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AIRPORT SECURITY, TERRORISM, AND THE FOURTH AMENDMENT: A LOOK BACK AND A STEP FORWARD

SANFORD L. DOW

A pocketwatch. Four size AA batteries. Several strands of 18-gauge wire. Available at any five and dime, the ingredients are simple enough. They could fit in a child's lunch box— or in the lining of a briefcase. But add to these a fanatic's hatred and a softball-size lump of putty known as plastique, and you have the recipe for a massive tragedy.¹

I. INTRODUCTION

COMMERCIAL AIR TRAVEL, once considered a luxury for a privileged few, is today a fixture of modern society. Over 450 million passengers board 6.5 million flights annually at American airports and more than 700 million pieces of luggage are checked on to U.S. aircraft.² This provides an opportunity for terrorists³ and other

¹ *The Next Bomb*, LIFE, Mar. 1989, at 130.

² *Id.*

³ While no one definition of terrorism has gained universal acceptance, the notion behind furthering one's views through a system of coercive intimidation has existed for hundreds of years. For example, the meaning of terrorism was included in the 1798 supplement of the *Dictionnaire of the Academie Francaise* as '*systeme, regime de la terreur.*' *Dictionnaire, Supplement* 775 (Paris, an VII (1798)). The term "terrorism" apparently has its origin in the Jacobin and Thermidorian dictatorships during the French Revolution. PAUL WILKINSON, *POLITICAL TERRORISM* 9 (1974). Revolutionaries used physical violence to produce a foundation for a new social order, executing members of the aristocracy based solely on their societal position. Robert Calvert, *Terrorism in the Theory of Revolution*, in *TERRORISM, IDEOLOGY & REVOLUTION* 27 (Noel O'Sullivan ed., 1986).

The U.S. Congress has defined an "act of terrorism" as: an activity that (A) involves a violent act or an act dangerous to human life that is a violation of

criminals to inflict massive destruction and death on unsuspecting passengers.

As the only remaining global superpower following the end of the Cold War, American soil is not immune to security threats, and may now find itself the target of resent-

the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appears to be intended- (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping. 1984 Act to Combat International Terrorism, 18 U.S.C. § 3077 (1993).

Under the Immigration Act of 1990, Congress has also determined "terrorist activity" to include "the hijacking or sabotage of any conveyance (including an aircraft)." 8 U.S.C. § 1182(a)(3)(B)(ii)(I) (1993).

The President's Commission on Aviation Security and Terrorism (President's Commission) maintains that terrorism is a deadly weapon of the weak and the cowardly and leverages violence against innocent victims. Additionally, state-sponsored terrorism is a form of surrogate warfare when conventional warfare is too complex or too expensive. *Report of the President's Commission on Aviation Security and Terrorism*, at 113 (May 13, 1990) [hereinafter *President's Commission Report*].

Benjamin Netanyahu, former Deputy Foreign Minister of Israel, explains terrorism as "the deliberate and systematic murder, maiming and menacing of the innocent to inspire fear for political ends." Address by U.S. Deputy Attorney General Arnold I. Burns, *The Lawyers Division of the Anti-Defamation League Appeal* 3 (Dec. 17, 1986).

Others describe terrorism as "the use of force, or threat of force, directed against innocent third parties for primarily ideological, financial or psychological purposes." Robert A. Friedlander, *Terrorism and Self-Determination: The Fatal Nexus*, 7 SYRACUSE J. INT'L L. & COM. 263, 265 (1979-1980) (quoting Robert Friedlander, *Reflections on Terrorist Havens*, 32 NAVAL WAR COL. REV. 59, 60 (1979)).

A dispassionate approach views terrorism as the systematic use of terror, especially as a means of coercion. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1218 (1984).

Despite the inability to agree upon a uniform definition of terrorism, some experts believe it is easier to state what terrorism is not. For example, the cliché that "one man's terrorist is another's freedom fighter," was categorically rejected by the late Senator Henry Jackson who remarked that:

The idea that one person's "terrorist" is another's "freedom fighter" cannot be sanctioned. Freedom fighters or revolutionaries don't blow up buses containing non-combatants; terrorist murders do. Freedom fighters don't set out to capture and slaughter school-children; terrorist murderers do. Freedom fighters don't assassinate innocent businessmen, or hijack and hold hostage innocent men, women, and children; terrorist murderers do.

George P. Shultz, *The Challenge to Democracies*, in *TERRORISM: HOW THE WEST CAN WIN* 16, 18 (Benjamin Netanyahu ed., 1986).

For an overview of terrorism, see *THE TERRORISM READER: A HISTORICAL ANTHOLOGY* (Walter Laqueur ed., 1978); *CONTEMPORARY TERRORISM* (William Guttridge ed., 1986); *THE POLITICS OF TERRORISM* (Michael Stohl ed., 1988).

ment from a wide range of enemies.⁴ Cells of terrorists⁵ are stationed in the United States and have the capability to become violent.⁶ Moreover, as evidenced by the World Trade Center bombing in New York City,⁷ the potential for terrorism directed against American citizens at home and abroad in response to U.S. foreign policy decisions, particularly in the Middle East, cannot be underestimated.⁸ Terrorism experts predict future threats and attacks by Islamic fundamentalists and other shadowy

⁴ See, e.g., Robert Reinhold, *Blast Wrecks Van of Skipper Who Downed Iran Jet*, N.Y. TIMES, Mar. 11, 1989, at A1. (the "explosion that rocked the vehicle of Sharon Lee Rogers while she was on her way to work here this morning may have been set off as an act of terrorism against the captain, Will C. Rogers 3d"); Robert Handley *Defendant Gets 30 Years in Jail Bombing Plot*, N.Y. TIMES, Feb. 7, 1989, at B2. ("A Japanese national described by Federal authorities as one of the first international terrorists caught and convicted in the United States was sentenced" by a judge who described the man as "a member of the Japanese Red Army . . . [who] had built and transported bombs to cause 'multiple deaths.' " Robin Wright, *U.S. Hoping to Turn Corner in Terrorism War*, L.A. TIMES, Aug. 18, 1991, at A1. "Since 1985, the United States has convicted more than 460 people on domestic terrorism charges and more than 60 on international terrorism charges." *Id.*; 8 *Pro-Libyans Seized, Plot on North Reported*, CHI. TRIB., July 21, 1988 at C3. ("FBI agents . . . arrested eight men linked to pro-Libyan activities in the United States, and a U.S. attorney said one of them was involved in a plot to assassinate a top official"). Between 1982 and 1986, approximately 36,000 firearms were detected at U.S. airports, leading to more than 15,000 related arrests, and 117 hijackings or related crimes where attempted, but thwarted. Cecilia Preble, *FAA Defends Domestic Airport Security Measures*, AVIATION WK. & SPACE TECH., June 29, 1987, at 36.

⁵ International terrorists in the United States are those individuals who are directed from abroad and who target foreign groups or governments, including the United States government and its citizenry. Cecilia Albin, *The Politics of Terrorism: A Contemporary Survey*, in THE POLITICS OF TERRORISM 183, 194 (Barry Rubin ed., 1989).

⁶ *Id.* at 180. International terrorists operating in the United States have been able to generate significant support, both financially and from the refusal of supporters to provide information to law enforcement authorities on the terrorist's activities. The necessary infrastructure is also already in place from which a base of operations may be conducted. *Id.* at 195.

⁷ Robert D. McFadden, *Blast Hits Trade Center, Bomb Suspected; 7 Killed, Thousands Flee Smoke in Towers*, N.Y. TIMES, Feb. 27, 1993, at A1.

⁸ Ross Gelbspan, *Terrorism Threat Triggers Alert in Nation and Anxiety in Public; War in Middle East*, BOSTON GLOBE, Feb. 6, 1991, at 1; Michael Schachner & Sara J. Harty, *Terrorism Fears Remain Despite End of Gulf War*, BUS. INS., Mar. 11, 1991, at 3. In the Federal Aviation Administration's (FAA) most recent report to Congress on civil aviation security, the FAA stated that "American interests also continue to be targeted by terrorist organizations and those countries supporting international terrorist activities." *President's Commission Report*, *supra* note 3, at 40.

Middle Eastern factions which operate in a dark nether-world⁹ and elements on the political fringe, furthermore, may attempt to undermine democratic openings around the world, particularly in the former Yugoslavia.¹⁰ Compounding this problem, some hijackers may have lost any political or ideological rationale for committing these acts of air terrorism.¹¹ Their goal is sheer intimidation.¹²

With the development of sophisticated modern weaponry, power, defined simply as the capacity to disrupt or destroy, has descended to smaller and smaller groups.¹³ Additionally, because of the rapid technological advancements made in explosives used by terrorists,¹⁴ coupled

⁹ *President's Commission Report*, *supra* note 3; see Jim Wolf, *CIA Chief Says Terrorism Threat Unchanged Since Gulf War*, REUTERS, May 30, 1991, available in LEXIS, Nexis Library, Reuters File; see also Oliver B. Revell, "Terrorism Today," FBI Law Enforcement Bull., Oct. 1987, at 2.

¹⁰ Pricilla Painton, *Who Could Have Done It?*, TIME, Mar. 8, 1993, at 33. Balkan groups have been involved in a series of terrorist acts in the United States. For example, in 1976 Croatian nationalists hijacked a TWA flight travelling from New York City to Chicago, diverting it to Paris. *Id.*

¹¹ Some terrorists "may have lost their political identity, having become increasingly nihilistic. One need only scratch the surface of their espoused Marxism to find their true purpose: destruction of the establishment, whatever government is in power." ROBERT KUPPERMAN & DAVID TRENT, *TERRORISM: THREAT, REALITY, RESPONSE* 39-40 (1979).

¹² It has been written:

The principle of terrorism as a psychological weapon [is illustrated by a Chinese proverb]: "To kill one and frighten 10,000 others." The 'one' here is the immediate victim, but the '10,000' are the real target. The dramatic fate of the one intimidates the 10,000 into yielding concessions to remove what they perceive as an ultimate threat to themselves. In the modern world, particularly in democracies, the terrorists aim at isolating the country's leadership from the people and forcing changes by 'popular demand' in line with their own political or ideological objectives."

Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 129 n.66 (1986).

¹³ Brian M. Jenkins, *International Terrorism: Trends and Potentialities*, in *LEGAL AND OTHER ASPECTS OF TERRORISM* 439, 495 (Edwin N. Lowe & Harry D. Shargel eds., 1979). Massive quantities of Semtex, an odorless, virtually undetectable plastic explosive compound, are available to terrorists worldwide. Former Czechoslovakia President Vaclav Havel has even admitted that his country sold 1000 tons of Semtex to Libya, an amount Havel said was sufficient to outfit the world terrorist community with the ability to make bombs for 150 years. Glenn Frankel, *Havel Details Sale of Explosives to Libya*, WASH. POST, Mar. 23, 1990, at A15.

¹⁴ An example of one of the difficulties confronted by security personnel is identifying an explosive material like semtex, used in the bombing of Pan Ameri-

with a reduction in the budget for counterterrorist re-

can Flight 103. Semtex can be molded like clay and take on a configuration that would not trigger a response from security personnel or sniffer dogs, or can be rolled into a sheet less than one-quarter of an inch thick and used as a liner for luggage. Denise Gellene, *Long After Lockerbie, Air Safety Still A Worry*, L.A. TIMES, Dec. 23, 1990, at D3.

There is an international movement to attempt to prevent the undetected spread of plastic explosives. In March, 1991, forty countries (including the United States and the former Soviet Union, but excluding Iraq, Yemen, and Libya) signed a treaty at the headquarters of the International Civil Aviation Organization requiring manufacturers in signatory countries to include a chemical compound in plastic explosives that would set off a warning buzzer on vapor detectors available to airports. *Treaty to Make Bombs Easier For Airports To Spot*, L.A. TIMES, Mar. 2, 1991, at A29.

The FAA issued a rule that would have required installing a new technology, thermal neutron analyzers, (TNA) to inspect checked luggage (but no carry-on luggage) at major domestic and international airports. TNAs, which weigh 14 tons and are the size of a small truck, rely on computers and require minimal training and no sophisticated judgments by airline security personnel. The machine scans luggage with beams of protons, positively-charged particles in the nuclei of atoms. Atoms of the luggage's contents capture some of the neutrons, immediately discharging gamma rays. Nitrogen, an element found in high concentration in all conventional explosives, then emits gamma rays and the machine detects these high-energy rays, setting off an alarm. James Popkin, *Holes in the Security Web*, U.S. NEWS & WORLD REP., Feb. 18, 1991, at 39.

The effectiveness of TNAs however, is dubious at best. Some scientists believe "there is no way [a] TNA can work for little bombs . . . unless you violate the law of physics." *Id.* This is so because as the amount of plastic explosives in luggage drops, it is more difficult for the machine to make a distinction between gamma rays emitted from the nitrogen in explosives and from nitrogen in other sources like cheese, leather, and wool. "Any terrorist with a rudimentary knowledge of physics can easily obtain materials to cloak these explosives from TNAs scrutiny." *Id.* at 41. Additionally, the President's Commission recommended stopping the deployment of TNAs because they would not have spotted the plastic explosives that destroyed Pan Am 103, and they have a high false alarm rate when tuned for sensitivity to bombs similar to the one used on Pan Am 103. The Commission also called for increasing research and development efforts for alternative systems. David Perlman, *Baggage Screening Called Cumbersome*, S.F. CHRON., Mar. 14, 1991, at A4; Carl H. Lavin, *New Machines Can Detect Terrorists' Bombs, Usually*, N.Y. TIMES, Sept. 12, 1989, at C1.; Russell W. Baker, *Bomb-Detection Device Debated*, CHRIST. SCI. MON., Sept. 27, 1989, at 7. It was also the concern of the President's Commission that requiring air carriers to devote significant financial resources to TNAs would extinguish interest in developing different and superior technologies and the widespread deployment of TNAs could mislead the travelling public by offering a false sense of security. *President's Commission Report*, *supra* note 3, at 65-6.

