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PLANE VIEW DOCTRINE? PRIVATE AIRCRAFT SEARCHES

SHARON A. ALEXANDER

I. INTRODUCTION

WARRANTLESS SEARCHES of automobiles and other vehicles comprise one of the most controversial and confusing areas of constitutional law.1 The Supreme Court has constructed an intricate web of fourth amendment rules2 and exceptions3 governing the authority of

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1 Justice Rehnquist once termed the laws governing warrantless searches and seizures, especially those involving vehicles, as "something less than a seamless web." Cady v. Dombrowski, 413 U.S. 433, 440 (1973). A majority of the Supreme Court in 1982 referred to vehicle searches as "this troubled area." United States v. Ross, 456 U.S. 798, 817 (1982). Justice O'Connor has referred to "[t]he hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence." New York v. Quarles, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in part). Justice Powell stated that the "law of search and seizure with respect to automobiles is intolerably confusing." Powell further stated that "[t]he Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided." Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring), overruled, United States v. Ross, 456 U.S. 798, 822-25 (1982) (a plurality of the Court in Robbins required officers to obtain a search warrant before searching containers inside an automobile; one year later in Ross the Court rejected Robbins, holding that if an officer has probable cause to search a lawfully stopped vehicle, he may search every part of the vehicle, including containers, in which the object of the search might reasonably be found); see also Note, Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule, 68 CORNELL L. REV. 105 (1982) (discussing Burger Court decisions on warrantless searches).

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

U.S. CONST. amend. IV; see infra notes 29-55 and accompanying text for discussion.

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law enforcement officers to search automobiles without a warrant. The Court has also ruled on warrantless searches of motor homes and boats, but has never directly addressed aircraft searches. A majority of the United States Courts of Appeals, however, has addressed searches of private aircraft. These courts have reached a number of different results by using a variety of rationales. The vast majority of these cases involve airplanes engaged in drug smuggling.

Illicit narcotics are estimated to be the United States' second largest industry, with total revenues that may reach as much as $300 billion per year. While drug traffickers occasionally smuggle narcotics on commercial air-

- See infra notes 56-68 and accompanying text for a summary of exceptions to the warrant requirement; see also 1 W. LAFAVE & J. ISRAEL, supra note 2, §§ 3.1-4.6 for further discussion of the fourth amendment.
- See infra notes 145-148 and accompanying text for a discussion of how courts have applied the fourth amendment to motor home searches.
- See infra notes 149-157 and accompanying text for discussion of applications of the fourth amendment to boats.
- See infra note 158 for aircraft search cases in which the Supreme Court has denied certiorari.
- See infra note 159-163 for a summary of the circuit courts' applications of the automobile exception to private airplane searches; infra notes 250-283 and accompanying text for a discussion of searches incident to arrest; infra notes 284-316 and accompanying text for a discussion of the plain view doctrine; infra notes 317-333 and accompanying text for a discussion of limited intrusion searches; infra notes 334-340 and accompanying text for a discussion of administrative inventory searches; infra notes 341-343 and accompanying text for a discussion of the open fields doctrine; infra notes 344-348 and accompanying text for a discussion of consent searches; and infra notes 349-358 and accompanying text for a discussion of border searches.
- All airplane searches discussed in this Comment involve drug smuggling, with the exception of Patterson v. National Transportation Safety Board, 638 F.2d 144 (10th Cir. 1980) (open fields doctrine used to justify a warrantless search by a Federal Aviation Administration safety inspector who uncovered illegal modifications to an aircraft). See infra notes 341-343 and accompanying text for a discussion of Patterson. This Comment focuses on private aircraft searches. It does not address commercial aircraft searches, or searches of passengers or baggage aboard commercial aircraft, which are performed primarily for security and safety purposes.
lines, more than eighty percent of illicit narcotics air transport occurs by way of noncommercial, or general, aviation. The southern border of the United States provides a prime example of the tremendous volume of illegal narcotics smuggling. Federal agencies seized 18,487 pounds of marijuana and 7,029 pounds of cocaine from private aircraft along this border in 1988. The federal government's increased interest in controlling drug traffic, combined with advances in electronic surveillance and radar tracking technology, should result in an increased number of private aircraft being apprehended and searched.

Aircraft searches raise a variety of issues. One issue concerns determining whether a party has standing to raise a claim that officials violated his fourth amendment rights during a warrantless search. Owners, lessors, lessees, pilots, and passengers all have different interests.

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10 United Nations and its Agencies Heighten War Against Illicit Drugs, ICAO BULL., Feb. 1987, at 9, 10. The International Civil Aviation Organization (ICAO) Secretariat presented this information at the United Nations' First International Conference on Drug Abuse and Illicit Trafficking, which was held in Vienna, Austria on June 17-26, 1987. Id. at 9. The Secretariat also noted that drug smugglers frequently fly at low altitudes in an unsafe manner, fail to file flight plans, and often steal airplanes or rent them under false pretenses, all in violation of the Chicago Convention and its Annexes. Id. at 10; see Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (commonly known as the Chicago Convention).


12 See, e.g., Early Warning Aircraft Procured for Drug Interdiction, ICAO BULL., Aug. 1988, at 20 (data provided by Lockheed Aeronautical Systems Co., U.S.A.). United States customs officials began using radar-equipped Lockheed P-3 Orion aircraft, which have a 508,000 square kilometer detection range, in mid-1988 to aid in detecting both airborne and ground-level drug smugglers. Id.; see also Ilgen & Reeder, supra note 9, at 19. An aerostat radar system, consisting of a helium-filled balloon equipped with radar capable of tracking drug smugglers over a 240 kilometer range, is being used along the southern border of the United States and above the Caribbean Sea to detect low-flying aircraft. Id. at 19-20; see also Dallas Morning News, supra note 11, at 43A, col. 2. In 1988 the amount of marijuana seized by federal agencies from private aircraft along the northern border of Mexico represented a 51% increase over 1987 seizures. The amount of cocaine seized increased by 91% over the same period. Id.; see also Kroll, Can the Fourth Amendment Go High Tech?, A.B.A. J., Sept. 1987, at 70 (Kroll gives a brief history of leading fourth amendment cases involving technology and surveillance).
with respect to the ownership and operation of an airplane, and therefore, have different expectations of privacy. Another issue focuses on whether the exceptions to the warrant requirement that are designed for automobiles should also apply to airplanes. The two most common rationales for the automobile exception to the warrant requirement, mobility and decreased expectations of privacy, do not necessarily apply to airplanes in the same manner as they apply to automobiles. A third issue concerns whether the scope permitted for automobile searches applies to airplanes. A fourth issue is whether the same rules regarding the search of compartments and containers inside automobiles also apply to compartments and containers inside aircraft. Finally, the circuits do not agree on whether an officer may climb onto the wings of an airplane and peer inside for the purposes of the plain view doctrine.

This Comment will: (1) briefly describe fourth amendment principles and exceptions, including standing, probable cause, and reasonable expectations of privacy, (2) analyze the decisions of the different circuits regarding private aircraft searches, and (3) discuss possible solutions to the problems encountered in applying the Supreme Court’s bright line rules.

13 See infra notes 65-98 and accompanying text for a discussion of the interests of these parties and their ability to establish standing to challenge a search.
14 See infra notes 158-168 and accompanying text for a discussion of whether an airplane is the functional equivalent of an automobile.
15 See infra notes 133-249 and accompanying text for a discussion of the rationales of mobility and decreased expectations of privacy with regard to automobiles.
16 See infra notes 250-283 and accompanying text for a discussion of the scope of automobile and airplane searches that are incident to arrest.
17 See infra notes 141 and 254-255 and accompanying text for a discussion of searches of containers that are inside a vehicle.
18 See infra notes 284-316 and accompanying text for a discussion of the plain view doctrine.
II. BACKGROUND: FOURTH AMENDMENT

A. Historical

The fourth amendment provides for protection against unreasonable searches and seizures by government officials.19 While the framers of the Constitution were concerned primarily with protection against searches conducted pursuant to general warrants or no warrant at all,20 modern technology has added new concerns and dimensions to the protection of fourth amendment rights.21 Electronic eavesdropping devices, high-magnification telescopic and infrared lenses, and other high tech equipment allow government officials to see, hear, and search in a manner well beyond the imaginations of those who drafted the Constitution.22

Early cases involving searches conducted without warrants focused on the protection of property rights. The

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19 See supra note 2 for the text of the fourth amendment. For further discussion of the fourth amendment and warrantless searches, see generally 1 W. LaFAVE & J. ISRAEL, supra note 2, §§ 3.1-3.10.
21 See, e.g., United States v. Knotts, 460 U.S. 276, 285 (1983) (electronic tracking “beeper” placed in a container inside an automobile does not violate a reasonable expectation of privacy); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (telephone company’s use of pen registers to record telephone numbers dialed from a particular telephone does not violate the fourth amendment); United States v. White, 401 U.S. 745, 747, 754 (1971) (use of radio transmission equipment attached to a “wired” informant does not invade a reasonable expectation of privacy); Katz v. United States, 389 U.S. 347, 359 (1967) (use of electronic devices to enhance eavesdropping does not violate fourth amendment rights); see also Note, Tracking Katz: Beepers, Privacy, and the Fourth Amendment, 86 YALE L.J. 1461, 1496 n.150 (1977) (airplanes are regularly tracked by the government on radar and therefore are frequently subjected to “regulatory” searches, which suggests a lower expectation of privacy inside an aircraft). For a discussion of administrative and regulatory searches, see infra notes 334-340 and accompanying text, and infra notes 33-55 and accompanying text, for a discussion of reasonable expectations of privacy.
22 See, e.g., Kroll, supra note 12 (discussing technological advances in surveillance).
courts usually required a trespass on private property before recognizing a fourth amendment violation.\textsuperscript{23} In a 1967 electronic surveillance case, \textit{Katz v. United States},\textsuperscript{24} the Supreme Court departed from its property rights approach and held that "the Fourth Amendment protects people, not places."\textsuperscript{25} The Court held that the important issue was not whether law enforcement officials trespassed on private property while conducting their search, but whether they invaded a reasonable expectation of privacy.\textsuperscript{26} Thus, the Court's current view may allow trespasses on private property in some instances,\textsuperscript{27} but may also disallow searches conducted in public places if the search violates a person's reasonable expectation of privacy.\textsuperscript{28}

B. Fourth Amendment Requirements

The fourth amendment requires that searches and

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  \item \textsuperscript{24} 389 U.S. 347 (1967).
  \item \textsuperscript{25} Id. at 351. The Court repeated this phrase in many subsequent fourth amendment decisions including Smith v. Maryland, 442 U.S. 735, 739 (1979); United States v. Chadwick, 433 U.S. 1, 7, 9 (1977); United States v. Dionisio, 410 U.S. 1, 8 (1973); Alderman v. United States, 394 U.S. 165, 193 (1969); Terry v. Ohio, 392 U.S. 1, 9 (1968).
  \item \textsuperscript{26} \textit{Katz}, 389 U.S. at 353.
  \item \textsuperscript{27} See, e.g., Oliver v. United States, 466 U.S. 170, 180-84 (1984) (the fourth amendment does not protect the open fields beyond the area immediately surrounding a private dwelling, which is called the curtilage; government officials may trespass on open fields without invading a reasonable expectation of privacy); see also United States v. Dunn, 480 U.S. 294, 301 (1987) (four factors determine the curtilage: (1) proximity to the dwelling, (2) whether the area is enclosed, (3) use of the area, and (4) steps taken to protect the area); Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986); California v. Ciraolo, 476 U.S. 207, 212-14 (1986) (both cases holding that aerial observations are not considered to be searches under the open fields doctrine). The Court further expanded the scope of the open fields doctrine in 1989. Florida v. Riley, 109 S. Ct. 693, 696-97 (1989) (an officer's observations from a helicopter hovering within navigable airspace do not constitute a search for which a warrant is required). For a discussion of the open fields doctrine, see \textit{infra} notes 341-343 and accompanying text.
  \item \textsuperscript{28} See, e.g., Walter v. United States, 447 U.S. 649, 658-59 (1980) (a person has a reasonable expectation of privacy with regard to items that are sent through the mail and mistakenly opened).
\end{itemize}
seizures not be unreasonable and that warrants not be issued unless probable cause to search or seize exists. De-
termining what is "reasonable" and what constitutes "probable cause" is left to the courts. The Supreme Court's interpretation of these terms, however, has changed frequently. The Court employs, but has not expressly announced, a three-step analysis to determine whether fourth amendment requirements have been met. The steps are (1) determining whether a person has standing to raise a claim; (2) determining whether a search or seizure actually occurred; and (3) determining whether the search or seizure was reasonable.

The first step in analyzing a fourth amendment claim is to determine whether a person has standing to contend that his fourth amendment rights were violated. The threshold issue is whether the person had a reasonable expectation of privacy with regard to the area searched or the item seized. If no reasonable expectation of privacy existed, then a claim that fourth amendment rights have been violated may not be raised. The second step in determining whether a person's fourth amendment rights have been violated is to determine whether a search or seizure occurred. A search is defined as an intrusion by the government upon a person's reasonable expectation of privacy. A seizure is the exercise of control by the government over a person or

29 See supra note 2 for the text of the fourth amendment.
32 Id.; see infra notes 65-98 and accompanying text for a discussion of the requirement of standing.
33 United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining a search as occurring "when an expectation of privacy that society is prepared to consider reasonable is infringed"); see also Smith v. Maryland, 442 U.S. 735, 745 (1979) (a person's expectation of privacy must be "legitimate"); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (fourth amendment rights are personal; therefore a person's own reasonable expectation of privacy must be violated); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (a search must be made by a government official as opposed to a private citizen for there to be a violation of fourth amendment rights).
thing. Searches and seizures conducted by private individuals are not protected by the fourth amendment; the search must be conducted by a government official. In addition, any expectation of privacy invaded by a government official must be objectively reasonable for the amendment to apply. If a person's property interest in an item is not sufficient to challenge a search or seizure, or if the item is essentially public in nature, then that person has no reasonable expectation of privacy to be

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35 Burdeau v. McDowell, 256 U.S. 465, 475 (1921). But see People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132, 134 (1965) (if a law enforcement officer encourages a private citizen to conduct an illegal search, the search violates the defendant's fourth amendment rights).


