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Cover Page Footnote

Members of the New York Bar. Mr. McGinley received his A.B. from Iona College, his J.D. from Seton Hall University, and his LL.M. from New York University. He is presently a member of the firm Gasperini, Koch & Savage, New York City. Mr. Downs received his B.A. from Amherst College and his J.D. from Cornell University. He is presently associated with the firm of Gasperini, Koch & Savage. The authors wish to express their appreciation to Edward J. Kelly, Esq., and Michael Young, Esq., members of the New York Bar, for sharing their defense experiences in airport search cases, and to Helen Motro of New York University Law School for her research assistance.

AIRPORT SEARCHES AND SEIZURES— A REASONABLE APPROACH

PATRICK W. MCGINLEY AND STEPHEN F. DOWNS*

I. INTRODUCTION

AIRPLANE hijacking, or, more popularly, skyjacking¹ has been described as the “escalating criminal phenomenon of our times”² and a “continuing hazard to public travel.”³ Because of the potentially catastrophic consequences of a skyjacking, there is a tendency on the part of our courts to “‘keep the Constitution up to date’ or ‘to bring it into harmony with the times’”⁴ by upholding the anti-hijacking procedures currently utilized at most airports. This judicial determination to mitigate “the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane”⁵ has been accomplished by an extension of the “stop-and-frisk” rule enunciated by the Supreme Court in *Terry v. Ohio*.⁶ As a result, airport searches have been excused as limited and, on balance, insignificant intrusions of privacy.⁷

This article is based upon the belief that the airport screening procedures now in use are neither effective nor constitutional. There is at the present time a “compelling necessity to protect essential air commerce and the lives of passengers.”⁸ But it is important that this protection be afforded within the constitutional framework since “the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike.”⁹ The purpose

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1. The terms air hijacking, air piracy, and skyjacking are herein used interchangeably. See note 22 *infra*.

2. *United States v. Bell*, 464 F.2d 667, 670 (2d Cir.), cert. denied, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972).

3. 464 F.2d at 669.

4. *Katz v. United States*, 389 U.S. 347, 373 (1967).

5. 464 F.2d at 675.

6. 392 U.S. 1 (1968).

7. 464 F.2d at 674.

8. *United States v. Epperson*, 454 F.2d 769, 772 (4th Cir.), cert. denied, 405 U.S. 947 (1972).

9. 464 F.2d at 676 (Mansfield, J., concurring).

of this article is to suggest a system of airport law enforcement that will avoid the necessity of stretching the *Terry* doctrine to cover an airport search and that will provide an effective method of combating skyjacking.

We shall begin with the history and background of the air hijacking problem; discuss various theories for controlling skyjackers; describe the current airport screening procedures; examine the relevant constitutional problems; and, finally, present our conclusion.

II. HISTORY AND BACKGROUND

Although recent publicity would indicate otherwise, skyjacking is not a phenomenon of recent origin. In 1930, a band of Peruvian revolutionaries seized an airplane to shower Peru with propaganda pamphlets and thereby achieved the dubious distinction of having perpetrated the first skyjacking.¹⁰ This event remained a bizarre chapter in the development of air travel until the end of the Second World War. The war had left Europe divided by the Communist Iron Curtain, and refugees in Eastern Europe soon developed a new technique for fleeing Communist domination. In 1947, the first successful air hijacking across the Iron Curtain occurred.¹¹ In the next year, five more air hijackings from Eastern to Western Europe were carried out.¹² By 1953, fourteen successful and two unsuccessful air hijackings had occurred, all involving persons fleeing Eastern Europe.¹³

Improved security in the Communist countries and greater political stability in Europe brought a five year respite from hijackings.¹⁴ However, Fidel Castro's takeover of the government of Cuba inspired eleven successful and five unsuccessful air hijackings from 1958 to 1960, mostly involving Cuban citizens fleeing Castro's new Communist government.¹⁵

The first skyjacking of a United States airliner occurred in May, 1961¹⁶ with Cuba as the destination. Thus, a reverse flow of refugees from non-Communist to Communist countries began. The movement was slow at first; seven United States air hijackings occurred in the first seven years. However, in 1968, skyjacking suddenly became a major problem for United States aircraft. In that year alone, eighteen United

10. Aggarwala, *Political Aspects of Hijacking*, *International Conciliation* 7, 8 (Nov. 1971) [hereinafter cited as Aggarwala]; see J. Arey, *The Sky Pirates* 49 (© 1972 James A. Arey) (used by permission of Charles Scribner's Sons) [hereinafter cited as Arey].

