman Howard Pollock of Alaska, who introduced the amendment for a passenger exception, pointed out on the House floor that Congress conducted no hearings on the original bill to express the committee's understanding. An opponent of the bill, Pollock did express his concerns: "We have had some meaningful freedom to keep and bear arms under the Constitution of the United States for something like 192 years, but crime has gotten out of hand only in the last 7 or 8 years."³⁴³ Advocating state enforcement rather than federal legislation, he argued that "[n]o matter how we slice this evil piece of cake, the bill does infringe on the right of the citizens to keep and bear arms."³⁴⁴ He noted that Alaskans have the highest rate of firearms ownership in the nation and that they frequently travel by air carrier with firearms for hunting.³⁴⁵ Indeed, Pollock noted that he and other colleagues transported firearms by air to and from Washington, D.C. and their home states:

There is a question that has been asked several times today, as to whether this legislation would allow an owner to transport firearms and ammunition in interstate commerce.

I think the bill is absolutely silent on that matter, and it does not cover this relatively common occurrence in one way or the other. This should certainly be covered by an amendment.³⁴⁶

Accordingly, Congressman Pollock offered the passenger exception amendment worded precisely as passed.³⁴⁷ Pollock offered the only explanation of the amendment:

Mr. Chairman, my amendment is simple and self-explanatory. It provides clarification in yet another area of the pending bill which is otherwise silent. The amend-

³⁴³ 114 CONG. REC. 21,806 (1968).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *See id.* at 23,088.

ment makes it clear that a person traveling by commercial carrier to another State may lawfully transport his firearm and ammunition with him by placing them in the custody of the pilot, captain, conductor, or operator of the interstate common carrier.³⁴⁸

As amended, section 922(e) of the Gun Control Act includes two parts. First, one may not deliver to a common carrier "any package or other container in which there is any firearm or ammunition without written notice to the carrier."³⁴⁹ Congress obviously used the terms "package or other container" because one normally delivers items to be shipped in packages or other containers. No one would deliver a firearm to a carrier with nothing but an address tag on it and without packing it securely to avoid damage.

Second, a passenger transporting a firearm "may deliver said firearm or ammunition into the custody of the pilot" or other agent of the carrier without violating the statute.³⁵⁰ Congress probably chose not to repeat the phrase "package or other container" here because some passengers, particularly police, security guards, or persons with pistol-carry permits, would arrive with the firearm in a holster on their person and not have a package for it. Indeed, in the many states which do not prohibit carrying firearms on the person, anyone could walk right into a terminal with an unpackaged firearm and check it for air shipment.³⁵¹ Since one cannot legally board an aircraft with the firearm on his person, the exception allows the passenger to deliver the firearm to the common carrier for shipment, regardless of whether it is packaged on arrival at the airport.

Conspicuously absent from section 922(e) is any requirement that the passenger notify the carrier that any

³⁴⁸ *Id.*

³⁴⁹ 18 U.S.C. § 922(e) (1982).

³⁵⁰ *Id.*

³⁵¹ Most airlines rent or sell containers for firearms to passengers who do not have containers.

package contains a firearm. The passenger "delivers" the firearm to the carrier merely by transferring custody of it for the duration of the trip. Had Congress intended to require a declaration to discourage transport of personal firearms into states where possession thereof would be illegal, it simply could have prohibited such transportation, whether by private vehicle or common carrier.

An opponent of the overall bill, Congressman Pollock probably would not have supported a requirement that passengers declare orally or in writing that a package delivered to the carrier contains a firearm. In 1968 the law did not require passengers of common carriers to declare firearms, and it is clear from Pollock's comments that he did not intend to make the requirements more stringent. The FAA eventually promulgated a rule in 1975 that requires an oral declaration that a firearm in baggage is unloaded, but even under this rule failure to declare remains a mere civil violation.³⁵²

B. *Judicial Construction*

In a memorandum dated March 28, 1972, the Acting Director of the Alcohol, Tobacco, and Firearms Legal Division advised the Regional Counsel of the Midwest Region of the agency's construction of section 922(e) as follows:

We concur with the conclusions which your memorandum sets forth. You correctly point out that a passenger aboard a common or contract carrier who possesses a firearm on his person would not fall within the proscriptions of the statute since there would be no delivery. The legislative history of the Gun Control Act of 1968 (House Report no. 1577, June 21, 1968, 3 U.S. Cong. Admin. News '68 4410, 4420), relates that this provision is designed to make more effective the succeeding subsection which prohibits a carrier from transporting or delivering a firearm in violation of Chapter 44, Title 18. The possession of a firearm by a passenger would not offend that subsection.