37 Id. at 132-34; see also Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (mere ownership of an item does not necessarily give rise to standing to challenge the item's seizure); United States v. Salvucci, 448 U.S. 83, 86-87, 95 (1980) (abolishing the "automatic standing" rule, which provided that a person charged with a crime relating to the possession of an item automatically had standing to challenge the seizure of that item). For a discussion of standing, see infra notes 65-98 and accompanying text.

38 See, e.g., California v. Ciraolo, 476 U.S. 207, 213-15 (1986) (what can be seen from an airplane is of a public nature); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) ("pen registers" used by telephone company to record telephone numbers dialed from a particular telephone); Cardwell v. Lewis, 417 U.S. 583, 591 (1974) (paint samples scraped from an automobile); United States v. Dionisio, 410 U.S. 1, 14 (1973) (the sound of a person's voice); United States v. Mara, 410 U.S. 19, 22 (1973) (a person's handwriting); see also United States v. Jacobsen, 466 U.S. 109, 124-25 (1984) (cocaine field testing, which consists of taking small samples of substances believed to be cocaine and testing them to determine their composition, does not violate reasonable expectations of privacy); United States v. Place, 462 U.S. 696, 706-07 (1983) (a limited intrusion that merely reveals the existence of contraband, such as a narcotics "sniff test" of luggage by trained dogs, does not invade a reasonable expectation of privacy). Items that are of a public nature are not protected by the fourth amendment. However, a reasonable expectation of privacy may accompany some items held out to the public, in certain circumstances. For example, a merchant has a reasonable expectation of privacy regarding books and films on display for sale if their covers do not indicate they are pornographic. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979). For further discussion of reasonable expectations of privacy regarding airplanes, see infra notes 167-168.
protected. Government officials may search for and seize the instrumentalities of a crime, the fruits of a crime, contraband, and the "mere evidence" of a crime.\textsuperscript{39}

The third step is to determine whether the search or seizure was reasonable under the fourth amendment. The primary concern is whether officers properly obtained a warrant, and if not, whether the search or seizure fell under an established exception to the warrant requirement. Unless a search can be justified under an established exception, a law enforcement officer must obtain a search warrant.\textsuperscript{40} To obtain a warrant, an officer must demonstrate that he has probable cause to conduct a search, which is accomplished by presenting to a neutral magistrate sufficient facts and circumstances such that a reasonable person would conclude that seizable evidence will be found on the premises to be searched.\textsuperscript{41} A "totality of the circumstances" test is used to examine tips supplied by informants; these tips may be used to aid in establishing probable cause, so long as the informant is reliable and has a sound basis for his information.\textsuperscript{42} If the informant has not given previous tips or chooses to remain anonymous, information that the officers corroborate may be used to establish probable cause.\textsuperscript{43}

When he determines that the officers have established probable cause, the magistrate may issue the search warrant. The warrant must specify with reasonable certainty the place to be searched and the items to be seized.\textsuperscript{44} A doctrine known as the exclusionary rule may prohibit evidence obtained by an illegal search or seizure from being

\textsuperscript{39} Warden v. Hayden, 387 U.S. 294, 310 (1967).
\textsuperscript{40} United States v. Ventresca, 380 U.S. 102, 106-07 (1965); see infra notes 56-63 and accompanying text for a summary of the exceptions to the warrant requirement.
\textsuperscript{41} Carroll v. United States, 267 U.S. 132, 155-56, 162 (1925).
\textsuperscript{43} Id. at 237-38.
\textsuperscript{44} See Andresen v. Maryland, 427 U.S. 463, 479-82, 484 (1976). The court held that a search warrant which listed and described certain items, but also authorized the seizure of "other fruits, instrumentalities and evidence of the crime at this [time] unknown" was sufficiently precise. Id. at 479 (brackets in original).
used against a suspect in criminal proceedings.\textsuperscript{45} Therefore, if officers do not properly obtain a search warrant, their search must meet the conditions of one of the recognized exceptions to the warrant requirement. Otherwise, under most circumstances, the evidence obtained during the search will not be admissible in criminal proceedings.\textsuperscript{46}

Fourth amendment protections apply to any area in which a person has a reasonable expectation of privacy, including his home,\textsuperscript{47} office,\textsuperscript{48} automobile,\textsuperscript{49} motor

\textsuperscript{45} Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that illegally obtained evidence may not be used against a defendant in a criminal proceeding); see also Mapp v. Ohio, 367 U.S. 643, 660 (1961) (applying the exclusionary rule to cases heard in state courts). All evidence obtained illegally must be excluded, including evidence acquired indirectly as a result of an illegal search. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) ("fruit of the poisonous tree" doctrine). But see Nix v. Williams, 467 U.S. 431, 443-44 (1984) (adoption of the inevitable discovery rule, which allows the use of evidence that ultimately would have been discovered even without the existence of police misconduct); Wong Sun, 371 U.S. at 486, 491 (the intervening voluntary act of a defendant dissipates the taint of an official's illegal act, such as an illegal search) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (stating the independent source rule, which provides that knowledge gained from an independent source may be used against a suspect). For further discussion, see Wingo, supra note 30, at 575, which questions whether the exclusionary rule actually deters illegal arrests, searches, and seizures, and whether the Supreme Court is correct in holding that there are no other more effective ways to enforce the fourth amendment.

\textsuperscript{46} See United States v. Leon, 468 U.S. 897, 906 (1984). If, for example, officers unknowingly obtain a defective warrant and rely on the warrant in good faith, evidence obtained from the illegal search can be introduced in criminal proceedings under the Leon "good faith exception." Id. at 926; see infra notes 56-63 and accompanying text for a summary of exceptions to the warrant requirement.

\textsuperscript{47} See, e.g., Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968). A person's expectations of privacy are highest inside his home. To search a residence without a warrant, at least one of the following circumstances must exist: (1) the officer must have the consent of a person authorized to give such consent and must search only the area in which that person gives consent to search; (2) if the officer makes an arrest in the home, he may search only the area within the control of the person being arrested; or (3) the officer must believe that exigent circumstances exist, such as the possible destruction of evidence, the need to prevent harm to others, or actually be in hot pursuit of a suspect. Id.; see also United States v. Matlock, 415 U.S. 164, 171 (1974) (authority to give consent); Vale v. Louisiana, 399 U.S. 30, 35 (1970) (the arrest must occur inside the house to justify a warrantless search incident to arrest); Chimel v. California, 395 U.S. 752, 765 (1969) (officers may search the area within the reach of the arrestee at the time of the arrest); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (search and seizure was
home,\textsuperscript{50} and boat,\textsuperscript{51} as well as his own body.\textsuperscript{52} Most courts hold that airplanes are analogous to automobiles,\textsuperscript{53} while others distinguish the two vehicles.\textsuperscript{54} Whether or not an airplane is analogous to an automobile, boat, or mobile home, fourth amendment principles and exceptions apply to any reasonable expectations of privacy a person may have regarding the airplane.\textsuperscript{55}

C. \textit{Exceptions to the Warrant Requirement}

The Supreme Court recognizes at least eight exceptions justified by exigent circumstances created by the pursuit of a robbery suspect). For a discussion of consent searches, see \textit{infra} notes 344-348 and accompanying text. For a discussion of searches incident to arrest, see \textit{infra} notes 250-283 and accompanying text.

\textsuperscript{49} See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of a university newspaper office, pursuant to a search warrant); Andresen v. Maryland, 427 U.S. 463 (1976) (search of a law office, pursuant to a search warrant).

\textsuperscript{50} Carroll v. United States, 267 U.S. 132, 153 (1925) (an automobile's mobility was used to justify the creation of an exception to the warrant requirement); see also United States v. Ross, 456 U.S. 798, 821-22 (1982) (containers in an automobile may be searched); Colorado v. Bannister, 449 U.S. 1, 3-4 (1980) (per curiam) (an officer's observations during a legal traffic stop may give rise to probable cause to search a vehicle); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (upholding the search of an automobile towed to a station house if the police had probable cause to search at the time the automobile was stopped). For discussion of the automobile exception, see \textit{infra} notes 133-249 and accompanying text.


\textsuperscript{52} See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (authorizing the warrantless search of a sailboat that was on inland waters but had ready access to the open sea); see also Note, \textit{Supreme Court Misses the Boat in Approving Warrantless Random Vessel Seizures: United States v. Villamonte-Marquez}, 18 U.S.F. L. REV. 617 (1984). For a discussion of \textit{Villamonte-Marquez}, see \textit{infra} notes 149-157 and accompanying text.

\textsuperscript{53} See, e.g., Chimel v. California, 395 U.S. 752, 763 (1969) (allowing the search of a person and the area within his immediate reach when he is arrested); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (allowing a limited "stop and frisk" of a person's outer clothing based upon an officer's reasonable suspicion that criminal activity is afoot). For discussion of searches incident to arrest, see \textit{infra} notes 250-283. For a discussion of limited detentions, see \textit{infra} notes 317-333.

\textsuperscript{54} See \textit{infra} notes 158-249 and accompanying text for a discussion of holdings that analogize airplanes to automobiles.

\textsuperscript{55} See \textit{infra} notes 226-231 and accompanying text for a discussion of the Fifth Circuit's reluctance to hold that airplanes are analogous to automobiles.

\textsuperscript{56} Katz v. United States, 389 U.S. 347, 351 (1967); see supra notes 31-55 and accompanying text for a discussion of reasonable expectations of privacy.
to the warrant requirement. The exceptions include (1) automobile exception searches, (2) searches incident to lawful arrest, (3) plain view doctrine, (4) open fields doctrine, (5) limited intrusion searches, (6) administrative inventory searches, (7) consent searches, and (8) border searches. The United States Courts of Appeals


[60] Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (a limited detention and search for weapons, commonly known as a stop and frisk, is not an unreasonable search and seizure under the fourth amendment if the officer has a reasonable suspicion that criminal activity may be afoot); see also United States v. Sharpe, 470 U.S. 675, 688 (1985) (twenty-minute detention was not unreasonable and did not amount to a full custodial arrest); Adams v. Williams, 407 U.S. 143, 148-49 (1972) (a frisk is limited to the outer clothing, but an officer may reach into the clothing if he has information that a weapon is hidden inside the clothing). For an application of limited intrusion searches to aircraft, see infra notes 317-333 and accompanying text.


[62] United States v. Matlock, 415 U.S. 164, 171 (1974) (a person who shares an apartment may give consent to search common areas, but not areas over which he has no control); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (consent must be given freely and voluntarily); Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968) (if police falsely claim to have a warrant, consent is presumed to be given involuntarily); Stoner v. California, 376 U.S. 483, 489-90 (1964) (a hotel clerk may not give consent to search the room of a hotel guest); see infra notes 344-348 and accompanying text for a discussion of consent searches.

[63] Almeida-Sanchez v. United States, 413 U.S. 266, 272-75 (1973) (a search at
have applied all of these exceptions to airplane searches, but have not always agreed upon how they should be applied. Section IV of this Comment discusses how the courts have applied the exceptions to airplane searches.64

III. STANDING: WHO MAY RAISE FOURTH AMENDMENT CLAIMS?

Before a person may raise a claim that his fourth amendment rights have been violated, he must demonstrate that he has standing to challenge the alleged violations.65 To meet the standing requirement, a person must show that, at the time of the search, he had a reasonable expectation of privacy in either the area searched or the item seized.66 The mere fact that evidence obtained from a search or seizure is introduced against a suspect does not give him "automatic standing" to raise a fourth amendment challenge.67

While ownership of property that was searched or seized is an important factor, it is not determinative of whether a person has a reasonable expectation of privacy.68 Instead, the Supreme Court has adopted a "total-

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64 See infra notes 99-358 and accompanying text for a discussion of exceptions to the warrant requirement as applied to airplanes.


66 Id. at 142; see supra notes 33-39 and accompanying text for a discussion of reasonable expectations of privacy.

67 United States v. Salvucci, 448 U.S. 83, 86-87, 95 (1980) (abolishing the "automatic standing" rule, which stated that a defendant charged with a possessory offense had automatic standing to challenge the legality of both the search and seizure of evidence introduced against him).

ity of the circumstances” test, in which it weighs a variety of factors including the ownership, possession, and location of the property searched or seized. The Court also considers the extent of the intrusion upon a person during the search. For example, the Court has held that a limited intrusion which merely reveals the possession of a controlled substance, such as a “sniff test” by trained narcotics detection dogs, does not invade a reasonable expectation of privacy. In addition to these objective factors, the Court may also consider subjective factors, such as whether the person objecting to the search or seizure actually believed that the area searched would be free from governmental intrusion. Another factor is whether the officer was “legitimately on the premises” at the time of the search. This factor was once dispositive, but is now only one of many factors considered.

Although a person claiming that an illegal search of an aircraft or an illegal seizure of evidence aboard the aircraft violated his fourth amendment rights must first establish that he has standing, the courts do not always strictly enforce this requirement. For example, in United States v. Nigro the Sixth Circuit held that, despite the government’s claim that a passenger who had purchased fuel for the airplane lacked standing to object to the

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60 Id. In Rawlings, the defendant placed narcotics in an acquaintance’s purse. While the defendant was present, police officers requested that the acquaintance empty her purse. When she complied, the defendant’s narcotics fell out. Because the defendant had known the acquaintance only a few days and had not previously had access to the purse, the court held that his ownership of the narcotics was not sufficient to establish a reasonable expectation of privacy with respect to the search of the purse. Id. at 101-02 n.1.

61 United States v. Place, 462 U.S. 696, 706-07 (1983) ("sniff tests" by trained dogs do not violate any reasonable expectations of privacy); see also United States v. Jacobsen, 466 U.S. 109, 124-25 (1984) (taking samples of substances believed to be cocaine and testing them to determine their compositions, which is known as cocaine field testing, does not violate a reasonable expectation of privacy).

62 Rawlings, 448 U.S. at 105 (Rawlings admitted that he did not believe the purse would be free from governmental intrusion).

63 Rakas, 439 U.S. at 148. The Court held that passengers in an automobile had no standing to contest its search simply because they were “legitimately on the premises.” Id.