11. *Id.* at 50. For a chronology of skyjacking events, see *id.* at 315-54 (app. A).

12. *Id.* at 50-51.

13. Aggarwala 8.

14. Arey 52; Aggarwala 8.

15. Arey 52-55; Aggarwala 8-10.

16. Arey 55; Aggarwala 10.

States airplanes were air hijacked as well as twelve foreign airplanes.¹⁷ In 1969, the number of attempted air hijackings involving United States aircraft for the year had risen to forty, of which thirty-three were successful. Of the forty-six attempts on airplanes from other nations, thirty-seven were successful.¹⁸

Since 1969, the number of air hijackings each year has declined. In 1970, fifty-six successful air hijackings and twenty-eight unsuccessful attempts took place world wide, with eighteen successful air hijackings and eight unsuccessful attempts involving United States planes.¹⁹ In 1971, the Federal Aviation Administration (FAA) reported twenty-seven attempted skyjackings on United States planes with twelve successful, and thirty-two attempts on foreign planes with eleven successful. Between January 1 and September 1, 1972, twenty-nine attempted air hijackings were made on United States aircraft of which eight were successful, and twenty-one attempts on foreign planes with eleven successes.²⁰

Not surprisingly, legislative activity has followed closely behind each new increase in skyjacking activity. In 1961, Congress passed a statute²¹ which closed a curious loophole in the law by making skyjacking per se a crime. Theretofore, skyjacking had been a crime only to the extent that some other crime was committed in the act of commandeering the aircraft.²²

In 1963, the Tokyo Convention on Offenses and Certain Other Acts

17. Aggarwala 9.

18. *Id.*

19. *Id.*

20. The statistics for 1971-1972 were obtained from reports compiled by the Federal Aviation Administration (FAA) upon our verbal inquiry. For detailed listing of all skyjackings up to October 29, 1972, see FAA, Office of Air Transportation Security, Domestic and Foreign Aircraft Hijackings (1972).

21. 49 U.S.C. § 1472(i)-(m) (1970), as amended 49 U.S.C.A. § 1472(i)-(m) (1972 Supp.).

22. Piracy is defined in the 1958 Geneva Convention on the High Seas as "[a]ny illegal acts of violence . . . committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State . . ." Convention on the High Seas, Apr. 29, 1958, [1962] 2 U.S.T. 2312, 2317, T.I.A.S. No. 5200, 450 U.N.T.S. 82. Most aerial hijackings simply do not fit this definition as they often take place within the jurisdiction of a particular State and are not directed against another ship or aircraft. Also, in some cases, it is questionable whether the act was for private ends. Aggarwala 14. The term "hijack" is defined as stealing something in transit. Webster's Third International Dictionary 1069 (3d ed. 1964). Thus, it also does not technically apply to the aircraft situation, particularly where the aircraft is ultimately returned. In such a case, under traditional criminal law, the only remaining crimes would be "assault" and "theft of service" (although if the hijacker had purchased a ticket to a further point even this latter crime is questionable).

Committed on Board Aircraft²³ was drawn up under the auspices of the International Civil Aviation Organization.²⁴ This convention attempted to clear up questions of jurisdiction so that existing national penal laws could be utilized against a skyjacker upon capture. However, it did little to answer problems such as the need to create the specific crime of skyjacking or to accomplish the extradition of a captured skyjacker. The convention became effective in 1968.²⁵

When skyjacking began to escalate sharply after 1968, two more international conventions to control skyjacking were drafted. The first, The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970,²⁶ attempted to establish an international definition of the offense of skyjacking and provided for the mandatory punishment or extradition of all skyjackers taken into custody in a signatory state.²⁷ The convention went into effect in 1971 and was ratified by the United States Senate on September 8, 1971.²⁸

The second convention, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,²⁹ prepared in 1971, has expanded the Hague Convention to include sabotage, extortionary threats or other types of force against an aircraft.³⁰ It was ratified by the United States Senate on October 3, 1972.³¹

Recent federal legislative activity reflects the growing concern and confusion over what must be done to combat air hijackings. On September 21, 1972, the United States House of Representatives passed a bill³² requested by the administration; Title I of the bill was called the Anti-Hijacking Act of 1972 and Title II was known as the Air Transportation Security Act of 1972.³³ The bill, in part, was complementary to the Hague Convention which provided that all signatory states would enact severe penalties for skyjacking.³⁴ The bill also pro-

23. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768.

