Volume 8
Number 1 *Fall 1973*

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Airport Security: Piracy Within the Terminal?

AIRPORT SECURITY: PIRACY WITHIN THE TERMINAL?

Hijacking! This term has been the topic of innumerable news stories in the past decade and serves as a constant reminder to air travellers of a peril they may face when aboard a commercial aircraft. The serious threat to life and property incident to an act of aerial piracy, coupled with the rising number of attempts, has prompted governmental action to develop and implement procedures designed to thwart this criminal interference with air transportation. As a result of efforts by the United States Government and the airlines, it has been shown that only *limited* procedures are available which will effectively deter this criminal activity. However, as in all areas of law enforcement, vital constitutional standards must be met. Airport security must survive the current fourth amendment attacks being waged against it.[1] The purpose of this note is twofold: 1) to evaluate the procedural steps presently used in airport security in light of the flexible fourth amendment standards;[2] and 2) to recommend practices that must be incorporated into the security system if it is to remain viable under our Constitution.

The scope of the problem of aircraft hijacking is clearly indicated by a cursory review of available statistics. Of the 393 attempts that have occurred worldwide throughout history, 246 have been successful.[3] The need for remedial measures in the United States is emphasized by the fact that 160 of these attempts have originated here, 98 being successful.[4] The significance of these figures is heightened in light of the increased passenger capacity of our modern commercial aircraft. The untold thousands of "victims" who have been thrust into perilous situations created by the presence of hi-

1. *See* note 40 *infra* and accompanying text.

2. *See* notes 40-42 *infra* and accompanying text.

3. Interview with Neil Callahan, FAA Director of Public Affairs for the Great Lakes Region, in Des Plaines, Illinois, Feb. 20, 1973 [hereinafter cited as Callahan Interview]. These statistics were accumulated as of February 1, 1973. The distinction between successful and unsuccessful is determined by whether or not the hijacker actually gained control of the aircraft at any time. *Id.*

4. *Id.* For a more detailed account of specific instances see Abramovsky, *The Constitutionality of the Anti-Hijacking Security System*, 22 BUFFALO L. REV. 123, 123-26 (1972); Sonnemann, *Aerial Piracy*, 1971 ABA SECT. OF INS., N. & C. L. 135, 136-38 (1971); Toothman, *Legal Problems of Skyjacking*, 1969 ABA SECT. OF INS., N. & C. L. 251, 252-53 (1969); Wurfel, *Aircraft Piracy—Crime or Fun?*, 10 WM. & MARY L. REV. 820, 821-28 (1969).

jackers reflect the immediacy of the problem. It is with this realization that responsible governmental and airline officials have resolved to frustrate potential hijackers.

THE EVOLUTION OF AIRPORT SECURITY

At the foundation of remedial measures designed to alleviate the problem of hijacking is the theory that potential hijackers must be discouraged from attempting this criminal activity. The desperate and determined nature of a hijacker makes his presence aboard commercial flights extremely hazardous. If passengers are to be adequately protected, it is essential that sky pirates be denied access to aircraft.

The International Effort — A Prelude to Airport Security

The area in which the United States initially concentrated its efforts in the struggle to combat aerial hijacking was that of international arbitration. It has been the belief of our Government that the elimination of all escape routes through extradition agreements would provide an effective supplement to national counteractive measures. To this end, several international conventions and conferences have been held to bring about this desired arrangement.[5] In the past however, these efforts have failed to attain their desired impact due to the lack of ratification by key countries such as Cuba and Algeria.[6] This has, in turn, resulted in a compelling national interest in augmenting security procedures on the home front.

A significant exception to the pattern of failure on the international scene occurred on February 15, 1973, when the United States and Cuba signed an agreement calling for severe punishment of air hijackers.[7] The eleven previous years of severed diplomatic relations

5. Most notable of these were the Tokyo Convention in 1963, the Hague Convention in 1970 and the Montreal Conference of 1971. An analysis of these and other international efforts may be found in Malmborg, *International Efforts to Deter Aerial Hijacking,* 1971 ABA SECT. OF INS., N. & C. L. 129 (1971).

6. The importance of Cuba's participation is reflected by the fact that 85 of the 98 successful hijackings in the United States have ended in Havana, Cuba. Callahan Interview.

7. Hijacking Agreement with Cuba, Feb. 15, 1973, [1973] ___U.S.T. ___, T.I.A.S. No. 7579. A second similar agreement was reached between Canada and Cuba. Both agreements were to be effective immediately. Chicago Tribune, Feb. 16, 1973, §1, at 14, col. 1. Despite the probable deterrent effect of the agreement, Secretary of State William P. Rogers stated that he anticipated no changes in security checks of passengers boarding airplanes. *Id.* at col. 2.

between the two countries[8] had resulted in recognition of Cuba as the ideal destination for hijacked United States aircraft; the absence of an extradition arrangement and geographical proximity were enticing factors.[9] Fortunately, this recent pact was a giant step toward elimination of the island as a sanctuary for sky pirates. By the terms of the agreement, "hijackers may be tried by the country to which they fled or were extradited for prosecution."[10] The agreement also provides that "money obtained by extortion will be returned and both countries are under obligation to speed the continuation of trips of innocent passengers and crewmen."[11] These significant terms appear to be representative of a mutual desire for cooperation between the signers to stop the flow of criminally commandeered aircraft to Havana. However, the sincerity of this desire remains to be demonstrated. If the pact is to be successful, it will not depend on the provisions of the agreement itself, but rather on the determination of each party to make it work.

The National Experience

Within our own boundaries, the federal government has initiated rules and regulations through the Federal Aviation Administration that are designed to promote security within terminals and aboard aircraft. The Administrator of the FAA has been given authority to prescribe rules and regulations as he "may find necessary to provide adequately for national security and safety in air commerce,"[12] and it was in performance of these duties that regulations banning the carrying aboard commercial aircraft of deadly or dangerous weapons, both concealed and unconcealed,[13] and requiring

8. 119 CONG. REC. 2442 (daily ed. Feb. 8, 1973).