64 727 F.2d 100 (6th Cir. 1984).
search of the airplane, the passenger had established standing "under all the facts and circumstances." The court, however, pointed to no specific facts or circumstances in support of its conclusion. In one sentence the court simply held that standing was established, but gave no rationale or explanation for its conclusion.

An example of a district court’s failure to require the defendant to establish standing to challenge a search occurred in United States v. Bachner. The Eleventh Circuit remanded the case to the district court because the lower court adopted a magistrate’s recommendation to suppress evidence, even though the defendant never demonstrated any reasonable expectation of privacy with regard to the airplane. The magistrate refused to address whether the airplane’s pilot had standing, despite the government’s attempt to raise the issue. The only evidence on the record supporting a reasonable expectation of privacy was the defendant's presence during the search. The magistrate stated that standing was “not necessarily a threshold question” and that the issue did not need to be addressed in that particular case.

These cases are the exception rather than the rule, but

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74 Id. at 103.
75 Id. The court’s entire discussion of standing consists of the following sentence: “Though the government maintained that Nigro lacked standing to object to the search of the plane, we conclude that under all the facts and circumstances, including the stipulation for use of the Corp hearing as a basis for deciding Nigro’s motion, standing was established.” Id. The contents of the Corp hearing are not described in the opinion. The court refers to Nigro’s companion case, United States v. Corp, 452 F. Supp. 185 (W.D. Tenn. 1977). In Corp, the court did not discuss standing because the government did not raise the issue. Corp, 452 F. Supp. at 190.
77 Id. at 1125.
78 Id. at 1127.
79 Id. at 1126.
80 Id. at 1127. In denying the government’s request to address the standing issue, the magistrate stated that “standing’ is ‘not necessarily a threshold question’ and that this case ‘does not appear to be one of those instances where the threshold question exists.’” Id. The magistrate reserved ruling on the standing issue, proceeded to consider whether the search and seizure were unreasonable, and never made a final ruling in regard to standing. Id.
they serve to illustrate that the courts are not always consistent in either requiring or analyzing standing. Most courts, however, require that the defendant show some type of interest in either the aircraft itself or the items seized to establish standing to challenge a search or seizure. If the defendant contests the legality of the search or seizure, he has the burden of proving that he had a reasonable expectation of privacy with regard to the airplane. As with any other type of property, even though ownership is an important factor to consider, mere proof of ownership of an airplane is not sufficient to establish a reasonable expectation of privacy.

Two other important factors in establishing standing are (1) possession and (2) dominion and control. These factors alone, however, are not sufficient if the defendant cannot also demonstrate some type of property interest in the airplane or that he used the airplane with the owner's permission. For example, in United States v. Dickerson, a pilot accused of smuggling drugs argued that his dominion and control over the aircraft should be sufficient to establish a reasonable expectation of privacy. The certificate of ownership indicated that Fantail, Inc. owned the aircraft. Dickerson presented no evidence indicating that he possessed any interest in the corporation or that he flew with the owner's permission. The court, therefore, held that he had no reasonable expectation of privacy. The court also stated that anyone piloting a stolen airplane will have difficulty establishing standing to contest a search of the plane or a seizure of its contents. Because many airplanes used in smuggling operations are either stolen or have falsified Federal Aviation Administration

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81 United States v. Dickerson, 655 F.2d 559, 561 (4th Cir. 1981). The government must raise the issue of standing at the trial court level in order to raise it on appeal. United States v. Amuny, 767 F.2d 1113, 1121 (5th Cir. 1985).


83 655 F.2d 559 (4th Cir. 1981).

84 Id. at 561.

85 Id.
(FAA) registration and ownership records, drug-smuggling pilots may have difficulty establishing standing and, therefore, be unable to raise fourth amendment claims at all.

Even if a person demonstrates a property interest in an aircraft, he may not be able to establish standing if he relinquished its possession and control to another party. In United States v. Dyar and United States v. Tussell, the respective courts held that a person who finances the leasing of an airplane does not have a reasonable expectation of privacy if he subsequently turns possession and control over to a pilot. Both courts emphasized that the defendants, who had financed the leasing, were not present at the time of the search. Therefore, they relinquished their reasonable expectations of privacy when they gave possession and control of the respective airplanes to the pilots.

If, however, the financing party retains some control, such as the authority to determine who has access to the aircraft, then the court may find that he has retained a sufficient expectation of privacy to challenge the search. For example, in United States v. Burnett, the lessee of a van gave written permission to another person to use the van, but retained the ultimate authority regarding access to the vehicle. The court found that, based on the facts and circumstances of the case, both the lessee and the driver had standing.

Passengers present a different set of issues with regard to standing. A mere passenger in an airplane has no rea-

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86 See supra note 10 and accompanying text for a discussion of the ICAO's concerns about private aircraft used in drug smuggling, including the facts that many airplanes used are stolen and FAA records falsified.

87 574 F.2d 1385 (5th Cir.), cert. denied, 439 U.S. 982 (1978).


89 Dyar, 574 F.2d at 1390-91; Tussell, 441 F. Supp. at 1103.


91 Id. at 952.

92 Id.; see also United States v. Cresta, 592 F. Supp. 889, 905 (D. Me. 1984) (holding that the lessee of an automobile who allows others to drive the vehicle retains a reasonable expectation of privacy with respect to the automobile strictly on the basis of his possessory interest).
sonable expectation of privacy with regard to the airplane itself, but may retain a reasonable expectation of privacy regarding any personal belongings he brings aboard. While passengers may not raise fourth amendment issues regarding a search of the airplane itself, they may challenge searches of their luggage, cargo, and any other items for which they have a reasonable expectation of privacy.

The holdings in Dickerson, Dyar, Tussell, and Burnett indicate that to establish standing, one who holds a property interest in an airplane must either be in possession of the airplane at the time of a search or must retain some degree of dominion and control over the aircraft. A pilot must not only be in possession of the airplane, but must also establish either a property interest in the airplane or that he is flying with the permission of someone who holds a property interest. A mere passenger with no property interest has no standing to challenge the search of the aircraft. A passenger, however, does have standing to challenge the seizure of any item in which he has a

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93 United States v. Reyes, 595 F.2d 275, 279 (5th Cir. 1979) (holding that mere passengers on airplanes, who make no claim of ownership, have no reasonable expectation of privacy with regard to a search of the airplane); see also United States v. Martinez, 625 F. Supp. 384, 389-90 (D. Del. 1985) (persons unloading drugs from an airplane have no reasonable expectation of privacy and may not object to a search of the airplane). See generally United States v. Chadwick, 433 U.S. 1, 13 (1977) (a person’s expectations of privacy regarding searches of personal luggage are greater than his expectations of privacy regarding searches of an automobile).

94 United States v. Chadwick, 433 U.S. 1, 13 (1977); see also Rakas v. Illinois, 439 U.S. 128, 142 n.11 (1978) (indicating that a visitor in a house would have standing to challenge a search or seizure of his own property). But cf. Rawlings v. Kentucky, 448 U.S. 98 (1980) (holding that a person who put narcotics in an acquaintance’s purse did not have standing to challenge the search of the acquaintance’s purse). For further discussion of Rakas and Rawlings, see supra notes 65-72 and accompanying text.


97 United States v. Reyes, 595 F.2d 275, 279 (5th Cir. 1979); see also United States v. Chadwick, 433 U.S. 1, 11-13 (1977); United States v. Martinez, 625 F. Supp. 384, 389-90 (D. Del. 1985). For further discussion of these cases, see supra note 93 and accompanying text.
property interest, if he can show that he had a reasonable expectation of privacy with regard to the item while it was aboard the aircraft.\footnote{Rakas v. Illinois, 439 U.S. 128, 142 n.11 (1978); see also Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (the defendant admitted that he had no subjective expectation of privacy; therefore, he had no reasonable expectation of privacy).}

IV. EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Overview of the Difficulty in Applying Established Exceptions to Aircraft Searches

Once a defendant establishes standing to challenge a warrantless search, the burden shifts to the prosecution to prove that the search was justified under one of the recognized exceptions to the warrant requirement.\footnote{See Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984) (stating that the police bear a heavy burden in justifying warrantless arrests and searches).} While the United States Courts of Appeals have applied all eight established exceptions to aircraft searches,\footnote{See supra notes 56-63 and accompanying text for a summary of exceptions to the warrant requirement.} the most commonly applied are the automobile exception,\footnote{See infra notes 133-249 and accompanying text for a discussion of the automobile exception.} searches incident to arrest,\footnote{See infra notes 250-283 and accompanying text for a discussion of searches incident to arrest.} and the plain view doctrine.\footnote{See infra notes 284-316 and accompanying text for a discussion of the plain view doctrine.} These three exceptions are the most relevant to vehicle searches; they are also the most controversial.\footnote{For a critical review of the Supreme Court's fourth amendment decisions, see Note, supra note 1; at 105. For references to criticisms of the Supreme Court's fourth amendment holdings, see supra note 1 and accompanying text.}

The United States Courts of Appeals have applied these three exceptions using a variety of rationales, resulting in a variety of outcomes.\footnote{For a summary of the circuits' opinions regarding the automobile exception as applied to airplanes; infra notes 250-283 and accompanying text for a discussion of searches incident to arrest; infra notes 284-316 and accompanying text for a discussion of the plain view doctrine.} For example, the circuits disagree as to whether an airplane is analogous to an automobile, and thus, whether the automobile exception applies
to aircraft searches. The primary disagreement concerns whether significant differences in mobility exist between airplanes and automobiles.

Another difficulty in placing parameters on aircraft searches stems from the Supreme Court's bright line rules regarding the searches of automobiles incident to arrest. These rules allow the search of the entire passenger section, including the glove compartment and containers inside the passenger section. In the application of the search incident to arrest exception to aircraft, however, none of the circuits have addressed the permissible parameters of an airplane search.

The Supreme Court's parameters for applying the plain view doctrine to automobiles are also difficult to apply to airplanes. For example, under the plain view doctrine, items plainly visible to persons passing by are not considered discoveries resulting from a search for the purposes of the fourth amendment. No search is deemed to have occurred because the passerby inadvertently discovered the items and was not trespassing at the time. Airplanes, however, are more difficult to peer into than automobiles, which raises the issue of whether climbing onto the wing of an aircraft to look inside constitutes a

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106 See infra notes 158-166 and accompanying text for a discussion of whether an airplane is the functional equivalent of an automobile.

107 See infra notes 169-225 and accompanying text for a discussion of the mobility rationale and the differences in mobility between airplanes and automobiles.

108 See infra notes 250-257 and accompanying text for a discussion of searches of automobiles incident to arrest.

109 See infra notes 254, 277-279 and accompanying text for a discussion of glove compartment searches; see also Alschuler, supra note 30, at 227.

110 See infra notes 254-255 and accompanying text for a discussion of searches of containers inside a vehicle.

111 See infra notes 261-283 and accompanying text for the Eleventh Circuit's application of the search incident to arrest exception to airplanes.

112 See infra notes 284-316 and accompanying text for a discussion of the plain view doctrine.


114 See id; infra notes 284-316 and accompanying text for a discussion of applying the plain view doctrine to automobile searches.
tress.  

The circuits have also applied other warrant requirement exceptions to airplane search. The major issue concerning consent searches is determining who has the authority to give consent to searches. Border searches are controversial for all types of vehicles, but are beyond the scope of this Comment. Administrative inventory searches do not appear to be controversial when applied to airplanes. Limited intrusion, or “stop and frisk” searches, and the open fields doctrine have also been applied to airplanes.

B. Probable Cause

Probable cause is required to obtain a search warrant and to justify certain types of warrantless searches. Two types of probable cause exist: probable cause to search and probable cause to arrest. Probable cause to search exists when an officer is presented with sufficient underlying facts and circumstances from which a reasonable person

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115 See infra notes 286-316 and accompanying text for a discussion of whether climbing onto the wing of an aircraft constitutes a trespass.

116 See infra notes 344-348 and accompanying text for a discussion of consent searches.

117 See infra notes 349-358 and accompanying text for a discussion of border searches. Border searches include a number of controversial issues, including: (1) determining whether a vehicle actually crossed an international border; (2) how long a detention is permissible; and (3) the scope of the search. While the law regarding border searches is not settled and is quite controversial, a full discussion of this area is beyond the scope of this Comment. For further information regarding border searches see 1 W. LaFave & J. Israel, supra note 2, § 3.9(f); Mandell & Richardson, Lengthy Detentions and Invasive Searches at the Border: In Search of the Magistrate, 28 Ariz. L. Rev. 331 (1986); Comment, United States v. Montoya de Hernandez: The Border Search Exception to the Exclusionary Rule, 12 New Eng. J. on Crim. & Civ. Confinement 395 (1986); Note, Reasonable: A Different Meaning at the Border, Crim. Just. J. 363 (1986); Note, Intrusive Border Searches — What Protection Remains for the International Traveler Entering the United States after United States v. Montoya de Hernandez and Its Progeny?, Vand. J. Transn’l L. 551 (1987).

118 See infra notes 334-340 and accompanying text for a discussion of administrative inventory searches.

119 See infra notes 317-333 and accompanying text for a discussion of limited intrusion or “stop and frisk” searches.

120 See infra notes 341-343 and accompanying text for a discussion of the open fields doctrine.
would conclude that seizable evidence will be found on the premises or person to be searched.\textsuperscript{121} Probable cause to arrest exists when, at the time of arrest, the facts and circumstances within the arresting officer’s knowledge, and of which he has reasonably trustworthy information, are sufficient to induce a prudent person to believe that the suspect has committed or is committing an offense.\textsuperscript{122}

To justify a search conducted pursuant to the automobile exception, an officer must have probable cause to search;\textsuperscript{123} and to justify a search incident to arrest, he must have probable cause to arrest.\textsuperscript{124} The other exceptions to the warrant requirement do not have a probable cause requirement.\textsuperscript{125}

To search an automobile pursuant to the automobile exception, an officer must first have probable cause to search the automobile.\textsuperscript{126} An officer has probable cause


\textsuperscript{123} See, e.g., Colorado v. Bannister, 449 U.S. 1, 3 (1980); Arkansas v. Sanders, 442 U.S. 753, 760 (1979) (holding that an officer may search an automobile if he has probable cause to believe that the vehicle contains contraband, evidence of a crime, or other seizable items), modified, United States v. Ross, 456 U.S. 798 (1982) (upholding the result of Sanders, but rejecting the rationale, to which only a plurality had agreed). For further discussion of the probable cause requirement for an automobile exception search, see infra notes 142-144 and accompanying text.