24. FitzGerald, *Toward Legal Suppression of Acts Against Civil Aviation*, International Conciliation 42, 45-46 (Nov. 1971) [hereinafter cited as FitzGerald].

25. *Id.* at 46.

26. T.I.A.S. No. 7192 (1970).

27. FitzGerald 51-66.

28. 117 Cong. Rec. 13,894-95 (daily ed. Sept. 8, 1971).

29. 10 Int'l Legal Materials 1151 (1971).

30. FitzGerald 66-76.

31. 118 Cong. Rec. 16,651-53 (daily ed. Oct. 3, 1972).

32. S. 2280, 92d Cong., 2d Sess., 118 Cong. Rec. 15,633-35 (daily ed. Sept. 21, 1972).

33. *Id.*

34. *Id.* at 15,631. Although the bill provided that skyjacking may be punished by death, questions were raised as to whether such a penalty would be constitutional. *Id.* (remarks of Senator Chiles).

posed that United States law be brought into harmony with the Montreal Convention by including as offenses, sabotage against aircraft and threats to its passengers.³⁵

Under this anti-hijacking bill, the President would be empowered, with respect to countries acting in a manner inconsistent with the Hague Convention or acting as a base or sanctuary for skyjackers, to (1) suspend the right of any airline, domestic or foreign, to operate to such country, or (2) suspend the right of other foreign countries to operate air service to the United States unless they were to terminate their air service with the offending nation.³⁶

The proposed Air Transportation Security Act would have made mandatory on all airlines, domestic and foreign, the use of the federal anti-hijacking procedures. It would also have empowered the Administration of the Federal Aviation Administration to search all embarking passengers or baggage, and to refuse transportation to anyone not consenting to such a search.³⁷

The House bill, however, was significantly modified in the Senate which disagreed with the administration's theory that the financial burden of the anti-hijacking procedures and airport security should be borne, for the most part, by the airlines.³⁸ The Senate version provided for a large federal expenditure to equip a corps of federal marshals to enforce the various provisions of the Act. After several attempts, a joint House-Senate conference was unable to resolve their differences and the fate of the proposed legislation was postponed until 1973.³⁹

III. THEORIES FOR CONTROLLING SKYJACKING

The rush for new legislation has been accompanied by a search for theories to control skyjacking. It has been generally believed that if the skyjacker's motivations could be identified, it would be possible to find a means of preventing or at least controlling the threat.⁴⁰ The following is a brief description of the more common patterns and motivations of skyjackers, together with some theories for control.

A. *Politics and the Armed Guard Theory of Control*

Since 1967, politically motivated air hijackings have accounted for almost two-thirds of such crimes.⁴¹ The majority of such skyjackings

35. Id. at 15,633.

36. Id.

37. Id. at 15,634.

38. Id. at 15,622 (remarks of Senator Cannon).

39. N.Y. Times, Oct. 14, 1972, at 32, col. 1.

40. See *United States v. Lopez*, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971); Arey 98-99.

41. Aggarwala 11.

involved persons fleeing a particular political system, or concerned various militant or extremist groups such as the Black Panthers, Asian and Latin American Communists, African liberationists and revolutionaries from the Middle East.

Another motivation for skyjacking is political blackmail. The most spectacular political plot to blackmail was the attempt, by the Popular Front for the Liberation of Palestine in September, 1970, to simultaneously seize five airlines in order to bargain for the release of Arab prisoners.⁴² One attempt on an El Al airliner failed, but planes from TWA, Swissair and BOAC were hijacked to Jordan, and a Pan American aircraft was hijacked to Cairo.⁴³ After nearly three weeks of tense negotiations, the passengers were released in exchange for seven Arab prisoners. The aircraft, however, were blown up. Despite the adverse publicity arising from this incident, the Middle East has increasingly become a target for political hijackers.⁴⁴