Under the Aviation Security Improvement Act, airports are not required to install TNAs until the FAA certifies that the machines can detect small amounts of explosives capable of destroying a commercial aircraft with sixty or more passenger seats. Aviation Security Improvement Act of 1990, H.R. 5200, 101st Cong., 2d. Sess., § 320 (1990); 136 CONG. REC. H8469 (daily ed. Oct. 1, 1990).

search and development,¹⁵ the travelling members of the American public will find themselves in a precarious position.¹⁶

Individual civil liberties, often taken for granted by many Americans, may be at risk as the government attempts to respond to these threats of terrorism.¹⁷ Historically, suspicion and fear of domestic and foreign subversion have been pervasive in American society.¹⁸ To

¹⁵ The Congressional Office of Technology Assessment (OTA) conducted a study which determined that the \$70 million in funding for anti-terrorism research was .7 percent of equivalent Department of Defense research and development and 3 percent of the appropriation given to the space station. The funding is scattered among twenty separate federal agencies and the only government-wide program, administered by the State Department, receives \$2 million annually, approximately one-fifth of what it received in 1986. The study reported that it was particularly difficult for the Federal Bureau of Investigation (FBI) which "is unable to pursue many promising research projects, especially in the area of explosives detection, because of the minuscule amount of resources available (less than \$100,000 per year)". George Lardner, Jr., *U.S. Faulted on Antiterrorism Funding: Congress Told New Airport Bomb-Detection Devices Are Too Touchy*, WASH. POST, Feb. 27, 1991, at A23.

¹⁶ "An airplane in flight, despite all of its engineering sophistication, is a uniquely fragile and vulnerable target when a passenger or crewmember is threatened by a weapon or an explosive." *United States v. Bell*, 464 F.2d 667, 670 (2d Cir. 1972).

¹⁷ *President's Commission Report*, *supra* note 3, at 114. "The more security measures are imposed, the more fundamental freedoms are restricted. Searching bags and screening passengers constitute intrusions upon privacy." *Id.* The concern of overzealous government officials, furthermore, was eloquently articulated by Justice Louis Brandeis over sixty-five years ago:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

¹⁸ For example, in the charged atmosphere created by the French Revolution and a growing United States domestic partisan struggle, the Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired), commonly referred to as The Alien and Sedition Act of 1798, was used by the Federalist Administration to oppress the Republicans, led by Jefferson and Madison, for their political views. The Federalists and Jeffersonians "took turns accusing one another of subversion." *FREEDOM AT RISK; SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980s* 5 (Richard O. Curry ed., 1988) [hereinafter *FREEDOM AT RISK*].

The first significant federal domestic intelligence program was established during World War I, when thousands of American citizens were investigated by the Bureau of Investigation for "un-American activities." Don Edwards, *Reordering*

alleviate these concerns, the United States government has sometimes acted to restrict certain citizens' rights in times of political or civil unrest.¹⁹ In June, 1940, for example, Congress passed the Alien Registration Act.²⁰ This law, generally known as the Smith Act, made illegal membership in any group that advocated the forceful overthrow of the United States government. The Act also served as a mechanism by which the Federal Bureau of Investigation (FBI) could attempt to justify illegal investigations into individuals' political beliefs.²¹ Following the attack on Pearl Harbor in 1941, the United States government interned Japanese-American citizens in "relocation camps," the only "crime" being that they were of the same racial extraction as the enemy with which the United

The Priorities of the FBI in Light of the End of the Cold War, 65 ST. JOHN'S L. REV. 59, 67 (1991).

In 1956, FBI Director J. Edgar Hoover instituted a far reaching program of domestic surveillance under the auspices of an FBI counterintelligence group known as COINTELPRO (an acronym for Counterintelligence Program). COINTELPRO's operations in the 1960s included targeting not only college students who were opposed to American policy during the Vietnam conflict, but also non-violent Black civil rights groups. By 1976, the group was conducting 4868 domestic security investigations and by 1981, the FBI was maintaining a file on over 500,000 Americans. Geoffrey Stone, *The Reagan Administration, the First Amendment, and FBI Domestic Security Administration, the First Amendment, and FBI Domestic Security Investigations*, in FREEDOM AT RISK 272, 275-77 (1988). In 1988, under the guise of its "Library Awareness Program," the FBI even sent in agents to public and university libraries requesting information on foreign nationals who were reading various unclassified scientific and technical journals. *FBI Counterintelligence Visits to Libraries: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, 100th Cong., 2d Sess. 3 (1988) (testimony of Duane Webster, Executive Director, Association of Research Libraries). This was not, however, the first instance in which the FBI had investigated library records. As early as 1944, FBI agents recruited a librarian at the University of California to "produce records" on the reading habits of a poet, Muriel Rukeyser. The FBI described Rukeyser as "a well-known poetess who is alleged to have mixed considerable left-wing politics with her iambic pentameters." NATALIE ROBINS, *ALIEN INK: THE FBI'S WAR ON FREEDOM OF EXPRESSION* 190 (1992).

¹⁹ See generally, ROBERT GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* 1978 (1978); RICHARD O. CURRY, *CONSPIRACY: THE FEAR OF SUBVERSION IN AMERICAN HISTORY* (1972); MURRAY LEVIN, *POLITICAL HYSTERIA IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION* (1971).

²⁰ Alien Registration Act of 1940, ch. 439, § 23, 54 Stat. 670,671-73 (1940) (current version at 18 U.S.C. § 2385-87 (1988)).

²¹ *Id.*; ROBINS, *supra* note 18, at 187.

States was then at war.²² In the 1950's, the hysteria of the Red menace created by Senator Joseph McCarthy's communist witch-hunts resulted in legislative restrictions on the constitutional freedoms of many patriotic citizens.²³ Between 1969 and 1979, the FBI secretly investigated the women's liberation movement, amassing a file of nearly 3000 pages,²⁴ and during the Reagan Administration, the State Department attempted to vigorously enforce the McCarran-Walter Act of 1952,²⁵ a law that denies visas to foreigners whose views are considered dangerous to American ideals and values. The desired goal of the Administration was to bar individuals opposed to the Reagan

²² Pursuant to Executive Order 9066, over 120,000 persons of Japanese ancestry, 70,000 of whom were U.S. citizens, were forced into "relocation camps". In *Korematsu v. United States*, 323 U.S. 214 (1944), by a vote of six to three, the Supreme Court held that it was constitutional to confine Japanese-American citizens, premised on the powers of the President as Commander-in-Chief and the war powers of Congress. *Id.* at 217. Internment was a reasonable military precaution, and the danger was believed to be so great that there was no time to set up procedures to judge each Japanese-American on an individual basis. It was also assumed that Japanese-American's racial ties to Imperial Japan, regardless of citizenship or loyalty, would result in sabotage, treason, and perfidy. *Id.* at 237-242 (Murphy, J., dissenting); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Ex parte Endo*, 323 U.S. 283 (1944). For a historical treatment of Japanese-Americans in American jurisprudence, see FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* (1976).

²³ See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (Supreme Court sustained the conviction of 12 Communist Party members for conspiracy to violate the Smith Act); *Marshall v. United States*, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950).

²⁴ ROBINS, *supra* note 18, at 327. This file, containing reports from meetings, demonstrations, and membership lists, examined various women's groups affiliations with other organizations, such as the Students for a Democratic Society (SDS) and the Black Panthers. One absurd report, describing a gathering, noted: "[t]he women, in general, appeared to be hippies, lesbians or from far-out groups. Most of them were colorfully dressed, but the majority wore faded blue jeans. Most seemed to be making a real attempt to be unattractive." *Id.*

²⁵ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in different sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 49 U.S.C., and 50 U.S.C. (1988)) (prior to amendment by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978). The McCarran-Walter Act, passed in 1950 over President Harry S. Truman's veto, required communists to register with the U.S. Attorney General and agree to be apprehended if a national security emergency arose. Playwright Arthur Miller called the McCarran-Walter Act "one of the pieces of garbage left behind by the sinking of the great scow of McCarthyism." Mark Schapiro, *The Excludables*, in *FREEDOM AT RISK*, *supra* note 17, at 165.

policy in Central America.²⁶ More recently, approximately one week before the United Nations imposed a deadline for the withdrawal of Iraqi forces from Kuwait, FBI agents began questioning American citizens of Arabic heritage about their support for the Persian Gulf War and whether they had any knowledge of planned terrorist attacks.²⁷ Today, critics of the FBI contend that the policy of combatting "terrorism" may be used by the FBI in the same manner "communism" was used by the FBI in the 1950s, "as a pretext to repress radicals and dissenters."²⁸

This Comment will address the governmental response to air piracy and terrorism and discuss the methods instituted by Congress to control the spread of these crimes. Through both the use of electronic surveillance to safeguard domestic security, and through specific legislation attempting to combat hijacking and terrorism directed towards air carriers, the United States government has taken actions to solve or, at least, mitigate these problems that some assert may involve potentially grave restrictions on individuals' Fourth Amendment rights.

This article begins with a historical overview of the American response to air piracy and air terrorism and next discusses the four approaches within the Fourth Amendment generally taken to justify airport searches and seizures. It analyzes the role of the Foreign Intelligence Surveillance Act (FISA) in fighting this nemesis and demonstrates that, at a minimum, the FISA is a legitimate mechanism to assist in combatting the problem.

²⁶ A list of individuals denied entry into the United States since the enactment of the McCarran-Walter Act includes English novelist Graham Greene, Nobel laureates Gabriel Garcia Marquez, Pablo Neruda and Czeslaw Milosz, Chile's Hortensia de Allende, the widow of Salvador Allende, and Mexican writer Carlos Fuentes. Schapiro, *supra* note 25, at 163-164.

²⁷ Lisa Belkin, *For Many Arab-Americans, F.B.I. Scrutiny Renews Fears*, N.Y. TIMES, Jan. 12, 1991, § 1, at 1; Sharon LaFraniere, *FBI Starts Interviewing Arab-American Leaders; Watch Ordered on Iraqi Embassy, Mission*, WASH. POST, Jan. 9, 1991, at A14.

²⁸ ROBINS, *supra* note 18, at 371; Ashley Dunn, *McCarthy Era Legacy Survives With U.S. Government Blacklist*, HOUS. CHRON., Oct. 13, 1991, at A9.

II. HISTORY OF HIJACKING, AIR TERRORISM AND THE GOVERNMENTAL RESPONSE

Airplane hijacking²⁹ and terrorist attacks on air carriers, for both political and non-political purposes, have had a long and ugly tradition, beginning in the earliest days of civil aviation. The first recorded hijacking in the world occurred in 1930. Peruvian revolutionaries took control of an aircraft and bombarded the ground with political pamphlets.³⁰ The first recorded bombing of a commercial aircraft took place in May 1949 when a man and woman hired two ex-convicts to place a time bomb on a Philippine Airline's flight on which the woman's husband was a passenger, killing all thirteen passengers aboard, including the husband.³¹ The first American carrier hijacked was in 1961 when an Eastern Airlines airplane was seized and ordered to be diverted to Cuba.³² Congress quickly responded to this event by making aircraft piracy and certain other related activities federal crimes.³³ The 1961 amendment to the Federal Aviation Act of 1958³⁴ made aircraft piracy punishable by either death or imprisonment for not less than twenty years, and the amendment

²⁹ The word "hijack" may have derived in 19th-century England from vagabonds who greeted each other with the phrase, "Hi Jack". With the rise of crime, this warning served as a signal that a holdup was about to occur. See ERIC PARTRIDGE, *ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH* 288 (1963); Thomas J. Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657-58 n.1. (1974).

³⁰ JAMES A. AREY, *THE SKY PIRATES* 49 (1972).

³¹ Humphrey G. Dawson, *Civil Aviation, Hijacking and International Terrorism: An Historical and Legal Review*, 15 INT'L BUS. LAW. 57, 58 (1987). Worldwide, between 1949 and 1990, there were ninety-five documented explosions aboard commercial aircrafts, resulting in over 2100 deaths. *Foreign Airport Security: Hearing Before the Committee on Foreign Affairs*, 101st Cong., 1st Sess. 197-98 app. 22 (1989).

³² AREY, *supra* note 30, at 55. The first act of aviation sabotage aboard a United States air carrier, however, occurred on November 1, 1955. *President's Commission Report*, *supra* note 3, at 160 app. 22. A United Air Lines jet exploded near Longmont, Colorado eleven minutes after takeoff, when a dynamite bomb detonated in a baggage compartment, killing 39 passengers and 5 crewmembers. *Id.*

³³ Act of Sept. 5, 1961, Pub. L. No. 87-197, (i)-(n) 75 Stat. 466 (current version at 49 U.S.C. § 1472(i)-(m)(o) (1988).