\textsuperscript{124} United States v. Robinson, 414 U.S. 218, 235 (1973) (a full search of a person incident to a lawful arrest is reasonable and is recognized as an exception to the warrant requirement); see infra notes 258-260 and accompanying text for a discussion of the probable cause requirement and searches incident to arrest.

\textsuperscript{125} For a discussion of general considerations concerning probable cause, see 1 W. LaFave & J. Israel, supra note 2, § 3.3. Probable cause is usually inherent in hot pursuit searches because an officer does not ordinarily pursue a suspect unless he has probable cause to believe the suspect may have committed a crime. Probable cause is not a relevant factor for consent searches because an officer may always search the premises if he has permission from someone who has the authority to give permission. The courts have waived the probable cause requirement for administrative inventory searches, border searches, and the open fields doctrine. No probable cause to search is necessary under the plain view doctrine because no “search” exists for the purposes of the fourth amendment. Limited intrusion or “stop and frisk” searches may be conducted based upon a reasonable suspicion that criminal activity is afoot. Id.

\textsuperscript{126} Carroll v. United States, 367 U.S. 132, 156 (1925).
to search if he reasonably believes that contraband, evidence of a crime, or other seizable items are inside the automobile. The Court's original reason for allowing an automobile search based solely upon probable cause was that the mobility of an automobile created exigent circumstances. The Court later added discussions of reduced expectations of privacy inside automobiles to its rationale.

Before an officer may search a person incident to arrest, he must first make a lawful arrest. If the officer has not obtained an arrest warrant, he must have probable cause to believe that the suspect is committing or has committed a crime for which he can be arrested, or the arrest is not legal. Similarly, before an officer may search an automobile incident to the arrest of a driver or passenger, the officer must first make a lawful arrest.

C. Automobile/Vehicle Exception

In 1925, the Supreme Court recognized a "movable vessel" exception to the warrant requirement in *Carroll v. United States.* Carroll involved federal prohibition officers who, after several months of surveillance, stopped and searched the defendant's automobile, where they found bottles of illegal liquor. The Court justified the warrantless search of the automobile by finding that defendants or their confederates could have easily moved the car and removed or destroyed the evidence before the officer could obtain a warrant.

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127 Id.
128 Id. at 153; see also Arkansas v. Sanders, 422 U.S. 753, 763 (1979), modified, United States v. Ross, 456 U.S. 798 (1982).
129 Sanders, 442 U.S. at 764-65.
130 Robinson, 414 U.S. at 224, 235.
131 Id. at 235.
133 267 U.S. 132 (1925). For further discussion of the automobile exception, see 1 W. LaFave & J. Israel, supra note 2, § 3.7(b).
134 267 U.S. at 134-36.
135 Carroll, 267 U.S. at 153; see also Sanders, 442 U.S. at 762 (discussing Carroll, as well as reduced expectations of privacy).
An officer must meet only one requirement before conducting a search pursuant to the automobile exception: he must have probable cause to believe that the vehicle contains the fruits or instrumentalities of a crime, evidence of a crime, or contraband. The Supreme Court has built its rationale for the automobile exception on two different bases. Initially, the Court held that the mobility of an automobile gives rise to exigent circumstances, thus justifying the officer's failure to obtain a warrant. The Court later added, as a second basis, that a person has a lower expectation of privacy in his automobile than in his home or office. As reasons for a reduced expectation of privacy in automobiles, the Court has mentioned both the public nature and the amount of governmental regulation of automobiles, including licensing and other motor vehicle regulations.

The scope of a search conducted pursuant to the automobile exception is often confused with the scope of a search performed incident to arrest. The primary difference between these two exceptions is that the automobile exception allows a search of the entire automobile, including the trunk, while a search incident to arrest allows a search of only the passenger compartment (including the glove compartment and containers inside the passenger compartment). Another important dif-

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136 See 1 W. LAFAVE & J. ISRAEL, supra note 2, § 3.7(b), at 277; see, e.g., Warden v. Hayden, 387 U.S. 294, 310 (1967) (police may search for and seize contraband and the fruits and instrumentalities of a crime); Carroll, 267 U.S. at 155-56 (1925) (official must have probable cause to believe that the automobile is carrying contraband or illegal merchandise).

137 Carroll, 267 U.S. at 153; see also Sanders, 442 U.S. at 761.

138 Sanders, 442 U.S. at 761; see also California v. Carney, 471 U.S. 386, 394 (1985) (motor home has lower expectations of privacy); United States v. Ross, 456 U.S. 798, 823 (1982) (privacy interests in packages and containers inside an automobile must give way if officers have reason to believe they contain contraband). But cf. United States v. Chadwick, 433 U.S. 1, 13 (1977) (no decreased expectation of privacy is associated with a footlocker simply because it is placed inside an automobile).


141 New York v. Belton, 453 U.S. 454, 460-61 n.4 (1981); see infra notes 250-283
ference between the two exceptions is that in order to conduct a search incident to arrest, an officer must first have probable cause to arrest the suspect, but does not have to establish independent probable cause to search. In an automobile exception search, however, an officer may conduct a search without making an arrest, but he must have probable cause to search the automobile. Furthermore, an officer's subsequent observations may allow probable cause to search to ripen, even when an automobile is stopped for a reason that ordinarily does not give rise to establishing probable cause, such as a traffic violation.

In addition to warrantless automobile searches, the Supreme Court has addressed warrantless searches of motor homes and boats. In California v. Carney, the Court held that the police could conduct a warrantless search of a motor home parked in a public lot. The police placed the motor home under surveillance while trying to apprehend Carney, who was suspected of soliciting sex from boys. Police confirmed their suspicions when they questioned a boy who was leaving the motor home. The officers arrested Carney and, without first obtaining a warrant, searched the motor home. The Court upheld the search, holding that Carney had a reduced expectation of privacy inside the motor home. The Court also held that a motor home in a public parking lot is more compa-

and accompanying text for a discussion of searches of vehicles incident to arrest; see also 1 W. LAFAVE & J. ISRAEL, supra note 2, § 3.7(a), at 275-76.

142 See, e.g., Belton, 453 U.S. at 460; United States v. Robinson, 414 U.S. 218, 235 (1973). For a discussion of establishing probable cause to arrest and searches incident to arrest, see infra notes 258-260 and accompanying text. See also 1 W. LAFAVE & J. ISRAEL, supra note 2, §§ 3.3, 3.5, 3.7(a); Note, supra note 1, at 119-22.

143 Carroll v. United States, 267 U.S. 132, 155-56 (1925); 1 W. LAFAVE & J. ISRAEL, supra note 2, § 3.7(b).

144 See, e.g., Colorado v. Bannister, 449 U.S. 1, 3-4 (1980) (per curiam) (while issuing a citation for speeding, the officer saw items inside the vehicle that matched the description of items reported stolen; this observation gave rise to probable cause to search).


146 Id. at 389.

147 Id. at 392-94.
rable to a movable automobile than to a home.\textsuperscript{148}

The Supreme Court also upheld the warrantless search of a private sailboat in \textit{United States v. Villamonte-Marquez}.\textsuperscript{149} Pursuant to 14 U.S.C. § 89(a), the Coast Guard has statutory authority to search vessels on the high seas and in waters over which the United States has jurisdiction.\textsuperscript{150} Congress also granted customs officers the authority to search any vessel in United States or customs waters, pursuant to 19 U.S.C. § 1581(a).\textsuperscript{151} Section 1581(a) allows customs officers to board vessels within United States or

\textsuperscript{148} Id.

\textsuperscript{149} 462 U.S. 579 (1983); see also Note, supra note 51, at 617.

\textsuperscript{150} 14 U.S.C. § 89(a) (1982). Section 89(a) provides:

\begin{quote}
The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.
\end{quote}

\textsuperscript{151} Id.

\textsuperscript{152} 19 U.S.C. § 1581(a) (1982). Section 1581(a) provides:

\begin{quote}
Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. 1701 et seq.], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.
\end{quote}

\textit{Id.} (brackets in original).
customs waters to examine required documents and inspect the vessel, even if the officers do not have either reasonable suspicion or probable cause to search.152 Before Villamonte-Marquez, courts had held that the fourth amendment required at least reasonable suspicion to search a boat.153

In Villamonte-Marquez, United States customs officers boarded a sailboat to check its documentation pursuant to section 1581(a) while it was anchored eighteen miles inland near Lake Charles, Louisiana.154 The officials searched the boat and found 5,800 pounds of marijuana.155 In upholding the search, the Court noted the difficulty in drawing the line between pleasure boats, in which a person would have a higher expectation of privacy, and commercial vessels, in which one would have a lower expectation of privacy.156 Thus, the Court held that reasonable suspicion is not required to search either private or commercial boats in United States or customs waters.157

To date, the Supreme Court has not directly addressed whether the automobile exception applies to aircraft.158 Five circuits, however, have addressed the issue: the

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152 Id.
153 See Note, supra note 51, at 619-22.
154 Villamonte-Marquez, 462 U.S. at 582-83.
155 Id. at 583.
156 Id. at 592 n.6.
157 Id. at 592-93.
Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits. With the exception of the Fifth Circuit, these courts agree that the automobile exception should apply in some manner to airplanes. The circuits base their rationales for extending the exception to aircraft on the aircraft’s mobility or exigent circumstances. An airplane is similar to an automobile in many respects, including its mobility and its use as a transportation vehicle. Airplanes,


United States v. Brennan, 538 F.2d 711, 721 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977). The Fifth Circuit did not extend the automobile exception to airplanes because it declined to hold that an automobile is the functional equivalent of an airplane. The court, however, justified the warrantless search based on exigent circumstances, which was also part of the basis for creating the automobile exception. Id. at 721 (citing Warden v. Hayden, 387 U.S. 294 (1967)); see supra note 137 and accompanying text for a discussion of exigent circumstances; infra notes 226-231 and accompanying text for a discussion of Brennan; see also Chambers v. Maroney, 399 U.S. 42, 51 (1970) (the mobility of an automobile was held to give rise to exigent circumstances).

United States v. Nigro, 727 F.2d 100, 105-07 (6th Cir. 1984). The Sixth Circuit focused on an airplane’s mobility in applying the automobile exception to aircraft, even though the aircraft at issue was secure and unlikely to be moved. See infra notes 192-203 and accompanying text for a discussion of the Sixth Circuit’s decisions.

The Ninth Circuit decided that exigent circumstances existed because the vehicle was movable, despite the fact that the plane was secure when searched. United States v. Flickinger, 573 F.2d 1349, 1357 (9th Cir.), cert. denied, 439 U.S. 836 (1978), overruled on other grounds, United States v. McConney, 728 F.2d 1195, 1205 (9th Cir.), cert. denied, 469 U.S. 824 (1984); see infra notes 204-213 and accompanying text for a discussion of the Ninth Circuit’s rationale.

The Tenth Circuit based its decisions primarily on the mobility of an airplane, but also discussed reduced expectations of privacy. United States v. Finefrock, 668 F.2d 1168, 1171-72 (10th Cir. 1982) (exigent circumstances and reduced expectations of privacy); United States v. Gooch, 603 F.2d 122, 124 (10th Cir. 1979) (mobility and reduced expectations of privacy); United States v. Sigal, 500 F.2d 1118 (10th Cir.) (mobility of aircraft gave rise to exigent circumstances), cert. denied, 419 U.S. 954 (1974); see infra notes 169-191 and accompanying text for a discussion of the Tenth Circuit’s rationale.

The Eleventh Circuit first extended the automobile exception to airplanes in an unpublished district court decision. United States v. Rollins, 699 F.2d 530, 534 (11th Cir.), cert. denied, 464 U.S. 933 (1983) (citing the unpublished opinion that was affirmed without comment in United States v. Olson, 670 F.2d 185 (11th Cir. 1982)). The Rollins court stated no reasons for extending the automobile exception to airplanes, but said that it could “see no difference between the exigent circumstances of a car and an airplane.” Rollins, 699 F.2d at 534; see infra notes 214-225 and accompanying text for a discussion of the Eleventh Circuit’s decisions.
however, differ from automobiles in several significant respects.

One major difference is that fewer people are licensed to fly an airplane than are licensed to drive an automobile, primarily because airplanes are more difficult to operate and require more pilot training. Another difference is that although airplanes are generally restricted to airports, landing strips, and other flat areas for takeoff and landing, after takeoff they can travel in any direction and along any route they choose. Furthermore, they can travel greater distances in a shorter time than automobiles. The courts have not addressed whether these differences in mobility are significant for the purposes of the fourth amendment.

With respect to the second rationale underlying the automobile exception, the courts have not directly addressed the issue of expectations of privacy. Because airplanes are more highly regulated than automobiles, a person should have even lower expectation of privacy in an airplane than in an automobile. Many differences between automobiles and airplanes, however, might give rise to an increased expectation of privacy in an airplane.

One difference is that many airports and hangars have restricted access, which might increase expectations of privacy at these locations. Another important difference is that airplanes usually are much larger than automobiles. The courts, however, have not addressed how large an area of an airplane may be searched pursuant to the automobile exception. Officers may search any area of an airplane, including the trunk and containers, in which they have probable cause to believe they may find contraband, evidence of a crime, or other seizable

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164 See United States v. Gooch, 603 F.2d 122, 124-25 (10th Cir. 1979).
165 Id.
166 Id.
167 See, e.g., United States v. Nigro, 727 F.2d 100, 101 (6th Cir. 1984) (a four-engine DC-6 cargo plane was used in smuggling narcotics).
The courts have not indicated whether similar parameters apply to airplane searches.

From the five circuits that have addressed these issues, a variety of rationales and results have emerged. The following is a brief survey of how these circuits have applied the automobile exception to aircraft.

1. **Tenth Circuit: The Mobility Rationale**

In a 1974 decision, *United States v. Sigal*, the Tenth Circuit became the first circuit to explicitly extend the automobile exception to airplanes. Customs agents placed Sigal’s Piper Cherokee-6 under surveillance after an agent noticed flattened boxes inside and that the passenger seats were removed. Agents followed Sigal for several days, observed him load several boxes into his airplane in Los Angeles, and followed him to Grants, New Mexico. At the Grants airport, an agent looked into the airplane and saw numerous boxes inside. The agent reported that he detected a “strong odor of marijuana” from the airplane’s vents and decided to search the airplane, even though he had no warrant. After finding the door to the aircraft locked, the agent opened the unlocked baggage compartment and found a sealed box. The agent opened the box and found marijuana inside.