³⁵² 40 Fed. Reg. 17,552 (1975).

As you indicate, a passenger may, of course, like a nonpassenger, deliver a package containing a firearm to the carrier for shipment. In such event, he may give the written notice required of a nonpassenger, or he may deliver the firearm or ammunition to the pilot, captain, conductor, or operator of the carrier for the duration of the trip. The statute does not require the passenger following the second alternative to advise the operator, etc. that the article being delivered is a firearm. Thus, it may well be that the operator will unwittingly receive from the passenger luggage containing a firearm. However, such delivery is specifically excluded from the prohibitions of the subsection. We do not believe the Act can be broadened by contending that the intent of Congress was otherwise.

We also concur that the Government would not be successful in contending that the term "operator" does not include the agency itself, i.e., railroad, airline, etc. Therefore, we think you are correct in concluding that a passenger who checked his luggage with the baggage agent of the carrier would be in compliance with the section.³⁵³

The first judicial construction of section 922(e) also took place in 1972 in the Midwest Region. *United States v. Burton*³⁵⁴ involved a passenger who in January 1972 checked a suitcase containing a loaded revolver with an airline, giving no oral or written statement about the firearm to the agent.³⁵⁵ The United States District Court for the Western District of Missouri agreed that section 922(e) does not impose "stringent reporting requirements" for persons traveling with firearms, "most noteworthy of which is the hunter desiring to transport a weapon in furtherance of the sport."³⁵⁶ But the court

³⁵³ Memorandum from Acting Director, Alcohol, Tobacco and Firearms Legal Division, to Regional Counsel, Midwest Region (Mar. 28, 1972).

³⁵⁴ 351 F. Supp. 1372 (W.D. Mo. 1972), *aff'd on other grounds*, 475 F.2d 469 (8th Cir.), *cert. denied*, 414 U.S. 835 (1973).

³⁵⁵ *Id.* at 1374. The Eighth Circuit in *Burton* upheld the search and seizure because "the Braniff agent conducted the search entirely on his own" without government sanction or participation. 475 F.2d at 471. The agent believed the defendant fit the "hijacker profile," and the weight distribution in one bag seemed unusual; he opened the bag and found the revolver. *Id.* at 470.

³⁵⁶ *Burton*, 351 F. Supp. at 1377.

then compared the statutory written notice requirement for shipment of "any *package* or other *container* in which there is any firearm or ammunition,"³⁵⁷ to the exception for the passenger who "may deliver said *firearm or ammunition* into the custody of the pilot."³⁵⁸ The court concluded that "[t]he failure of the statute to allow a passenger to deliver the container instead of the firearm itself to certain designated persons is obvious."³⁵⁹ The court ignored the argument that the firearm is indeed "delivered" when checked with the airline in a suitcase.³⁶⁰

The Fourth Circuit adopted the *Burton* reasoning in *United States v. Williams*,³⁶¹ and suggested that the contrary view would allow a dealer to "ship any quantity of firearms and ammunition in sealed containers and evade the requirement of written notice by the simple expedient of flying as a passenger and carrying containers as luggage."³⁶² The court's argument overlooks the fact that the dealer could be prosecuted under other sections of the Gun Control Act if he transferred any such firearm outside his own state.³⁶³ The argument also ignores the lack of any prohibition against transporting the same firearms across state lines with a private motor vehicle.

Williams involved a traveler who handed luggage containing a legally possessed firearm to the pilot, who placed

³⁵⁷ 18 U.S.C. § 922(e) (1982) (emphasis added).

³⁵⁸ *Id.* (emphasis added).

³⁵⁹ *Burton*, 351 F. Supp. at 1378. The court concluded that to fall within the passenger exception provided in section 922(e), "actual delivery of the firearm and ammunition to one of the designated persons must have been accomplished." *Id.*

³⁶⁰ The court suggested that an oral declaration may be unnecessary "where the firearm is delivered over to the pilot in a gun case or other similar object under circumstances where it is clear the recipient knows he is receiving a firearm." *Id.* at 1378 n.3. One wonders if submitting a suitcase with a firearm for x-ray inspection would satisfy the requirement. See *United States v. Brown*, 508 F.2d 427, 432 (8th Cir. 1974) ("the act of a passenger presenting his hand luggage to responsible airline personnel for inspection suggests an intent to disclose rather than to conceal those items within the bag which will come into view on ordinary inspection").

³⁶¹ 485 F.2d 1383 (4th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974).