³⁴ 49 U.S.C. app. §§ 1301-1557 (1988).

also contained a lesser offense of "interference with flight crew or cabin crew members," punishable by a monetary fine or imprisonment for a period of not more than twenty years, unless a deadly weapon was used.³⁵ In the latter instance, imprisonment could be for life.³⁶

In 1963, the United States became a signatory to the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, an international agreement designed to address questions and concerns of jurisdiction hijacking cases.³⁷ The Convention extended the usual territorial rules of each signatory nation's criminal codes, so that each nation had jurisdiction over criminal acts which took place on aircraft registered in that country, regardless of where the aircraft was when the criminal act transpired. The Tokyo Convention was largely ineffective, however, because it did not specifically make hijacking a crime and did not provide for the extradition of captured hijackers.³⁸

The number of hijackings of American commercial airplanes dropped to an average of about two per year between 1961 and 1967,³⁹ and was not a serious problem again until 1968 when eighteen successful attempts on American aircrafts and twelve foreign carriers were carried out.⁴⁰ The following year, thirty-three of forty attempts on U.S. carriers were successful.⁴¹ Once again, the

³⁵ Dawson, *supra* note 31, at 60.

³⁶ *Id.*

³⁷ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941 (entered into force Dec. 4, 1969). Interestingly, this was not the first global attempt to address the problem. Dawson, *supra* note 31, at 58. In 1937, the League of Nations sponsored two Conventions, the Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court. *Id.* Both Conventions were signed, but neither was ever implemented. *Id.*

³⁸ Patrick W. McGinley & Stephen F. Down, *Airport Searches and Seizures—A Reasonable Approach*, 41 *FORDHAM L. REV.* 293, 295-96 (1972).

³⁹ James A. Brodsky, *Terry and the Pirates: Constitutionality of Airport Searches and Seizures*, 62 *KY. L.J.* 623, 624 (1974).

⁴⁰ Narinder Aggarwala, *Political Aspects of Hijacking*, in *INTERNATIONAL CONCILIATION* 7, 9 (Nov. 1971).

⁴¹ *Id.*

United States entered into international agreements directed at resolving complications left unanswered by the Tokyo Convention.⁴²

In 1968, the United States government organized a special Federal Aviation Administration (FAA) task force composed of FAA staff members, airline representatives, and individuals from the Departments of Justice and Commerce who either had psychological, legal, engineering, or administrative backgrounds.⁴³ Their task was to develop a method to detect individuals who possessed concealed weapons.⁴⁴ The task force developed and implemented the first anti-hijacking system which included: (1) notices to the general public, (2) the use of a "hijacker profile,"⁴⁵ (3) the use of magnetometers to detect any

⁴² The first convention, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, ratified by the U.S. Senate on September 8, 1971, provided for mandatory punishment or extradition of hijackers and attempted to define the offense of hijacking. 117 CONG. REC. 13,888-89 (1971). The Hague Convention did not, however, address the threat of explosives being placed on commercial aircrafts. The second convention, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, ratified on October 3, 1972, augmented the Hague Convention by including sabotage and other threats against an airplane. 118 CONG. REC. 33,367-76.

In 1978, the United States and other members of the Economic Group of 7 signed the Bonn Declaration, an agreement to halt air service to and from any country that does not either extradite or prosecute terrorists for hijacking. The Venice Annex, signed at the 1987 Summit of the Heads of State of the Economic Group of 7, expanded the Bonn Declaration to include stopping air service in cases of sabotage. To date, the Bonn Declaration has been implemented only once, in 1981, against Afghanistan following the hijacking of a Pakistani aircraft. Dawson, *supra* note 31 at 62. The President's Commission has attacked the Declaration, claiming that the political will is often not always forthcoming from Group members, citing for example, the refusal of members to accept the request of the British government that both air service and diplomatic relations be severed with Syria following the attempted bombing of an El Al airplane at Heathrow Airport. *President's Commission Report*, *supra* note 3, at 37.

⁴³ See *United States v. Davis*, 482 F.2d 893, 898 (9th Cir. 1973); *United States v. Lopez*, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).

⁴⁴ *FAA Report on Detection Devices: Hearings on Aviation Safety and Aircraft Piracy Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., at 98-102 (Feb. 5, 1969).

⁴⁵ The "hijacker profile" consists of 25 behavioral characteristics associated with hijackers and terrorists. The results of the profile have never been released to the public. Robert E. Dallos, *Passengers at Stake: Airlines Try to Out Think Terrorists*, L.A. TIMES, June 21, 1986, at 1. Most of the world's known terrorists are university-educated males between the ages of twenty-two and twenty-five and are from

metal objects on passengers who met the profile,⁴⁶ (4) interviews with selected passengers, and (5) frisks or searches of suspected passengers.⁴⁷

Initially, the screening system was entirely voluntary and left to the discretion of the individual carriers, but in 1972 the FAA promulgated a rule requiring all U.S. airlines to initiate a screening system that was acceptable to the FAA.⁴⁸ Screening of all passengers was to include, but not be limited to, behavioral profiles, the use of a magnetometer, identification checks, and physical searches.⁴⁹ The following January, the FAA terminated this voluntary approach and instead made it mandatory that all passengers, not only those passengers identified under the profile, be checked prior to boarding by passing through a metal detector.⁵⁰

In 1974, faced with a growing problem of airline secur-

middle to upper class families. Generally, their political views have been shaped by the philosophies of either the extreme left or right, which advocate violence and have disdain for the underpinnings of constitutional democracy. Charles A. Russell and Bowman H. Miller, *Profiles of a Terrorist*, in *TERRORISM, AN INTERNATIONAL JOURNAL* 1 no. 1 (1977). Based on a number of interviews conducted by the Los Angeles Times, "[t]he most likely people to fit a terrorist profile, and thus to receive extraordinary scrutiny, are young, Arab-looking males. And if such an individual has a passport issued by a Middle Eastern country with which the United States has poor relations — Libya, Syria, or Iran, for example, — a bell figuratively goes off." Dallos, *supra*, at 1. The fact that a defendant matches several characteristics of a hijacker profile does not, however, constitute reasonable suspicion to search their luggage. *United States v. Allen*, 349 F. Supp. 749, 752 (N.D. Cal. 1971). Furthermore, while the use of a profile does not detract from the evidentiary significance of an officer's personal observations, the profile does not, in and of itself, necessarily constitute reasonable suspicion on which to search a person or his luggage. A court will require an officer to articulate the factors that led to his conclusion that a search was justified. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). See *supra* notes 19-29 for a discussion of the constitutional requirements of a "stop-and-frisk" search, such as that described above.

⁴⁶ A magnetometer electronically detects the presence of ferrous metals. "[T]he operation of the [magnetometer] requires no understanding of its theory. Its calibration is easy and its adjustment can be assured by simple visual observation." *United States v. Lopez*, 328 F. Supp. 1077, 1085-86 (E.D.N.Y. 1971).

⁴⁷ See WAYNE R. LAFAVE, *SEARCH AND SEIZURE* §§ 1-6(a) (2d ed. 1987).

⁴⁸ 14 C.F.R. § 121.538 (1992).

⁴⁹ FAA Press Release No. 72-26 (Feb. 6, 1972).

⁵⁰ See LAFAVE, *supra* note 47, § 6. The use of an x-ray machine, or magnetometer to ascertain the contents of a closed bag constitutes a "search" within the meaning of the Fourth Amendment since the machine's very purpose is to dis-

ity, Congress passed a two-title statute directed at the problem of hijacking.⁵¹ Title I, the Anti-hijacking Act of 1974, was intended to implement the Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention).⁵² Title II, the Air Transportation Security Act of 1974, empowered the Administrator of the FAA to create and monitor security measures for preventing acts of hijacking and criminal violence.⁵³ The Administrator was directed to prescribe reasonable regulations that required all passengers and all property intended to be carried on a commercial aircraft be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier prior to passengers boarding the aircraft.⁵⁴ The statute also empowered the Administrator to prevent any air carrier, intrastate air carrier, or foreign air carrier from transporting any individual who did not consent to a search of his person or property.⁵⁵ The purpose of the search is to ascertain whether the person is carrying either on himself or in his property a "dangerous weapon, explosive, or other destructive substance."⁵⁶

The FAA's role in aviation security expanded in 1985 with the passage of the Foreign Airport Security Act.⁵⁷ The Act was signed in the wake of a hijacking of a Trans World Airlines (TWA) flight from Athens, Greece, during which a U.S. Navy Petty Officer, Robert Stethem, was

cover the presence of metals of privacy. *United States v. Doe*, 786 F. Supp. 1073, 1079 (D. Puerto Rico 1991).

⁵¹ CONF. REP. NO. 1194, 93d Cong., 2d Sess. 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3975, 3996; S. REP. NO. 13, 93d Cong., 1st Sess. 1 (1973); H.R. REP. NO. 885, 93d Cong., 2d Sess. 1 (1974).

⁵² H.R. REP. NO. 885, 93d Cong., 2d Sess. 9 (1974).

⁵³ Pub. L. No. 93-366, 88 Stat. 415 (1974) (codified at 49 U.S.C. app. §§ 1301, 1356, 1357, 1472, 1511, 1515 (1988)).

⁵⁴ 49 U.S.C. app. § 1356(a) (1988).

⁵⁵ *Id.*

⁵⁶ *Id.* § 1511(a)(1)-(2).

⁵⁷ Foreign Airport Security Act, Publ. L. No. 99-83, § 551, 99 Stat. 190, 222 (1985) (signed into law on Aug. 8, 1985 as part of the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83) (amending § 1115 of the Federal Aviation Act of 1958, 49 U.S.C. app. § 1515) (1988).

murdered. The Act mandates FAA assessment of the adequacy of both the security procedures at foreign airports served by U.S. carriers and the security procedures of foreign air carriers flying into United States airports.⁵⁸ If the Secretary of Transportation determines that deficiencies exist in security, the foreign nation is notified and provided with a recommendation of steps necessary to correct the inadequacies in the security procedures.⁵⁹ If that nation fails to implement these recommendations or fails to take other appropriate steps, sanctions may be imposed.⁶⁰

The crash of Pan American World Airways Flight 103 (Flight 103) on December 21, 1988, caused by a terrorist bomb that exploded while the plane was enroute from London's Heathrow Airport to John F. Kennedy Airport in New York, resulted in the death of 258 innocent victims onboard and at least fifteen people on the ground in Lockerbie, Scotland.⁶¹ On August 4, 1989, President George Bush responded to the destruction of Flight 103 through Executive Order 12,686 by creating the President's Commission on Aviation Security and Terrorism (the "Commission").⁶² The Commission's responsibility was to appraise the complete effectiveness of the U.S. civil aviation security system, including reviewing options for

⁵⁸ 49 U.S.C. app. § 1515(a)(1988).

⁵⁹ *Id.* § 1515(d).

⁶⁰ *Id.* § 1515(e). These sanctions include: (1) the mandatory issuance of a travel advisory by the Secretary of State; (2) identifying the non-complying airport by publication in the *Federal Register*; (3) advertising the decision publicly; and (4) including a travel advisory with tickets for flights between the United States and that airport. *Id.* Furthermore, all assistance under the Foreign Assistance Act of 1961 and the Arms Control Act to that country may also be suspended. COUNTER TERRORISM POLICY AND EMBASSY SECURITY IN EASTERN EUROPE, REPORT OF A STUDY MISSION TO EASTERN EUROPE BY THE COMM. ON FOREIGN AFFAIRS, 100th Cong. 2d Sess, at IX (1988).

⁶¹ *N.Y. Bound Jet crashes: 258 Die, Flaming 747 Slams Town in Scotland*, CHI. TRIB., Dec. 22, 1988, at 1; Edward Cody, *Pan Am Jet Crashes in Scotland, Killing at Least 273: Dead Include 38 Syracuse Students, 15 People in Town*, WASH. POST, Dec. 22, 1988, at A1; *Worldwide Hunt Launched for Bombers of Pan Am Jet: Explosion Blamed in Death of 270*, L.A. TIMES, Dec. 28, 1988, at 1; STEVEN EMERSON & BRIAN DUFFY, *THE FALL OF PAN AM 103* (1990).

⁶² Exec. Order No. 12,686.

addressing terrorist threats.⁶³ In its final report delivered on May 15, 1990, the Commission advanced more than sixty recommendations to the President for improving the U.S. civil aviation security program.⁶⁴ Following the filing of the report, Congress enacted the Aviation Security Improvement Act of 1990 (the "Aviation Security Act" or the "Act").⁶⁵ The Aviation Security Act was signed by the President on November 16, 1990 and was designed to enhance civil aviation by providing increased security from terrorism and other criminal acts against passengers of American carriers.⁶⁶

Title I of the Act amends the Federal Aviation Act of 1958 and establishes the position of Director of Intelligence and Security in the Office of the Secretary of Transportation.⁶⁷ The Director's duties and powers include, *inter alia*, the assessment of intelligence information relating to long-term security, and the development of policies, strategies, and plans for handling threats made to airline security.⁶⁸ The Aviation Security Act also commands the FAA to accelerate research and development, requires implementation of new technologies to counteract terrorist threats, and demands stricter guidelines in the hiring practices of the airlines.⁶⁹ For example, section 105(a) of the Aviation Security Act amends Section 316 of the Federal Aviation Act of 1958⁷⁰ by prescribing criteria for the hiring and continued employment of air carrier and airport security personnel.⁷¹ The new standards include minimum training and retraining requirements,

⁶³ *Id.*

⁶⁴ *President's Commission Report*, *supra* note 3, at ii. These recommendations ranged from suggesting new technologies to deal with terrorism to methods to comfort the families of victims of terrorism. *Id.* at 121-25.

⁶⁵ Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990) (codified in assorted sections of 49 U.S.C. App. and 22 U.S.C.).

⁶⁶ 14 C.F.R. §§ 107, 108 (1992).

⁶⁷ 49 U.S.C. app. § 1526 (Supp. II 1990).

⁶⁸ 136 CONG. REC. 16,539 (daily ed. Oct. 23, 1990).

⁶⁹ 49 U.S.C. app. § 1357(d) (Supp. II 1990).