Other air hijackings have had more direct political results. In 1956, an aircraft carrying certain Algerian rebels to Tunisia was diverted by its own crew to a French army base, as the result of a conspiracy with the French Government.⁴⁵ Similarly, in 1967, an aircraft carrying the Congolese Prime Minister, Moise Tshombe, was skyjacked to Algeria and the Prime Minister taken prisoner by the Algerian Government.⁴⁶ More recently, in 1971, two Libyan jets forced a BOAC commercial airliner to land in Benghazi so that two Sudanese army officers flying to join a revolution in Khartoum could be arrested.⁴⁷

Skyjackings carried out for direct political effect, such as the BOAC or Tshombe incidents, are difficult to prevent. Certain officials, however, believe that skyjackings, particularly those that are politically motivated, can be deterred by a program of armed guards on all flights. The United States Government, at one point, established a corps of armed marshals to guard those flights considered most susceptible to skyjackings, but the program was terminated after it proved ineffective.⁴⁸ Some foreign airlines, however, continue to employ armed guards.⁴⁹

42. *Id.* at 12.

43. *Id.*

44. Arey 93. See also *N.Y. Times*, Sept. 7, 1972 at 1, col. 4.

45. Aggarwala 13.

46. *Id.*

47. *Id.*

48. 118 Cong. Rec. 15,622 (daily ed. Sept. 21, 1972) (remarks of Senator Cannon).

49. Fenello, *Technical Prevention of Air Piracy*, *International Conciliation* 28, 34, 37 (Nov. 1971) [hereinafter cited as Fenello].

B. *Extortion and the No-Pay Theory of Control*

Extortion includes the several types of violence employed against airplanes for the purpose of financial gain. Certain of these extortion plots, while technically within the anti-hijacking laws previously mentioned, do not correspond to the popular conception of air hijacking. These, for example, would include the destruction of an airplane on which the perpetrator has recently placed an unsuspecting "loved one" in order to obtain life insurance proceeds. After insurance companies began refusing to pay for deaths resulting from deliberate explosions, a variation of this plot was conceived. The perpetrator would conceal or pretend to conceal a bomb on an airplane and then offer to reveal the location of the bomb in exchange for a large sum of money.

Another type of air hijacking, in this general category, emerged spectacularly in November, 1971, when one "D. B. Cooper" hijacked a Northwest jetliner.⁵⁰ After landing in order to exchange the passengers for a parachute and \$200,000 in cash, Cooper forced the pilot to take off again. Before the flight ended, Cooper dropped out through the rear door of the aircraft and parachuted into his own corner of American folk legend.⁵¹ However, most skyjackers forego these machinations and simply demand millions of dollars to release the skyjacked plane and its passengers.

Political blackmail and extortion-motivated skyjackings could arguably be deterred if the federal government were to secure legislation making it illegal to pay any ransom for a skyjacked plane. However, the general response to this proposal is that the immediate threat to the well-being of passengers must outweigh any long term possibility of deterrence based on a no-pay policy.⁵²

C. *Escape and the No-Sanctuary Theory of Control*

As mentioned above, the majority of skyjackings have probably been perpetrated by persons seeking to escape a particular political system.⁵³ In addition, a number of other persons have attempted to skyjack their way beyond the reach of the law simply to escape from financial or other personal problems.⁵⁴

It should be noted, however, that regardless of whether a skyjacker's

50. N.Y. Times, Nov. 25, 1971, at 1, col. 1; id., Nov. 19, 1972, § 1, at 3, col. 1.

51. Such rear doors were subsequently sealed to prevent a repetition of this feat.

52. Nevertheless, some countries, particularly Israel and its national airline, El Al, do not subscribe to this response.

53. See Arey 182.

54. Id. at 146.

motivation is politics or extortion, escape is always his object. The anticipation of escape is the very foundation on which skyjacking rests. If there were no haven to which a skyjacker could flee, skyjackings (except, of course, for suicide bombings or extortion threats where the perpetrator is not on board) would in all probability cease to be a significant threat. Because of this underlying objective of escape, it is generally agreed that the best method of controlling skyjacking is to convince a potential skyjacker, before he boards a plane, that there will be no sanctuary for him anywhere in the world.⁵⁵

Unfortunately, cooperation between nations on skyjacking has not been easily achieved. Those countries which had not signed either the Tokyo, Hague or Montreal conventions included, as of November 16, 1971, Cuba, Algeria, Egypt, Syria, Nepal, Tunisia, Yemen, Lebanon, Sudan, Morocco, Bolivia, Libya, Peru, Republic of Viet-Nam, Uganda and Uruguay.⁵⁶ Nevertheless, at the present time, the nations of the world seem closer than ever to the acceptance of international controls on skyjacking.⁵⁷ After World War II, when Communist countries were the principal victims of skyjacking, the West tended to regard skyjackers as heroes escaping Communist domination. It is only since domestic airlines have been seriously affected by the skyjacking problem that the United States Government has sought international agreement to control this problem.