Sigal contended that the warrantless search violated his fourth amendment rights and moved to exclude from evidence the 445 pounds of marijuana found during the search. The court held that the automobile exception applied to the warrantless search and therefore the evidence obtained was admissible. While the court implied that a reduced expectation of privacy existed inside an air-

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169 500 F.2d 1118 (10th Cir.), cert. denied, 419 U.S. 954 (1974).
170 Id. at 1120.
171 Id. at 1120-21.
172 Id. at 1121.
173 Id. at 1119, 1121.
plane, the primary basis for the decision was the airplane's mobility. The court stated that an airplane could travel great distances in any direction, to unknown destinations. The court concluded that this high degree of mobility gave rise to exigent circumstances, which justified the search in the same manner as an automobile search would be justified. It is interesting to note that the defendant did not challenge the opening of the sealed box, in which he might have claimed a reasonable expectation of privacy.

Five years after Sigal, the Tenth Circuit addressed similar issues in United States v. Gooch. After radar tracking an airplane travelling north from Mexico, federal agents dispatched aircraft to intercept the suspect airplane. When the airplane landed, Gooch jumped out and attempted to flee, dropping a bag as he left the airplane. The agents arrested both Gooch and the pilot. A subsequent search of the airplane revealed 1,185 pounds of marijuana.

In its analysis, the court noted that an airplane is less mobile than an automobile in some respects because fewer people can operate airplanes than automobiles. The court further noted that once it leaves the ground, an airplane is more mobile than an automobile because it can travel greater distances in a shorter time and is not restricted to roadways. The airplane in Gooch, however, was secured and the pilot was under arrest when the of-

174 Id. at 1121. The court compared the greater expectation of privacy in a home with the lower expectation of privacy in an automobile. Id.
175 Id. at 1121-22. The court stated that "the mobility of the thing searched in the instant case is a most significant factor in determining whether [agent] Weatherman's search of Sigal's aircraft was constitutionally permissible." Id.
176 Id. at 1122.
177 Id. at 1121-22.
179 603 F.2d 122 (10th Cir. 1979).
180 Id. at 123.
181 Id. at 124-25.
182 Id.
Officers conducted their search.\textsuperscript{183} Although the court noted problems with deciding the case on the basis of mobility alone, the decision was based primarily on this rationale.\textsuperscript{184} The court, however, also discussed a person's reduced expectations of privacy inside airplanes. The reasons given for these reduced expectations were the public nature of airplanes and the amount of governmental regulation of airplanes.\textsuperscript{185}

In \textit{United States v. Finefrock},\textsuperscript{186} however, the Tenth Circuit abandoned its hesitance to base decisions regarding secured aircraft solely on the mobility rationale. Even though the \textit{Finefrock} airplane was secure, the court based its decision solely on mobility and made no mention whatsoever of lower expectations of privacy.\textsuperscript{187} Officers suspected that Finefrock was transporting narcotics and waited for his airplane to land. After the airplane landed, the officers peered inside and observed marijuana stems protruding from containers. The officers arrested Finefrock and searched the airplane two hours later, without first obtaining a warrant.\textsuperscript{188}

The court justified the search under the automobile ex-

\textsuperscript{183} \textit{Id.} at 124.

\textsuperscript{184} \textit{Id.} at 124-25 n.3. In footnote 3, the court discusses its concerns over mobility being the determinative factor in this type of case. In \textit{Gooch} the airplane was secure, and the court believed that actual mobility was not an issue. The court, however, felt bound to follow the rationale of \textit{Chambers v. Maroney} and decided the case primarily on the inherent mobility of airplanes and secondarily on reduced expectations of privacy, which the Tenth Circuit believed was a more appropriate rationale. \textit{See Chambers v. Maroney}, 399 U.S. 42, 48-51 (1970). \textit{Chambers}, however, does not expressly preclude a rationale based on reduced expectations of privacy. Furthermore, the court in \textit{Gooch} also cited \textit{Arkansas v. Sanders}, which discusses both mobility and reduced expectations of privacy. \textit{Arkansas v. Sanders}, 442 U.S. 753, 761 (1979).

\textsuperscript{186} \textit{Gooch}, 603 F.2d at 125 (citing United States v. Chadwick, 433 U.S. 1 (1977)). The court concluded that the reduced expectations of privacy associated with automobiles also applied to airplanes, but gave no reasons for this conclusion. \textit{Id.; see also} United States v. Chadwick, 433 U.S. 1, 12 (1977) (an automobile's "function is transportation and it seldom serves as one's residence or as the repository of personal effects") (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

\textsuperscript{187} 668 F.2d 1168 (10th Cir. 1982).

\textsuperscript{188} \textit{Id.} at 1171-72.

\textsuperscript{184} \textit{Id.} at 1170.
Although the airplane in *Finefrock* was secure and in no danger of being moved, as was the airplane in *United States v. Gooch*, the court did not question the mobility rationale as it had in *Gooch*. Instead, the court held that because of the potential mobility of the vehicle, exigent circumstances justified the warrantless search.

2. **Sixth Circuit: The Mobility Rationale**

As did the Tenth Circuit, the Sixth Circuit relied upon the mobility rationale to justify aircraft searches, even when the aircraft were secured and only potentially mobile. The Sixth Circuit first addressed airplane searches in *United States v. Cusanelli* in 1973. Although the court mentioned *Carroll v. United States* and *Chambers v. Maroney* to support its opinion, it never developed an analysis beyond discussing probable cause. In fact, the court never mentioned the automobile exception in its opinion. The only indications that it might be relying on this exception were references to *Carroll* and *Chambers* in its discussion of probable cause.

In 1984, the Sixth Circuit explicitly extended the automobile exception to aircraft in *United States v. Nigro*. An FAA official noticed that a four-engine DC-6 at Memphis International Airport had a defective propeller and nu-

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189 *Id.* at 1171-72.
190 *See id.*
191 *Id.* at 1171. The court said that it could not distinguish the present case from *Chambers v. Maroney*, which held that the search was justified because of the automobile's mobility. *See Chambers v. Maroney*, 399 U.S. 42, 50 (1970) (holding that an automobile's mobility justifies warrantless searches when probable cause to search exists); *supra* notes 179-185 and accompanying text for discussion of *Gooch*.
193 *Cusanelli*, 357 F. Supp. at 680-81. Probable cause to search is the only requirement necessary to conduct an automobile exception search. The *Cusanelli* court, however, never clearly expressed whether it was basing its opinion on the automobile exception or some other exception, or creating a new exception to the warrant requirement. *See id.; supra* notes 133-135 and accompanying text for a discussion of *Carroll; supra* notes 184 and 191 for a discussion of *Chambers*.
195 727 F.2d 100 (6th Cir. 1984).
merous nicks, indicating that it had been landing on gravel airstrips. The official also observed that the pilot had followed an unusual landing pattern and had not notified the tower that his propeller was malfunctioning, as was conventional practice. When the official questioned the pilot and asked for required documents, the pilot was evasive and failed to produce the documents. A customs agent then inspected the exterior of the airplane, opened the cargo belly, and found marijuana debris. Officials arrested the pilot and searched the plane.

In its analysis, the court noted that a number of courts of appeals had applied the automobile exception to airplanes. It then adopted its own version of the exception. First, the court concluded that an unoccupied parked airplane is less mobile than a similarly situated automobile because fewer people are capable of flying an airplane than driving a car. Next, the court stated that once an airplane is airborne, it is considerably more mobile than an automobile because it can cover greater distances in a shorter time and is not restricted to existing roadways. Finally, the court concluded that because of the public nature of airports, a person should have a lower expectation of privacy in an airplane. The court based its opinion solely on the mobility rationale, however, because it believed that the Supreme Court had placed the reduced expectation of privacy justification in doubt in *United States v. Ross.* This reasoning is quite similar to the Tenth Circuit's reasoning in *United States v. Gooch,* except that the

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196 Id. at 101-02.
197 Id. at 101.
198 Id. at 101-02.
199 Id. at 102.
200 Id.
201 Id. at 107.
202 Id.; see *United States v. Ross,* 456 U.S. 798, 823 (1982) (holding that "an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband"); *supra* notes 33-39 and accompanying text for a discussion of reasonable expectations of privacy.
Sixth Circuit did not appear to be concerned that the airplane was secured and, therefore, only potentially mobile.  

3. Ninth Circuit: Movable Vehicle Exception

The Ninth Circuit, like the Tenth and Sixth Circuits, based its reasoning on the potential mobility of an airplane in adopting what it termed the “moving vehicle” exception in United States v. Flickinger. The factual situation in Flickinger is similar to the one the Supreme Court addressed regarding automobiles in 1971 in Coolidge v. New Hampshire. The Flickinger opinion, however, makes only passing reference to Coolidge. A four-member plurality in Coolidge attempted to distinguish between a moving vehicle and a movable vehicle, but the majority of the Court has never recognized this distinction. In Coolidge, police arrested the defendant and two days later searched his car without first obtaining a warrant. The majority of the Court held that the search was not justified under either the search incident to arrest exception or the automobile exception because the car was parked in the driveway and there was little likelihood that anyone would drive the vehicle away. The Coolidge plurality distinguished searching a car parked in a driveway when the owner is in jail from stopping a car on the open road and searching it contemporaneously because of exigent circumstances.

In Flickinger, the airplane was parked and the occupants were not in the immediate area at the time of the

203 See supra notes 179-185 and accompanying text for a discussion of Gooch.
206 Flickinger, 573 F.2d at 1357.
207 Coolidge, 403 U.S. at 461 n.18. The four-member plurality consisted of Justices Brennan, Douglas, Marshall, and Stewart. Id.
208 Id. at 447-48.
209 Id. at 457, 463-64.
210 Id. at 461 n.18.
The defendants had used the plane earlier during the day of their arrest, but were arrested at their home, which was nowhere near the airplane. The court, however, held that the “moving vehicle” exception justified the warrantless search because exigent circumstances, specifically that the vehicle was capable of being moved, excused the lack of a warrant.

4. Eleventh Circuit: Applying the Automobile Exception

The Eleventh Circuit has also applied the automobile exception to aircraft, and has focused on both probable cause and mobility to justify its holdings. In an unpublished 1982 decision, United States v. Olson, a district court held that the automobile exception included airplanes. A subsequent case, United States v. Rollins, relied upon Olson and the automobile exception to justify warrantless searches of airplanes.

Based on an unnamed informant’s tip that Rollins and codefendant Thomas would fly from one Alabama airport to another with a pound of cocaine, federal agents began surveillance at both airports. Agents observed their flight from the first airport to the second, corroborating the tip. Agents at the second airport watched them leave the airplane with a brown satchel and paper bag, and enter a car occupied by a known drug trafficker. When Rollins and Thomas left the car, boarded their airplane, and prepared to take off, the agents approached

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211 Flickinger, 573 F.2d at 1353.
212 Id.
213 Id. at 1357.
214 670 F.2d 185 (11th Cir.) (memorandum decision denying the defendant’s appeal), cert. denied, 458 U.S. 1110 (1982). The district court's opinion is not published.
216 Rollins, 699 F.2d at 534; Thomas, 536 F. Supp. at 743. Both the district court and the Eleventh Circuit cited Olson, but neither gave any indication as to the basis for Olson's application of the automobile exception to airplanes.
217 Rollins, 699 F.2d at 531.
218 Id. at 531-32.
the airplane. One agent, following standard procedures, climbed onto the airplane's wing to check for possible confederates aboard. The agent saw a bag containing a white powder, which he believed to be cocaine, and entered the airplane to confirm his belief. The agents then arrested the suspects and obtained a search warrant to search the rest of the airplane.\footnote{Id. at 532.}

The court upheld the warrantless search based on both the automobile exception and search incident to arrest exception.\footnote{Id. at 534; see infra notes 250-283 and accompanying text for a discussion of searches incident to arrest.} While the Eleventh Circuit gave no rationale for upholding the search pursuant to the automobile exception, it did not dispute the district court's holding that the search was legal because of the difficulty involved in securing a movable vehicle while an officer obtains a warrant.\footnote{Thomas, 536 F. Supp. at 742.} Rollins also helps to illustrate the confusion that exists in differentiating the automobile exception and searches of automobiles incident to arrest. In its holding, the Eleventh Circuit states that "[b]ecause the search was based on a legal arrest supported by probable cause . . . we conclude that the search was within the bounds of both 'search incident to an arrest' and the 'automobile exception.' "\footnote{Rollins, 699 F.2d at 534.} As discussed previously, probable cause to arrest is distinguishable from probable cause to search.\footnote{See supra notes 121-132 and accompanying text for a discussion of probable cause.} Probable cause to search is a prerequisite to a valid automobile exception search, but probable cause to arrest does not necessarily imply that probable cause to search exists.\footnote{See supra note 136 and accompanying text for a discussion of probable cause to search and the automobile exception.} While the Eleventh Circuit's outcome in Rollins is probably correct, its reasoning and use of terminology are not.\footnote{While the search should not be justified as a search incident to arrest, as discussed infra notes 250-283, the search could be justified under the automobile exception.}
5. Fifth Circuit: Exigent Circumstances Rationale

The Fifth Circuit addressed the application of the automobile exception to aircraft in *United States v. Brennan.* In this case, an informant contacted federal officials and told them that he suspected Brennan would soon engage in smuggling activities. When Brennan departed in his airplane approximately one month later, federal agents tried to track the flight but failed. The next day Brennan returned to the airport, parked his airplane in the hangar, and attempted to leave. While other agents detained Brennan, one agent searched the aircraft. Upon discovering marijuana and hashish in the airplane, the agents placed him under arrest.