9. For statistics which verify this see note 6 *supra*.

10. Hijacking Agreement with Cuba, Feb. 15, 1973, [1973] ___ U.S.T. ___, T.I.A.S. No. 7579 at 2. There is also a provision that hijackers be "punishable by the most severe penalty according to the circumstances and the seriousness of the acts." *Id.* at 1.

11. *Id.* at 2. However, the treaty also states:

> The party in whose territory the perpetrators . . . first arrive may take into consideration any extenuating or mitigating circumstances . . . in which the persons responsible . . . were being sought for strictly political reasons and were in real and imminent danger of death, without a viable alternative for leaving the country, provided there was no financial extortion or physical injury to . . . persons in connection with the hijacking.

Id. This could serve as an escape clause that would dilute the effectiveness of the pact.

12. 49 U.S.C. §1421 (a) (6) (1958).

13. No person may, while aboard an airplane being operated by a certificate holder, carry on or about his person a deadly or dangerous weapon, either concealed

the locking of flight crew compartment doors[14] were issued as early security measures in 1964. Punitive provisions were also enacted which made it illegal to deliver or transport explosives or other dangerous articles on commercial aircraft[15] and prohibited aircraft piracy itself.[16] Initially these penalties operated as a temporary deterrent that minimized the number of hijacking attempts on United States aircraft.[17] The year 1968, however, marked the advent of the current crisis in air piracy. The number of attempts mushroomed to 22 in that year and increased to 40 in 1969, with 27 attempts

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or unconcealed. This paragraph does not apply to—

(a) Officials or employees of a municipality or a State, or of the United States, who are authorized to carry arms; and

(b) Crewmembers and other persons authorized by the certificate holder to carry arms.

14 C.F.R. §121.585 (1964); 14 C.F.R. §135.64 (1964). 49 U.S.C. §1472 (1) (1961) imposes a fine of not more than $1,000 or imprisonment of not more than one year, or both, for violation thereof.

14. (a) Except as provided in paragraph (b) of this section, the pilot in command of a large airplane carrying passengers shall ensure that the door separating the flight crew compartment from the passenger compartment is closed and locked during flight.

(b) The provisions of paragraph (a) of this section do not apply—

(1) During takeoff and landing if the crew compartment door is the means of access to a required passenger emergency exit or a floor level exit; or

(2) At any time that it is necessary to provide access to the flight crew or passenger compartment, to a crewmember in the performance of his duties or for a person authorized admission to the flight crew compartment . . . .

14 C.F.R. §121.587 (1964). In accord with this, 49 U.S.C. §1472 (j) (1961) provides for a $10,000 maximum fine or imprisonment for not more than 20 years, or both, for interference with flight crew members or flight attendants (including stewardesses). By the same provision, if a deadly or dangerous weapon is used, a life sentence may be imposed.

15. 49 U.S.C. §1472 (h) (1958) provides for a fine of not more than $1,000 or imprisonment of not more than one year, or both for each offense. Should a person be injured or killed as a result of such a violation, the offender would be subject to a maximum $10,000 fine or ten years imprisonment, or both.

16. 49 U.S.C. §1472 (i) (1961) provides:

(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this situation, the term "aircraft piracy" means any seizure or exercise of control, by force or violence and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

17. After five hijacking attempts involving United States-registered aircraft in 1961, the numbers decreased to one in 1962, zero in 1963, one in 1964, four in 1965 and one in 1967. DEPT. OF TRANSPORTATION, 5TH ANNUAL REPORT, Fiscal Year 1971, at 163.

occurring in 1970.[18] This prompted an announcement by President Nixon on September 11, 1970, that armed United States Government guards, to be known as Sky Marshals, would be placed on flights of United States commercial airlines and that use of electronic surveillance equipment and techniques would be extended by American-flag carriers to all gateway airports.[19]

The inadequacies of the Sky Marshal program became immediately apparent. The year 1971 saw 14 reported hijacking attempts, of which only six were frustrated.[20] Despite this virtual 50 percent reduction in attempts from 1970, the figure was still excessive. The inherent weakness of the program was its failure to deal with a hijacker until the plane was loaded, airborne and its diversion commenced. At this point, the availability of hostages and imminent danger to all passengers, if apprehension were attempted, made compliance with the hijacker's demands compelling. As a result, airports and airlines realized that the only effective method of deterring hijackers would be to prevent their initial boarding of aircraft,[21] and ground security systems were accordingly intensified.[22]

The Profile and Magnetometer

Ground security procedures evolved around the development of the Behavioral Profile analysis and the electronic magnetometer. It is therefore appropriate to explain the basic principles of these devices.[23] The Profile was originated in 1968 by a task force study of characteristics possessed by actual hijackers.[24] The result was an abbreviated list of 25 to 30 common traits[25] set forth in capsule form

18. *Id.*
19. *Id.* at 23.
20. *Id.* at 163.
21. 49 U.S.C. §1511 (1970) provides:

> [A]ny air carrier is authorized to refuse transportation to a passenger or to refuse to transport property when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.

22. New Orleans' Moisant International Airport became the first airport to conduct electronic surveillance of all passengers going through its gates. DEPT. OF TRANSPORTATION, *supra* note 17, at 24.
23. For a more complete description see United States v. Lopez, 328 F. Supp. 1077, 1083-84, 1086-87 (E.D.N.Y. 1971).
24. *Id.* at 1082.
25. *Id.* at 1086. These characteristics were easily observable and not discriminatory against any nationality, race, religion, or political ideology. *Id.*

so as to enable ticket agents to perform an immediate appraisal of each passenger and make a determination as to whether he was to be designated as a "selectee" — that is, a possible hijacker. If a passenger conformed with the Profile, this information was relayed to the personnel manning the magnetometer. The customary procedure was then to have this selectee pass through the magnetometer, along with other passengers selected at random to protect the secrecy of the Profile.