³⁶² *Id.* at 1384-85.

³⁶³ See 18 U.S.C. § 922(b)(2), (3) (1982).

the luggage in the nose cone of the plane.³⁶⁴ Construing the terms "deliver said firearm or ammunition into the custody of the pilot," the court held that "'custody' must be construed to mean a transfer of control in a manner which gives the carrier actual notice of the presence of a firearm."³⁶⁵ Yet the bag and all of its contents were in the physical possession of the pilot, regardless of whether or not he knew the identity of those contents.³⁶⁶

The Seventh Circuit in *United States v. One Heckler-Koch Rifle*³⁶⁷ agreed that "section 922(e) was enacted in order to inform the carrier of the character of the items it was shipping, thus placing on it the duty to inquire into the legality of the shipment. Thus, it is imperative that the carrier be given actual notice of the character of the items it is transporting."³⁶⁸ The passenger in this case, however, did declare the rifle to the airline baggage clerk.³⁶⁹ The issue was whether or not this constituted delivery "into the custody of the pilot, captain, conductor or operator" of the carrier.³⁷⁰ The court held,

The purpose of the proviso is evidently to permit the lawful transportation of a passenger's firearm while insuring that the weapon is placed under the control of the person in charge of the trip. It would seem that a passenger who transfers custody of a firearm to a responsible agent of the carrier and who gives notice that it is in fact a firearm which is being transferred would substantially comply with the proviso. That conduct could reasonably be considered constructive delivery into the custody of the pilot. . . . This interpretation of the proviso also seems more reasonable than that advanced by the government because the rather

³⁶⁴ 485 F.2d at 1384.

³⁶⁵ *Id.* at 1385.

³⁶⁶ It should be noted that section 922(e) clearly applies to the undeclared shipment of firearms when the owner is not present. *See, e.g., United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976) (defendant convicted under section 922(a) and other statutes for delivering a stolen machine gun to a bus for interstate transportation without written notice).

³⁶⁷ 629 F.2d 1250 (7th Cir. 1980).

³⁶⁸ *Id.* at 1254.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

rigorous security measures in effect at many airports make it unlikely that an airline passenger could personally deliver a firearm into the custody of the airline's pilot. We cannot attribute to Congress the intent to specifically declare certain conduct to be outside the penal provisions of the Act with the knowledge that it is practically impossible to engage in that conduct. To do so would render the passenger proviso a nullity and be contrary to the practice of the courts to construe criminal statutes in favor of the defendant.³⁷¹

By the same token, one should not attribute to Congress an intent to make carrying an undeclared, loaded firearm on one's person in flight a misdemeanor under the Antihijacking Act,³⁷² but shipping an undeclared, unloaded gun in baggage a felony under the Gun Control Act.

Some argue that requiring the individual to declare the firearm violates the right against self-incrimination. In *United States v. Wilson*³⁷³ defendant was convicted for having another person transport four undeclared revolvers and a rifle out of the country by airline, intending that notice not be given to the carrier.³⁷⁴ Since the exportation was illegal, he argued that compelling him to admit his guilt by giving notice of the crime to the carrier violated the fifth amendment.³⁷⁵ Because the carrier had no legal obligation to inform government authorities (a debatable proposition, since misprision of felony is itself a felony³⁷⁶), the court held that a declaration does not create a substantial hazard of self-incrimination:

For the common carrier is the only party to receive the required notice, and it need not inform any government officials to itself escape liability under the companion stat-

³⁷¹ *Id.* The court added, "We think it relatively clear, however, that the proviso as a whole was only intended to provide a means by which persons who could otherwise lawfully take their firearms across state lines could bring the firearms with them when traveling by commercial carrier." *Id.* at 1255.

³⁷² See *supra* text accompanying note 105.

³⁷³ 721 F.2d 967 (4th Cir. 1983).

³⁷⁴ *Id.* at 973.