⁷⁰ Pub. L. No. 85-276 (codified at 49 U.S.C. app. § 1357 (Supp. II 1990)).

⁷¹ 14 C.F.R. §§ 107, 108 (1992).

staffing levels, language skills, and a minimum education level.⁷²

III. THE FOURTH AMENDMENT AND AIRPORT SECURITY

A. THE FOURTH AMENDMENT GENERALLY

The Fourth Amendment to the United States Constitution provides:

The rights 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 person or things to be seized.⁷³

The Supreme Court has struggled with the precise meaning of the Fourth Amendment and has even remarked that "[t]he course of true law pertaining to searches and seizures . . . has not- to put it mildly- run smooth."⁷⁴ This confusion, moreover, has extended to Fourth Amendment searches conducted in airports as law enforcement officers attempt to prevent terrorists from creating fear and uncertainty.⁷⁵

Under the Fourth Amendment, only unreasonable searches and seizures are prohibited.⁷⁶ Identifying what is reasonable generally focuses on the totality and nature of

⁷² *Id.* § 108.31.

⁷³ U.S. CONST. amend. IV.

⁷⁴ *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

⁷⁵ In *Florida v. Royer*, 460 U.S. 491 (1983), the Court remarked that:

Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Id. at 506-07.

⁷⁶ *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972). The Supreme Court has stated that a "search" implies an intrusive "quest by an officer of the law." *Hale v. Henkel*, 201 U.S. 43, 76 (1906). A search

the circumstances surrounding the search or seizure.⁷⁷ When air travel is considered, determining reasonableness requires balancing the individual's right to be free of meddlesome searches with the greater societal interest in safe air travel.⁷⁸ This is so because numerous Supreme Court decisions have recognized that the basic purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by gov-

has also been defined as a government intrusion into infringement of an individual's privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978).

A "seizure" within the Fourth Amendment occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The court has further elucidated the seizure test: "In order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the *police conduct* would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 111 S.Ct. 2382, 2389 (1991) (emphasis added).

⁷⁷ *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985) ("What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."); *Scott v. United States*, 436 U.S. 128, 137 (1978) ("[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.").

⁷⁸ *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986). In *United States v. Bell*, 464 F.2d 667 (2d Cir.) *cert. denied*, 409 U.S. 991 (1972), Judge Friendly wrote in an oft-quoted concurring opinion that:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

Id. at 675.

This view, however, must be balanced with the concern that abuse which restrains individual liberties does not occur:

[I]t is the very ubiquitousness of airport security checks that calls for the greatest vigilance on our part. Because these checks touch the lives of so many, because they have become such an accepted part of our existence, they are capable of great abuse. Liberty-the freedom from unwarranted intrusion by government- is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.

United States v. \$124,570 U.S. Currency, 873 F.2d 1240, 1246 (9th Cir. 1989).

ernment officials.”⁷⁹

It is well established that screening an airline passenger and his luggage constitutes a “search” within the context of the Fourth Amendment.⁸⁰ In *Florida v. Royer*⁸¹ the Supreme Court held that a “seizure” occurred in the context of police questioning at an airport when the police asked the defendant to go with them to an interview room while deliberately withholding the defendant’s airline ticket and drivers license during questioning.⁸² The defendant was not able to “decline the officers’ requests”⁸³ for an interview and, thus, the Court recognized that it was neither a sensible nor a realistic option for a “reasonable” traveler to abandon his identification and travel papers.⁸⁴

All arrests and the majority of searches and seizures must be supported by probable cause.⁸⁵ Probable cause exists if facts and circumstances exist within a police officer’s knowledge that would be sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed or is being committed.⁸⁶

Courts have generally held that searches conducted without a warrant supported by probable cause are “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”⁸⁷ Four exceptions to the warrant requirement have been advanced and

⁷⁹ *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

⁸⁰ *Epperson*, 454 F.2d at 770.

⁸¹ 460 U.S. 491 (1983).

⁸² *Id.* at 501-02. “[A]sking for and examining [a detainee’s] ticket and his driver’s license were no doubt permissible in themselves, but when the officers . . . asked him to accompany them to the police room, while retaining his ticket and driver’s license and without indicating in any way that he was free to depart, [the detainee] was effectively seized for the purposes of the Fourth Amendment.” *Id.*

⁸³ *Bostick*, 111 S.Ct. at 2389.

⁸⁴ *Royer*, 460 U.S. at 502.

⁸⁵ *Marron v. United States*, 275 U.S. 192, 196 (1927).

⁸⁶ *Draper v. United States*, 358 U.S. 307, 313 (1959) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

⁸⁷ *Katz v. United States*, 389 U.S. 347, 357 (1967). Some other exceptions not discussed in this comment include:

(1) Searches conducted incident to a lawful arrest. *New York v. Belton*, 453 U.S. 454 (1981); *Chimel v. California*, 395 U.S. 752 (1969).

analogized to justify the constitutionality of airport searches. These four exceptions, each of which will be subsequently discussed, are: (1) the stop-and-frisk search; (2) administrative searches; (3) the border search; and (4) searches based on express or implied consent.

The four theories used to justify airport searches conducted without a warrant or probable cause concern carry-on items only, and are not applicable to checked luggage.⁸⁸ Searches of checked luggage must be made upon probable cause and not as a matter of routine procedure.⁸⁹ A search warrant is required, and unless exigency can be established, based upon the individual facts of each case, a non-consensual search is violative of the Fourth Amendment.⁹⁰ If, however, an x-ray scan detects that a piece of luggage contains something that appears to be either dangerous to the flight, or that cannot be positively identified as benign, the luggage is subject to a full hand search until the object has been determined to be harmless.⁹¹

B. THE TERRY DOCTRINE: STOP-AND-FRISK SEARCHES

The first exception to the search warrant requirement that is used to justify searches at airports, the stop-and-frisk search, was enunciated by the U.S. Supreme Court in *Terry v. Ohio*.⁹²

(2) Inventory searches of a prisoner's personal effects. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

(3) The automobile exception. *Carroll*, 267 U.S. 132.

(4) The plain view doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

(5) The hot pursuit exception. *Warden v. Hayden*, 387 U.S. 294 (1967).

(6) Searches of schoolchildren's possessions at school. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁸⁸ *United States v. Czerwinski*, 484 F.2d 509 (5th Cir. 1973), *cert. denied*, 415 U.S. 902 (1974). "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." *Id.* at 518.

⁸⁹ *United States v. Palazzo*, 488 F.2d 942, 947 (5th Cir. 1974).

⁹⁰ *United States v. Allen*, 349 F. Supp. 749, 752 (N.D. Cal. 1972).

⁹¹ *United States v. Clay*, 638 F.2d 889 (5th Cir. 1981), *cert. denied*, 451 U.S. 917 (1981).

⁹² 392 U.S. 1 (1968). An initial question in any situation involving a stop-and-

Terry held that a police officer, without a search warrant, could stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity is stirring, even if the officer lacks probable cause to arrest.⁹³ A patdown search of a detainee may also be justified under this exception if a police officer has reason to fear that an individual may produce a weapon that would endanger the safety of either the officer or others nearby.⁹⁴ The patdown is limited, however, to the stopped person's outer clothing, for no more is necessary to detect the presence of a weapon that might be available for instantaneous use against the officer.⁹⁵

The narrow constitutional question before the Court in *Terry* was whether it was per se unreasonable for a police officer to seize an individual and subject him to a limited search for a weapon if there was no probable cause for the

frisk search is whether the detainee has been stopped. The questioning of a citizen on the street by a police officer does not necessarily constitute a *Terry* stop: "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16; see also *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)) ("[T]he Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals.'"); *Royer*, 460 U.S. at 497 ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, [or] by asking him if he is willing to answer some questions . . .").

After a law enforcement officer has made a reasonable stop, the government's interest in permitting a frisk is based not on "the prevention or the detection of crime, but rather the protection of the officer making the 'stop'." CHARLES E. MOYLAN, *THE RIGHT OF THE PEOPLE TO BE SECURE: AN EXAMINATION OF THE FOURTH AMENDMENT* 158 (rev. 2d ed. 1979).

⁹³ *Terry*, 392 U.S. at 20. Terms like "reasonable suspicion" and "articulable facts" fall short of providing clear guidance. The essence of these concepts is that, based on the totality of the circumstances, the detaining law enforcement officers have a particularized and objective basis for suspecting criminal activity in order to stop the suspect. In other words, the whole picture must be taken into account. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

⁹⁴ *Terry*, 392 U.S. at 29.

⁹⁵ *Id.* at 26.

arrest.⁹⁶ Although the Court noted that any restraint of a person by a police officer constituted a seizure of the detainee within the meaning of the Fourth Amendment,⁹⁷ it nonetheless affirmed Terry's conviction. The Court rejected the argument that a stop-and-frisk search lies outside the boundaries of those searches subject to Fourth Amendment constraints, reasoning that a stop-and-frisk search involved a restraint, although a lesser restraint than a traditional search.⁹⁸ In reaching its decision, the Court enunciated a new standard, "reasonable suspicion."⁹⁹ Satisfying this new standard requires a minimal level of objective justification.¹⁰⁰

The first case to uphold a *Terry* type frisk of an individual at an airport boarding gate on the grounds of matching the hijacker profile and activating the magnetometer was *United States v. Lopez*.¹⁰¹ Lopez's profile suggested a substantial likelihood that he was a potential hijacker. He was frisked by a Federal Marshal after he activated a magnetometer and then failed to produce identification. The patdown resulted in a discovery of heroin. On review, the

⁹⁶ *Id.* at 15.

⁹⁷ *Id.* at 16.

⁹⁸ *Terry*, 392 U.S. at 30.

⁹⁹ The Court created a balancing test to articulate the reasonable suspicion standard:

In order to assess the reasonableness of [the police officer's] conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionality protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. at 20-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967)) (footnotes omitted).

¹⁰⁰ *Sokolow*, 490 U.S. at 7.

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

court stressed the compelling governmental interest in preventing hijackings and the effectiveness of the search.¹⁰² The court reasoned that the *Terry* standard permits a law enforcement officer to perform a frisk if the officer believes there is a threat to safety; and thus the court upheld the legitimacy of the search.¹⁰³

The *Terry* rationale has also been extended to allow a brief detention of a person's luggage for a limited investigation, in order to quickly confirm or dispel a suspicion of illegality.¹⁰⁴ In *United States v. Place*¹⁰⁵ a traveler at the Miami International Airport aroused the suspicion of law enforcement officers who approached him and requested both a form of identification and his airline ticket. On the basis of statements made by the suspect, the agents seized the passenger's luggage and presented the bags to a trained narcotics detection dog. The dog's reaction indicated the presence of illegal narcotics and the bag was held until a search warrant could be obtained. When the bag was opened, the agents discovered over 1,100 grams of cocaine.

The Supreme Court reasoned that because the seizure of luggage "intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary,"¹⁰⁶ the same standards enunciated in *Terry* to determine the reasonableness of an investigative detention of an individual were applicable to the reasonableness of a limited seizure of an individual's luggage.¹⁰⁷ The Court also made it clear that to comply with *Terry*, the detention of luggage must be brief.¹⁰⁸ While the Court has not specified an outside time limit, it

¹⁰² *Id.* at 1097-98.

¹⁰³ *Id.* at 1098.

¹⁰⁴ *United States v. Place*, 462 U.S. 696, 702 (1983).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 708.

¹⁰⁷ *Id.* at 708-09. The standard involves determining "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

¹⁰⁸ "The brevity of the invasion is an important factor in determining whether

is apparent that detaining luggage for ninety minutes before submitting the bag to a dog sniff test is per se unreasonable;¹⁰⁹ detaining luggage under a *Terry* stop for 20 minutes may be acceptable.¹¹⁰

In *United States v. Ortiz*¹¹¹ the United States District Court for the Central District of California rejected the government's argument that a search of a passengers luggage met the *Terry* requirements when no actual stop of the suspected person occurred, and the suspect's carry-on luggage was not within the suspect's immediate control when the search was conducted.¹¹²

On September 7, 1987, at approximately 11 p.m., passengers Ortiz and Valenzuela approached an American Airlines ticket agent. They informed the agent that they held reservations for a 12:15 a.m. flight to Chicago. The agent issued two one-way tickets, for which Ortiz paid a total of \$970 in cash, and accepted the passengers' two suitcases. During the agent's conversation with the two passengers, she noticed that Valenzuela acted extremely anxious and looked nervously at her and the two suitcases. The agent believed that Ortiz and Valenzuela fit the behavioral profile employed to identify potential hijackers. Believing that the bags might contain a bomb or other type of material capable of endangering the safety of the flight, the ticket agent carried the bags to a back room where she could privately open them without being seen by the two passengers. The agent placed the two suitcases on an X-ray machine and observed that the contents of the first suitcase included two black squares and that the interior of the second suitcase appeared as a mass of gray with a black area in the center of the suitcase. The ticket agent opened the bags, discovering marijuana in the first suitcase, and a white powdery substance, later determined

the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *Place*, 462 U.S. at 709.

¹⁰⁹ *Id.* at 710.

¹¹⁰ *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

¹¹¹ 714 F. Supp. 1569 (C.D. Cal. 1989).

¹¹² *Id.* at 1575.

to be cocaine, in the second piece of luggage. Ortiz and Valenzuela were subsequently arrested.