The magnetometer is an electronic surveillance device designed to record the amount of ferrous metal carried by a person who passes through it. The weapons detector, the term most commonly used to describe the magnetometer, is adjusted to register a positive reading when "metal having the effect of a 25 caliber pistol passes through it."[26]

Under security procedures utilized by airports in recent years, the Profile analysis and magnetometer search of a person and his carry-on baggage have been the methods employed to single out passengers for questioning and a possible frisk by United States Marshals stationed in the terminal.[27] However, in order to counter an alarming increase in hijacking and to meet an emergency in air commerce safety requiring immediate action,[28] an amendment to FAA regulations was adopted on March 7, 1972.[29] The amendment prescribed the mandatory establishment by each airline of a screening system acceptable to the Administrator of the FAA.[30]

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26. *Id.*

27. For a description of the actual steps involved see McGinley and Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293, 303-04 (1972) [hereinafter cited as McGinley & Downs].

28. 37 FED. REG. 2501 (1972).

29. 37 FED. REG. 4905 (1972) (amendment 121.85 to 14 C.F.R. §121.538). On March 11, 1972 the amendment was revised to establish the effective date as March 9, 1972. 37 FED. REG. 5254 (1972).

30. 14 C.F.R. §121.538 (1972) provides in part:

> (b) Each certificate holder shall . . . adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carryon baggage or on or about the persons of passengers . . . . Each certificate holder shall immediately adopt and put into use its security program . . . .
>
> (c) Each certificate holder shall prepare in writing and submit for approval by the Administrator its security program including the screening system prescribed by paragraph (b) . . . and showing the procedures, facilities, or a combination thereof, that it uses or intends to use to support that program and that are designed to—
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> (1) Prevent or deter unauthorized access to its aircraft;

Airport Security Today

Today, airport security procedures have been intensified so that *all* who pass a designated security point within the terminal, passengers and non-passengers alike, are subject to search.[31] All carry-on luggage is hand searched or X-rayed for weapons and explosives and each individual must pass through a magnetometer.[32] Recent

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(2) Assure that baggage is checked in by a responsible agent or representative of the certificate holder; and

(3) Prevent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures.

In addition, the regulation provides:

(g) The Administrator may amend any screening system or any security program . . . upon his own initiative if he determines that safety in air transportation and the public interest require . . . .

(1) . . . . If the Administrator finds that there is an emergency requiring immediate action with respect to safety in air transportation or in air commerce, . . . he may issue an amendment, effective without stay, on the date the certificate holder receives notice of it.

14 C.F.R. §121.538 (g) (1) (1972).

31. Callahan Interview. For a complete history of the events which ultimately led to intensified airport security searches see Note, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 384-92 (1973). Points where the screening takes place will vary with the plan adopted by the airport. The concourse plan places the site of the security check point at the beginning of the concourse, whereas the gate plan is conducted immediately prior to one's entry of the boarding ramp. Interview with Lloyd Nelson, TWA Security Manager for the Central Region, in Arlington Heights, Illinois, Feb. 20, 1973 [hereinafter cited as Nelson Interview].

32. Callahan Interview. This increase in intensity of security measures was the result of a directive, issued December 5, 1972, by the Administrator of the FAA pursuant to his amending powers granted him by 14 C.F.R. §121.538 (g) (1) (1972). Nelson Interview. For the important terms of this provision see note 30 *supra*. In cooperation with the requirement that airlines intensify their security programs, an individual airline's security arrangement provides:

1) Every passenger . . . must be screened by a weapon detector, prior to boarding. Passengers must receive weapon detector screening without their carry-on articles.

2) All carry-on articles of passengers will be inspected by a United employee or authorized agent prior to boarding. Inspection of a carry-on item by a weapon detector is not adequate or acceptable. The inspection must be an actual physical inspection. After carry-on articles have been inspected, they will not be released to the passenger until he or she has cleared through the weapon detector.

United Air Lines Revision to Aircraft Security Program, §IV, §§A, cls. 1 & 2, Jan. 4, 1973.

A visit to O'Hare International Airport in Chicago on February 10, 1973 revealed that passengers with carry-on baggage were first subjected to a hand search of these articles and were then obliged to pass through the magnetometer. This practice has continued but the hand search is gradually being replaced by the systematic X-raying of all carry-on luggage. The luggage passes under the X-ray unit, at which time a "picture" is projected on a screen that is viewed by security personnel. These people have approximately five seconds to determine if the article is then to be hand searched for identification of questionable objects.

additions to FAA regulations have been adopted to strengthen the deterrent effect of airport security. Most important of these is §107.4 which requires the continual presence of at least one law enforcement officer at each flight departure point.[33] The cost of this venture is now imposed on the airport operators. This conveniently permits the federal government to cut costs previously incurred by providing United States Marshals (not to be confused with Sky Marshals) at flight departure points. Although Marshals are still to be stationed within the terminals, the presence of police officers gives rise to an opportunity for the federal government to reduce the number of Marshals it must supply. Resultant opposition to this alleged federal withdrawal has been heated but unsuccessful.[34]

Costs of the present security system are already placed predominantly upon the airlines and airports;[35] imposition of additional costs seems uncalled for. It is submitted that the burden of maintaining airport security should be shouldered by the federal government to insure the uniformity and adequacy of a program which so intimately affects traditional constitutional rights. When concerned with a security system that has resulted in approximately 6,000 arrests over a span of 22 months, 80 percent of which were unrelated

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Telephone Interview with Lloyd Nelson, TWA Security Manager for the Central Region, Sept. 19, 1973 [hereinafter cited as Nelson Telephone Interview]. The X-ray equipment was approved by the Administrator of the FAA and is being employed in various degrees by the airlines. *Id.* At O'Hare, United Airlines has totally phased out the initial hand search in favor of X-ray equipment, while TWA uses both procedures and Braniff uses only the physical search. *Id.*

33. 37 FED. REG. 25935 (1972). 14 C.F.R. §121.310 (1972) deals with rear exit security and requires the construction of each ventral and tail cone exit so that they may not be opened during flight. 37 FED. REG. 25354 (1972). This prevents the parachuting of hijackers to safety.