Before such international agreement is achieved, it is generally agreed that certain steps should be taken to discourage skyjackers. For instance, Cuba has been the destination of numerous skyjackers with criminal backgrounds and psychiatric problems. On several occasions, the Cuban authorities have meted out prison sentences or other forms of punishment.⁵⁸ Publicizing the penalties inflicted by foreign countries upon hijackers could help to dissuade potential skyjackers from the hope of locating a foreign sanctuary. In this regard, it appears that Cuba intends to put three American skyjackers on public trial in order to discourage hijackers from landing there.⁵⁹

55. *Id.* at 265, 274-77.

56. *FitzGerald* 79.

57. As of November 16, 1971, 58 countries had signed the Tokyo Convention. *Id.* at 82. See also *N.Y. Times*, Nov. 19, 1972, § 4, at 10, col. 1, and § 4, at 11, col. 1.

58. "Of approximately 60 American skyjackers in Cuba 20 are believed to be in jail, while most of the others are under house arrest, confined in mental hospitals or working in the sugar cane fields." *N.Y. Sunday News*, Nov. 19, 1972 at 77, col. 1.

59. *N.Y. Times*, Nov. 21, 1972, at 1, col. 6; *id.*, Nov. 19, 1972, § 4, at 11, col. 1.

D. *Mental Derangement and the Personality Theory of Control*

"Mental derangement" is sometimes given as the reason for a particular skyjacking.⁶⁰ Convenient though this explanation may be, it glosses over a very significant body of psychiatric theory beginning to emerge from recent studies of skyjackers. For example, Dr. David Hubbard, a Dallas psychiatrist, argues that the psychiatric make-up of hijackers is very similar, whatever their motivation may be.⁶¹ Dr. Hubbard, after studying some 48 air hijackers, found all to be "mentally unstable, suicidal and belligerent losers" who share fantasies of dying a heroic death, fear heights, and are attracted to domineering women.⁶²

Dr. John T. Dailey, Chief Psychologist of the FAA, recently made the following comment about American air hijackers:

We have found in our studies that they *are* amateurs. They weren't organized, they weren't very resourceful, they weren't very determined. They were a real bunch of losers. Many of our hijacking attempts have been very inept, undertaken by people who break down in the middle and quit trying, who can be talked out of what they may have started, or are so incompetent that the crew is able to disarm them without endangering the passengers.⁶³

From such studies, it was concluded that an effective anti-skyjacking system could be designed based upon similar patterns and weaknesses in the personality of the average skyjacker.⁶⁴

IV. THE FEDERAL ANTI-HIJACKING PROCEDURES

In February, 1969, the FAA began an investigation of new methods of preventing air hijackings.⁶⁵ As a result of the efforts of the FAA, an anti-skyjacking system was developed that incorporated many of the theories previously discussed.

The system as it presently exists includes a program to publicize the latest information on criminal sentences given skyjackers in foreign countries, particularly Cuba.⁶⁶ It also attempts to supply information or assistance to foreign countries for the prosecution or extradition of American-based skyjackers.⁶⁷ However, the most important aspects in the

60. Arey 127-45.

61. Perilous War on the Skyjacker, *Life*, Aug. 11, 1972, at 26, 29.

62. *Id.*

63. Interview with Dr. John T. Dailey, Chief Psychologist of the FAA, in Arey 99.

64. *Id.* at 98-103; see *United States v. Lopez*, 328 F. Supp. 1077, 1082-85, 1086-92 (E.D.N.Y. 1971).

65. Arey 234.

66. Such publicity may have been a significant factor in causing the number of skyjackings from the United States to Cuba to decrease to 31 in 1969, to 14 in 1970, to 10 in 1971, and to 6 up to November 1972. *N.Y. Sunday News*, Nov. 19, 1972, at 77, col. 1.

