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THE FOURTH AMENDMENT AT THE AIRPORT:  
ARRIVING, DEPARTING, OR CANCELLED?

JOEL M. GORA†

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.<sup>1</sup>

The emergency security procedures . . . require:

Airport operators to station armed local law enforcement officers at passenger check points during periods when passengers are boarding or reboarding.

Electronic screening of all passengers by the airlines as a condition to boarding.

Inspection by the airlines of all carry-on items accessible to passengers during flight.<sup>2</sup>

Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.<sup>3</sup>

I. INTRODUCTION

In the past few years, the problem of aircraft hijacking, or "sky-jacking," has been the subject of much concern. It has generated public discussion, congressional hearings, executive pronouncements, federal regulations, and judicial decisions. While the problem is fairly interesting from the viewpoint of a political scientist studying the interaction of various groups and agencies dealing with a new issue, it is extremely disquieting as an example of how the values of the fourth amendment can be easily disregarded in order to respond to a crisis.

The American Civil Liberties Union (ACLU) is occasionally criticized for crying "Wolf!" when it voices concern over any new governmental policy or practice which appears to have hostile implications for constitutional safeguards. If you will forgive me a perhaps

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The views in this paper are not necessarily those of the ACLU.

1. U.S. CONST. amend. IV.

2. Emergency Order of FAA, Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

3. *Mapp v. Ohio*, 367 U.S. 642, 659 (1961).

unpardonable mixing of wildlife metaphors, we do so because of our concern about letting the camel get his nose under the constitutional tent. We resist any seemingly limited intrusion upon personal liberties because, historically, such intrusions rarely remain limited.<sup>4</sup>

This is precisely what has happened with the issue of aircraft security. The camel has gotten his nose, not just under the tent, but into the pockets, luggage, and belongings of all air travelers in the United States. What began as a limited, selective, screening system, focusing on those few individuals who might well have posed a threat to the safety of the airplane, has now degenerated into a program of general searches of all passengers.

The initial screening system was at least arguably consistent with fourth amendment principles, and the initial judicial response found it to be constitutional.<sup>5</sup> However, persuasive evidence that the limited authority was being abused came to light. To be sure, airport searches were resulting in the discovery of some weapons, but the majority of arrests were on charges having absolutely nothing to do with safeguarding air travel. Rather, arrests were for possession of drugs and other contraband, for violations of the immigration laws, and for miscellaneous other crimes.<sup>6</sup> Furthermore, it was reported "that certain classes of individuals, such as young people and oddly attired individuals, were being harassed and intimidated by general frisks or shake-downs without any prior indication or probable cause to believe that such persons were unlawfully carrying weapons."<sup>7</sup> Moreover, instead

4. The camel's nose aphorism is, of course, a shorthand description for an important and traditional constitutional principle:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

Boyd v. United States, 116 U.S. 616, 635 (1886). See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these [totalitarian] ends by avoiding these beginnings." *Id.* at 641.

5. See United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

6. In late November 1972, the New York Times reported that in the almost 2 years of passenger screening there had been approximately 6,000 arrests. Less than 20 per cent were on charges related to aircraft safety. Over 2,000 persons were arrested for possession of drugs, and the same number were arrested as illegal aliens. The remainder were charged with miscellaneous crimes such as parole violation and forgery. N.Y. Times, Nov. 26, 1972, at 1, col. 2. In the 3-month period from July to October 1972, there were 1,350 arrests, which projects to an annual rate of approximately 5,000. See McGinley & Downs, *Airport Searches and Seizures — A Reasonable Approach*, 41 FORDHAM L. REV. 293, 306 (1972).

7. S. REP. No. 93-13, 93d Cong., 1st Sess. 9 (1973). Indeed, the pattern of arrests and harassment even prompted General Benjamin O. Davis, Assistant Secretary of Transportation, to express concern:

I think it's true that some people have been doing some searching for narcotics violations. And I think there is a danger in this from a civil rights standpoint that has me worried.

N.Y. Times, *supra* note 6.

of attempting to curtail the abuses which had become increasingly evident, the Administration expanded the program by requiring not just a careful inspection of a few passengers, but a systematic search of all passengers.<sup>8</sup> The Government's response to abuses of the limited system of searches was to direct that everyone be searched.

There has been an understandable lag in the judicial response to these changes. Initially, those federal courts which dealt with the issue approved what they viewed as a highly selective screening system.<sup>9</sup> Now that the abuses have surfaced and the system has expanded, a long awaited trend of judicial reaction appears to be developing.<sup>10</sup>

This Article will attempt to place airport searches in the general context of the fourth amendment, trace the development of case law on the specific issue and its relation to changing governmental policies, and finally, suggest ways for reconciling the need for security with the interests of privacy. The major thesis presented is that while the former selective screening system was probably constitutional, although the courts erred in refusing to apply the exclusionary rule to nonweapon evidence seized during searches initiated by that system, the new passenger screening regulations are completely inconsistent with the values safeguarded by the fourth amendment.

## II. APPLICABLE FOURTH AMENDMENT PRINCIPLES

It has proven much too easy to allow public concern over the threats and dangers of skyjacking to obscure the fourth amendment principles which presumptively apply at airports as elsewhere. It is important, therefore, to recall certain fundamental propositions central to the interpretation of that amendment.