34. The Airport Operators Council International obtained a temporary restraining order delaying the implementation of 14 C.F.R. §107.4. However, their application for a permanent injunction was denied and the program was commenced as of 12:01 a.m., Feb. 16, 1973. N.Y. Times, Feb. 14, 1973, §1, at 6, col. 1; Airport Operators Council Int'l v. Shafer, 354 F. Supp. 79 (D.D.C. 1973). The airlines are afraid that, since the airport operators must provide the armed officers, increased costs will ultimately be imposed upon them by such measures as increased landing fees. Nelson Interview.

35. Nelson Interview. One existing method designed by some airports and airlines to alleviate a part of the financial strain is to charge boarding fees. *Id.*

The United States Senate has responded to this problem by unanimously passing a bill establishing a federal security force. This would require the federal government to pay for all anti-hijacking personnel and devices. 119 CONG. REC. 3089 (daily ed. Feb. 21, 1973). Another feasible solution to the problem, proposed by Rep. Podell of N.Y., is to use trained armed service personnel already in the employ of the federal government. 119 CONG. REC. 881 (daily ed. Feb. 8, 1973). This would substantially reduce costs to the airlines and the Government.

to acts connected with hijacking,[36] one must take a hard look at the extreme tolerance that allows such a significant matter of law enforcement to be executed by persons possessing differing, and often minimal degrees of expertise.[37] Although there has been only one reported hijacking in the United States since the newly formulated security procedures went into effect,[38] an examination of the constitutional permissibility of the system as a whole must penetrate beyond its effectiveness and consider the delicate issue of "search and seizure" as it pertains to airport security.

THE CONSTITUTIONAL ASPECTS OF AIRPORT SECURITY

"Must I submit to a search as a prerequisite for boarding a flight?" Such a question must have entered every airline passenger's mind as he watched the person across the table ardently rummaging through his suitcase. "Wouldn't I rather go through this temporary inconvenience, as opposed to facing a desperate hijacker who threatens my safety?" This secondary thought must be answered on an individual basis by each prospective airline passenger; but the primary question will inevitably have to be considered by the Supreme Court. Unfortunately, the issues involved are not as simple as these inquiries might have them appear. The complexity of the situation arises out of a conflict between the rights guaranteed by the fourth amendment and the national interest in promoting safety of people engaged in air travel.[39] Criticism of airport security searches has

36. 119 CONG. REC. 2469 (daily ed. Feb. 8, 1973). Over 2,000 of the arrests were for possession of drugs, about 2,000 for illegal entry with the remainder including various offenses from parole violations to forgery. *Id.*

37. In compliance with the requirement that they provide security personnel, airlines obtain the necessary manpower through agencies such as Pinkerton's and put them through a training program. Nelson Interview. This practice is dangerous to the system's validity since

> [a]ny system and the dangers it poses must be evaluated in the light of the skills and the dedication of those who will operate it . . . .

United States v. Lopez, 328 F. Supp. 1077, 1102 (E.D.N.Y. 1971). Any deviation from the system's procedures will surely defeat its constitutionality.

> The approved system survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality. When elements of discretion and prejudice are interjected it becomes constitutionally impermissible.

Id. at 1101.

38. Address by James E. Landry, General Counsel for Air Transport Association of America, Syracuse University Symposium on Aircraft Hijacking, March 27, 1973. This one attempted hijacking was unsuccessful. *Id.*

39. Criticism of airport security based upon its alleged restrictions on a passenger's constitutional right to travel between the states is hardly substantial. The Supreme Court has stated:

emphasized the absoluteness of the fourth amendment and has failed to treat it as the flexible standard it is;[40] the fourth amendment is not absolute.[41] When speaking in terms of what is reasonable and what is not, there can be no arbitrary delineation. The test for reasonableness must focus on "balancing the need to search against the invasion [of constitutional rights] which the search entails."[42] It therefore becomes necessary to evaluate each step of the security system,[43] keeping in mind that "the specific content and incidents of" a right under the fourth amendment "must be shaped by the context in which it is asserted."[44]

The Magnetometer

The use of the magnetometer to screen all persons passing through security points in the terminal has been held to be a search within the meaning of the fourth amendment.[45] A passenger passing through the device, who does not activate it, is generally allowed to continue on. However, this is conditioned upon the absence of any extenuating circumstances sufficient to arouse the level of suspicion necessary for a search, independent of security procedures.[46] Should he register a positive reading, the normal procedure is to have the attendant ask if he is carrying anything metallic on his person which may have caused the electronic reaction. If feasible, he is asked to

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> [I]n moving from state to state . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (original emphasis). Airport security is a measure that tries to *assure* the right to travel for the public and the compelling national interest in deterring hijackers makes the "resulting inconvenience of the few . . . at least tolerable." United States v. Bell, 464 F.2d 667, 674 (2d Cir. 1972).

40. "[W]hat the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." Elkins v. United States, 364 U.S. 206, 222 (1960) (emphasis added).

41. See Terry v. Ohio, 392 U.S. 1 (1968); Walker v. United States, 404 F.2d 900 (5th Cir. 1968).

42. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

43. The Profile will not be dealt with since it is no longer in use. Nelson Interview.

44. Terry v. Ohio, 392 U.S. 1, 9 (1968); *accord,* People v. Botos, 27 Cal. App. 3d 774, ___, 104 Cal. Rptr. 193, 195 (1972).