The Fifth Circuit held that exigent circumstances justified the search of the aircraft, but declined to hold that "an airplane is the legal equivalent of an automobile." The court held that the agents were justified in allowing Brennan to park the airplane in the hangar rather than trying to stop him on the taxiway because of the potential danger to the agents. In addition, very little time elapsed between Brennan's detention and the search of the airplane. The court further justified the immediate search because two vehicles belonging to Brennan were parked outside the hangar, indicating that confederates might be present. In addition, the informant had said that a large amount of narcotics would be smuggled, which also indicated that confederates who could move or destroy evidence might be present. Thus, the Fifth Cir-

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exception as a potentially movable vehicle. *See supra* notes 169-213 and accompanying text for other circuits' applications of the mobility rationale.


227 *Id.* at 714.

228 *Id.* at 721.

229 *Id.*

230 *Id.*; cf. *Coolidge v. New Hampshire,* 403 U.S. 443, 447-48, 456, 462-64 (1971) (two days elapsed between the arrest and search, which the Court held to be too long a period of time).

231 *Brennan,* 538 F.2d at 721.
cuit avoided addressing the mobility rationale, but justified the search based on other exigent circumstances.

6. Analysis: Automobile Exception and Aircraft

The circuit courts have applied both of the rationales for the automobile exception, mobility and reduced expectations of privacy, to aircraft searches. The Sixth and Tenth Circuits based their decisions on the potential mobility of an airplane, even when the airplane was secure and not likely to be moved before a warrant could be obtained. Both circuits emphasized that fewer people can fly airplanes than can drive automobiles and that airplanes can take off and land only in certain places. An airplane, however, is much more mobile once it is airborne because it can cover greater distances in a shorter time than an automobile and is not restricted to roadways.

The Ninth Circuit, however, correctly noted that a significant difference exists between a vehicle that is moving and a vehicle that is movable. The exigent circumstances that exist when an airplane is stopped on a runway, and, therefore, is capable of taking off before a search can be conducted, do not exist when an airplane is parked or otherwise secured.

The Fifth Circuit also addressed an important concern regarding the distinction between moving and movable vehicles when it held that federal agents could first let a pilot park an airplane and, thus, immobilize it. The court

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232 See United States v. Nigro, 727 F.2d 100 (6th Cir. 1984); United States v. Finefrock, 668 F.2d 1168 (10th Cir. 1982); United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Sigal, 500 F.2d 1118 (10th Cir.), cert. denied, 419 U.S. 954 (1974); supra notes 192-203 and accompanying text for a discussion of the Sixth Circuit's mobility rationale and notes 169-191 and accompanying text for a discussion of the Tenth Circuit's mobility rationale.

233 See supra notes 181 and 201 and accompanying text.

234 See supra notes 182 and 201 and accompanying text.

235 See supra notes 204-213 and accompanying text. The Coolidge plurality's distinction between moving and movable vehicles has not been adopted by a majority of the Court.

236 See supra notes 209-210 and accompanying text for a discussion of the distinction between movable and moving automobiles in Coolidge.
held that this would be necessary in some circumstances because of the dangers associated with approaching an unsecured plane.\textsuperscript{237} For example, officers on the ground cannot pursue an airplane if the pilot takes off when he sees them approaching. In addition, a pilot could use the airplane as a means of chasing and injuring officers. Furthermore, an officer is not able to look inside an airplane as easily as he can look inside an automobile when approaching the vehicle. Therefore, he cannot readily determine whether the pilot or passengers are armed.

Although the Fifth Circuit declined to extend the automobile exception to airplanes, the "exigent circumstances" rationale it gave for justifying the warrantless airplane search is virtually identical to the mobility rationale given by the Supreme Court in early automobile search cases.\textsuperscript{238} For example, in \textit{Chambers v. Maroney},\textsuperscript{239} the Court held that an automobile's inherent mobility justified the officers' taking it to the police station to conduct a search instead of searching at the site of the stop.\textsuperscript{240} The mobility rationale has been criticized because it allows officers to conduct searches when it is highly unlikely that the vehicle will be moved before they can obtain a search warrant.\textsuperscript{241} This criticism is especially applicable to airplanes because fewer people can fly them and because at many airports airplanes must receive permission from controllers before taking off.

The circuit courts focused on the actual and potential mobility of airplanes to justify warrantless searches during the 1970s and 1980s. A portion of the Supreme Court, however, began to question this justification.\textsuperscript{242} A four-member plurality of the Court in 1970 recognized a dis-

\textsuperscript{237} See \textit{supra} note 184 for a comparison with the Tenth Circuit's rationale.


\textsuperscript{239} 399 U.S. 42 (1970).

\textsuperscript{240} Id. at 52.

\textsuperscript{241} Note, \textit{supra} note 1, at 111-13.

\textsuperscript{242} See \textit{supra} notes 169-225 and accompanying text for circuit court opinions based on mobility.
tinction between moving and movable vehicles in Coolidge v. New Hampshire. A majority of the Court, however, has never accepted this distinction. Nevertheless, in 1979, the Court began justifying warrantless automobile searches based on a person’s reduced expectation of privacy inside an automobile, in addition to considering the vehicle’s mobility. The Court also began to use the term “inherent mobility” to justify warrantless searches of temporarily immobile vehicles, apparently attempting to establish a bright line rule to allow more searches based on probable cause alone.

Even though the mobility rationale does not always apply to airplanes as well as it does to automobiles, the rationale that people have lower expectations of privacy inside airplanes can be more easily justified. Unlike vans, mobile homes, or boats, airplanes are seldom used as living quarters. Furthermore, the government regulates airplanes more heavily than automobiles. These factors tend to reduce expectations of privacy. One factor that may increase expectations of privacy, however, is that airplanes, especially larger ones, are more difficult to see into than automobiles.

The justifications for warrantless automobile searches, which are based on a combination of probable cause and either exigent circumstances created by mobility or lower expectations of privacy, also apply to airplanes. While the courts have used these rationales to establish parameters for automobile searches, they have given little guidance regarding airplane searches. For example, police

\[243\] 403 U.S. 443 (1971) (plurality opinion of Brennan, Douglas, Marshall, and Stewart); see supra notes 205-213 and accompanying text.
\[247\] See, e.g., 14 C.F.R. §§ 21-43 (1988) (FAA airworthiness requirements). Airplanes are subject to stricter licensing requirements, maintenance procedures, and overall operating procedures than automobiles.
\[248\] See supra notes 133-168 and accompanying text for a discussion of these rationales.
officers may search any part of an automobile, including the trunk, in which they have reason to believe they might find seizable items. Extending these parameters to airplanes would allow officers to search any part of an airplane in which they might expect to find seizable items. Airplanes, however, are significantly different from automobiles in that certain parts of an airplane, such as parts of the wings, are crucial for safe flight. If officers tamper with these areas during a search, the airplane's safety during subsequent flight may be compromised. Therefore, it would not be prudent to allow warrantless searches of areas that involve tampering with the structure of the airplane. Instead, officers should be required to procure a warrant if they wish to inspect areas that require removal of integral structural components.

D. Searches Incident to Lawful Arrest

1. Background

Searches incident to lawful arrest comprise another exception to the warrant requirement. Probable cause must exist for the arrest, but independent probable cause to search need not be demonstrated as long as the following requirements are met. First, the arrest must be a full custodial arrest that is authorized by the offense for which the suspect is arrested. Second, the arrest must be made legally, pursuant to either an arrest warrant or probable cause to arrest without a warrant. Third, officers may conduct a full search of the suspect and the areas within his reach or control. The area of control includes the entire passenger section of an automobile, including the glove compartment, even if the arrestee is

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249 See supra notes 139-140 and accompanying text.
250 See 1 W. LAFAVE & J. ISRAEL, supra note 2, § 3.7(a) (discussing searches of vehicles incident to arrest); see also infra notes 258-260 and accompanying text for a discussion of probable cause.
252 Id. at 235-36.
253 Id. at 235; see also Chimel v. California, 395 U.S. 752, 762-63 (1969).
not in or near the automobile at the time of the search.\textsuperscript{254} In addition, officers may search containers inside the passenger compartment if they have probable cause to believe the container has seizable evidence inside.\textsuperscript{255} Fourth, the search must be contemporaneous with the arrest.\textsuperscript{256} If, however, a valid reason for delay exists, the search may still be deemed incident to the arrest.\textsuperscript{257}

a. Probable Cause to Arrest

In cases involving aircraft searches incident to arrest, two primary areas of concern involve establishing probable cause to make the arrest and the scope of the search after the arrest. While arrests made pursuant to a warrant are preferred, officers often place airplanes under surveillance based on less than probable cause. The decision to begin surveillance may result from tips received from anonymous or less than credible sources. The tips must be sufficiently corroborated before probable cause can be established.\textsuperscript{258} The practical problem is that an officer must decide when probable cause has been established, because if he arrests the suspect before establishing probable cause, the arrest will be declared illegal and any evidence found cannot be used against the suspect.\textsuperscript{259} If, on the other hand, the officer waits too long, the suspect may escape. Thus, officers frequently do not have time to procure arrest warrants and must make arrests based on probable cause alone.\textsuperscript{260}

\textsuperscript{255} Id. at 460 n.4 (a container includes the closed or open glove compartment, consoles, luggage, boxes, bags, and clothing, but not the trunk of the automobile).
\textsuperscript{258} See supra notes 169-225 and accompanying text for a discussion of the mobility of aircraft.
\textsuperscript{259} See supra notes 251-252 and accompanying text for a discussion of warrantless arrests and notes 45-46 and accompanying text for a discussion of the fruit of the poisonous tree doctrine; see also Draper v. United States, 358 U.S. 307, 313 (1959).
\textsuperscript{260} See, e.g., United States v. Willis, 759 F.2d 1486 (11th Cir.), cert. denied, 474
b. Scope of Search

The second area of interest concerning searches of airplanes incident to arrest is the scope of the search. The Eleventh Circuit addressed this issue in *United States v. Rollins*. Before arresting the suspects Thomas and Rollins, an officer climbed onto the airplane's wing and saw a bag of white powder. He then boarded the plane and determined that the bag contained cocaine. Officers then arrested the suspects and procured a warrant to search the rest of the airplane. As codefendants, Thomas and Rollins claimed that the original search violated their fourth amendment rights.

The Eleventh Circuit apparently extended to airplanes the *New York v. Belton* rule, which allows a search of the entire passenger compartment incident to a suspect's arrest. The court, however, gave no explanation for extending the rule but merely affirmed the district court's decision of *United States v. Thomas*. In *Thomas*, the district court based its reasoning on a rather confusing combination of the automobile exception and the *Belton* rule. The court first stated that the Eleventh Circuit had extended the automobile exception to airplanes in a previous case. Then it stated that the passenger compart-

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U.S. 849 (1985); United States v. Walden, 707 F.2d 129 (5th Cir. 1983); United States v. Groomer, 596 F.2d 356 (9th Cir. 1979).

261 United States v. Thomas, 536 F. Supp. 736 (M.D. Ala. 1982), aff'd sub nom. United States v. Rollins, 699 F.2d 530 (11th Cir.), cert. denied, 464 U.S. 933 (1983) (Rollins and Thomas were codefendants and coappellees); see supra notes 215-219 for further discussion of the facts in *Rollins* and *Thomas*.

262 Rollins, 699 F.2d at 532.

263 Id.

264 453 U.S. 454 (1981); see supra notes 254-255 and accompanying text.

265 Id. at 460-61.


267 See supra notes 133-245 and accompanying text for a discussion of the automobile exception; supra notes 140-144 and accompanying text, which detail the difference between the automobile exception and searches incident to arrest.

268 See supra notes 254-255 and 264-265 for a discussion of the *Belton* rule.

ment of a small airplane should be treated in the same manner as the passenger compartment of a car when it is searched incident to arrest.\(^{270}\) Thus, the district court produced a hybrid opinion that was based on two distinct exceptions to the warrant requirement, the automobile exception and searches incident to lawful arrest.\(^{271}\)

2. Analysis: Searches Incident to Arrest

The most apparent flaw in the Eleventh Circuit's approach is that it applied the search incident to arrest exception to a search that was conducted before the police arrested the defendants. The exception should be applied only when a legal arrest is made first, followed by a search.\(^{272}\) Thomas and Rollins are also good examples of the courts' confusion regarding the differences between searches incident to arrest and automobile exception searches. While both exceptions can apply to one search, an analysis should distinguish the two exceptions because the scope of each search is different.\(^{273}\) The automobile exception as extended to airplanes would allow a search of all areas of the airplane in which an officer reasonably believed he might find seizable items.\(^{274}\) A search of an airplane incident to arrest would be limited to the area within the control of the pilot or other arrested suspect if the rules for searches of automobiles incident to arrest apply.\(^{275}\) The area of control in an automobile consists of

\(^{270}\) Thomas, 536 F. Supp. at 743.

\(^{271}\) Id.; see supra notes 133-168 and accompanying text for a discussion of the automobile exception; supra notes 250-257 and accompanying text for a discussion of searches incident to arrest.

\(^{272}\) See supra notes 250-257 and accompanying text for a discussion of searches incident to arrest.

\(^{273}\) See supra notes 133-168 and accompanying text for a discussion of the automobile exception; supra notes 250-257 and accompanying text for a discussion of searches incident to arrest; supra notes 140-144 and accompanying text for differences between the two exceptions.

\(^{274}\) See supra notes 140-144 and accompanying text for the parameters of an automobile exception search.

\(^{275}\) See supra note 140 and accompanying text; see also Chimel v. California, 395 U.S. 752, 762-63 (1969) (justifying the search of the area within the arrestee's immediate control).
the entire passenger compartment, including the glove compartment and containers inside the passenger compartment.\textsuperscript{276}

The Supreme Court created the controversial bright line rule allowing searches of the entire passenger compartment during a search incident to arrest in \textit{Belton}.\textsuperscript{277} The original justifications for warrantless searches incident to arrest were to protect the officer from harm if the arrestee had a weapon in the automobile and also to prevent the destruction of evidence.\textsuperscript{278} The Court, however, created a bright line rule allowing the search of the entire passenger compartment rather than limiting the search to an area that might be within the suspect's reasonable or probable reach. Allowing a search of the entire passenger compartment of an airplane is more difficult to justify. The passenger compartment of a medium-sized airplane certainly extends well beyond the immediate reach or control of the pilot.\textsuperscript{279} A search of the entire passenger compartment of a large airplane might be justified, however, if officers reasonably believe that confederates could be hiding in the airplane.\textsuperscript{280} Officers could then make a cursory search of a large passenger compartment and possibly search further if seizable items were in plain view.\textsuperscript{281} The officer could justify the more extensive search under the plain view doctrine combined with the automobile exception.\textsuperscript{282} Under this combination, any items discovered

\textsuperscript{276} See supra notes 141 and 255 and accompanying text.