As the Supreme Court readily acknowledges, fourth amendment jurisprudence falls somewhat short of sparkling clarity.<sup>11</sup> Yet, certain principles have commanded general agreement. Due to the unique history of the enactment of the fourth amendment and the felt need that it was designed to meet,<sup>12</sup> any departure from its norms is immediately suspect. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process without prior

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8. See Emergency Order of FAA, Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

9. *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971). See notes 18-24 and accompanying text *infra*.

10. See *United States v. Muelener*, 351 F. Supp. 284, (C.D. Cal. 1972); *United States v. Kroll*, 351 F. Supp. 148 (W.D. Mo. 1972).

11. See *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971).

12. As aptly indicated in *Chimel v. California*, 395 U.S. 752 (1969), the fourth amendment "was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." *Id.* at 761.

approval by judge or magistrate, are *per se* unreasonable under the fourth amendment — subject only to a few specifically established and well-delineated exceptions.’ ”<sup>13</sup> Thus, any fourth amendment analysis must commence with the recognition that warrantless searches are presumptively disallowed. Second, even in those few kinds of exceptional circumstances where a warrantless search may go forward, the police officer must, nevertheless, have probable cause to undertake the search.<sup>14</sup> Thus, for fourth amendment purposes, an “unreasonable” search is one conducted without probable cause.<sup>15</sup> In short, warrants are *normally* required whereas probable cause is *always* required.

The one exception to these rules — and an obviously relevant one — is the police officer’s protective frisk for weapons, authorized by the Supreme Court in *Terry v. Ohio*.<sup>16</sup> What should be clear, even at this point in the discussion, however, is that a general search of all passengers — merely because they wish to board an airplane — made without a search warrant, coming within none of the recognized exceptions to the warrant requirement, and undertaken without probable cause to believe that the individual has committed or is committing a felony, is directly contrary to all fourth amendment principles.

### III. JUDICIAL APPROVAL, ADMINISTRATIVE ABUSE, AND JUDICIAL RESPONSE

I do not propose to survey the origins of the federal efforts to deal with the problem of skyjacking by creating a system of screening passengers; that has been done effectively elsewhere.<sup>17</sup> It is sufficient simply to describe the elements of the system as it existed when it first received judicial attention in *United States v. Lopez*.<sup>18</sup>

13. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971), quoting *Katz v. United States*, 389 U.S. 347, 357 (1968).

14. Three such exceptional circumstances — a search incident to an independently valid arrest, searches of automobiles under exigent conditions, and seizures of contraband in “plain view” — are discussed at length in *Coolidge v. New Hampshire*, 403 U.S. 443, 453-73 (1971).

15. See *Beck v. Ohio*, 379 U.S. 89 (1964), wherein it was stated:

The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the . . . arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

*Id.* at 91.

16. 392 U.S. 1 (1968).

17. See McGinley & Downs, *supra* note 6; Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).

18. 328 F. Supp. 1077 (E.D.N.Y. 1971). So far, the constitutional issues have been litigated in the context of motions to suppress evidence seized during the course of an airport search. In only one of the six reported cases dealing with the validity

As described with characteristic thoroughness by Judge Weinstein, the system was comprised of several elements, the combined effect of which was to reduce drastically the number of passengers who might ultimately be subjected to a limited form of protective search for weapons.<sup>19</sup> The central element was the "profile" — an aggregate of characteristics purportedly common to approximately 90 per cent of potential skyjackers.<sup>20</sup> For fourth amendment purposes, the most significant factor of the profile was that less than one-half of 1 per cent of air travelers came within its description.<sup>21</sup> Thus, it was theoretically both reliable and selective. Only those relatively few passengers whose characteristics matched those of the profile became the focus of further attention.

In addition to the profile, the system also employed a magnetometer to detect the presence of an amount of metal equivalent to that of a small handgun. While the magnetometer itself was not particularly selective — approximately 50 per cent of the people who pass through trigger it because of change, keys, cigarette lighters, and so forth — in conjunction with the profile, it served to further reduce the number of passengers who would actually be stopped momentarily.<sup>22</sup> Even a person who met the profile *and* triggered the meter would be "permitted to proceed unimpeded" if he provided satisfactory identification.<sup>23</sup>

Only when all three conditions existed — a person met the profile, triggered the magnetometer, and failed to provide satisfactory identification — would a marshal be summoned. The marshal would again request identification, have the person pass through the magnetometer, and provide the individual with an opportunity to explain the presence of any metal. Only after all three procedures were exhausted could the marshal frisk the person as a condition to allowing him to board.<sup>24</sup>

It was in response to a frisk under this screening system which resulted in the seizure of a quantity of heroin, that the *Lopez* court applied fourth amendment analysis. The court rejected, seriatim, the Government's contentions that the search could be justified on theories

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of the system was the prosecution for possession of a weapon; all of the rest involved drugs.

To date, no one has filed a civil action seeking to enjoin airport searches, although, airport operators have brought suit on the issue of who is to finance portions of the recently expanded security system.

19. *Id.* at 1084.

20. *Id.* at 1086.

21. *Id.* at 1084.

22. *Id.* at 1085-86.

23. *Id.* at 1083.