45. United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972), *cert. denied,* 406 U.S. 947 (1972).

46. Searches conducted within the airport terminal by United States Marshals have been upheld based upon a passenger's unusual nervousness, bulges in his clothing and failure to produce satisfactory identification on demand. The validity of such a search was unaffected by the absence of a positive magnetometer reading. *See e.g.,* United States v. Moreno, 475 F.2d 44 (5th Cir. 1973); United States v. Lindsey, 451 F.2d 701 (3rd Cir. 1971), *cert. denied,* 405 U.S. 995 (1972).

remove the article, or articles, and proceed through the machine again. If there is no reaction the second time, he is allowed to go on. Should an explanation for the initial positive reading identify the source as an unremovable object, for example metal braces in shoes, metal pins in bones or brassieres and corsets on women, a "hand wand" is utilized to verify its presence.[47]

This relatively simple practice cannot reasonably be described as "an annoying, frightening, and humiliating experience" censured by our courts.[48] When this instrumentality is used in connection with aircraft hijacking,

> [t]he danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement for search and seizure is excused by exigent national circumstances.[49]

A search within the terminal by a magnetometer is "more than reasonable"[50] and its intrusions on privacy are little more than minor inconveniences. It is not surprising that our judicial system has had little difficulty in upholding its validity under fourth amendment standards.[51]

The "Stop and Frisk" Approach

A much more difficult constitutional problem arises when the passenger passes through the magnetometer the second time and still registers a positive reaction. In such an instance, the normal

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47. The chronology and details of these procedural steps are from the Nelson Interview. The "hand wand" is merely a miniaturized magnetometer.

48. Terry v. Ohio, 392 U.S. 1, 20 (1968).

49. United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972). *Cf.* Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961), *cert. denied*, 366 U.S. 950 (1961) (border searches).

50. United States v. Epperson, 454 F.2d 769, 772 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972).

51. The Court of Appeals for the Third Circuit has stated:

> [W]ithin the context of a potential hijacking the necessarily limited "search" accomplished by use of the magnetometer *per se* is justified by a reasonable governmental interest in protecting national air commerce.

United States v. Slocum, 464 F.2d 1180, 1182 (3rd Cir. 1972) (original emphasis).

The same reasons given to justify the use of the magnetometer may be applied to justify use of X-ray equipment now employed to screen carry-on luggage. Objections to the X-ray equipment based upon claims that its radiation emissions are dangerous to those around it and that it fogs undeveloped film within a suitcase are unfounded. TWA has conducted tests on both of these matters and has determined that the low intensity radiation used is harmless. Nelson Telephone Interview.

procedure is to summon a United States Marshal to question the subject. If the officer is not satisfied with the answers given, the passenger is taken to a private area and subjected to a frisk of his person. The stop and frisk rationale of *Terry v. Ohio*[52] has been used on numerous occasions to justify the limited pat-down of the person in the airline terminal.[53] In *Terry*, the Court held that a police officer who

> observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . 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*. . . .[54]

The position of airport security personnel is highly analogous to that of the police officer in the street. Both are charged with the duty of safeguarding the lives of those immediately surrounding them. To perform this function, each must be equipped with constitutional tools that will enable him to frustrate reasonably suspected criminal activity. To insure their acceptance, tools of this type must entail a minimal intrusion upon personal privacy.

To justify a particular intrusion, the Court in *Terry* further stated that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrustion."[55] Despite the statistical determination that approximately 50 percent of all passengers who pass through the magnetometer activate it,[56] use of the device provides these essential facts. When activated, an opportunity is furnished for an explanation; failure to explain, either inadvertently or purposefully, should suggest that something metallic and dangerous may be hidden. The chance that it may be a weapon

52. 392 U.S. 1 (1968).

53. *See e.g.*, United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972); United States v. Slocum, 464 F.2d 1180 (3rd Cir. 1972); United States v. Lindsey, 451 F.2d 701 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). For further discussion of the *Terry* doctrine see McGinley & Downs at 307-08.

54. 392 U.S. 1, 30 (1968) (emphasis added).

55. *Id.* at 21.

56. United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971).

does *not* have to be more probable than not; Justice Harlan, concurring in *Terry*, made it clear that

> [c]oncealed weapons create an immediate and severe danger to the public, and though that danger might not warrant routine general weapons checks, it could well warrant action on less than a probability.[57]

The dangers involved when one possesses a weapon during the course of criminal conduct within the confines of an airliner, often miles above the earth, are beyond description. It seems clear that

> [i]n the context of a possible airplane hijacking with the enormous consequences which may flow therefrom, and in view of the limited time . . . to act, the level of suspicion required for a *Terry* investigative stop and protective search should be lowered.[58]

At this time it is critical to emphasize the limited grounds on which our courts may acquiesce in a frisk and yet respect established constitutional restrictions.[59] First, the search must not be based on conjecture or a hunch[60]—there must be reasonable grounds to justify reasonable suspicion.[61] Second, the "[o]fficials for a *Terry* search, must suspect the person of having *weapons*."[62] There is never an all-inclusive license to frisk persons based solely on an official's observation of bulges equivalent in size to a weapon or upon a belief that a person may be carrying contraband.[63] Any over-

57. 392 U.S. 1, 31-32 (1968).

58. United States v. Lindsey, 451 F.2d 701, 703 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972).

59. Even in a hijacking situation, any intrusion by a [United States] Marshal beyond the legitimate scope of a weapons search is clearly unjustified and the fruits of such an excessive search would be inadmissible in a subsequent criminal proceeding.

United States v. Lopez, 328 F. Supp. 1077, 1098 (E.D.N.Y. 1971).

60. People v. Erdman, 69 Misc.2d 103, 108, 329 N.Y.S.2d 654, 659 (1972).

61. *Id.* at 660.

62. United States v. Lindsey, 451 F.2d 701, 704 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972) (emphasis added).

63. Contraband, other than weapons or explosives, discovered during the course of a valid search may be properly seized. *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969); Simpson v. United States, 453 F.2d 1028 (10th Cir. 1972). This principle was cautiously applied to the airline terminal setting in United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971):

> If a search is conducted in good faith to locate a weapon [or explosives] and if it does not go beyond the limits of what is required to uncover such an object [or objects] then the officer need not close his eyes to evidence of other crimes which he

stepping of this carefully prescribed authority will surely be judicially censured and result in a successful motion to suppress.