The government argued that the *Terry* stop-and-frisk approach should be expanded in *Ortiz* in two respects. First, no actual stop of the suspected passengers should be required before a search of the suitcases began; and second, the search should not be limited to either the suspects outer clothing or the luggage which the suspects retained dominion over, but should also extend to any container affiliated with the passengers.¹¹³

The court began its analysis by noting that while some courts had upheld a limited detention of a passenger and his carry-on luggage to resolve questionable behavior, in each of these cases, the police officers had stopped the individual and searched only the carry-on luggage within the passenger's immediate control.¹¹⁴ The court opined that assuming *arguendo* that *Terry* could be expanded to meet the government's request, a balancing of governmental interests justifying the inspection was to be weighed against the invasion which the search entailed.¹¹⁵ While the court described the general governmental interests in protecting passengers from hijacking, the pertinent inquiry, according to the court, was what were the specific governmental concerns with respect to the first suitcase that justified its intrusion and search.¹¹⁶ The government maintained that these concerns were based on: (1) Ortiz and Valenzuela purchasing their tickets at "the last minute"; (2) the fact that the tickets were for one-way travel; (3) the tickets were paid in full in cash; and (4) the peculiar behavior of the two passengers.

Even after examining all of the factors taken together which led to the ticket agent's reasonable suspicion that a threat to passenger safety existed, the court nevertheless

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *United States v. Homburg*, 546 F.2d 1350, 1352-54 (9th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977)).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

held that these were insufficient to meet the *Terry* standard because they “ ‘describe a very large category of presumably innocent travelers.’ ”¹¹⁷ It appears that the court based its holding on the belief, in part, that the ticket agent had other options available to her which she failed to utilize. The court noted, for example, that it would have been reasonable for the agent to instruct Ortiz and Valenzuela to carry their luggage to the departure gate for checking, thus forcing them to either undergo a magnetometer search in which they would have impliedly consented to a search,¹¹⁸ or forego travelling altogether.¹¹⁹ The ticket agent could have also: (1) asked Ortiz and Valenzuela for photo identification to match their names with those on the tickets; (2) conducted a hand search of the checked luggage; (3) waited until Ortiz and Valenzuela had boarded the aircraft before putting their luggage on board or; (4) summoned a police officer who would then have the choice of either requesting consent to search the suitcases or securing a search warrant if the officer believed that sufficient evidence existed to indicate the likely presence of a bomb.¹²⁰ These options, the court held, were simply an application of the Fourth Amendment requirement that the search be no more intrusive than necessary.¹²¹

Some courts have argued that the *Terry* doctrine has little, if any, application today to airport searches unless specific articulable facts can establish that reasonable

¹¹⁷ *Id.* (citing *Reid v. Georgia*, 448 U.S. 438, 441 (1980)). The court remarked that:

[p]urchasing tickets which have already been reserved about one hour and fifteen minutes before the flight is not unusual. Neither are the facts that the tickets were for one-way travel or that one of the passengers was nervous before the flight. While most travelers probably do not pay for their tickets in cash, this fact even in conjunction with the others, does not establish reasonable suspicion to believe that Defendants were hijackers.

Id. at 1575-76.

¹¹⁸ See *supra* notes 46-51 and accompanying text.

¹¹⁹ *Ortiz*, 714 F. Supp. at 1576.

¹²⁰ *Id.* at 1577.

¹²¹ *Id.*

cause exists to believe that an individual is armed and about to commit a crime.¹²² This does not necessarily mean, however, that *Terry* is never relevant when assessing a search occurring at an airport.¹²³

In *United States v. Dalpiaz*¹²⁴ for example, the Sixth Circuit noted that a person who successfully passed the screening process may nonetheless, based on facts gathered during that process, present a significant risk if he is allowed to board a commercial aircraft without further investigation.¹²⁵ If a law enforcement officer justifiably believes that an individual whom he is investigating at close range is armed and dangerous, "it would appear to be clearly unreasonable to deny the officer the power to take necessary measures . . . to neutralize the threat of physical harm."¹²⁶ *Terry* does not require that an officer have actual certainty that a suspect is armed.¹²⁷ All that is re-

¹²² For example, in *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), the court held that a *Terry* approach was inapposite because the agent conducting the search did not have a particular interest in the passenger as an individual. "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." *Id.* at 907-908.

¹²³ *LaFAVE*, *supra* note 47, § 10.6(f); see *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977). In *Homburg*, a *Terry* search was applied when security officers observed a rectangular bulge in the front part of the defendant's pants which he attempted to conceal with his suitcase. When the defendant later left a restroom, the bulge was gone and he was carrying his suitcase normally. Based on *Terry*, the court determined that the government interest justified the search and balanced the government interest against the invasion which the search entailed. *Id.* at 1353; see also *United States v. Fern*, 484 F.2d 666 (7th Cir. 1973); *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).

¹²⁴ 494 F.2d 374 (6th Cir. 1974).

¹²⁵ *Id.* at 377-78. When the defendant in *Dalpiaz* reached the security checkpoint, he handed a security agent a case which contained a gun. After activating a magnetometer, he was asked to remove all metal objects. Again activating the alarm a second and third time, a search conducted on the defendant revealed a walkie-talkie, a hunting knife, six bullets taped together, and an alarm clock. After the defendant had been cleared to the boarding gate, a police officer asked the defendant to empty his pockets, producing a projectile simulator which contained printed instructions stating that if the projectile exploded in close proximity to humans, it was extremely dangerous. *Id.* at 375.

¹²⁶ *Terry*, 392 U.S. at 24.

¹²⁷ *Dalpiaz*, 494 F.2d at 378.

quired is that a prudent person believes that he, or others, are in danger.¹²⁸

C. ADMINISTRATIVE SEARCH

A second approach taken to justify airport searches is the administrative search. The Supreme Court has addressed searches conducted for purposes other than criminal law enforcement that might invade areas protected by the Fourth Amendment. In 1967, the Supreme Court enunciated the administrative search doctrine in a pair of companion cases: *Camara v. Municipal Court*¹²⁹ and *See v. City of Seattle*.¹³⁰ In *Camara*, the Court reasoned that an administrative search was permissible under the Fourth Amendment "by balancing the need to search against the invasion which the search entails."¹³¹ In articulating the new administrative search doctrine, the Court redefined the traditional probable cause standard. Individualized suspicion was replaced with a more expansive concept of reasonableness, cast in the form of a balancing test.¹³² This reasonableness "must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it."¹³³ Administrative searches generally satisfy the Fourth Amendment's reasonableness requirements because the searches are not personal in nature, are not directed toward discovering evidence of a crime,¹³⁴ and thus involve a relatively limited invasion of privacy.¹³⁵

Airport security screenings have consistently been upheld as a consensual regulatory search to further an administratively directed program whose goal is to ensure

¹²⁸ *Id.*

¹²⁹ 387 U.S. 523 (1967).

¹³⁰ 387 U.S. 541 (1967).

¹³¹ *Camara*, 387 U.S. at 537.

¹³² *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973).

¹³³ *Id.* at 908.

¹³⁴ *Id.*

¹³⁵ *Camara*, 387 U.S. at 537.

air safety.¹³⁶ In the seminal case of *United States v. Davis*¹³⁷ the Ninth Circuit Court of Appeals approved warrantless airport security checks of all passengers and their carry-on luggage as administrative searches.¹³⁸ According to the court, administrative searches are constitutionally permissible without a warrant if the intrusion is consistent with satisfying the administrative need.¹³⁹ A warrantless administrative search is also legitimate when requiring a search warrant would frustrate the governmental purpose behind the search.¹⁴⁰

The administrative search, however, does not extend to checked luggage. The FAA has mandated that commercial air carriers confront only the hijacking risk posed by checked luggage on a passenger-by-passenger basis.

¹³⁶ See, e.g., *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240 (9th Cir. 1989); *United States v. Herzbrun*, 723 F.2d 773 (11th Cir. 1984); *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

¹³⁷ 482 F.2d 893 (9th Cir. 1973).

¹³⁸ *Id.* at 908.

Screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.

Id.

For cases where nonconsensual warrantless searches without individualized suspicion or probable cause have been constitutionally upheld in furtherance of a regulatory program designed to advance a government policy, see *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding warrantless drug testing of employees of the U.S. Customs Service seeking either transfers or promotions to sensitive positions); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989) (upholding safety regulations of the Federal Railroad Administration for alcohol and drug testing, without either a warrant or individualized suspicion of any worker involved in a train accident which resulted in property damage, injury, or death); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding stopping motorists at border patrol checkpoints for questioning concerning residence status); *United States v. Biswell*, 406 U.S. 311 (1972) (upholding warrantless and routine check of firearm dealer's storeroom, pursuant to procedures authorized by Gun Control Act of 1968); *Wyman v. James*, 400 U.S. 309 (1971) (upholding scheduled home visit by caseworker under State Aid to Families With Dependent Children Program).

¹³⁹ *Davis*, 482 F.2d at 910.

¹⁴⁰ *Biswell*, 406 U.S. at 316.

When a passenger meets the hijacker profile, airlines can satisfy the FAA requirement by demanding photo identification to match the passenger to his ticket and luggage stubs, by loading the luggage on the aircraft after the suspect has already boarded, or by inspecting the luggage. Thus, because a search of checked luggage is triggered by individual suspicion, it cannot be rationalized as an administrative search.¹⁴¹

Administrative searches are to be utilized only for the specific regulatory purposes for which they were contemplated.¹⁴² If used for purposes outside the administrative scheme, they may fall beyond the rationale which justified their approval. Legitimate fear exists that screening passengers and their carry-on luggage for weapons or explosives might be subverted into a general search for evidence of crime, thus providing law enforcement officers with a mechanism to circumvent the customary guidelines of the Fourth Amendment.¹⁴³ The *Davis* court noted that if this were to occur, a court would have to exclude the evidence.¹⁴⁴ Nevertheless, the court in *Davis* maintained that the governmental interest in assuring air safety was compelling and outweighed the competing privacy interests of travelers.¹⁴⁵

*United States v. \$124,570 U.S. Currency*¹⁴⁶ provides an illustration of an administrative search that exceeded its limited purpose.¹⁴⁷ *U.S. Currency* involved the United States Customs Service officials' policy at the Seattle airport under which Customs would pay a \$250 reward to any baggage screener who discovered and reported any

¹⁴¹ *Davis*, 482 F.2d at 910.

¹⁴² *Id.* at 910-11.

¹⁴³ *Abel v. United States*, 362 U.S. 217, 230 (1960).

¹⁴⁴ *Davis*, 482 F.2d at 909. However, in *Abel*, the Supreme Court stated that when conducting a justified administrative search, if an officer uncovers contraband completely unrelated to the purpose for which the administrative search was conducted, that contraband *can* be used against the defendant in court. *Abel*, 362 U.S. at 241.

¹⁴⁵ *Davis*, 482 F.2d at 910.

¹⁴⁶ 873 F.2d 1240 (9th Cir. 1989).

¹⁴⁷ *Id.* at 1245.

sum of U.S. currency exceeding \$10,000.¹⁴⁸ During a routine screening, a security officer discovered \$130,000 in cash in a passenger's briefcase and promptly notified Customs agents who paid the officer for the tip. Later, after the passenger had deplaned and retrieved his luggage in Los Angeles, Drug Enforcement Administration (DEA) agents stopped the passenger and detained his suitcase. While no formal arrest was made, the DEA made it known to the passenger that should he refuse to open his briefcase, the agents would attempt to obtain a search warrant. The passenger opened the briefcase, revealing bundles of currency in various denominations and a substantial quantity of cigarette rolling papers.¹⁴⁹ The agents kept the currency and returned the papers after photocopying them.

The court noted that the officers had very broad discretion in determining the extent of their search for weapons or explosives.¹⁵⁰ If, while searching, the officers have only one objective, such as detecting firearms, an administrative search is appropriate, and a court will defer to the officer's judgment since an officer's only motive to open a package is the belief that it contained something potentially hazardous.¹⁵¹ In this case, however, the court held that because the officers had a dual purpose in searching passengers both searching for explosives and for large amounts of currency, the searches were more intrusive than necessary.¹⁵² The searches would have been accepta-

¹⁴⁸ 21 U.S.C. § 881(a)(6) (1988) governing civil forfeitures. It provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance.

Id.

¹⁴⁹ The next day Smoky, a narcotics-detecting dog, was used to test the currency for the odor of illicit drugs. Smoky's reaction indicated that cocaine, heroin, or marijuana had come in contact with the bills. *\$124,570 U.S. Currency*, 873 F.2d at 1242.

¹⁵⁰ *Id.* at 1245.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1247. A dual search "effectively transforms a limited check for weap-

ble if they had focused on air safety alone.¹⁵³ Airport x-ray searches thus constitute an administrative exception to the warrant requirement only if the search is conducted to further a compelling administrative purpose, such as preventing weapons and other dangerous items from being smuggled onto aircrafts.¹⁵⁴

As noted, ensuring that criminal investigations are not based upon the findings of an administrative search is a great concern.¹⁵⁵ When a court approves a warrantless administrative search, it is, in effect, granting approval for a search of an entire class of similar situations.¹⁵⁶ Thus, courts must often examine the legislative history and facts applicable to an entire class of cases, not simply those adjudicative facts which are applicable solely to those cases before the court.¹⁵⁷ Courts must then rely on the legislative intent to determine that the intrusion serves a "narrow but compelling administrative objective."¹⁵⁸

The Colorado Supreme Court recently decided a case that is typical of the approach taken today of airport searches pursuant to administrative and regulatory programs. In *People v. Heime*¹⁵⁹ Heime was charged with unlawful possession of illegal drugs seized during a warrantless search of a small bag at the Colorado Springs Municipal Airport. Heime presented himself at a clearly marked checkpoint station for security screening. The se-

ons and explosives into a general search for evidence of crime. This substantially erodes the privacy rights of passengers who travel through the system. . . . A limited administrative search cannot . . . serve unrelated law enforcement purposes." *Id.*

¹⁵³ *Davis*, 482 F.2d at 910.