24. *Id.*

of implied consent, voluntary consent, searches incident to arrests, hot pursuit, or danger of imminent destruction of known evidence.<sup>25</sup> "Thus, the only exception to the warrant rule under which the search of this defendant can be justified is the protective 'frisk' for weapons authorized by *Terry v. Ohio*. . . ."<sup>26</sup>

In *Terry*, the Supreme Court held that:

[W]here 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 the 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.<sup>27</sup>

Further, in a companion case, *Sibron v. New York*,<sup>28</sup> the Court placed limits on the *Terry* right to "frisk":

The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.<sup>29</sup>

It is apparent that the "stop and frisk" doctrine is premised on the understanding that the police officer will be acting on specific facts about the particular person confronted which will amount to a slightly diminished, but potent form of probable cause. As Judge Weinstein viewed *Lopez*, the problem was "whether the screening program by itself produces sufficient information to justify a cursory weapons 'frisk' under the standard established in *Terry v. Ohio*."<sup>30</sup> That issue, in turn, involved a consideration of the following factors: (1) the objective evidence then available to the officer; (2) the probability that the individual was armed and about to engage in dangerous conduct; (3) the manner in which the frisk was conducted as relevant to the

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25. *Id.* at 1092-93.

26. *Id.* at 1093.

27. 392 U.S. at 30.

28. 392 U.S. 40 (1968).

29. *Id.* at 64.

30. 328 F. Supp. at 1095.

possible resentment it might arouse; and (4) the risk to the officer and the community in not disarming the individual if he were armed.<sup>31</sup> The *Lopez* court concluded that the elements of the system produced enough specific information about a particular individual to justify a "narrowly circumscribed protective weapons 'pat-down' or 'frisk'."<sup>32</sup> Taking note of the "disquieting implications of the system,"<sup>33</sup> the opinion nevertheless ended on a sanguine note:

[W]e are unpersuaded that the rights of air travelers generally have been or will be violated by the proper application of the system. We ought not be frightened out of taking sensible protective steps by the possibilities of misuse so long as our courts are in a position to prevent abuse should it arise.<sup>34</sup>

The analysis and conclusions in *Lopez* set the judicial tone for the next three cases which dealt with the admissibility of evidence seized as a result of the airport screening system.<sup>35</sup>

In *Epperson v. United States*<sup>36</sup> the defendant passed through the magnetometer which disclosed "an unusually high reading."<sup>37</sup> After emptying his pockets of several metal objects, he again registered a positive reading on the meter. Thereupon the marshal searched Epperson's jacket and found a loaded pistol. The Fourth Circuit held that the use of the magnetometer constituted a "search" without a warrant and *not* within any of the recognized exceptions to the warrant requirement.<sup>38</sup> Accordingly, such a search could be sustained only upon an application of the *Terry* analysis. The court reasoned that:

Since the use of the magnetometer was justified at its inception, and since the subsequent physical frisk was justified by the information developed by the magnetometer, and since the search was limited in scope to the circumstances which justified the interference in the first place, we hold the search and seizure not unreasonable under the Fourth Amendment.<sup>39</sup>

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31. *Id.* at 1097.

32. *Id.*

33. *Id.* at 1100.

34. *Id.* at 1101. It is interesting to note that the court actually held that the evidence was inadmissible because the screening system was not properly applied in that particular case, which technically renders all of the previous discussion dicta.

35. There have been at least two other cases arising out of searches directed at departing air passengers, but neither involved elements of the screening system analyzed in *Lopez*. In *United States v. Burton*, 341 F. Supp. 302 (W.D. Mo. 1972), a spontaneous baggage search by an airline employee was held not to be a government-directed search. In *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971), a frisk was held to be justified because of the suspicious conduct of the passenger.

36. 454 F.2d 769 (4th Cir. 1972).

37. *Id.* at 770.

38. *Id.* at 772.

39. *Id.*

Six months later, in *Slocum v. United States*,<sup>40</sup> the Third Circuit upheld the search of the carry-on luggage of a passenger who met the profile, triggered the magnetometer, was unable to provide proper identification, and did not have any weapon on his person. The court described the screening system and noted that the use of the profile had the beneficial effect of focusing on a limited number of persons among each group of boarding passengers.<sup>41</sup> The *Slocum* court concluded that the circumstances justified the search, and, therefore, allowed a conviction for possession of cocaine found in a rolled-up sock.<sup>42</sup>

At about the same time that *Slocum* was decided, the issue of airport security searches reached the Second Circuit in *United States v. Bell*.<sup>43</sup> The *Bell* case presented facts almost identical to those in *Lopez*. The defendant intended to board a flight at La Guardia Airport. He came within the profile, twice activated the magnetometer, and had no identification. When asked why he had no identification, the defendant explained that he had just been released from jail and was facing attempted murder and narcotics charges. The ensuing patdown disclosed two sacks of heroin in the defendant's raincoat pockets.<sup>44</sup>

Judge Mulligan, relying on *Terry* and noting all the particular facts available to the officer, concluded that the frisk was justified, limited, and not "a general exploratory search."<sup>45</sup> Chief Judge Friendly concurred, although reluctant to rest the affirmance on the particular facts of the case. He would have held that the danger of skyjacking alone, without more, justified good faith searches for weapons of all passengers and their luggage.<sup>46</sup> These views prompted Judge Mansfield to write a concurring opinion solely to take issue with them:

Airplane hijacking indeed poses a grave threat to the safety and convenience of the traveling public. However, I do not share the view that it justifies a broad and intensive search of all passengers, measured only by the good faith of those conducting the search, regardless of the absence of grounds for suspecting that the passengers searched are potential hijackers. To adopt such a vague principle would be to abandon standards that have been carefully constructed over the years as a means of protecting individual rights guaranteed by the Fourth Amendment.<sup>47</sup>

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40. 464 F.2d 1180 (3d Cir. 1972).