An interesting problem concerned with *who* may progress beyond the initial screening of passengers and carry-on luggage should be recognized. At Chicago's O'Hara International Airport, law enforcement officers from the local police department, present under recent FAA directives,[64] have refused to conduct any searches incident to airport security.[65] Assuming the unavailability of a United States Marshal, what authority does an airline employee, engaged in the security program, have to conduct a frisk? The obvious answer is none. He is not a law enforcement officer with any arrest powers.[66] Since the fourth amendment restricts only governmental intrusions and not those of private parties without governmental authority or assistance,[67] what would result if an airline employee were to conduct an unreasonable frisk of a passenger or search of luggage and discover weapons or contraband? The fruits of such a search should fit within the scope of the exclusionary rule considering the federal government's control of commercial aviation through the Civil Aeronautics Board and the security checks conducted pursuant to FAA regulations.[68] When engaged in airport security, airline employees are actually acting as agents of the federal government. However, the highly questionable decision in *United States v. Burton*[69] provides authority contrary to this reasoning. In *Burton*, the defendant left a suitcase with an airline ticket agent who observed that he conformed to the hijacker Profile. Upon picking up the suitcase and noticing an uneven distribution of weight, the

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may uncover.

Id. at 1098. This requires two things: 1) reasonableness of the search from its inception and 2) adherence to the scope of the search justified. Problems are presented by the license to search for explosives. Who may determine where a vial of nitro may be concealed? For an overview of how the courts have treated this predicament, *compare* United States v. Slocum, 464 F.2d 1180 (3rd Cir. 1972) [*and*] United States v. Lindsey, 451 F.2d 701 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972) *with* United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972) [*and*] People v. Erdman, 69 Misc.2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972).

64. *See* note 33 *supra* and accompanying text.

65. Nelson Interview.

66. Callahan Interview.

67. Burdeau v. McDowell, 256 U.S. 465 (1921); Watson v. United States, 391 F.2d 927 (5th Cir. 1968), *cert. denied*, 393 U.S. 985 (1968).

68. For a thorough discussion of these and other points see Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1041-47 (1971).

69. 341 F. Supp. 302 (W.D.Mo. 1972); *accord*, Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

agent searched the luggage and discovered a weapon. The defendant was subsequently arrested and his motion to suppress the seized evidence was later denied. The court stated:

> [T]he search of the defendant's suitcase . . . was not so connected with government participation or influence as to be characterized as a federal search cast in the form of a carrier inspection, but rather the search was an independent investigation by the carrier for its own purposes.[70]

This statement would appear to grant airline employees a widespread and unlimited right to search. Airline employees presently conducting the security searches have no interest in the prosecution of passengers who violate FAA regulations. Their primary concern is solely to confiscate weapons and other dangerous articles that may be carried aboard commercial aircraft. Therefore, the means of accomplishing this objective is immaterial to them. Unless the threat of civil suits for invasion of privacy against airlines and their employees can curb wholesale violations of the fourth amendment, the constitutional right to privacy will become meaningless in the airport terminal. Unrestricted searches by airline personnel would be disastrous and ultimately transform our airline terminals into sites of constitutional abuse under a guise of necessity for self-preservation.

The Physical Search of All Carry-On Baggage

The indiscriminate physical search of all carry-on articles represents a phase of anti-hijacking efforts that as yet remains untested by our courts. Advocacy of the constitutionality of the practice must proceed along very narrow lines to preserve the individual's control over his personal belongings and perpetuate the esteemed status of the personal right to privacy. The "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees"[71] have been many. It is therefore with utmost caution that another exception to search and seizure probable cause and warrant requisites should be created.[72] Despite the

70. *Id.* at 306.

71. Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

72. Inspection searches, conducted for various security and disciplinary reasons, have been held reasonable without a showing of probable cause and without a warrant. *See e.g.*, Walker v. United States, 404 F.2d 900, 902 (5th Cir. 1968) (border searches); United States v. Grisby, 335 F.2d 652, 654-55 (4th Cir. 1964) (search of enlisted man's on-base home by

debatable standing of fourth amendment rights in the face of national security urgencies, wholesale transgression of them must be subdued.

Authority for the licensing of airline personnel to conduct a hand search of carry-on baggage may be found in *United States v. Kroll.*[73] Although the defendant in *Kroll* was first subjected to a magnetometer search which proved positive, the ensuing search of his carry-on baggage was the focus of the court's opinion. The well-founded rationale of the decision would seem to be equally applicable to baggage searches unrelated to magnetometer use.[74] The court in *Kroll* stressed the rule that "[a] generalized need to search will allow only a general search."[75] Hijacking tactics involving the use of extortion and explosives render the magnetometer ineffective insofar as detection of these hazardous materials is concerned. The suitability of luggage and other portable receptacles for concealing such items makes it compulsory for a successful screening procedure to penetrate their outer shell. This need, supported by the governmental interest in repressing terror in air commerce, is ample justification for the hand search.[76] However, '[*t*]*his must not be interpreted . . . as a license for the wholesale exploration of a passenger's luggage and its contents.*'[77] "[A] general search is an inspection of that which may *reasonably* be deemed to conceal a weapon or explosives."[78] Any further intrusion into one's personal effects would exceed the type of search warranted by the sole fact that the individual desires to board the aircraft with carry-on luggage. To progress

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military authorities); Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725, 729-31 (M.D.Ala. 1968) (search of student's dorm room); United States v. Donato, 269 F. Supp. 921, 923-24 (E.D.Pa. 1967) (search of government employee's locker).

73. 351 F. Supp. 148 (W.D. Mo. 1972).

74. *See* note 32 *supra.* The court in *Kroll* recognized the indignities that some people may suffer when a public search of their personal belongings is performed. However, the court also pointed out that the humiliation suffered by a few is not sufficient to outweigh the national interest in preventing the potential terror, death and destruction which could occur without such a search. Accordingly, the court held as a general proposition that

> an inspection search of an airline passenger's carry-on luggage for the limited purpose of protecting lives and property from weapons and explosives is not unreasonable at its inception.

351 F. Supp. 148, 152 (W.D.Mo. 1972).

75. 351 F. Supp. 148, 153 (W.D.Mo. 1972).