67. Arey 236.

program are the pre-boarding passenger surveillance system, using a "profile" of the average potential hijacker and an electronic search with a device capable of detecting metal—the magnetometer. Before describing how this passenger surveillance system operates, it is necessary to describe briefly the profile and magnetometer.

A. *The Profile*

The profile was begun in October, 1968, by a task force of agencies including the FAA, the Department of Justice and the Department of Commerce. This task force completed a detailed study of the characteristics of all then known air hijackers and identified certain attributes supposedly distinguishing potential air hijackers from the general public.⁶⁸ With some modification, these characteristics were eventually compiled into a "profile" of a potential skyjacker, consisting of approximately twenty-five characteristics. Of these, only a small number are utilized at any one time to screen embarking passengers.⁶⁹

Informed discussion about the profile is difficult because the characteristics are secret. However, these characteristics are ostensibly based on the *behavioral* characteristics of embarking passengers rather than on inherited or social characteristics.⁷⁰

On occasion, officials have discussed the basic theory of the profile. One such official is the FAA's Dr. John T. Dailey:

There isn't any common denominator except in [the hijackers'] behavior. Some will be tall, some short, some will have long hair, some not, some a long nose, et cetera, et cetera. There is no way to tell a hijacker by looking at him. But there are ways to differentiate between the behavior of a potential hijacker and that of the usual air traveler. This is what we depend on: that is what we call our profile of the behavioral characteristics of a hijacker. We stress it is behavior—things they do or don't do, or their style of doing it or not doing it.⁷¹

Dr. Dailey also noted:

The way we have it set up now, it [the behavioral pattern] is highly simplified. We have a small number of criteria and the way it works now he must meet every one of them. If we were to find it necessary to put in additional criteria, to emphasize the difference between hijackers and other passengers, we might then require the passenger to meet some but not all of the criteria. With the smaller number we now use, the passenger must meet them all to be cleared.⁷²

68. *United States v. Lopez*, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).

69. *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972).

70. See 328 F. Supp. at 1086-87.

71. Interview with Dr. John T. Dailey, Chief Psychologist of the FAA, in Arey 241.

72. *Id.* at 240.

B. *The Magnetometer*

As initially devised, a suspect selected by the profile (a "selectee") was subjected to an examination by a magnetometer to determine whether he was carrying a significant amount of metal. A magnetometer is a device which is able to detect the presence of ferrous metal by sensing the deflections which the metal causes in the earth's magnetic field.⁷³ It is a passive device which emits no rays or signals but merely reacts to the effect of nearby metal on the earth's magnetic field.⁷⁴

An airport magnetometer generally consists of two upright metal rods. The embarking passenger walks between the rods and, if he is carrying more than a particular threshold amount of metal, a light or buzzer is activated. The machine's threshold can be calibrated—usually to the amount of metal found in a small hand gun. Advanced versions of the magnetometer can be calibrated to indicate the mass or the amount of the metal and they can even be designed to show where on a passenger the metal is located. Some airports utilize portable hand magnetometers which can be moved over a person's body or over baggage to detect the location of any ferrous metal.⁷⁵

It should be stressed that a magnetometer can only detect ferrous metal. It cannot detect weapons without ferrous metal and, more importantly, it cannot distinguish ferrous metal objects which are not weapons from those which are. The magnetometer is, therefore, far more useful in theory than in practice. Because it will react to coins, keys, cigarette lighters, steel shoe plates, and other innocuous objects, it is activated by approximately 50 percent of all those who pass through its poles.⁷⁶

C. *Airport Procedure*⁷⁷

When a passenger arrives at the check-in counter, the airline personnel apply the behavioral profile. Statistics indicate that 0.28 percent of passengers come within the profile,⁷⁸ and those who do not are simply cleared for boarding at the check-in counter. Those passengers whose behavior matches the profile are designated as "selectees." The selectee's ticket is

73. See *id.* at 243-44.

74. See *id.*; 328 F. Supp. at 1085.

75. Wahl, *How Science Will Foil the Skyjacker*, *Popular Science*, Nov. 1970, at 58. See generally sources cited in 328 F. Supp. at 1085.

76. 328 F. Supp. at 1086.

77. For descriptions of the airplane boarding procedures, see *United States v. Bell*, 464 F.2d 667, 668-69 (2d Cir. 1972); *United States v. Edmunds*, Crim. No. 71-251 (E.D.N.Y., filed Jan. 24, 1972).