³⁷⁵ *Id.*

³⁷⁶ See 18 U.S.C. § 4 (1982).

ute, 18 U.S.C. § 922(f), but can simply refuse to transport the weapons. Indeed, the legislative history of § 922(e) indicates that its primary purpose was not the apprehension of illegal arms dealers; rather, it was designed to enable common carriers to fulfill more effectively their own statutory responsibilities under § 922(f).³⁷⁷

In *United States v. Udofot*³⁷⁸ defendant checked baggage containing a dozen revolvers, without declaration of the contents, on an international flight.³⁷⁹ X-ray screening of the bag revealed its contents.³⁸⁰ Holding that section 922(e) does not require proof of specific intent, the Eighth Circuit found that the section as applied to defendant did not violate due process under the fifth amendment.³⁸¹ Defendant argued that he should be put on notice of the required behavior and that the section was void under *Lambert v. California*.³⁸² The court found that the passenger had actual notice because he had extensive exposure to firearms regulations, "knew that carryon baggage was screened for firearms," and "a bulletin was posted at the ticket counter announcing in conspicuous print and bold colors that firearms in checked baggage must be declared and unloaded."³⁸³

The fifth amendment problem received attention again in *United States v. Flores*.³⁸⁴ *Flores* involved an attempt to fly twenty-two revolvers to Ecuador in checked baggage.³⁸⁵

³⁷⁷ 721 F.2d at 974 (footnote omitted).

³⁷⁸ 711 F.2d 831 (8th Cir.), cert. denied, 464 U.S. 896 (1983).

³⁷⁹ *Id.* at 834.

³⁸⁰ *Id.* at 840.

³⁸¹ *Id.* at 841.

³⁸² 355 U.S. 225 (1957). The Supreme Court in *Lambert* reversed the conviction of a defendant charged with failing to register under a Los Angeles ordinance that made it unlawful for a person with a past felony conviction to remain in the city for more than five days without registering his or her presence. *Id.* at 225-26. The Court based the decision squarely on constitutional due process principles, noting that while ignorance of the law generally provides no excuse, the nature of the ordinance in question was such that defendant could not be charged with constructive notice of her duty to register. *See id.* at 228-29.

³⁸³ *Udofot*, 711 F.2d at 841. However, the sign only indicated that failure to declare subjected one "to a civil penalty of \$1,000." *Id.* at n.11.

³⁸⁴ 753 F.2d 1499 (9th Cir. 1985).

³⁸⁵ *Id.* at 1500.

A majority of the Ninth Circuit panel upheld the statute because it is regulatory and the notice requirement is addressed to the public at large.³⁸⁶ A strong dissent argued that the statute has penal aspects that go beyond mere regulation, and that the term “‘knowingly’ requires actual notice and specific intent to violate the statute.”³⁸⁷

Fifth amendment questions also arose in *United States v. Alkhafaji*,³⁸⁸ in which a search based on a tip revealed three shotguns and eight handguns in checked baggage being shipped by a passenger on a flight to Iraq.³⁸⁹ The Sixth Circuit in *Alkhafaji* recalled the United States Supreme Court opinion in *Haynes v. United States*³⁹⁰ which held that the fifth amendment precluded prosecution for failing to register a sawed-off shotgun for taxation purposes.³⁹¹ The Court in *Haynes* based its decision on the fact that the registration statute in that case was part of an “area permeated with criminal statutes,” rather than an area concerned primarily with regulation.³⁹² The *Alkhafaji* court noted, however, that most firearms are not so restricted: “Since many people are permitted to own and legally transport firearms, compliance by most people with the notice requirement would reveal no criminal activity.”³⁹³

In a concurring opinion, Judge Krupansky distinguished that part of section 922(e) involving written notice, from the passenger exception portion of the statute. He stated, “The Fourth Circuit’s determination [in *Wilson*] that no Fifth Amendment infringement was present under circumstances where the incriminating information was mandated to be disclosed to a private party is contrary to every principle associated with the Fifth Amend-

³⁸⁶ *Id.* at 1502.

³⁸⁷ *Id.* at 1508-09.

³⁸⁸ 754 F.2d 641 (6th Cir. 1985).

³⁸⁹ *Id.* at 642.

³⁹⁰ 390 U.S. 85 (1968).

³⁹¹ *Id.* at 99.

³⁹² *Id.*

³⁹³ 754 F.2d at 646.

ment's guarantee of the liberty to remain silent."³⁹⁴ He saw the passenger exception as a different matter:

The second section of Section 922(e) addressed passengers who travel with firearms which they "own or legally possess." Such passengers are required to disclose and deliver the firearm or firearms to the control of the carrier for the duration of the flight; unlike the first section of Section 922(e), no criminal association is made a predicate of compliance.³⁹⁵

Judicial construction of section 922(e) raises two issues which need either reassessment by the courts or legislative correction. First, neither the language of nor the intent behind the passenger exception would impose a declaration requirement. The Congress which made it a misdemeanor to carry a loaded firearm on board an aircraft would not make it a felony for the same passenger to ship his firearm unloaded, in checked baggage. As a practical matter, FAA action regarding passengers found to be transporting firearms not declared to be unloaded most often takes the form of a simple letter explaining the proper procedure.