76. "Similar searches are also a matter of routine in every Federal building in the country open to the public." *Id.* at 151 n.2.

77. *Id.* at 152 (original emphasis).

78. *Id.* at 153 (original emphasis).

beyond this limitation, probabilities must exist that approach probable cause standards.

Checked Baggage

Supposedly one may avoid the inconvenience of an inspection of the contents of his luggage by checking the articles with a ticket agent for transportation in the baggage compartment of an airliner. Indeed, signs posted at various positions in Chicago's O'Hare terminal encourage this procedure.[79] What the passengers do not know, however, is that this does not always exempt these articles from being searched.[80] The screening of checked articles is often performed by X-ray equipment.[81] This should be the maximum extent of intrustion condoned. Any physical examination of the contents of checked articles, without the express consent of the owner, should be limited to commercial shipments only.[82] When luggage is checked by passengers, their access to its contents is denied, the imminence of danger by hijacking is greatly diminished and the corresponding governmental interest is reduced. It is a logical extension of these facts that a physical search, as opposed to electronic or X-ray surveillance of baggage checked would be unjustified at its inception.[83]

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79. Placards posted within the terminal read, "All Hand Articles Will Be Searched Prior to Boarding — Please — Place These Articles In Checked Luggage to Avoid Delay." United Air Lines at O'Hare has posters located behind their ticket purchase counters which read in part:

> To Avoid - Having your wrapped packages opened, We Suggest - You place your wrapped packages in one of our boxes, then they can be checked as luggage and will be available to claim at your destination.

80. Air carriers are generally given the right to inspect checked items under their own tariff provisions. Nelson Interview. For example, TWA's tariff reads: "*Inspection of Shipments*—Shipments are subject to inspection by carriers to determine proper charges thereon." Corngold v. United States, 367 F.2d 1, 4 n.3 (9th Cir. 1966).

81. Callahan Interview.

82. In order to stay within the authority granted by a tariff provision, physical searches must be limited to commercial shipments subject to special freight shipping rates. *See* note 80 *supra*. This would exclude passenger's checked luggage since the charges on it are normally assessed according to weight.

83. To increase security precautions, airlines have formulated directives that prescribe the refusal of checked baggage unless specific conditions are met. United Air Lines has supported this policy by directing: 1) no baggage will be accepted from passengers who do not hold a valid ticket at the time baggage is presented; 2) requests to check baggage for destinations other than the last destination shown on the passenger's ticket will be denied; and 3) before baggage belonging to any standby passengers can be checked, it must have outside identification. United Air Lines Revision to Security Program, §IV, §§B, cls. 1 & 2, Jan. 4, 1973.

AN ADDITIONAL SAFEGUARD FOR PROSPECTIVE PASSENGERS

As previously stated, the constitutionality of airport security procedures depends upon their degree of infringement on personal rights. Every alternative must be exhausted to perpetuate the sanctity of civil liberties while implementing a program designed to deter hijackers. It is therefore appropriate that prospective passengers be informed of their options throughout the procedure and not be "left in the dark" as to their constitutional freedoms. Perhaps the most critical phase of security operations occurs immediately prior to the frisk of persons. Once the magnetometer is activated, the level of suspicion created does not amount to probable cause necessary for arrest or for issuance of a warrant.[84] After security personnel have detained the potential passenger, is it reasonable and necessary to proceed with the intrusion and conduct a frisk or extended search in order to fulfill the governmental interest in deterring hijackings? Does the Government have the right to demand the cooperation of the suspect with such investigative measures? Both questions must be answered in the negative.

The case of *United States v. Meulener*[85] provides the essential element necessary to afford sufficient protection to the potential passenger. The defendant in *Meulener* met the Profile and activated the magnetometer. The attending United States Marshal ordered him to open his suitcase, which he did with apparent hesitation, and marijuana was discovered. The court held:

> the defendant's fourth amendment rights were violated when he was not told at the time the search was initiated that he had a right to refuse to submit to the search provided he did not board the airplane.[86]

It is evident that the *Terry* rule should not apply in the situation where the suspect expresses a desire not to board the flight since the compelling interest to deter air piracy and achieve safety in air transportation has already been served. Absent this compelling interest, an intrustion into one's personal privacy is unjustified.[87]

84. See United States v. Epperson, 454 F.2d 769, 770-71 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972); United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077, 1093-95 (E.D.N.Y. 1971).

85. 351 F. Supp. 1284 (C.D.Cal. 1972), *appeal docketed*, No. 73-1011, 9th Cir., March 5, 1973.

86. *Id.* at 1286.

87. *Id.* at 1289.

The frisk concept in airport security is based upon the principle of consent. The lack of any probable cause gives the potential passenger the choice of whether or not he wishes to waive his constitutional rights and subject himself to the pat-down. It has been stated that

> the consent must be proved, by clear and positive evidence, to be voluntary, unequivocal, specific, and intelligently given rather than resulting from duress or coercion, whether actual or implied.[88]

It is only logical and equitable that a voluntary and intelligent consent to the airport search be made with knowledge of the right to make a choice.[89]

The United States Supreme Court has recently had occasion to consider the issue of what constitutes a voluntary consent to a *pre-custodial* search. In *Schneckloth v. Bustamonte*[90] the Court reasoned that the individual's knowledge of a constitutional right to refuse consent is only one factor in the totality of circumstances to be considered in determining the effectiveness of a consent.[91] The Court also held that to require a law enforcement officer to advise an individual of a right to refuse consent to a pre-custodial search would be impractical and a hindrance to investigatory techniques.[92] However, an examination of the majority's opinion reveals that this rationale has little weight when applied to airport security procedures.

Implicit in the statement that all circumstances surrounding a consent be examined is the inference that each determination be made on a case by case basis. The burden of proving a consent to be voluntary and uncoerced necessarily falls upon the prosecutor;[93] the relinquishment of constitutional rights is not an insubstantial matter capable of being assumed. The *Bustamonte* decision discounted knowledge of one's right to refuse a search (in a pre-custodial setting) as solely determinative of a valid consent. This

88. United States v. Bell, 335 F. Supp. 797, 803 (E.D.N.Y. 1971).

89. United States v. Ruiz-Estrella, 481 F.2d 723, 727-28 (2d Cir. 1973); United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973) (dictum); United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring).