41. *Id.* at 1183.

42. *Id.*

43. 464 F.2d 667 (2d Cir. 1972).

44. *Id.* at 669.

45. *Id.* at 673.

46. *Id.* at 674-75 (Friendly, C.J., concurring).

47. *Id.* at 675 (Mansfield, J., concurring).

Judge Mansfield concluded that the conviction could be affirmed simply because the marshal had sufficient grounds for a *Terry* frisk for weapons.<sup>48</sup>

After these stirrings of disagreement, the issues did not receive further judicial attention for several months. In the interim, however, airport searches appeared to be increasing in number and broadening in scope. Certainly the number of arrests was increasing dramatically.<sup>49</sup> Further, as documented by the Senate Committee on Commerce, limited protective frisks for weapons were fast degenerating into general exploratory searches for drugs, directed particularly at the young.<sup>50</sup> That impression was confirmed by statistics released in late November 1972.<sup>51</sup> No longer could it be said that the officials conducting airport searches were merely chancing upon drugs; they were looking for them.<sup>52</sup>

However, no action was taken by the federal government to curb these obvious abuses of the very limited authority which the courts had sanctioned. Rather, on December 5, 1972, Secretary Volpe announced a new directive compelling the electronic screening of *all* passengers and the searching of *all* carry-on luggage.<sup>53</sup> Significantly, and with an appropriate dose of poetic justice, on both the day before and the day after the Secretary's pronouncement, two federal judges entered decisions suppressing drugs discovered pursuant to airport security searches — allegedly seeking weapons — which were deemed to have gone too far. The factual pattern in each case clearly indicated that officials were not merely searching for weapons.

In *United States v. Muelener*,<sup>54</sup> District Judge Ferguson's opinion rested upon alternate holdings. First, the defendant's fourth amendment rights were violated because, even though he fit the profile and triggered the magnetometer, he was not informed of his right to refuse to submit to the search provided he did not board the plane.<sup>55</sup>

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48. *Id.* at 676 (Mansfield, J., concurring).

49. In the late summer and early fall of 1972, arrests produced by the screening system were averaging 400 per month. The majority of these arrests continued to be for crimes having absolutely no relationship to aircraft or passenger safety. *See* note 6 *supra*.

50. *See* note 7 and accompanying text *supra*. One young woman reported to the ACLU that in August 1972 officials at Boston's Logan Airport forced her to open and empty a small Excedrin bottle which contained one aspirin. She assumes, probably correctly, that the official was searching for marihuana.

51. *See* note 6 *supra*.

52. The phenomenon vindicated Justice Frankfurter's warning given in a similar context three decades earlier: "Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene." *Harris v. United States*, 331 U.S. 146, 173 (1947) (dissenting opinion).

53. *See* Emergency Order of FAA, Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

54. 351 F. Supp. 1284 (C.D. Cal. 1972).

55. *Id.* at 1286.

Second, the search violated the fourth amendment because its scope exceeded constitutional requirements. Instead of determining whether the defendant had a weapon on his person, the marshal proceeded directly to search the defendant's suitcase, where he found and seized a small bag of marihuana.<sup>56</sup> Such a procedure violated the limited exploration for weapons allowed by *Terry*:

[T]he failure of the Marshal to make an initial pat-down of the defendant's outer clothing before searching his suitcase prevents the search from coming within the *Terry* penumbra and makes it violative of the Fourth Amendment. A limited pat-down search which reveals the metal object responsible for the positive magnetometer reading obviates the necessity for a search of the suitcase. . . . Under the Fourth Amendment, the Marshal does not have a blank check to search anything in the suspect's possession, and may not search the suitcase without an initial pat-down search for weapons that falls within *Terry*.<sup>57</sup>

Two days later, Judge Collinson reached the same result on similar reasoning in *United States v. Kroll*.<sup>58</sup> There, the defendant also fit the profile and triggered the magnetometer. As his briefcase was being searched, a marshal became "suspicious" when the defendant did not open the file section. The marshal insisted that it be opened and found a letter-sized white envelope with a very small bulge, one-quarter inch thick and 2 inches square. The defendant was compelled to empty the contents which turned out to be 10 grams of "speed."<sup>59</sup> As in the earlier cases, a *Terry* analysis was utilized. The court reasoned that the mere *possibility* that weapons or explosives might be contained in a particular place was insufficient to justify a search:

Where an inspection of those things which probably could contain a weapon or explosives reveals nothing, the search cannot be expanded to include everything in an attache case that could possibly harbor a weapon or explosives. This is entirely consistent with the proposition that the scope of a search must be reasonably related to the purpose which justified it in the first instance.<sup>60</sup>

The court concluded that the search of the envelope "was not dictated by the probabilities of the situation"<sup>61</sup> and could not be justified by any "reasonable suspicion arising from other facts."<sup>62</sup>

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56. *Id.* at 1292.

57. *Id.*

58. 351 F. Supp. 148 (W.D. Mo. 1972).

59. *Id.* at 150.

60. *Id.* at 153.