\textsuperscript{277} See Note, supra note 1, at 119-22 (critical discussion of \textit{Belton}).

\textsuperscript{278} \textit{Chimel}, 395 U.S. at 762-63.

\textsuperscript{279} See, e.g., United States v. Nigro, 727 F.2d 100 (6th Cir. 1984) (a DC-6 was used to smuggle narcotics); see supra notes 195-202 and accompanying text for further discussion of \textit{Nigro}. A DC-6 is approximately 100 feet long and has a wingspan of approximately 117 feet. M. MONTGOMERY & G. FOSTER, \textit{A FIELD GUIDE TO AIRPLANES} 138 (1984).

\textsuperscript{280} See, e.g., United States v. Brennan, 538 F.2d 711, 721 (5th Cir. 1976), \textit{cert. denied}, 429 U.S. 1092 (1977). The Fifth Circuit allowed a warrantless search based partially on the possibility that confederates might be present. \textit{Id.}; see supra notes 226-231 and accompanying text for a discussion of \textit{Brennan}.

\textsuperscript{281} See infra notes 284-316 and accompanying text for a discussion of the plain view doctrine.

\textsuperscript{282} See supra notes 133-249 and accompanying text for a discussion of the auto-
in plain view would give the officer the probable cause necessary to search the entire vehicle.\textsuperscript{283}

E. \textit{Plain View Doctrine}

1. \textit{Background}

The plain view doctrine allows the seizure of items that are either not described in a search warrant or are "inadvertently" found in plain view when the officer has no warrant. Law officers must fulfill the following requirements to comply with the doctrine: (1) the officers must have a legitimate reason for being where they are ("valid prior intrusion"); (2) they must inadvertently discover the objects seized ("in plain view"); and (3) it must be apparent that the objects are evidence ("fruits or instrumentalities of a crime").\textsuperscript{284} The doctrine is not an exception to the warrant requirement because, for the purposes of the fourth amendment, no search is considered to have been made if all plain view doctrine requirements are met.\textsuperscript{285}

One of the most important concerns is determining whether the officer was legitimately on the premises at the time he discovered the evidence.\textsuperscript{286} With respect to aircraft, the most controversial issue is whether an officer is allowed to climb onto the wing of an airplane to look inside.\textsuperscript{287} Some jurisdictions hold that, under certain cir-

\begin{footnotesize}
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\item See Colorado v. Bannister, 449 U.S. 1, 3-4 (1980) (per curiam). In Bannister the Court allowed the warrantless search of an automobile after an officer stopped the vehicle in order to issue the driver a citation for speeding. The officer noticed items inside the automobile which matched the description of items which had been reported stolen. The Court held that the officer's observations after stopping the vehicle gave rise to probable cause to search. \textit{Id.}; see \textit{supra} note 144 and accompanying text.
\item Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971); 1 W. LaFave & J. Israel, \textit{supra} note 2, § 3.2(b), at 166.
\item See Coolidge, 403 U.S. at 464-73.
\item Id. at 466 (the officer must have a "legitimate reason for being present").
\item See infra notes 288-316 and accompanying text for a discussion of the effect of an officer's presence on an airplane's wing.
\end{itemize}
\end{footnotesize}
cumstances, an officer may climb on the wing.\textsuperscript{288} Other jurisdictions, however, hold that an officer is not legitimately on the premises when he is on the aircraft's wing without permission, but instead has trespassed.\textsuperscript{289}

2. Fourth Circuit

The Fourth Circuit was one of the first circuits to conclude that, under some circumstances, an officer may climb onto the wing to peer into the airplane. In \textit{United States v. Bellina},\textsuperscript{290} an experienced drug enforcement officer inspected an airplane that he thought looked suspicious because of damage to the propellers, landing gear, and wing braces.\textsuperscript{291} Upon inspection, the officer observed that the curtains were tightly drawn over the airplane's windows, concluding that the pilot did not want the interior to be observed. To obtain a better look inside the airplane, he climbed onto a wing. From this vantage point, he saw marijuana inside the aircraft.\textsuperscript{292}

Other jurisdictions might hold that, because the officer had trespassed, the search was illegal.\textsuperscript{293} The Fourth Circuit, however, employed a totality of the circumstances test to determine whether the officer was justified in climbing onto the wing.\textsuperscript{294} The court weighed such factors as the officer's experience, the suspicious condition of the airplane, and the location of the airplane in an unlighted area, concluding that the officer had not unconstitutionally intruded upon the defendant's fourth amendment rights.\textsuperscript{295}

\textsuperscript{288} United States v. Smith, 797 F.2d 836 (10th Cir. 1986); United States v. Bellina, 665 F.2d 1335 (4th Cir. 1985).
\textsuperscript{289} United States v. Amuny, 767 F.2d 1113, 1125 (5th Cir. 1985).
\textsuperscript{290} 665 F.2d 1335 (4th Cir. 1985).
\textsuperscript{291} \emph{Id.} at 1337.
\textsuperscript{292} \emph{Id.}
\textsuperscript{293} See infra notes 297-299 and accompanying text for a discussion of the Fifth Circuit's holding that climbing onto the aircraft's wing constitutes a trespass and violates the fourth amendment.
\textsuperscript{294} \emph{Bellina}, 665 F.2d at 1344 ("[t]he court must look at all the surrounding circumstances").
\textsuperscript{295} \emph{Id.} at 1344-45.
3. **Fifth Circuit**

The Fifth Circuit considered a similar factual situation in *United States v. Amuny*. The Drug Enforcement Agency (DEA) placed an electronic tracking device, commonly known as a beeper, on Amuny's twin-engine aircraft and placed him under surveillance. When Amuny returned to the airport from which he had originally departed, agents surrounded his airplane. One agent climbed onto the wing and saw several packages wrapped in brown paper and encased in plastic, which he believed contained contraband. Agents then entered the airplane and seized the packages. The defendants claimed that the officers' climbing onto the wing constituted a trespass and therefore, the search and seizure were in violation of the fourth amendment. The court held that under most circumstances climbing onto the wing of an airplane is a trespass; therefore, the officer was not legitimately on the premises.

With respect to the use of electronic or other aids to enhance one's vision, however, the Fifth Circuit has held that these aids do not cause a search to be invalid for the purposes of the fourth amendment. For example, in *United States v. Dorr*, the Fifth Circuit held that the plain view doctrine applies if the officer shines a flashlight from the ground into the airplane, instead of climbing onto the wing.

4. **Tenth Circuit**

The Tenth Circuit appears to have adopted a totality of the circumstances test, similar to that of the Fourth Cir-

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296 767 F.2d 1113 (5th Cir. 1985).
297 Id. at 1117.
298 Id. at 1118.
299 Id. at 1128-29.
300 See supra note 21 and accompanying text for a discussion of cases involving electronic surveillance devices.
301 636 F.2d 117 (5th Cir. 1981).
302 Id. at 121.
cuit. In *United States v. Smith*, the court indicated that climbing onto the wing of airplane would normally be considered a trespass. In *Smith*, drug enforcement agents followed Smith's Cessna twin-engine aircraft to the Durango, Colorado airport, landing a few minutes after the defendants. They found the Cessna parked at a public tie-down. Believing that smugglers might be aboard the aircraft, one agent climbed onto a wing and saw boxes inside, which he believed to contain contraband. They then towed the airplane to a nearby service building, picked the lock, and searched the airplane, finding a large amount of marijuana inside.

Smith challenged the warrantless search, claiming that because the agent trespassed when he climbed onto the wing, the plain view doctrine did not apply. The court held that the officer's reasonable belief that suspects might be aboard constituted exigent circumstances, justifying climbing onto the wing. The court concluded that because the officer was legally on the wing, no trespass occurred; therefore, the plain view doctrine applied.

5. Analysis: Plain View Doctrine

The plain view doctrine has been in an unsettled state since *Coolidge v. New Hampshire*, in which the Supreme Court failed to agree on the doctrine's application to an automobile search. The Supreme Court has not addressed the application of the plain view doctrine to airplane searches, so automobile searches must be considered by analogy. Airplanes are more difficult to peer into than automobiles, thus, aircraft owners and pi-

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303 797 F.2d 836 (10th Cir. 1986).
304 Id. at 842.
305 Id. at 838.
306 Id. at 839.
307 Id.
308 Id. at 841.
309 Id. at 843.
310 403 U.S. 443, 464-73 (1971); see supra note 285 and accompanying text.
lots do not consider most objects inside to be in plain view. In addition, climbing onto an airplane’s wing is quite similar to trespassing upon a dwelling’s curtilage, which is defined as the area immediately surrounding the dwelling.\textsuperscript{311} Because entry is not allowed upon the curtilage for purposes of the plain view doctrine, climbing onto an airplane’s wing may be unlawful as well.\textsuperscript{312}

The Tenth Circuit allows an officer to climb onto a wing when he is in pursuit of a suspect and believes that the suspect or confederates might be aboard the airplane.\textsuperscript{313} Exigent circumstances, however, are not a recognized exception to the requirement that an officer must not be trespassing when he observes the objects in plain view. It should also be noted that the Tenth Circuit could have justified the search in \textit{Smith} as one conducted in hot pursuit of a suspect, and thus avoided having to address the trespass issue.\textsuperscript{314} Furthermore, the Fourth Circuit’s totality of the circumstances test, which allows an officer to trespass under certain circumstances, also is not recognized by the Supreme Court.\textsuperscript{315}

Even if the circuits ever agree that climbing onto the wing of an airplane constitutes a trespass, officers still have other options available when they wish to observe the interior of an airplane. For example, they can climb onto other objects, including other airplanes, ladders, and any nearby items that will allow them to see inside.\textsuperscript{316} Therefore, should the Supreme Court ever settle the issue of whether an officer may climb onto a wing for the purposes of the plain view doctrine, officers will still be able to use the doctrine to look into airplanes, but will have a clearer idea of what constitutes a trespass.

\textsuperscript{312} Id.; see also \textit{Coolidge}, 403 U.S. at 464-73.
\textsuperscript{313} See supra note 308 and accompanying text.
\textsuperscript{315} See supra notes 293-295 and accompanying text.
F. Other Exceptions

1. Limited Intrusions ("Stop and Frisk")

The Supreme Court has recognized a limited right to stop, briefly detain, and search a person for investigatory purposes based solely on reasonable suspicion, which is a level of suspicion that is less than probable cause. The reasonable suspicion standard requires that the officer's observations lead him to reasonably "conclude in light of his experience that criminal activity may be afoot . . ." A court will employ a totality of the circumstances test to determine if the officer's conclusions were reasonable. The scope of such a search is limited to a pat down of the person's outer clothing, ostensibly to determine if he is carrying a weapon.

The Fifth Circuit has applied this exception to the "limited detention" of an airplane and its pilot. In United States v. Worthington, a pilot under surveillance made a number of quick flights throughout Texas during a twenty-four hour period, unloading empty boxes during one stop. When the airplane made a final stop because

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517 Terry v. Ohio, 392 U.S. 1, 30 (1968). The Court did not define "reasonable suspicion," but instead gave the following guidelines:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30-31.

518 Id. at 30.


520 Terry, 392 U.S. at 30.


522 Id. at 1278.
of poor weather conditions, customs agents blocked the airplane’s path so that it could not depart and advanced toward the airplane with their guns drawn. Looking into the airplane from the ground, one agent observed burlap bags, which he correctly believed to be filled with marijuana. The agent then told the pilot to raise his hands and remain seated.\textsuperscript{323}

The court held that the pilot’s erratic flying throughout the day gave rise to reasonable suspicion to stop and detain,\textsuperscript{324} and that the burlap bags in plain view from the ground gave rise to probable cause to arrest the pilot.\textsuperscript{325} The court justified the subsequent search of the airplane based on both the automobile exception and the plain view doctrine.\textsuperscript{326}

The initial detention of the pilot and airplane, however, may well have been beyond the scope of the limited detention allowed by the “stop and frisk” exception.\textsuperscript{327} The agents blocked the path of the airplane, approached the pilot with at least one gun drawn, and ordered him to remain seated with his hands raised.\textsuperscript{328} The dissenting judge argued that the initial blocking of the airplane and the agents’ subsequent approach with guns drawn constituted an arrest, or was at least more than the limited detention allowed by the exception.\textsuperscript{329} If the dissenting judge is correct, the pilot was arrested before probable cause arose, as both the majority and dissent agreed that probable cause arose when the agent first saw the burlap bags in the airplane.\textsuperscript{330} Therefore, under a \textit{United States v. Wong Sun} “fruit of the poisonous tree” analysis,\textsuperscript{331} the initial detention was illegal, thus, the “fruits” of that deten-

\textsuperscript{323} Id.
\textsuperscript{324} Id. at 1279.
\textsuperscript{325} Id. at 1280.
\textsuperscript{326} Id.
\textsuperscript{327} Id. at 1282 (Goldberg, J., dissenting).
\textsuperscript{328} Id. at 1278, 1282.
\textsuperscript{329} Id. at 1282.
\textsuperscript{330} See id. at 1278, 1282.
\textsuperscript{331} See supra note 45 and accompanying text for a discussion of the “fruit of the poisonous tree” doctrine.
tion would be inadmissible as evidence. It is important to note, however, that the airplane might not have been able to take off despite the detainment because of bad weather. Therefore, the use of the evidence might have been upheld under the inevitable discovery doctrine.

2. Administrative Inventory Searches

Once a vehicle is properly impounded for any reason, for example being towed for a parking violation, authorities may perform an administrative inventory search. This search may be performed even if independent probable cause to search does not exist. The justification for this search is threefold: (1) the need to protect the property of the vehicle’s owner, (2) the need to inventory the items inside the vehicle to protect the authorities from subsequent claims made by the owner, and (3) the need to protect the police and others from potential dangers, such as a bomb planted inside the vehicle.