Second, the argument that a declaration does not involve self-incrimination clearly falters in those few states which require special permits for mere possession of firearms. For example, police now arrest several out-of-state travelers each week at the Newark, New Jersey airport, hub of People Express Airlines. A large sign at that airline's location states, "Declare all Weapons." When passengers comply with the instruction, the airline summons the police to determine if the passenger has a New Jersey permit, and an arrest generally ensues.³⁹⁶ Obviously, the innovative boarding and check-in procedures spawned by airline deregulation have impacted both the fourth and fifth amendments.³⁹⁷

³⁹⁴ *Id.* at 659.

³⁹⁵ *Id.* at 661.

³⁹⁶ See Scott, *The President's Page*, TRAP AND FIELD, Sept. 1984, at 62, 63.

³⁹⁷ Had the framers of the Firearms Owners' Protection Act, discussed *infra*

C. *The Firearms Owners' Protection Act of 1986*

The Firearms Owners' Protection Act of 1986³⁹⁸ represents a major liberalization and deregulation of the prohibitions contained in the Gun Control Act of 1968. According to the congressional findings of the new legislation, the rights of citizens "to keep and bear arms under the second amendment to the United States Constitution" and "to security against illegal and unreasonable searches and seizures under the fourth amendment" required corrective amendments.³⁹⁹

The 1986 legislation contains major amendments which affect the common carrier provisions of the 1968 Act. Failure to declare to a common carrier a firearm that one is shipping to another in interstate commerce in violation of 18 U.S.C. § 922(e) must now be "willful" before the government can obtain a conviction.⁴⁰⁰ Congress also amended section 922(f) to require that the prosecution prove that a common carrier "knowingly" transported a firearm in violation of 18 U.S.C. § 922(f).⁴⁰¹ The last Senate Judiciary Committee report concerning the amendments explained the differences between "knowing" and "willful" as follows:

The Committee amendment specifies a "knowing" state of mind with respect to offenses that involve the greatest moral turpitude and danger from a justified law enforcement standpoint. . . .

The willful state of mind applies to all other offenses. These were determined to be generally more regulatory in

notes 398-410 and accompanying text, been aware of the courts' misconstruction of what was intended to be the passenger exception to the declaration requirement, it seems probable that section 922(e) would have been clarified. This writer is authorized to state that former Congressman Howard Pollock, author of the passenger exception, concurs with the analysis of the provision as set forth *supra* notes 342-353 and accompanying text. Affidavit of Howard W. Pollock (Jan. 17, 1987) (on file with Stephen P. Halbrook).

³⁹⁸ 18 U.S.C.S. §§ 922-26A (Law. Co-op. Supp. 1986) (amending 18 U.S.C. §§ 922-26 (1982)).

³⁹⁹ Firearm Owners' Protection Act, Pub. L. No. 99-308, § 1(b) (May 19, 1986).

⁴⁰⁰ See 18 U.S.C.S. § 924(a)(1)(D).

⁴⁰¹ See *id.* at § 924(a)(1)(B).

nature, and warranted a higher state of mind to avoid the application of criminal penalties in inappropriate circumstances. These include purely recordkeeping offenses and others which, from a legitimate law enforcement standpoint, do not require less demanding state of mind requirements.⁴⁰²

In a list of offenses requiring proof of a "willful" intent, the report included section 922(e), which it described as arranging common carrier transportation "to nonlicensees without notice to carrier."⁴⁰³

Clearly the Judiciary Committee understood the passenger exception not to require notice to the carrier; rather the prohibition was the shipment "to nonlicensees" of firearms without declaration. Considering the sweeping liberalizing amendments to the 1968 Act, it seems fair to conclude that Congress intended to repudiate the courts' construction of the passenger exception discussed above.⁴⁰⁴ An earlier Senate Judiciary Committee report stated that "willfully" was inserted in the penalty clause to require the prosecution to prove intentional violation of a known legal duty. The report stated,

The purpose is to require that penalties be imposed only for willful violations—those intentionally undertaken in violation of a known legal duty. . . . Existing law for the most part requires at best a general intent, so that even inadvertent violations, and those made in the best of faith, may be the subject of prosecution. Improper prosecutions under such conditions—even, in one case, for acts which the director of the enforcing agency had stated were completely legal—were documented in hearings before the Committee, and in earlier hearings before its Subcommittee on the Constitution and the Senate Committee on Appropriations. This subsection is designed to guarantee against such practices.⁴⁰⁵

⁴⁰² S. REP. NO. 583, 98th Cong., 2d Sess. 20-21 (1985).