61. *Id.*

62. *Id.* at 154.

Taken together, *Muelener* and *Kroll* demonstrate a firm judicial disapproval of the kind of abuses which have become manifest in airport security searches. Hopefully, more courts will respond in the same manner.

At this point a brief summary is in order. The initial passenger screening system employed a number of elements designed to select only a very small percentage of air travelers for further inquiry. In several cases involving motions to suppress evidence seized as a result of this screening system, the courts held that the system developed sufficiently reliable and objective information about the particular individual to justify the kind of limited intrusion on that person's privacy sanctioned in *Terry*. In all of these cases the significant amount of information about the individual available to the officer, combined with the relatively intense nature of the governmental interest involved, justified the particular "stop and frisk." However, these decisions, insofar as they upheld the validity of the initial frisk, did not depart radically from the *Terry* analysis.<sup>63</sup>

#### IV. THE NEW APPROACH: ABANDONING THE FOURTH AMENDMENT

While the initial passenger screening system was arguably congruent with fourth amendment standards, the new airport security regime, promulgated by executive fiat,<sup>64</sup> is a total departure from relevant constitutional principles. Secretary Volpe's order requires (1) armed police at all passenger check points, (2) electronic screening of all passengers as a condition to boarding, and (3) inspection of carry-on items accessible to passengers during flight.<sup>65</sup> Thus, all passengers now have their persons electronically frisked, and their papers and effects thoroughly searched.<sup>66</sup>

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63. Allowing the seizure and admission of contraband or other evidence of a nature unrelated to the security of the airplane is quite another matter. See notes 77-98 and accompanying text *infra*.

64. See Emergency Order of FAA, Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

65. *Id.*

66. Pending legislation contains comparable provisions. S. 39, introduced this session, would create a new "Air Transportation Security Force" with extensive powers to frisk and search persons and baggage. S. 39, 93d Cong., 1st Sess. (1973). At least the legislation, as described in the report of the Senate Committee on Commerce, contains some limitations:

S. 39 provides that only those passengers who activate a positive response from the weapons-detecting device be subject to search. But before any physical search or frisk of the individual is conducted, he must be given the opportunity to remove from his person, clothing or other belongings any items which might have activated the detection device. After removing such objects, the individual must then be given another opportunity to be screened by the weapons detection device. If, at this time, the passenger still evokes a positive response from the device, then and only then is he subject to a search or frisk, but only if he first voluntarily consents. If such consent is denied, then the individual shall forfeit

The new system apparently abandons all the limiting safeguards previously required. Most importantly, it eliminates the use of the profile, a method which initially and without any intrusion at all reduced the number of persons who could be stopped or frisked to virtually a handful. Similarly, the new system appears to abandon any requirement that preliminary intermediate actions be employed before a frisk or search is undertaken. In short, the new system totally ignores judicial insistence that airport searches could be subsumed under the *Terry* doctrine only because the previous system developed specific, objective information about the particular individual which justified a protective weapons frisk. In almost every one of those cases, the defendant matched the profile, triggered the magnetometer, failed to provide satisfactory identification, and in other ways provided grounds for a reasonable suspicion that he was armed and dangerous. Now, the mere fact that an individual presents himself for boarding is apparently considered sufficient justification for an electronic frisk of his person and a thorough search of his carry-on baggage.

Similarly, the intrusion can no longer be considered de minimus, either quantitatively or qualitatively. No longer can it be said, as was true of the former system, that the program "is designed to speed passengers who are unlikely to present danger and to isolate, with the least possible discomfort or delay, those presenting a substantial probability of danger."<sup>67</sup> Nor is the new system "well calculated to winnow out potential hijackers while occasioning a bare minimum of inconvenience to a very small percentage of the flying public—an inconvenience which most subjects seem, in fact, to accept."<sup>68</sup> Under the present system everyone is subjected to a considerable amount of inconvenience and intrusion.<sup>69</sup>

Since all passengers are now subjected to searches, without any requirement of *particularized* reasonable suspicion, the system can only

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his opportunity on that occasion to be transported and the air carrier shall deny his passage.

S. REP., *supra* note 7, at 9. The Committee expressed concern with reports of "general frisks and shakedowns," but optimistically concluded that weapons detection devices can and will establish probable cause necessary to justify a stop and frisk to determine whether a given individual is carrying a weapon. *Id.*

It is questionable, however, whether the magnetometer can effectively serve such a constitutional purpose. Recently, at La Guardia Airport, one woman kept registering on the meter, even after she removed various articles of jewelry. Officials concluded that the detector had been triggered by metal stays on the woman's corset. N.Y. Times, Jan. 23, 1973, at 31, col. 7.

67. 328 F. Supp. at 1083.

68. *Id.* at 1097.