¹⁵⁴ *Id.*

¹⁵⁵ *Abel*, 362 U.S. at 229. According to *Abel*, the evidence derived through a search based on an administrative warrant for deportation is admissible, but the Supreme Court noted that its opinion would have been different if "the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding." *Id.* at 230.

¹⁵⁶ \$124,570 U.S. Currency, 873 F.2d at 1244.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 812 P.2d 1177 (Colo. 1991).

curity program at the airport required that all potential passengers present themselves at a checkpoint and pass through a magnetometer to gain access to the sterile area of the airport. Although Heibel passed through the magnetometer without activating the signal, the security agent attempted, unsuccessfully, to inspect a small carry-on bag that the defendant had strapped around his waist. After refusing to be searched, Heibel withdrew to a nearby waiting room. When a police officer approached Heibel, the officer noted that he was acting nervous and was pacing. The officer informed Heibel that he had to check the defendant for a weapon, and after taking Heibel back to the airport security office, the officer conducted a search of the bag, discovering eight clear bags of dried mushrooms.¹⁶⁰

The trial court ruled that there was no probable cause for the search of the bag, and the most that the officer could do was to feel the outside of the bag for a weapon, in order to ensure his safety during the temporary detention.¹⁶¹ The court distinguished previous airport security search cases by maintaining that those searches involved individuals who were attempting to board an airplane, while in Heibel's case, he had already voluntarily left the sterile area of the airport and could not have possibly smuggled a weapon onto an airplane.¹⁶²

The Colorado Supreme Court initially determined that the search was part of an administrative regulatory approach in furtherance of a program directed at preventing air piracy and ensuring the safety of the travelling public, and thus found that the nonconsensual warrantless search was constitutional.¹⁶³ The court stressed the need for flexibility for airport security personnel in their effort to determine whether someone who has presented himself at

¹⁶⁰ A field test and laboratory analysis of the mushrooms proved positive for psilocybin, a schedule I controlled substance. *Id.* at 1179-80.

¹⁶¹ *Id.* at 1180.

¹⁶² *Id.*

¹⁶³ *Id.*

a checkpoint is carrying a weapon or explosive substance.¹⁶⁴ Physical searches of carry-on items are, therefore, appropriate when the "purpose of the search is to allay any apprehension of a security risk occasioned by the inconclusive nature of other screening procedures."¹⁶⁵ This is true even when the search is conducted outside of the sterile area, and after the individual has presented himself for inspection.¹⁶⁶

A potentially disturbing extension of the administrative search doctrine developed in *United States v. Maldonado-Espinosa*.¹⁶⁷ In *Maldonado-Espinosa*, the U.S. District Court for Puerto Rico announced, in dicta, that if an administrative search program was already currently in place and sanctioned by the courts as being necessary, then it was the "heartfelt conviction of this court that . . . the lowering of privacy expectations resultant from that procedure should justify general, non administrative searches of persons and personal effects already subject to the administrative search."¹⁶⁸ The court reasoned that when most people pack their bags for a flight, they expect that their

¹⁶⁴ *Heimel*, 812 P.2d at 1181.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* See also *United States v. Lopez-Pages*, 767 F.2d 776, 778-80 (11th Cir. 1985); *United States v. Herzbrun*, 723 F.2d 773, 777-78 (11th Cir. 1984).

¹⁶⁷ 767 F. Supp. 1176 (D. P.R. 1991), *aff'd*, 968 F.2d 101 (1st Cir. 1992), *petition for cert. filed*, 61 U.S. L.W. 3491 (U.S. Jan. 6, 1993). In *Maldonado-Espinosa*, after a warrantless search, a brother and sister were charged with possession with intent to distribute sixty kilograms of cocaine discovered in two hard-shell suitcases which they checked aboard an American Airlines flight from San Juan, Puerto Rico to Miami.

The search was triggered by a dog sniff of the defendants' luggage. While a passenger possesses a privacy interest in personal luggage, to a trained narcotics dog has been held not to constitute a "search" within the meaning of the Fourth Amendment. *Sokolow*, 490 U.S. at 8; see also *United States v. Jacobsen*, 466 U.S. 109 (1984) (affirming *Place* holding that a dog sniff is not a search); *United States v. Germonsen-Garcia*, 712 F. Supp. 862 (D. Kan. 1989) (holding that canine sniff of luggage at airport was not a search); *United States v. Rodriguez-Morales*, 929 F.2d 780 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 868 (1992) (concluding that a dog sniff of automobile was not a search); *United States v. La France*, 879 F.2d 1 (1st Cir. 1989) (holding that a canine sniff of Federal Express Package does not constitute a search).

¹⁶⁸ *Maldonado-Espinosa*, 767 F. Supp. at 1187.

bags may be opened to public view once at the airport.¹⁶⁹ It appeared to the court:

pure abstraction to assert that a person retains a 'privacy interest' in a bag as to one type of search, but not another. Once the interior of luggage must be opened to scrutiny for the administrative purpose, the privacy interest in the contents as therein packed seems to us irrevocably lost.¹⁷⁰

While the court did not advocate the position that positive evidence of a crime derived from a warrantless x-ray would justify a complete warrantless search, it did maintain that this would constitute the probable cause necessary to hold the luggage and obtain a warrant.¹⁷¹ If courts were able to carefully monitor areas where administrative searches were applied, and were also certain that the police did not abuse their discretion, then the areas in which administrative searches lowered privacy interests would not expand.¹⁷² Privacy expectations, "once lowered by legitimately required administrative searches, [would] not suddenly regain because a new searcher approach[ed] the luggage with a different purpose."¹⁷³

D. BORDER SEARCHES

The third exception to the warrant requirement is the border search. At the nation's border, all that is required to justify a search for purposes of customs law enforcement is unsupported, or mere, suspicion.¹⁷⁴ Routine searches, moreover, are not subject to any requirement of reasonable suspicion or probable cause.¹⁷⁵ Numerous courts have maintained that airports are "critical zones"

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Maldonado-Espinosa*, 767 F. Supp. at 1188.

¹⁷³ *Id.*

¹⁷⁴ *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). For example, automobile travelers may be stopped at fixed checkpoints near a border without individualized suspicion, even if the stop is based predominantly on ethnicity. *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

¹⁷⁵ *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985).

based on their special character, and are thus analogous to national borders.¹⁷⁶

Since 1789, custom officials have had the authority to conduct warrantless searches without probable cause.¹⁷⁷ This authority was based on the need to regulate the collection of duties and to prevent contraband from being brought into the Republic.¹⁷⁸ Routine border searches have also had a lengthy history of judicial acceptance. In 1886, the Supreme Court held that because the border search exception was passed by the first Congress and preceded the Bill of Rights by two months, border searches were not intended to be included within the prohibition of the Fourth Amendment.¹⁷⁹

Courts have upheld airport searches by analogizing them to border searches, determining that the objective in each case is the discovery of contraband rather than the detection of past criminal activity.¹⁸⁰ The Supreme Court has noted that not only is the expectation of privacy less at

¹⁷⁶ *United States v. Moreno*, 475 F.2d 44, 51 (5th Cir.), cert. denied, 414 U.S. 840 (1973). In *Moreno*, the court stated why it considered airport boarding areas similar to national borders:

[Boarding areas are] the one channel through which all hijackers must pass before being in a position to commit their crime. It is also the one point where airport security officials can marshal their resources to thwart such acts before the lives of an airplane's passengers and crew are endangered.

Id. at 51; see also *United States v. Lopez-Pages*, 767 F.2d 776, 778 (11th Cir. 1985); *United States v. Herzbrun*, 723 F.2d 773, 775 (11th Cir. 1984).

¹⁷⁷ Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43.

¹⁷⁸ *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977). For a general discussion of border searches, see Judith B. Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329 (1973); Gary C. Robb, *Warrantless Border Searches: Crossing the Boundary of Unreasonableness*, 19 S. TEXAS L.J. 265 (1978); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

¹⁷⁹ "[I]t is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and that they are not embraced within the prohibition of the [Fourth] Amendment." *Boyd v. United States*, 116 U.S. 616, 623 (1886); see also *United States v. Ramsey*, 431 U.S. 606, 619 (concluding that the "longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself").

¹⁸⁰ McGinley & Down, *supra* note 38, at 323 n.196. (quoting Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1050-51 (1971)).

the border than it is in the interior of the country,¹⁸¹ but the Fourth Amendment balance between the competing interests of the government and the privacy rights of individuals is struck more favorably toward the government at the border.¹⁸² However, this does not mean that the potential for abuse of individual liberty does not exist.¹⁸³

In *United States v. Skipwith*¹⁸⁴ the Fifth Circuit addressed the question of whether an airport security search conducted at the boarding gate violated a passenger's Fourth Amendment rights. Skipwith appeared at his boarding gate at the airport, and because he met the FAA anti-skyjacking profile and claimed that he was not carrying any form of identification, a deputy United States marshal detained him for questioning. While questioning Skipwith, the marshal inquired whether a billfold-shaped bulge in Skipwith's left rear pocket was caused by a wallet, and if so, whether the wallet contained any identification. Immediately thereafter, Skipwith admitted that his name was different than the name he originally gave to the marshal. Skipwith was escorted to a private airport security office and on the way to the office, another deputy marshal noticed a bulge in the Skipwith's front trouser pocket which he believed was a gun. Once in the office, the security officers required Skipwith to empty his pockets, revealing cocaine.

The *Skipwith* court held that in order to determine the reasonableness of a search, courts must weigh more than the necessity of the search in relation to potential harm to the public.¹⁸⁵ The effectiveness of the search procedure in averting potential harm must be balanced with the "degree and nature of intrusion into the privacy of the person

¹⁸¹ *Carroll v. United States*, 267 U.S. 132, 154 (1925).

¹⁸² *Montoya de Hernandez*, 473 U.S. at 540.

¹⁸³ "Many border searches carry grave potential for 'arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *Id.* at 556 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

¹⁸⁴ 482 F.2d 1272 (5th Cir. 1973).

¹⁸⁵ *Id.* at 1275.

and effects of the citizen which the search entails.”¹⁸⁶ The court concluded that the standard for initiating a search of a person at the boarding gate should not be more stringent than the standard applied in border crossing situations.¹⁸⁷ Individuals who present themselves for boarding on an air carrier are similar to those seeking entrance into the country, and therefore are subject to a search based on mere, or unsupported suspicion.¹⁸⁸ Thus, reasonableness does not require that law enforcement officers search only those passengers who appear nervous or suspicious or meet a hijacker’s profile.

Within the border search exception for searches conducted at airports, courts have distinguished between searches conducted in secured boarding areas and those searches taking place in undefined remote zones in airports.¹⁸⁹ When a passenger enters a restricted zone at an airport, such as the boarding gate area, that passenger may be stopped and searched if there is a mere suspicion of possible illegal activity.¹⁹⁰ If, however, an individual is in the general airport area and has not consented to being searched, a case-by-case application of the reasonableness standard is utilized and police officers must have reasonable suspicion that the law is being violated before engaging in a search.¹⁹¹ This distinction attempts to protect the travelling public by assuring that the “net can sweep no wider than necessary since the broad right to search is limited to the last possible point in time and space which

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1276.

¹⁸⁸ “[T]he standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations.” *Id.* For other cases where the courts have adopted the view that airports are similar to border crossings and, therefore, different for Fourth Amendment purposes, see *United States v. Lopez-Pages*, 767 F.2d 776 (11th Cir. 1985); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985); *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973); *United States v. Legato*, 480 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973); *United States v. Moreno*, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973).

¹⁸⁹ *Skipworth*, 482 F.2d at 1276.

¹⁹⁰ *United States v. Thompson*, 475 F.2d 1359, 1362 (5th Cir. 1973).

¹⁹¹ *Moreno*, 475 F.2d at 51.

could protect the aircraft, the boarding gate.”¹⁹²

A unique argument proffered by the government in *Maldonado-Espinosa* was that a warrantless airport search could be justified in the context of a “checkpoint” examination at border crossings. Under this approach, a border patrol maintains a permanent checkpoint on roads and bridges leading from the border at which a vehicle may be detained and briefly questioned. Custom officials may stop a car even if they do not have a legitimate reason to believe that the vehicle contains illegal aliens.¹⁹³ Checkpoint searches, additionally, do not require showing that a person or luggage actually has crossed the border.¹⁹⁴

The court in *Maldonado-Espinosa*, however, rejected the government’s argument, proclaiming instead that a permissible search and seizure is more restricted in a checkpoint situation than in other border cases.¹⁹⁵ The only right the checkpoint approach gives the border patrol is the “right to make stops and inquiries without any particularized suspicion at a point away from the border where they would ordinarily be prevented from doing so.”¹⁹⁶

It is clear from *Maldonado-Espinosa* that while the checkpoint rationale admirably serves as a justification for a general screening for border purposes even without a suspicion that there was an illegal border crossing, the checkpoint theory cannot justify a warrantless luggage search in an airport. This reasoning is generally sound. If probable cause to search exists based on the outcome of stopping a traveler and his luggage in an airport, the custom official is in the same position as if probable cause had come about during a standard highway violation stop elsewhere in the interior of the country.¹⁹⁷

¹⁹² *Skipworth*, 483 F.2d at 1276-77.

¹⁹³ *United States v. Villamonte-Marquez*, 462 U.S. 579, 587 (1983).

¹⁹⁴ *Jasinski v. Adams*, 781 F.2d 843, 847 (11th Cir. 1986).

¹⁹⁵ *Maldonado-Espinosa*, 767 F. Supp. at 1183.