⁴⁰³ *Id.* at 21 n.46.

⁴⁰⁴ See *supra* notes 354-397 and accompanying text.

⁴⁰⁵ S. REP. NO. 476, 98th Cong., 2d Sess. 22 (1985). For the proposition that willful violations involve "a known legal duty," the report cites *Pomponio v. United States*, 429 U.S. 10, 12 (1976) and *United States v. Bishop*, 412 U.S. 346

To show that a defendant arranged common carrier transportation of firearms without notice to the carrier, the prosecution will have to prove beyond a reasonable doubt that, in the above language, the arrangement was "intentionally undertaken in violation of a known legal duty."⁴⁰⁶ In other words, a party sending a firearm to another party would have to know the law as described in section 922(e). More importantly, it seems almost impossible that in most instances the prosecution will succeed in proving that a passenger who checked baggage containing a firearm with a common carrier, without declaring the firearm, did so intentionally and with knowledge of the strained judicial interpretation that has emasculated the passenger exception.

The Firearms Owners' Protection Act contains an additional provision liberalizing interstate transportation of firearms by a passenger. Firearms that are unloaded and

(1973). See *id.* After the statement quoted in the text, the report continues as follows:

It is moreover designed to provide enforcing agents, prosecutors and courts with a clear delineation of the type of offenders against whom the law is directed. It removes the tendency of statutes permitting conviction for inadvertent violations to "ease the prosecutor's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morisette v. United States*, 342 U.S. 246, 263 (1952).

Id.

⁴⁰⁶ *Id.* But see H.R. REP. NO. 495, 99th Cong., 2d Sess. 11, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1327, 1337. The House Judiciary Committee offered the following comments concerning the willfulness standard in the Firearms Owners' Protection Act:

Proponents of the willfulness standard argue that the offenses for which the standard would apply are mere regulatory offenses, for which a conscious and specific intent to violate the law should be required. However, a person violating a city's vehicular speed limit cannot successfully assert that he had not read the city ordinance nor seen a posted speed limit. . . . The Committee believes that . . . a person who engages in the business of selling hand grenades or machine guns should not escape prosecution solely on the grounds that the government cannot produce witnesses to whom the defendant admitted knowledge that such conduct requires a federal license, and a determination to violate that law.

Id. These comments were offered in support of the Committee's bill, however, which was voted down. See 132 CONG. REC. 1699 (1986).

not readily accessible may be transported for lawful purposes from and to any place where one lawfully may possess and carry such firearms, regardless of state law.⁴⁰⁷ As a Senate Judiciary Committee report noted, this adds a provision

nullifying state and local laws which have the effect of prohibiting transportation of a firearm through such state when the firearm is unloaded and not readily accessible. This is intended to prevent such local laws, which may ban or restrict firearm ownership, possession or transportation, from being used to harass interstate commerce and travellers. It is anticipated that the firearms being transported will be made inaccessible in a way consistent with the mode of transportation⁴⁰⁸

This amendment is significant in that many arrests at airports for firearms involve passengers seeking to transport inaccessible firearms through states which prohibit mere possession of firearms without a permit.⁴⁰⁹ Prosecutions brought under state law for otherwise good faith and legal conduct will be precluded.⁴¹⁰

AFTERWORD: WILL THE FOURTH AMENDMENT SURVIVE THE AGE OF PLASTIC PISTOLS?

Current technology in both firearms and x-ray screen-

⁴⁰⁷ 18 U.S.C.S. § 926A.

⁴⁰⁸ S. REP. NO. 476, *supra* note 405, at 25. Almost identical language appears in S. REP. NO. 583, *supra* note 402, at 27-28.

⁴⁰⁹ For example, of some ninety-nine passengers arrested and booked for firearms in luggage at the Newark, New Jersey airport in 1983-84, none were charged with the federal offense of carrying a concealed weapon about the person. Letter from FAA to Stephen P. Halbrook (Feb. 1985). The Firearms Owners' Protection Act of 1986 will preempt state laws which allow conviction of nonresident hunters traveling through the state without notice or knowledge of the state's permit requirements. See *supra* note 407 and accompanying text. For an example of a case in which a state court held that nonresidents can be charged with violations of local firearms permit requirements, even though the nonresidents may lack knowledge or notice of the requirements, see *State v. Hatch*, 64 N.J. 179, 313 A.2d 797 (1973).