69. Since January 5, 1973, when the new system took effect, the ACLU has received an increasing number of complaints, particularly from professional people who travel frequently.

be justified on the theory that the danger of skyjacking is so great that it alone warrants those measures. Such a theory cannot be squared with fourth amendment principles, for it considers but one factor in the constitutional equation—the public interest in preventing skyjacking—and deems it paramount and conclusive.<sup>70</sup>

Of the federal judges who have considered this issue, only one, Chief Judge Friendly, suggested that the danger alone validates searching all passengers:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.<sup>71</sup>

Commending the Federal Aviation Administration for devising a program that “limits intrusions on privacy and reduces flight delays,”<sup>72</sup> he suggested that the former policy be recognized only as “a self-imposed expedient for minimizing inconvenience to those not believed to constitute a danger, not as an element necessary to validate a particular search.”<sup>73</sup> However, such a theory has ominous implications for the fourth amendment, as Judge Mansfield observed:

If the danger to the public posed by the current wave of hijackings were held to constitute adequate ground for such a broad expansion of police power, the sharp increase in the rate of serious crimes in our major cities could equally be used to justify similar searches of persons or houses in high crime areas based solely upon the “trained intuition” of the police. With the door thus opened, a serious abuse of individual rights would almost inevitably follow.<sup>74</sup>

There are several compelling reasons for rejecting the concept that the magnitude of the danger sought to be prevented can render “reasonable” a warrantless search which is lacking in probable cause. First, without wishing to minimize the dangers of hijacking and the terror to which passengers and crew are subjected, it should be noted that the number of attempted hijackings has diminished recently, and that the number of persons actually killed or injured has been

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70. See 328 F. Supp. at 1094. See also McGinley & Downs, *supra* note 6 at 314-15.

71. 464 F.2d at 675 (Friendly, C.J., concurring).

72. *Id.*

73. *Id.*

74. *Id.* at 675-76 (Mansfield, J., concurring). See also 328 F. Supp. at 1097-98.

relatively small.<sup>75</sup> Indeed, there have probably been far more taxi drivers and policemen murdered in New York City in the last 4 years than there have been air passengers killed or injured in connection with hijack attempts, even including those harmed as a result of law enforcement efforts to regain control of the plane. If it is "reasonable," in light of these statistics, to search all air travelers, why is it not also reasonable to screen in some manner everyone who tries to enter a taxi? There have been a number of murders in the New York subway system, and one armed person can wreak havoc in a crowded subway car. Why not install magnetometers at each entrance and frisk and search those who show the presence of metal? The same analysis could be utilized with regard to the increased violence in public schools in many cities.

The point is that, in our troubled society, where danger abounds, a principle that allows fourth amendment rights to turn solely on the amount of danger posed by the particular situation is an inherently limitless one. If a particular emergency in one aspect of daily life justifies an incursion on fourth amendment values and principles, where can the line be drawn? In addition, when such extraordinary procedures become institutionalized they are difficult to dismantle once the "emergency" has diminished. Indeed, here a selective system was instituted to deal with a wave of hijackings, particularly in 1969. The frequency of such attempts has lessened now, but instead of eliminating or simply retaining the initial limited system, the federal government has radically expanded it. That is precisely the danger which ought to be avoided and which inevitably follows any departure from constitutional norms.

Fortunately, the courts have usually been unpersuaded by claims that a particular crisis or emergency justifies overriding constitutional guarantees. For example, in *United States v. United States District Court*,<sup>76</sup> the Supreme Court rejected the contention that the threats to national security allegedly posed by domestic subversives justified electronic surveillance of such persons without prior judicial approval. If a perceived threat to national security does not allow for a departure from fourth amendment requirements, then neither does the present pattern of attempted hijackings.

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75. A table describing each domestic hijacking incident from 1961 through March 1972, based on Department of Justice statistics, is contained in S. REP., *supra* note 7, at 45-50. The figures on hijacking incidents in the last few years are as follows: 1968 — 22; 1969 — 41; 1970 — 26; 1971 — 25. *Id.* In the last few months there have been only three such incidents. *Id.*

76. 407 U.S. 297 (1972).

## V. AN OLD SOLUTION TO THE NEW PROBLEM

The efforts to prevent airplane hijackings have resulted in two sets of fourth amendment problems: first, the initial limited authority to detain a small number of people has been grossly abused, degenerating into wholesale searches for evidence and information having absolutely no relationship to the security of the airplane; and second, the Government now claims the power to search all passengers on the theory that the danger alone justifies such an approach. It is my thesis that a traditional fourth amendment device—the exclusionary rule—supplies an appropriate remedy to reconcile the competing interests of the individual and the Government. In general, the thesis is that if the Government continues to invade the privacy of air passengers, it must, at the very least, be denied the right to utilize the fruits of such intrusions.

One of the most surprising aspects of the initial judicial review of airport security searches was the casual manner in which the admission of nonweapon contraband was approved. After exhaustively analyzing whether the information developed by the screening system justified a protective weapons frisk of the defendant, the opinions then tended to reject summarily the argument that any nonweapon contraband discovered should not be admissible in a criminal prosecution.<sup>77</sup> Had those decisions concluded otherwise, the pattern of administrative excesses and abuses would have been interdicted at the outset.

For example, in *Lopez*, the court reasoned that in conducting a good faith, limited weapons search, an "officer need not close his eyes to evidence of other crimes which he may uncover,"<sup>78</sup> and concluded that "contraband seized as a result of a properly circumscribed investigatory frisk predicated on information generated by a well-administered federal antihijacking system is admissible in evidence."<sup>79</sup> To reach such a result, the court relied on language from *Harris v. United States*,<sup>80</sup> an analysis of *Terry*, and a suggestion that, once the marshal discovered what appeared to be narcotics, it would have been "unseemly" to require that he hand back the package.<sup>81</sup> But handing back the narcotics is not the issue; it is conceded that nonweapon contraband discovered during a valid protective frisk can probably be *confiscated*. Rather, the issue is whether the fruits of such a search should be al-

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77. See, e.g., 328 F. Supp. at 1098-99; 464 F. 2d at 674.