¹⁹⁶ *Id.*

¹⁹⁷ See *California v. Acevedo*, 111 S.Ct. 1982 (1991) (holding that police officers who attempt to search luggage in an airport cannot rely on the exigent circumstance exception to the warrant requirement for an automobile search).

E. EXPRESS AND IMPLIED CONSENT

The final exception to the warrant requirement advanced by many courts considering the constitutionality of airport searches is a search based on either express or implied consent. An airport security search may be justified since Fourth Amendment rights are waivable by consent provided that the individual's consent is freely and voluntarily given, and not the result of coercion or duress, actual or implied.¹⁹⁸ Efforts to obtain an individual's consent are most common when probable cause is nonexistent and thus a search warrant could not be obtained.¹⁹⁹

Before the United States Supreme Court decision in *Schneckloth v. Bustamonte*,²⁰⁰ consent was judged as a waiver of a known right or was simply viewed as an inquiry of voluntariness.²⁰¹ In *Schneckloth*, the Court held that the question of whether consent was freely and voluntarily given was to be determined from the totality of the circumstances.²⁰² In determining voluntariness, "two competing concerns must be accommodated . . . the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."²⁰³ Subtly coercive police interrogations and the vulnerable state of those individuals who consent to a search are factors to consider in determining whether consent was voluntarily given.²⁰⁴

¹⁹⁸ *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

¹⁹⁹ LAFAVE, *supra* note 47, § 8.1.

²⁰⁰ 412 U.S. 218 (1973). In *Schneckloth*, an officer stopped a car because one of its headlights and license plate light were burned out. After it was determined by the officer that the driver had no license and that only one of the five passengers had identification, the officer asked the passenger whose brother owned the car for permission to search the automobile. The passenger gave permission, and during the search, three checks that had been stolen from a car wash were discovered wadded up under the left rear seat. The checks became evidence and the passenger was convicted. *Id.* at 220.

²⁰¹ See LAFAVE, *supra* note 47, § 8.1(a) for an in-depth discussion of the differences between waiver and voluntariness.

²⁰² *Schneckloth*, 412 U.S. at 227.

²⁰³ *Id.*

²⁰⁴ *Id.* at 229.

In *United States v. Davis*²⁰⁵ the Ninth Circuit held that a pre-boarding search was not unlawful if there was implied consent, the search was reasonable, and the passenger had the right to leave the boarding area without being subject to the search.²⁰⁶ A passenger impliedly consents to a search by electing to proceed to the boarding gate, a place at which that passenger knows or should know that he is subject to being searched.²⁰⁷

The Ninth Circuit responded to the proliferation of air piracy and terrorism which grew after the *Davis* decision. In *United States v. Pulido-Baquerizo*,²⁰⁸ the court held that when a passenger places his luggage on an x-ray machine's conveyor belt at a secured boarding area for the purpose of travelling, that person has impliedly consented to both a visual inspection and a limited hand search of the luggage if the x-ray did not positively determine that the luggage did not contain a weapon. Given the slight privacy intrusion and the negligible social stigma arising from the manner in which such a search is conducted, the court reasoned that a free society was willing to tolerate these searches, provided that they were not conducted "in order to uncover other types of contraband."²⁰⁹

The *Pulido* court also addressed the *Davis* requirement of allowing a passenger to avoid a search by choosing not to fly.²¹⁰ The court held that a rule which allowed a passenger to leave the boarding area after an x-ray scan was

²⁰⁵ 482 F.2d 893 (9th Cir. 1973).

²⁰⁶ *Id.* at 912-914.

²⁰⁷ *Skipwith*, 482 F.2d at 1276-77.

²⁰⁸ 800 F.2d 899 (9th Cir. 1986). *Pulido-Baquerizo* involved a defendant who placed two briefcases onto an x-ray machine's conveyor belt. A security agent believed that a dark object in one of the briefcases might be a bomb. After a second agent thought that he spotted wires which might indicate a bomb or other explosive device, the agents decided to run the briefcase through the x-ray machine a second time. After the second x-ray failed to identify the object, a visual inspection and hand search uncovered over 2,100 grams of cocaine. *Id.* at 900-01.

²⁰⁹ *Id.* at 902.

²¹⁰ *Id.* The court relied on *United States v. DeAngelo*, 584 F.2d 46, 47-48 (4th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979), for the proposition that allowing a

inconclusive would, in effect, encourage airline terrorism and air piracy by providing a secure exit when detection was threatened.²¹¹ Thus, if a passenger does not wish to be searched, he must choose not to fly before he places his luggage on a x-ray machine's conveyor belt.²¹²

If an airline passenger believes that law enforcement officers are prepared to discover illegal contraband stashed in his suitcase, he might attempt to abandon or disclaim ownership of the bag.²¹³ An issue then would arise whether his disclaimer of ownership of the luggage divests him from any Fourth Amendment protection of privacy interest and whether that disclaimer constitutes his consent to a warrantless search.

In *United States v. Miller*²¹⁴ DEA agents seized four pieces of luggage from the defendant's car and asked him for his consent to a search of the luggage. The defendant denied both ownership and knowledge of the suitcases. While maintaining that he was not the owner of one of the bags, the defendant did agree to open a locked bag, revealing drugs. The court held that the disclaimer of ownership of the suitcase coupled with the unlocking of the suitcase constituted consent-in-fact to a search.²¹⁵

The abandonment issue has been extended to airport searches. The Sixth Circuit Court of Appeals, for example, determined in *United States v. Tolbert*²¹⁶ that a woman

defendant to remove his luggage when an x-ray raised suspicion would frustrate the government's attempt to combat terrorism. *Pulido-Bacquerizo*, 800 F.2d at 902.

²¹¹ *Pulido-Bacquerizo*, 800 F.2d at 902.

²¹² *Id.* A potential passenger who has not consented to a search has the right to refuse an airport security search by leaving a checkpoint area at any time prior to the commencement of the screening process. *Bostick*, 111 S.Ct. at 2387-88.

²¹³ The term "abandon" here does not refer to its traditional definition in property law. Abandonment in this context involves the Fourth Amendment and the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

²¹⁴ 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

²¹⁵ *Id.* at 1131. The First Circuit explained that "one who disclaims any interest in luggage thereby disclaims any concern about whether or not the contents of the luggage remain private." *Id.*

²¹⁶ 692 F.2d 1041 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983).

who had purchased her ticket with cash only twenty minutes prior to takeoff, who was traveling under an assumed name, who insisted that she was travelling without luggage, and who specifically denied ownership of a bag could not assert that she "‘exhibited an actual (subjective) expectation of privacy’ respecting the luggage."²¹⁷ Based on her actions and vigorous oral disclaimers, the court maintained that the defendant had no interest in preserving the secrecy of the contents of her luggage and had no legitimate expectation of privacy.²¹⁸ Thus, a warrantless search did not violate her Fourth Amendment rights.²¹⁹

IV. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

A. HISTORICAL ASPECTS OF ELECTRONIC SURVEILLANCE

Electronic surveillance can serve as an effective mechanism to prevent the spread of terrorism, including air piracy and other crimes targeted against air carriers. The use of electronic surveillance for security reasons expanded during World War II and continued after the end of fighting in 1945.²²⁰

The Supreme Court first addressed Fourth Amendment concerns raised by wiretapping in *Olmstead v. United States*.²²¹ Despite a sharply divided Court, the five justice majority followed the traditional "trespass" doctrine, maintaining that a physical search of property or home must occur before there was a violation of the Fourth

²¹⁷ *Id.* at 1045 (quoting *United States v. Miller*, 589 F.2d 1117, 1131 (1st Cir. 1978)).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ In 1940, after the Senate rejected a House resolution granting the FBI authority to conduct electronic surveillance for national security purposes, President Roosevelt, acting alone, granted Attorney General Jackson the power to use listening devices when dangerous matters "involving defense of the nation" were involved. Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 798 (1989).

²²¹ 277 U.S. 438 (1928).

Amendment.²²² Forty years later, *Olmstead* was reversed by the Court in *Katz v. United States*.²²³ In *Katz*, FBI agents installed a wiretap on the outside of a public telephone without a warrant to do so. Although there was no physical trespass, the Court stated that "the Fourth Amendment protects people, not places."²²⁴ Fourth Amendment guarantees thus protect against illegal searches and seizures conducted without an actual physical intrusion into one's property.²²⁵ In a famous footnote in *Katz*, the Supreme Court proclaimed that it had no opinion concerning the use of wiretaps for national security purposes.²²⁶

The Supreme Court has never directly addressed the issue of warrantless physical searches or electronic surveillance to collect foreign intelligence information.²²⁷ Prior to the enactment of the Foreign Intelligence Surveillance Act (FISA) in 1978,²²⁸ it was fairly well established by lower courts that a foreign intelligence exception to the Fourth Amendment existed and that the President had the inherent power to conduct warrantless electronic surveillance in the area of foreign intelligence collection.²²⁹ This power constituted an exception to the general

²²² *Id.* at 466.

²²³ 389 U.S. 347 (1967).

²²⁴ *Id.* at 351.

²²⁵ *Id.* at 353.

²²⁶ *Id.* at 358 n.23.

²²⁷ Justice Byron White's concurrence in *Katz* suggested that a warrantless electronic surveillance for national security purposes would be reasonable pursuant to the Fourth Amendment if either the President or the Attorney General authorized the surveillance for security purposes. *Id.* at 364. This view was rejected by Justices William O. Douglas and William Brennan as "a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases in which the Executive Branch itself labels 'national security' matters." *Id.* at 359.

²²⁸ 50 U.S.C. §§ 1801-1811 (1988).

²²⁹ See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied sub. nom.*, *Ivanov v. United States*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). But see *Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1974), *cert. denied*, 425 U.S. 944 (1976).

requirement for a search warrant under the Fourth Amendment.²³⁰

When domestic security concerns are involved, however, the President does not have unrestrained discretion under the Fourth Amendment to decide when surveillance will be initiated.²³¹ In *United States v. United States District Court* (known as the *Keith* case), the Supreme Court held that wiretaps conducted for domestic purposes violated the Fourth Amendment unless prior judicial approval had been obtained before the surveillance was conducted.²³² Under *Keith*, a search warrant is required for domestic intelligence gathering, but the surveillance may be entitled to different and more flexible standards of probable cause due to practical considerations.²³³ The test to ascertain whether a warrant is necessary involves balancing the question of whether the "needs of citizens for privacy and free expression may not be better protected by requiring a warrant" with the issue of "whether a warrant requirement would unduly frustrate the efforts of [the] Government" ²³⁴ Balancing the needs of the

²³⁰ *United States v. Duggan*, 743 F.2d 59, 72 (9th Cir. 1984).

²³¹ *United States v. United States District Court*, 407 U.S. 297, 322-23 (1972).

²³² *Id.* at 322. *Keith* arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property, including the dynamite bombing of a Central Intelligence Agency (CIA) Office in Ann Arbor, Michigan.

The defendants made a pretrial motion for disclosure of electronic surveillance information. The government argued that despite the warrantless nature of the surveillance, they were nonetheless lawful because they constituted a reasonable exercise of presidential power needed to protect national security.

The government based its argument on Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1988), which recognized the constitutionally granted authority of the executive to conduct domestic security surveillance without a warrant. The Court rejected this argument and held that the government's responsibility to safeguard domestic security had to be weighed against the potential for abuse of individual privacy. *Id.* at 322-23. These freedoms can not remain if domestic security surveillance are conducted only within the discretion of the Executive branch without judicial approval. *Id.* at 320.

²³³ *Id.* at 322. "[D]omestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources The exact targets of such surveillance may be more difficult to identify" *Id.*

²³⁴ *Id.* at 315.

government and individual privacy rights, the Court determined in *Keith* that the executive must seek a warrant before it undertakes domestic security surveillance.²³⁵

Against this historical backdrop, Congress enacted FISA to establish guidelines for the utilization of electronic surveillance in acquiring foreign intelligence information which can be applied to prevent the spread of air piracy.²³⁶ FISA was the fifth effort by Congress in the past 20 years to enact guidelines for gathering foreign intelligence via electronic eavesdropping.²³⁷ During the legislative debate, there was great concern that the government's legitimate interest in securing intelligence information did not conflict with an individual's interest in freedom from excessive government intrusion.²³⁸ The congressional goal was to create a stable framework within which the President could conduct legitimate electronic surveillance for foreign intelligence purposes within the context of the nation's commitment to privacy and individual rights.²³⁹

Numerous court decisions have concluded that FISA satisfies the constraints the Fourth Amendment places on foreign intelligence surveillance conducted by the government.²⁴⁰ The Fourth Amendment requirement of probable cause when a surveillance is conducted pursuant to national security concerns is not necessarily analogous to

²³⁵ *Id.* at 320.

²³⁶ *In re Kevork*, 788 F.2d 566, 569 (9th Cir. 1986).

²³⁷ Foreign Intelligence Surveillance Act of 1976, S. 3197, 94th Cong., 2d Sess. (1976); National Security Act of 1975, S. 743, 94th Cong., 1st Sess. (1975); Freedom from Surveillance Act of 1974, S. 4062, 93d Cong. 2d Sess. (1974); Surveillance Practices and Procedures Act of 1973, S. 2820, 93d Cong., 1st Sess. (1973).

²³⁸ S. Rep. No. 604, 95th Cong., 2d Sess. 15, *reprinted* in 1978 U.S.C.C.A.N. 3904, 3916.

²³⁹ S. Rep. No. 701, 95th Cong., 2d Sess. 11, *reprinted* in 1978 U.S.C.C.A.N. 3973, 3979-80. The FISA was meant to take into account "[t]he difference between ordinary criminal investigations to gather evidence of specific crimes and foreign intelligence investigations to uncover and monitor clandestine activities." *Id.* at 3983.