⁴¹⁰ The People Express Airlines hub in Newark, New Jersey, contains signs which state, "Declare all weapons." Travelers who comply are arrested or detained, even though they are in transit to and from other states. See Scott, *The President's Page*, TRAP & FIELD, Sept. 1984, at 62, 63.

ing devices allows for the accommodation of three interests: weapons transport, fourth amendment privacy, and aviation security. Most airlines still allow passengers to check baggage before authorities screen carryon baggage at the entrance to the sterile area. Further, FAA regulations neither authorize nor require x-ray searches of checked baggage for weapons. The only firearms which could threaten air carrier security are detectable by x-ray screening of carryon baggage and magnetometer screening of the passenger's person.

The recent advent of the plastic (or polymer) pistol, which is undetectable by conventional x-ray or magnetometer, raises serious issues about the continued accommodation of the above interests. If a firearm can be constructed out of non-metallic parts, one wonders if strip searches will take the place of what is now a slight inconvenience, and if remaining fourth amendment rights will be sacrificed to all-intrusive procedures to deter hijackings. This article's concluding remarks will address whether the current delicate balance of interests fashioned by Congress, the courts, and the FAA, can survive the new technology.

In early 1986, Jack Anderson published an article in the *Washington Post* entitled "Quaddafi Buying Austrian Plastic Pistols."⁴¹¹ It described the Austrian Glock 17, 9mm pistol which features all plastic parts other than the metal barrel, slide, and one spring. The article described the pistol as "frighteningly easy to smuggle past airport security," and alleged that it was being sold to the Libyan dictator.⁴¹² Legislators immediately introduced bills in Congress to ban the manufacture, importation, and sale of any firearm not readily detectable by the standard security equipment commonly used in airports.⁴¹³ On May 15, 1986, the Subcommittee on Crime of the House Judi-

⁴¹¹ *Washington Post*, Jan. 15, 1986, at F14, col. 2.

⁴¹² *Id.*

⁴¹³ See H.R. 4223, 94th Cong., 2d Sess. (1986); H.R. 4194, 94th Cong., 2d Sess. (1986).

ciary Committee held hearings on the subject.⁴¹⁴

Despite the fact that the Glock has an 83% metal mass, Congressman Mario Biaggi argued that the pistol could not be readily detected. Interestingly, he made an example of a Glock that had not been detected on a People Express Airlines flight.⁴¹⁵ The Congressman failed to point out that this example could be used just as easily to show that screening of larger baggage intended to be checked, by x-ray devices designed only for carryon baggage, sometimes fails to detect a firearm.

The study of the Office of Technology Assessment stated, "From our investigations it appears that the materials technology does exist to produce non-metallic firearms whose only metal components may be small springs."⁴¹⁶ In a stroke of luck for the fourth amendment, an engineering firm announced the Model Z x-ray inspection system which detects metals as well as "less dense materials such as plastic guns, plastic explosives, drugs and agricultural products."⁴¹⁷ This would preclude the need for burdensome and intrusive hand searches of carryon luggage. Unfortunately, it does not solve the problem of firearms carried on the person through the magnetometer. Alternatives to pat down or strip search must be devised should plastic pistols become available.

Many firearms have been on the market for a long time which use more plastic than the Glock 17, and these firearms never have posed a security problem, according to Phillip McGuire of the Bureau of Alcohol, Tobacco and Firearms.⁴¹⁸ Billie H. Vincent, FAA Director of Civil Avia-

⁴¹⁴ *Hearings on H.R. 4194 and H.R. 4223 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (May 15, 1986) (unpublished) [hereinafter *Hearings*].

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ American Science and Engineering, Inc., Micro-Dose Model Z X-Ray Inspection-System Product Description Brochure (1986).

⁴¹⁸ Oral Testimony recorded by the author at *Hearings*, *supra* note 414. In a private letter ruling by the Bureau of Alcohol, Tobacco and Firearms, that agency ruled the Glock 17 "suitable for importation into the United States as a sporting purpose firearm." BATF, Priv. Ltr. Rul. 7540 (Jan. 10, 1986).

tion Security, testified that while technological progress was being made in the development of better security systems, the Glock 17 can be detected readily by current x-ray systems.⁴¹⁹ Mr. Vincent added that a true all-plastic pistol was not expected for another two years.⁴²⁰ A new, international technology cannot be effectively banned, according to Dr. Edward C. Ezell, an Armed Forces curator with the Smithsonian Institution; instead, emphasis should be placed on interdiction of weapons to international terrorists.⁴²¹ James J. Baker of the National Rifle Association argued that only x-ray operator error can account for the alleged non-detection of the Glock (which contains nineteen ounces of steel), and that a subjective detectability standard based on inferior operator performance would justify a ban on all firearms.⁴²²

Without question, an x-ray of a Glock pistol is fully detectable.⁴²³ The firm which produced 90% of all airport x-ray units used in the United States wrote of the Glock,

Even the plastic frame shows as clearly as a toy plastic gun which, incidentally, is one of the most common items identified by airport security personnel screening packages and briefcases on the airport x-ray machine.