78. 328 F. Supp. at 1098.

79. *Id.* at 1099.

80. 331 U.S. 145, 155 (1947), *overruled on other grounds*, *Chimel v. California*,  
395 U.S. 752 (1969).

81. 328 F. Supp. at 1099.

lowed to serve as the basis for prosecution and conviction. If a totally invalid search produces contraband, is it "unseemly" subsequently to suppress the evidence so seized? I submit that it is not, since exclusion is the usual remedy applied to evidence obtained from an illegal search or seizure.

There are a number of reasons why nonweapon contraband found during an otherwise valid protective frisk should be subject to the exclusionary remedy. First, the sole purpose of the limited exception to the probable cause protection of the fourth amendment sanctioned in *Terry* was the immediate self-protection of the officer or other nearby persons. Accordingly, the Court emphasized that the scope of such a search "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."<sup>82</sup> I believe this means not only that the pat-down may not degenerate into a full-blown search, but also that nonweapon evidence seized may not be admitted in a prosecution. When the fruits of a *Terry* frisk do not consist of material capable of inflicting injury, no justification exists for permitting their use in a criminal prosecution. A *Terry* frisk is a form of limited purpose intrusion which may not be permitted to ripen into a general search.<sup>83</sup>

Nothing in the Supreme Court's stop and frisk cases is to the contrary. Indeed, the Court has never held that a valid weapons frisk which discovered nonweapon contraband could serve as the basis for a prosecution. In *Terry*, the pat-down was viewed as a reasonable search for weapons, weapons were found, and were properly introduced into evidence to form the basis for a concealed weapons charge.<sup>84</sup> By contrast, in *Sibron*, the officer "was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man."<sup>85</sup> The heroin seized was, therefore, held to be inadmissible in evidence.<sup>86</sup> Equally important, the companion case to *Sibron*,<sup>87</sup> involved not a weapons frisk at all, but a valid search following and incident to a lawful arrest, thereby rendering admissible, on traditional grounds, the burglary tools which were discovered.<sup>88</sup> Finally and similarly, in *Adams v. Williams*,<sup>89</sup> the defendant was ar-

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82. 392 U.S. at 19.

83. See *Stanley v. Georgia*, 394 U.S. 557, 569 (1969) (Stewart, J., concurring).

84. 392 U.S. at 7-8, 30-31.

85. 392 U.S. at 65.

86. *Id.* at 62.

87. *Peters v. New York*, 392 U.S. 40 (1968).

88. *Id.* at 66.

89. 407 U.S. 143 (1972).

rested after a weapons frisk, based upon an informant's tip, which disclosed a revolver. Thereafter, a search incident to the weapons arrest disclosed a substantial amount of heroin on the defendant's person which was admitted in evidence as the fruit of a lawful search.<sup>90</sup>

If the protective frisk doctrine does not justify the admission of nonweapon contraband, neither does any variation of the "plain view" doctrine.<sup>91</sup> That doctrine assumes that the search is always premised on probable cause, either with or without a warrant, that it has some independent basis, and that the seizure is inadvertent. But a protective weapons frisk is a special purpose, sub-probable cause intrusion which should not bring with it all the potency of the plain view doctrine. At the precise moment that a marshal opens a wrapped package, discovered during a pat-down, to determine whether it contains a weapon, he does not have probable cause to conduct that search. If the package turns out to contain not dynamite, but heroin, the plain view doctrine should not be available to support a prosecution.

Finally, the most persuasive reason for imposing a prophylactic exclusionary rule on nonweapon contraband or evidence seized during these airport searches is that such a remedy is the only sure way to deter the official misconduct which has become so evident. In *Lopez*, the court observed:

While there may be some merit to the argument that exclusion of evidence of other crimes would serve to deter police from using the frisk as a guise for a general contraband search, we need not fear such abuse in this case since it is patent that the anti-hijacking system is specifically designed to isolate potential hijackers and to seize weapons.<sup>92</sup>

It is submitted that had the *Lopez* opinion been written today, it might well have reached the opposite conclusion about the need for a broad exclusionary rule.

The *Terry* doctrine generally contains enormous possibilities for abuse. It is important to note that at least two of the Justices who joined in its formulation have now expressed doubt about its wisdom. Justice Marshall, dissenting in *Adams*, concluded that Justice Douglas, the sole dissenter in *Terry*, was correct in predicting that the authority could not be confined to circumscribed weapons frisks:

It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in *Terry*

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92. 328 F. Supp. at 1099.

90. *Id.* at 149.

91. The doctrine is analyzed at length in *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971).

is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow.<sup>93</sup>

Justice Brennan also dissented in *Adams*, relying completely on the dissenting opinion of the lower court.<sup>94</sup> The lower court opinion, written by Judge Friendly, expressed "the gravest hesitation in extending [*Terry*] to crimes like possession of narcotics."<sup>95</sup> Fortunately, some lower courts have shown a willingness to curb abuses by rejecting the more outrageous police claims.<sup>96</sup> *Muelener* and *Kroll*, the two recent cases suppressing contraband evidence seized during overreaching airport searches, are part of that trend.<sup>97</sup>

But abuses of fourth amendment safeguards are simply too systematic to hope that they will be curtailed by applying the *Terry* limitations and the exclusionary rule on a case-by-case basis. It strains credulity to suggest that the almost five arrests on charges unrelated to hijacking were the result of carefully circumscribed weapons frisks.<sup>98</sup> Rather the statistics strongly suggest that those who administer passenger screening tests are not looking for weapons, but rather they are looking for drugs, contraband, parole violators, or illegal aliens. The only way to put a stop to these unconstitutional practices is to adopt a per se rule prohibiting the punitive use of any evidence or information, other than weapons, discovered during such searches.