²⁴⁰ *See, e.g.*, *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 72-74 (2d Cir. 1984); *In re Kevork*, 788 F.2d 566, 571 (9th Cir. 1986); *United States v. Megahey*, 553 F. Supp. 1180, 1185-1192 (E.D.N.Y. 1982).

the individualized suspicion standard applied in criminal investigations.²⁴¹ The warrant application may vary depending on the governmental interest to be enforced and the character of citizen rights deserving protection.²⁴² While criminal warrants require probable cause, FISA requires no showing of criminal activity on the part of the suspect, unless the wiretap is directed toward intercepting the communications of a "United States person."²⁴³ In *Keith*, the Supreme Court maintained that the probable cause requirement was to be read against the Fourth Amendment's reasonableness standard.²⁴⁴

FISA allows a federal officer acting on the President's behalf, with the approval of the Attorney General, to obtain from either a judge or a specially created FISA court,²⁴⁵ an order sanctioning electronic surveillance of either a foreign power or an agent of a foreign power for

²⁴¹ *United States v. United States District Court (Keith)*, 407 U.S. 297, 322 (1972). The Court remarked that "[d]ifferent standards [of probable cause] may be compatible with the Fourth Amendment if [it is] reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." *Id.* at 322-23.

²⁴² *Cavanagh*, 807 F.2d at 790.

²⁴³ 50 U.S.C. § 1805(a)(3)(A) (1988). If the target of the wiretap is a United States person, FISA requires a showing of probable cause that the target is engaged in activity which "may involve" a criminal violation. *Id.* § 1801(b)(2)(A)-(B). The government is also required to demonstrate that the person is knowingly engaged in or is aiding a foreign power in terrorist activities or intelligence gathering. *Id.*

²⁴⁴ *Keith*, 407 U.S. at 323.

²⁴⁵ The Foreign Intelligence Surveillance Court (FISC) rules on ex parte *in camera* applications for warrants. The FISC is comprised of seven district court judges from seven different United States judicial circuits who are designated by the Chief Justice of the United States. 50 U.S.C. § 1803(a) (1988). Each judge serves a seven year term with no possibility of reappointment by the Chief Justice. *Id.* All applications to the FISC must first be approved by the Attorney General. *Id.* §§ 1804(a), 1805(a)(2). If a warrant is denied, the government may appeal the decision to the Foreign Intelligence Surveillance Court of Review, comprised of three federal appeals court judges. *Id.* § 1803(b). If the reviewing judge finds that certain conditions, including probable cause to believe that the target of the potential surveillance is either a foreign power, have been met, then the judge will issue a surveillance order. *Id.* § 1804.

One observer described the Foreign Intelligence Surveillance Courts as "most certainly the strangest creation in the history of the federal judiciary." JAMES BAMFORD, *THE PUZZLE PALACE: A REPORT ON AMERICA'S MOST SECRET AGENCY* 368 (1982).

the purpose of obtaining intelligence information.²⁴⁶ The Foreign Intelligence Surveillance Court (FISC) was expressly created by Congress to serve as a counterbalance to the Executive's power to direct electronic foreign intelligence surveillance.²⁴⁷

FISA contains definitions of "foreign power" and "agent of foreign power" that are relevant when discussing the prevention of air piracy on American air carriers or terroristic activities directed against these carriers. FISA defines "foreign power" to include "a group engaged in international terrorism or activities in preparation therefor."²⁴⁸ "Agent of a foreign power" is defined to include any person who either knowingly participates in sabotage or international terrorism,²⁴⁹ or knowingly participates in activities that are in preparation therefor.²⁴⁹ "International terrorism" also includes "violent acts or acts dangerous to human life" that either violate the criminal laws of the United States or would violate criminal laws if these acts were committed within the jurisdictional boundaries of the United States.²⁵⁰ International terrorism further includes any activities that appear to be intended to either "intimidate or coerce the civilian population."²⁵¹ Finally, "foreign intelligence information" relates to information that concerns the ability of the United States government to protect against "acts of international terrorism by a foreign power or an agent of a foreign power."²⁵²

Relying on the wide definitions of "foreign power," "agent of foreign power," and "foreign intelligence," the government can prosecute defendants in United States courts for engaging in hijacking or air terrorism. Thus,

²⁴⁶ 50 U.S.C. § 1802(b) (1988).

²⁴⁷ S. REP. No. 604, 95th Cong., 1st Sess. 3, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3917.

²⁴⁸ 50 U.S.C. § 1801(a)(4) (1988).

²⁴⁹ *Id.* § 1801(b)(2)(C).

²⁵⁰ *Id.* § 1801(c)(1).

²⁵¹ *Id.* § 1801(2).

²⁵² *Id.* § 1801(e)(1)(B).

obtaining a warrant pursuant to FISA would offer another method to investigate suspected hijackers without the traditional constraints of the Fourth Amendment as applied to airport searches.

FISA distinguishes between a "United States person" and a "non-United States person," and affords greater protection under the Act to a United States person.²⁵³ A United States person is either a United States citizen, a permanent resident alien, an unincorporated group composed of a substantial number of citizens or lawfully admitted aliens, or a United States corporation.²⁵⁴ A United States person can be an agent of a foreign power if he participates in criminal acts relating to terrorist operations on behalf of a foreign power.²⁵⁵

B. APPLICABILITY OF FISA TO COMMERCIAL AIR TRAVEL

The Government applied FISA to convict terrorists of transporting explosive materials on a commercial flight in *United States v. Sarkissian*.²⁵⁶ *Sarkissian* concerned the FBI's attempt to prevent Armenian terrorists from bombing the Honorary Turkish Consulate in Philadelphia. In September, 1982, the FBI obtained authorization from the FISC to place a wiretap on the telephone in Santa Monica, California of one of the three suspects who were terrorist defendants. The FBI concluded, through electronic eavesdropping, that the defendants were assembling a bomb, and planned to transport the bomb from Los Angeles to Boston on either a TWA or Northwest Orient flight. After determining the date and flight of the suspected terrorists, the FBI assembled a command post of 50 agents at Logan Airport in Boston, and established a search procedure that included both a dog sniff and an x-ray scan. An FBI agent ran the fifty-seven pieces of lug-

²⁵³ If the subject of the wiretap is a "United States persons," the FISC judge must find that all statements and certifications required by section 1804(a)(7)(E) are not clearly erroneous. *Id.* § 1805(a).

²⁵⁴ *Id.* § 1801(i).

²⁵⁵ *Id.* § 1801(b), 1805(a)(3).

²⁵⁶ 841 F.2d 959 (9th Cir. 1988).

gage unloaded from the flight through the x-ray scanner and detected components of a bomb. After opening the suitcase, the agent found an unassembled bomb and five sticks of dynamite, and the FBI later arrested the suspects.

The *Sarkissian* court addressed two issues relating to Fourth Amendment concerns. The first concern was whether exigent circumstances existed that allowed a search of the suitcase absent a warrant.²⁵⁷ Exigent circumstances supported by probable cause are required for a warrantless search of luggage.²⁵⁸ These circumstances include those that would cause an ordinarily reasonable person to believe that timely action or entry was necessary to prevent harm to police officers or others.²⁵⁹

The court determined that the FBI knew that a bomb or parts of a bomb were being transported by a terrorist group on a commercial flight.²⁶⁰ There was uncertainty as to whether the bomb was assembled or unassembled, and the FBI did not know the identity of the couriers, what the suitcase or suitcases looked like, and whether the bomb was in one or more suitcases. Grave and potentially imminent danger was found.²⁶¹ Upon the totality of these factors, the court concluded that exigent circumstances existed.²⁶²

The defendants' second argument, relying on the primary purpose test, was that the FBI's primary purpose for the wireless surveillance had shifted from an intelligence investigation to a criminal investigation. The primary purpose test is premised on the idea that the foreign intelligence exception to the warrant requirement is applicable "only when the surveillance is conducted 'primarily' for foreign intelligence reasons."²⁶³ The defendants argued

²⁵⁷ *Id.* at 962.

²⁵⁸ *United States v. Nikzad*, 739 F.2d 1431, 1433 (9th Cir. 1984).

²⁵⁹ *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984).

²⁶⁰ *Sarkissian*, 841 F.2d at 962.

²⁶¹ *Id.* at 964.

²⁶² *Id.* at 962.

²⁶³ *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

that the FBI would, therefore, be required to obtain authorization under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,²⁶⁴ and not FISA.

The *Sarkissian* court rejected this argument, declining to decide the issue, but refused to "draw too fine a distinction between criminal and intelligence investigations."²⁶⁵ In fact, there is no requirement in FISA that the "crime" even be related to foreign intelligence. The legislative history of Section 1801(h)(3) of FISA explains:

[T]he committee believes that dissemination should be permitted to State and local law enforcement officials. If Federal agents monitoring a foreign intelligence surveillance authorized under this chapter were to overhear information relating to a violation of State criminal law . . . the agents could hardly be expected to conceal such information from the appropriate local officials.²⁶⁶

The *Sarkissian* holding that the crime need not be related to foreign intelligence was confirmed by the Eighth Circuit Court of Appeals in *United States v. Isa*.²⁶⁷ FISA was used to monitor telephone conversations of Isa and his wife, who were later charged by the State of Missouri with first-degree murder of their daughter. Missouri had obtained the telephone recordings of murder conversations from the FBI, which had been conducting electronic surveillance of Isa. It was believed that Isa, a native-born Palestinian, had contacts and continuing communication with a terrorist organization, the Palestine Liberation Organization.

The *Isa* court rejected the defendant's argument that

²⁶⁴ Pub. L. No. 90-351, 82 Stat. 212 (Title III codified as amended at 18 U.S.C. §§ 2510-20 (1988)). The 1968 Omnibus Act requires police to acquire a warrant prior to using microphone or wiretapping surveillance, and states that a warrant shall not issue unless probable cause has been found by a neutral magistrate. 18 U.S.C. § 2518(3)(a), (b) (1988).

²⁶⁵ *Sarkissian*, 841 F.2d at 965.

²⁶⁶ S. REP. No. 701, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.A.N. 3973, 4029; see also *In re Kevork*, 788 F.2d 566, 570 (9th Cir. 1986) (providing authorization for use of electronic surveillance information in foreign criminal prosecution for conspiracy to commit murder and murder).

²⁶⁷ 923 F.2d 1300 (8th Cir. 1991).

the tapes contained a private domestic matter which was not relevant material under FISA.²⁶⁸ Citing an unpublished opinion with approval,²⁶⁹ the court maintained that "when a monitoring agent overhears evidence of domestic criminal activity, it would be a subversion of his oath of office if he did not forward that information to the proper prosecuting authorities."²⁷⁰

V. CONCLUSION

Since the adoption of the Air Transportation Security Act eighteen years ago, airline hijackings and terrorist incidents directed toward United States carriers, originating in the United States, have become a rarity. Americans understand and accept the need for protection in the air from criminals and political zealots and readily submit to metal detectors and x-ray machines everyday without much thought.²⁷¹ The President's Commission on Aviation Security even found unacceptable the idea of holding out in all cases a criminal standard of proof before any action was taken. The Commission stated that the United States must be ready to view terrorist attacks as a matter of national security.²⁷² From the standpoint of those persons concerned about the protection of their Fourth Amendment privacy rights, however, the singling out of a passenger based on the contents of his person or luggage is a permanent threat to privacy.

The *Terry* stop-and-frisk search, the administrative

²⁶⁸ *Id.* at 1304.

²⁶⁹ *United States v. Hawamda*, No. 89-56-A, 1989 WL 235836 (E.D. Va. Apr. 17, 1989).

²⁷⁰ *Isa*, 923 F.2d at 1305. Other courts of appeals have approved the use of surveillance information of criminal activity resulting from foreign intelligence surveillance activity. *See, e.g.*, *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); *Cavanagh*, 807 F.2d at 790-91; *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *United States v. Belfield*, 692 F.2d 141, 147-49 (D.C. Cir. 1982).

²⁷¹ It is estimated that at airports alone, over one billion screenings - four for every man, woman and child in the United States - are conducted annually. *Klarfeld v. United States*, 962 F.2d 866, 867 (9th Cir. 1992).

²⁷² *President's Commission Report*, *supra* note 3, at 115.

search, the border search, and a search based on consent are all possible justifications for airport security searches. The strong government interest in frustrating terrorism has been examined in the context of these four approaches. The protections granted by the courts are adequate to assure that the goals achieved by airport searches do not hinder the constitutional rights of commercial air travelers. The biggest concern, namely that an administrative search specifically for bombs and weapons might expand into a generalized law enforcement search of all passengers as a condition for boarding a flight, is real. The current approach taken by the majority of United States courts, however, is the constitutionally correct manner to assure passengers that their rights will not be infringed by an overly zealous security agent.

Applying FISA to those who conspire to hijack commercial flights is another method used to prevent the spread of air piracy and terrorism. The argument that FISA is limited to foreign intelligence gathering, furthermore, has been rejected by many of the circuit courts. Law enforcement officers are duty bound to turn over any and all information that may be used to stop air piracy, even absent a foreign intelligence connection.

While we live in uneasy times, and the need for vigilance is obvious, Americans today enjoy the greatest level of commercial air travel protection that has ever existed in this country. The intrusion into the privacy interests of Americans is minimal. The government's interest in community safety can, in appropriate circumstances, outweigh an individual's interest in freedom from certain aspects of governmental scrutiny. Commercial air travel is one of these appropriate circumstances.

Casenote