90. 412 U.S. 218 (1973).

91. *Id.* at 227.

92. *Id.* at 231-32.

93. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

appears to be an obvious attempt to reduce the burden of proof required of a prosecutor for practicablity's sake. But the difficulty in establishing the subjective mental state of a person can readily be overcome by direct testimony as to the *fact* that the person was advised of his constitutional right to refuse consent. What could be more practical as well as protective of one's right to privacy? When applied to airport security, the right to be advised acquires added impetus because of the special nature and purpose of the system; quite different from the *Bustamonte* car search performed in the early morning hours as a result of a traffic violation. Airport security programs represent another innovative exception to fourth amendment probable cause requirements and careful judicial scrutiny must be observed to prevent gradual erosion of the amendment's substantive meaning.

The Court in *Bustamonte* distinguished the *Miranda v. Arizona*[94] requisite of constitutional warnings on grounds that the latter applied only to custodial searches.[95] However, this distinction is not present with regard to security searches within the terminal. Airport security searches conducted subsequent to the initial screening of persons or luggage are performed by United States Marshals in a secluded room or area. This, combined with the presence of armed law enforcement personnel at flight departure points, creates a very authoritative and coercive atmosphere. Security searches under such conditions are, in effect, the very kind of custodial searches contemplated in *Miranda*. These intimidating circumstances make it impossible for a passenger to give more than a coerced assent to a frisk or search of luggage without first being informed of his constitutional prerogative to walk away. An apparent consent could be little more than assent to a claim of lawful authority regardless of how politely the official phrases a request to search the person or luggage. Indeed, the Court in *Bustamonte* left the door open for such a result when it noted that "evidence of any inherently coercive tactics—either from the nature of the police questioning or *the environment in which it took place*"[96] could alter the result in a different factual setting.

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94. 384 U.S. 436 (1966).

95. Schneckloth v. Bustamonte, 412 U.S. 218, 232 (1973).

96. *Id.* at 247 (emphasis added). In fact, the Court explicitly declined to determine "what effect *custodial conditions* might have on a search authorized solely by an alleged consent." *Id.* at 247 n.36 (emphasis added).

Any theory of implied consent to a security search in the terminal, based upon the presence of signs that warn a passenger that he is subject to a search, is also constitutionally repugnant. The right of privacy has been uniformly held to be too significant to be subject to waiver by silence.[97] Knowledge of available options is an indispensable factor if consent is to be voluntary and intelligent, and even then a waiver of constitutional rights must be specific and explicit. The Government and the airlines' only alternative, when confronted by a passenger who refuses to submit to a search, is to deny him passage onto the aircraft.[98] As the court in *Meulener* asserted:

> The fourth amendment rights of a prospective passenger who chooses not to board an airliner should be coextensive with those of anyone else in the terminal. The mere fact of meeting the profile and activating the magnetometer *does not establish grounds for a forced search.*[99]

CONCLUSION

Today, the air transportation industry has attained a vital position in the economy of our nation. Airlines are now recognized as a major mode of travel for millions of Americans. Each airline has contributed advancements in safety and comfort so that today, the means for a *safe,* swift and often relatively inexpensive way of travel is available to all. Safe, that is, until the hijacker emerged. Now that a serious threat is directed at the industry and, even more importantly, at the people who use it, constitutional theorists are attempting to withdraw the only effective means to alleviate the problem. These theorists are laboring under an unduly conservative interpretation of the fourth amendment. The national interest in abating the hazard of hijackings has transformed the airline terminal into a "critical zone where special fourth amendment considerations apply."[100] The anti-hijacking procedures now in effect have been developed in light of these special circumstances. Constitutional imperfections do exist in these procedures but their elimina-

97. *See* United States v. Kroll, 351 F. Supp. 148, 155 (W.D.Mo. 1972); United States v. Lopez, 328 F. Supp. 1077, 1092-93 (E.D.N.Y. 1971).

98. *See* note 21 *supra.*

99. United States v. Meulener, 351 F. Supp. 1284, 1290 (C.D.Cal. 1972), *appeal docketed,* No. 73-1011, 9th Cir., March 5, 1973 (emphasis added). *Contra,* United States v. Legato, 480 F.2d 408, 411 n.8 (5th Cir. 1973).

100. United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973).

tion will result in a sensible and reasonable system that can protect the airline passenger within the terminal as well as in the air.

The establishment of a federal security force would eliminate one weakness in the airport security arrangements. Hijacking interferes with interstate commerce, can affect national security and international relations, and is a violation of federal law. A federal security force would assure uniformity of procedures within a responsible system and provide the proper personnel to implement them objectively.[101] Furthermore, to assure the constitutionality of the security system, the degree to which it encroaches on individual privacy must be minimized. The compelling national interest to secure safety in air transportation is not sufficient to warrant unlimited searches that intrude on one's privacy of his person and belongings. Searches within the terminal are justified by their voluntary nature. Without other suspicions founded upon concrete facts, United States Marshals must obtain a passenger's consent to search his person or luggage. Moreover, in the context of an airport setting, knowledge of one's constitutional rights becomes indispensable. To insure an informed and uncoerced consent to search, the passenger must be advised of his option to leave the terminal without boarding the aircraft and without being searched.

While no security system can prevent the boarding of aircraft by people such as political terrorists who use extortion and violence as their ticket, the system we now have is an affective method to curtail air hijackings. It is the only method that allows latitude for constitutional rights to be exercised in the face of this national emergency. The constitutional limitations heretofore prescribed are designed to strike a balance between the national interest in deterring hijackers and the constitutional requirements of the fourth amendment. If these limitations are adopted and strictly adhered to, air travel will once again become a *safe* means of travel for all.

101. *See* note 37 *supra* and accompanying text.