The more difficult question, but one which arises less frequently, is what to do about weapons discovered during a valid *Terry*-type frisk premised on information developed by the former screening system.<sup>99</sup> While *Terry* allows prosecution for weapons so discovered, it must be remembered that *Terry* permitted a narrow exception to the probable cause rule for the sole purpose of protecting the officer. Once that purpose has been served, the reasons for allowing prosecution become less compelling.

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93. 407 U.S. at 162 (Marshall, J., dissenting).

94. *Id.* at 151.

95. 436 F.2d 35, 38 (2d Cir. 1970) (Friendly, J., dissenting).

96. For example, in *United States v. Del Toro*, 464 F.2d 520 (2d Cir. 1972), the officer claimed that he feared a folded \$10 bill, discovered during a frisk, might have been a razor blade. When opened it contained cocaine. The Second Circuit held that "the limited search for weapons, justified by the circumstances of this case, did degenerate into an unrelated and therefore unreasonable search for evidence." *Id.* at 522. The Court warned that encouraging indiscriminate searches unrelated to the need for protecting the officer would make the protections of the fourth amendment "illusory." *Id.*

97. See notes 54-62 and accompanying text *supra*.

98. See note 6 *supra*.

99. Less than 20 per cent of the arrests have been for weapons, and only one of the reported cases involving the use of the screening system, *United States v. Ep-person*, 454 F.2d 769 (4th Cir. 1972), dealt with possession of a weapon. All of the rest involved drugs.

Such a trade-off is not particularly startling. It frequently occurs in the closely-related fifth amendment area, where incriminating testimony can be compelled, but only in exchange for immunity from the use of that information in any prosecution.<sup>100</sup> There also is precedent for such an approach in fourth amendment doctrine as well. The cases have recognized that the amendment guarantees two sets of values: privacy against intrusion, and self-protection against the use of information obtained as a consequence of the intrusion.<sup>101</sup> The intrusion on privacy may be necessary, but it does not follow that the self-protection interest must be infringed as well.

Much of the above discussion is premised on the old screening system which, as the courts have held, developed enough information about the particular individual to justify a protective weapons frisk. I have suggested that nonweapon evidence found during such a search should certainly be subject to the exclusionary rule, and that even weapons and the like should probably be excluded as well. Such an approach vindicates fourth amendment rights without diminishing the ability to protect the air traveling public.

But the new system is a radical departure from fourth amendment standards. It is premised simply on the notion that the danger posed by hijacking is so great that it alone obscures all other elements of the constitutional equation. Accordingly, the new regulations authorize the electronic frisking of all passengers and the searching of all carry-on baggage.<sup>102</sup>

I think that the minimally tolerable constitutional response must be to interpose the exclusionary rule to secure the self-protection values of the fourth amendment. Any evidence or information obtained as a result of these new general searches, whether weapon or nonweapon, must be inadmissible in any punitive proceeding. One would hope that the courts would have little difficulty reaching the same conclusion. Such an approach would advance the two main purposes of the exclusionary rule—detering official misconduct and preserving judicial integrity.

Invoking the exclusionary rule would mitigate many of the objections to the new regulations. However, even assuming that evidence found will be inadmissible, the question still remains whether the Government should be allowed to compel a search of all passengers—I think not. As indicated above, it is my opinion that such searches

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100. *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441 (1972).

101. *See* *Camara v. Municipal Court*, 389 U.S. 523 (1967); *Frank v. Maryland*, 359 U.S. 360 (1959).

102. *See* Emergency Order of FAA, Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

are unconstitutional. Moreover, it has not been demonstrated that the adoption of the new approach was even necessary. If anything, the number of hijacking attempts seemed to be decreasing during the last months of 1972.<sup>103</sup> The valid governmental interest in deterring such crimes could have been and was being secured under the carefully limited system previously utilized and judicially approved, a system which intruded upon the fourth amendment rights of only a limited number of passengers. It would seem that a return to that system is mandated.

## VI. CONCLUSION

I began this discussion by observing that the Government's efforts to deal with skyjacking provided a case study demonstrating that initial, seemingly inconsequential incursions on civil liberties have an inevitable tendency to grow, once they take root. This is particularly true where fourth amendment values are concerned, for they frequently seem unreasonable and are usually invoked by "dubious characters."<sup>104</sup> The vigilant defense of those values is singularly important:

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and Constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values of the Fourth Amendment more, not less, important.<sup>105</sup>

The crisis posed to air travel is a real one, justifying some of the unusual measures which have been taken. Nevertheless:

[T]he ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."<sup>106</sup>

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103. See note 75 and accompanying text *supra*.

104. *Harris v. United States*, 331 U.S. 146, 156 (1947) (Frankfurter, J., dissenting).

105. 403 U.S. at 455.

106. *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring), quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).