The barrel and the ammunition clip will cause the metal detector to alarm although the plastic frame, by itself, obviously will not. However, the plastic frame is completely harmless and, in fact, looks less like a pistol than a plastic toy gun because it lacks a barrel. . . . [I]t would be as difficult to pass a Glock 17 pistol through an x-ray security checkpoint as it would be to pass any other real pistol

⁴¹⁹ Oral Testimony of Mr. Billie Vincent recorded by the author at *Hearings*, *supra* note 414. In a letter to Mr. Carl Walter of Glock, Inc., Mr. Vincent enclosed photographs of the Glock 17 as seen in an x-ray device, and referred to the "misinformation about the detectability of your fine weapon." Letter from Billie H. Vincent, Director of Civil Aviation Security, United States Department of Transportation, to Carl Walter of Glock, Inc. (Mar. 21, 1986).

⁴²⁰ Oral Testimony of Mr. Billie Vincent, *supra* note 419.

⁴²¹ See *Hearings*, *supra* note 414.

⁴²² *Id.*

⁴²³ See Dickey, *Glock 17 Pistol*, AM. RIFLEMAN, May 1986, at 23.

through the same checkpoint.⁴²⁴

The fact remains that an all-plastic pistol probably will be developed in the future. To make it detectable, one designer proposes an implant for the pistol, with a special sensor at the screening checkpoint, rather than a device that detects plastic.⁴²⁵ It has been suggested that sensors could be developed to detect pistols as far as fifty feet away, that all new pistols (whether plastic or metal) should have implants, and that police could use these sensors to detect pistols on the streets as well as at airports.⁴²⁶

Ominous constitutional implications accompany such proposals. Laws requiring that firearms be extraordinarily detectable and that citizens on the streets be scanned for weapons without probable cause would violate both the spirit and the letter of the fourth and fifth amendments. Alternatively, the right to privacy and the right against self-incrimination can be preserved without sacrificing public safety in the airport screening context by use of x-ray which keeps pace with firearms technology.⁴²⁷

While planning for hypothetical firearms and screening devices may be warranted today, the fact remains that magnetometers and x-ray devices currently cannot detect small but powerful explosives with a satisfactory level of efficiency. Further, unlike plastic pistols which do not exist, the present practice of employing poorly paid and trained x-ray operators, coupled with inadequate background checks of airport employees with access to sterile areas, poses real and immediate threats to air carrier security. Several factors should counsel reluctance to curtail further the fourth amendment rights of air travelers

⁴²⁴ Letter from Astrophysics Research Corp. to Congressman Mario Biaggi (Mar. 27, 1986).

⁴²⁵ Lesmeister, *World's First All-Plastic Pistol*, 14 AM. FIREARMS INDUSTRY 36-37 (1986).

⁴²⁶ See Molchan, *Industry Insights*, 14 AM. FIREARMS INDUSTRY 48 (1986).

⁴²⁷ Whether the magnetometer similarly can keep pace and detect plastic pistols on the person remains to be seen. The fourth amendment certainly would preclude use of a device that would show an x-ray like profile of a person, right down to their private parts and bones.

and the rights of persons who transport firearms for lawful purposes. Current procedures literally have eliminated any successful hijacking in the United States from 1973 to the present. Moreover, despite the awesome nature of a hijacking, the fact remains that most hijacking victims survive, particularly when the perpetrators employ firearms rather than explosives. The threat and appropriate responses should be kept in perspective with the reality that most acts of violence occur in streets, homes, and cities, where fourth amendment protections survive to varying degrees.

The rights of passengers to transport firearms and to be free of unreasonable searches and seizures currently enjoy a delicate balance with the interests of passengers in air carrier security. This balance will be upset if airlines eliminate the opportunity to check baggage before searching carryon baggage, a step one major airline already has taken. Moreover, the fate of this balance appears uncertain as new technologies in firearm components and weapon screening devices develop. The preservation of constitutional rights without compromising security in the next century will require vigilance and austere legislative craftsmanship.