Administrative inventory searches may also be performed incident to arrest for the same reasons. In United States v. Walden, an airplane search was justified as both an administrative inventory search and as a search incident to arrest. Officials impounded the airplane because of the pilot’s evasive conduct, his failure to produce ownership and registration documents, and because registration numbers were taped rather than painted on the airplane’s tail. The court held these factors sufficient to justify the airplane’s impoundment and subsequent administrative search. The pilot’s conduct immediately after the impoundment led to his arrest, which justified a

332 Id.
333 See supra note 45 and accompanying text for a discussion of the inevitable discovery doctrine.
335 Id.
336 Id. at 369.
338 707 F.2d 129 (5th Cir. 1983).
339 Id. at 131.
search of the airplane incident to arrest.\textsuperscript{340}

3. **Open Fields Doctrine**

Pursuant to the open fields doctrine, an officer may trespass on private property as long as the trespass is on an "open field" and not on the curtilage, which is the area immediately surrounding a dwelling.\textsuperscript{341} In *Patterson v. National Transportation Safety Board*,\textsuperscript{342} the Tenth Circuit applied this doctrine to a non-drug-related search of the exterior of an airplane parked outside a hangar. An FAA safety inspector observed that Patterson had made changes to his aircraft without obtaining the proper FAA permits. The inspector reported the illegal modifications to the FAA, which suspended Patterson's license. The court justified the search of the aircraft on the basis of the open fields doctrine because the airplane was not inside a hangar when it was searched.\textsuperscript{343}

4. **Consent Searches**

Officers do not need probable cause to search if they obtain proper consent.\textsuperscript{344} In order to give valid consent to search any premises owned, occupied, or controlled by another, a person must have a concurrent right to use the property.\textsuperscript{345} In addition, a person must give his consent freely and voluntarily.\textsuperscript{346} The issue of consent arose in *United States v. Tussell*,\textsuperscript{347} in which the court held that a pilot who was leasing an airplane had the authority to consent to a search because he had control of the airplane concurrent with that of the owner.\textsuperscript{348}

\textsuperscript{340} Id.
\textsuperscript{341} Oliver v. United States, 466 U.S. 170, 180-84 (1984).
\textsuperscript{342} 638 F.2d 144 (10th Cir. 1980).
\textsuperscript{343} Id. at 146.
\textsuperscript{346} Id. at 222.
\textsuperscript{348} Id. at 1103-04.
5. Border Searches

Searches at international borders or their functional equivalents comprise another exception to the warrant requirement. Officers may stop and search vehicles at these locations without a warrant, probable cause, or even reasonable suspicion. Officers may stop a vehicle at permanent checkpoints beyond the border for any reason or no reason at all, but searches must be based on probable cause, which may arise after the vehicle has been stopped. No special exceptions apply to roving border patrols beyond the border or its functional equivalent. Like other government officials, they may stop vehicles for questioning and brief detention based on reasonable suspicion. To search, however, they must have either a search warrant or probable cause to search, or the circumstances must qualify as one of the recognized fourth amendment exceptions allowing a search.

The general rule concerning airplanes is that an officer must demonstrate with reasonable certainty that an airplane in fact crossed an international border. The mere opportunity to cross the border does not give rise to the border exception. The test requires officers to show more than probable cause to believe that a border crossing occurred, but less than proof beyond a reasonable doubt. Therefore, if an officer can demonstrate with reasonable certainty that an aircraft crossed an international border, he may search the aircraft without even reasonable suspicion or probable cause to search. Officers may conduct these searches either near the border or at its functional equivalents. International airports are

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350 See id.
353 Id. at 881-82.
354 Martinez-Fuerte, 428 U.S. at 555-56; Almeida-Sanchez, 413 U.S. at 269.
355 United States v. Amuny, 767 F.2d 1113, 1123 (5th Cir. 1985).
356 Id. at 1124.
357 Id. at 1123.
functional equivalents of the border and the same rules apply.\textsuperscript{358}

V. Conclusion

A. The Supreme Court's Bright Line Rules

Although attempting to establish a set of clearly defined bright line rules to aid officers in performing searches without warrants, the Supreme Court has instead created a tangled web of rules and exceptions that lower courts cannot easily apply. Rules with strong logical foundations have been replaced by bright line rules that often appear arbitrary.\textsuperscript{359}

For example, *Chimel v. California*\textsuperscript{360} defined the scope of a search incident to arrest as the area that is within the reach or control of the arrestee.\textsuperscript{361} The justification for this rule was to protect the arresting officer from possible harm and to prevent destruction of evidence.\textsuperscript{362} The Supreme Court, however, extended the scope by allowing officers to search the entire passenger compartment, including the glove compartment and containers inside the car.\textsuperscript{363} This bright line rule gives officers clearly defined parameters for an automobile search, but gives no guidance regarding searches of boats, mobile homes, vans, or airplanes. Does *Chimel* control these searches and limit their scope to the area within the control of the arrestees, or must the Court create separate bright line rules for all types of vehicles?

The automobile exception provides another example of

\textsuperscript{358} \textit{Id.}
\textsuperscript{359} See Alschuler, supra note 30, at 231. But cf. Whitebread & Heilman, \textit{The Supreme Court Escalates Its Counterrevolution in Criminal Procedure, 14 Search \\ \\
\textsuperscript{360} 395 U.S. 752 (1969).
\textsuperscript{361} *Chimel*, 395 U.S. at 762-63; see supra note 253 and accompanying text for a discussion of the *Chimel* rule.
\textsuperscript{362} *Chimel*, 395 U.S. at 762-63.
\textsuperscript{363} New York v. Belton, 453 U.S. 454, 460-61 (1981); see supra notes 141 and 254-255 and accompanying text.
the failure of the Court's bright line rules to clarify the permissible scope of searches of other vehicles. The automobile exception allows a warrantless search of the entire automobile, including the trunk and containers. Should these parameters apply to an airplane that depends upon its structural integrity to ensure safe flight? If officers are allowed to tamper with or dismantle certain parts of an airplane during their search, safety in subsequent flights could be compromised.

Another trend appearing in the Supreme Court's recent fourth amendment decisions is that the Court appears to be announcing its bright line rules in an attempt to uphold warrantless searches that involve narcotics. In upholding a warrantless inventory search which uncovered cocaine and methaqualone, Chief Justice Rehnquist twice suggested in Colorado v. Bertine that the warrant clause applies only to searches conducted for the sole purpose of criminal investigations.

B. The Circuit Courts' Difficulties in Applying the Rules

Until the Supreme Court chooses to address the application of fourth amendment rules and exceptions to aircraft searches, the following is a brief summary of the state of the law as addressed by the appellate courts. While the Supreme Court has not explicitly applied exceptions to the fourth amendment warrant requirement to searches and seizures of aircraft, the majority of the courts of appeals have attempted to do so. Some areas appear to be fairly clear and settled, such as consent searches. Other areas, including the application of the automobile exception, the plain view doctrine, and searches inci-

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364 See supra notes 133-249 for a discussion of the automobile exception.
365 See supra note 140 and accompanying text.
366 See supra note 140 and accompanying text.
369 See supra notes 344-348 and accompanying text.
370 See supra notes 133-249 and accompanying text.
371 See supra notes 284-316 and accompanying text.
dent to arrest\textsuperscript{371} are neither clear nor settled.

For example, the courts do not agree on whether the automobile exception applies to airplanes. Four circuits apply the exception\textsuperscript{372} and one refuses to expressly apply it.\textsuperscript{373} Not only are the courts undecided as to whether the exception applies, they are also undecided on the appropriate rationale for applying the exception. Most courts focus on an airplane’s mobility, because they have decided that mobility makes an airplane comparable to an automobile.\textsuperscript{374} Even if an airplane is comparable to an automobile, the mobility rationale may not be appropriate for airplanes that are parked or otherwise secured.\textsuperscript{375} Other courts focus on the reduced expectations of privacy a person has inside both airplanes and automobiles in holding that the exception is applicable to airplanes.\textsuperscript{376} The courts, however, have not explained why a person has a reduced expectation of privacy inside an airplane. Logical arguments would include the facts that airplanes are regulated heavily by the government, and that hangars and other parking areas in small airports are usually accessible to the public. Airplanes, however, are more difficult to see into than automobiles because of their height, which should increase expectations of privacy.\textsuperscript{377} While many courts recognize some type of “airplane exception” based on the automobile exception, their applications of the exception are not consistent.\textsuperscript{378}

The circuit courts also have not determined which areas of an airplane may be searched pursuant to a lawful

\begin{footnotes}
\item[371] See supra notes 250-283 and accompanying text.
\item[372] See supra notes 169-225 and accompanying text for the Sixth, Ninth, Tenth, and Eleventh Circuits’ application of the automobile exception to aircraft.
\item[373] See supra notes 226-231 and accompanying text for the Fifth Circuit’s refusal to expressly extend the automobile exception to aircraft.
\item[374] See supra notes 169-203 and accompanying text.
\item[375] See supra notes 235-236 and accompanying text.
\item[376] See supra notes 246-247 and accompanying text.
\item[377] Id.
\item[378] See supra notes 232-249 and accompanying text.
\end{footnotes}
If an airplane is the functional equivalent of an automobile, then the entire passenger compartment may be searched. Courts, however, have not defined what comprises an airplane's passenger compartment. Therefore, it is not clear whether interior baggage compartments may be searched, or whether a search is limited to the area within the wingspan or control of the arrestee. A further problem is that the circuit courts occasionally confuse searches incident to arrest with automobile exception searches.

A third area in which the courts have not set clear parameters is the plain view doctrine. The courts seem to apply this exception when they are not certain which rule should apply but want to hold the search was legal. One disagreement among the circuits is whether climbing onto an airplane's wing is acceptable under this exception. The Tenth Circuit allows climbing onto a wing when exigent circumstances exist, but exigency is not a recognized consideration under the plain view doctrine. The Fifth Circuit holds that climbing onto a wing is a trespass under most circumstances. Therefore, the trespassing officer does not satisfy the doctrine's requirement that he have a legitimate reason for being where he is. Finally, the courts have applied the "stop and frisk" exception and the open fields doctrine when other exceptions might have been better applied.

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379 See supra notes 250-283 and accompanying text for a discussion of searches incident to arrest.
380 See supra notes 253-255 and 276-282 and accompanying text.
381 See supra notes 272-276 and accompanying text for a discussion of the Eleventh Circuit's confusion of the two different searches.
382 See supra notes 286-316 and accompanying text.
383 See supra notes 303-309 and accompanying text.
384 See supra note 299 and accompanying text for the Fifth Circuit's holding.
385 See supra notes 284-289 and accompanying text.
386 See supra notes 317-333 and accompanying text for a discussion of "stop and frisk" searches; supra notes 341-343 and accompanying text for a discussion of the open fields doctrine.
C. Possible Solutions

A possible solution to the problems in applying fourth amendment principles to airplanes might be to create a separate set of bright line rules for airplanes. The result would be an "airplane exception" that would allow a warrantless search, based on probable cause, of any area of the airplane that would not compromise the structural integrity of the aircraft. This solution, however, would simply add to the already confusing matrix of bright line rules that governs searches and seizures.387

To both ensure the protection of fourth amendment rights and provide a clear set of rules for officers to follow in conducting warrantless searches, the Court should avoid creating unrelated bright line rules and return to a "reasonableness" standard similar to the one announced in Chimel, which allows an officer to search the area within the control of the arrestee.388 This standard allows an officer discretion in evaluating the circumstances facing him and avoids bright line rules that may not apply to every situation he faces. Finally, the Court should return to emphasizing the need to obtain warrants whenever possible. If an officer obtains a warrant in good faith, he avoids the myriad of problems associated with justifying a warrant-

387 See Alschuler, supra note 30, at 285-86. Professor Alschuler describes a fictional muscular, green graduate of the police academy of 1990, Officer Gazenga. Gazenga is a good officer. He has memorized all 437 Supreme Court bright line rules for search and seizure. For example, Gazenga has made a lawful arrest in a car. Gazenga rip that car apart! But Gazenga never touch trunk of car unless there is probable cause, for Gazenga has read footnote 4 of Belton opinion.

Gazenga now has made a lawful arrest in a house. Different bright line rule apply to a house. Gazenga may search glove compartment of car when suspect far away, but may not search desk drawer in living room unless suspect right there. Why? Supreme Court say so. Gazenga just a cop.

Gazenga now has made lawful arrest in cabin cruiser. Oh no! Supreme Court forgot to give Gazenga bright line rule for cabin cruiser! What is poor Gazenga to do?

Id. at 286.

388 Chimel v. California, 395 U.S. 752, 762-63 (1969); see supra notes 261-283 and accompanying text for further discussion of the scope of searches incident to arrest.
less search.\textsuperscript{989}

In light of the above differences among the circuits, it is
difficult to determine which rules and exceptions apply to
warrantless searches of airplanes under different circum-
stances. Clearly, one must have some type of property in-
terest in the airplane to have standing to contest a
warrantless search.\textsuperscript{990} One also must have an interest con-
current with that of the owner to have authorization to
consent to a warrantless search.\textsuperscript{991} Other questions, such
as what parts of an airplane may be searched incident to
arrest, whether an officer may climb onto a wing to look
inside an airplane, and whether the automobile exception
applies to airplanes, are not settled.\textsuperscript{992} Until the Supreme
Court addresses these issues, officers conducting airplane
searches should be aware of the problems that may arise
with warrantless searches. In addition, criminal defense
attorneys should be aware of how the different circuits
have applied traditional fourth amendment exceptions to
aircraft.

\textsuperscript{989} See United States v. Leon, 468 U.S. 897, 921 (1984) (holding that evidence is
admissible if it was obtained by an officer who acted in reasonable reliance on a
search warrant that was later found to be invalid; this is commonly known as the
"good faith exception" to the exclusionary rule).

\textsuperscript{990} See \textit{supra} notes 65-98 and accompanying text for a discussion of standing.

\textsuperscript{991} See \textit{supra} notes 83-86 and accompanying text.

\textsuperscript{992} See \textit{supra} notes 133-249 and accompanying text for a discussion of the auto-
mobile exception as applied to airplanes; \textit{supra} notes 250-283 and accompanying
text for a discussion of searches of airplanes incident to arrest; \textit{supra} notes 284-
316 and accompanying text for a discussion of the plain view doctrine as applied
to airplanes.