78. 328 F. Supp. at 1084.

usually marked with a distinguishing sign or code signal by which the airline officials monitoring embarking passengers are alerted that a selectee will be boarding shortly. An airline investigator is also assigned to watch the selectee. To protect the system against disclosure when one passenger is designated a selectee, passengers accompanying him, or even passengers in proximity, may also be designated selectees.

There is apparently no mandatory procedure to be followed when the selectee presents himself for boarding. An airline official generally confronts the selectee and asks for identification. The selectee may also be examined by the magnetometer, although this procedure may not be employed if the passenger produces adequate identification. In other cases, the airline may subject all embarking passengers to the magnetometer search without regard to whether they may be selectees. However, selectees generally will not be frisked for weapons without first having activated the magnetometer.

There is also apparently no uniform procedure for airline officials to summon a United States marshal. Generally, if the selectee does not activate the magnetometer, or if he produces adequate identification, he is allowed to board the plane. Otherwise, the airline personnel may summon a United States marshal who will proceed with the investigation. The marshal's investigation may include another request for identification, a further direction to walk through the magnetometer and to identify the source of the metal if the magnetometer is activated. If the marshal is still not satisfied with the selectee's performance, he may ultimately conduct a frisk or pat-down of the selectee's outer clothing.⁷⁹

The basic objective of the pre-flight passenger surveillance system and, indeed, of the entire FAA anti-hijacking program is deterrence.⁸⁰ This is based on the assumption that the average American skyjacker has a "loser" or "failure" personality, and will be easily discouraged from commandeering an aircraft if faced with a series of obstacles and problems such as a mysterious psychological profile, a scientific electronic search, an interrogation, and a physical search.

As stated by Frank Cardman, Director of Security of Pan American World Airways:

The general public thinks of the behavioral profile as a slick device of behavioral measurement, much more in the area of cosmetics and psychological behavior and that type of thing. It's anything *but* . . . yet as long as they think that, well and good. The mere fact that the public knows you're operating a behavioral profile and mag-

79. In a sampling of 500,000 passengers screened by the system, about 0.28% satisfied the profile; half of this number activated the magnetometer, and of these about $\frac{1}{3}$ or 0.05% of all embarking passengers were singled out for frisking. Of the number frisked, about 6% were arrested. *Id.*

80. See Arey 234-42.

netometer provides a psychological deterrent. There is no question about it—operative or inoperative, it has been a deterrent.⁸¹

With respect to whether the profile is actually able to detect potential criminals, Mr. Cardman has said:

The profile is not a psychological measurement. It simply qualifies the person by age and characteristics of ticket purchase—not as somebody who is a potential hijacker, but as somebody who should be looked at further. This is what it does.⁸²

Indeed, from these observations, it would appear that the profile is not based on what might generally be considered the suspicious behavior of passengers, such as heavy breathing, perspiration, confusion, and so on. Rather, the profile is predicated upon the manner in which a passenger presents himself for boarding.

The statistics cited earlier on the number of successful and attempted skyjackings⁸³ indicate that immediately after the anti-hijacking procedures were implemented there was a significant drop in the number of attempted skyjackings. However, after this initial decline, the number of attempts and the number of successful skyjackings of United States planes has remained relatively constant. This data suggests that the present anti-hijacking procedures have been relatively successful in their primary objective of discouraging many of the failures and misfits from attempting to commandeer an airplane, but that there remains a fairly consistent number of potential hijackers who either do not show similar

81. Interview with Frank Cardman, Director of Security, Pan American World Airways, quoted in *id.* at 242. Dr. Dailey, speaking of the profile and the anti-hijacking procedures in general, has stated: "One common denominator among [skyjackers] is that they are losers, unsuccessful people. They've never done anything very well. They're failure-prone. They tend to give up when they run up against an obstacle. And they're not very clever. This is the reason we thought, at first, that we would be able to scare them off—some of them, at least—by making them believe that hijacking is a very difficult thing to do. The thing that we faced when we started to fight the epidemic was this public image of hijacking being the simplest thing in the world to do, that anybody could do it without risk of failure." *Id.* at 99. "This is like anti-submarine or anti-aircraft warfare. What you try to do is put as many obstacles as possible there to raise the risk of failure as high as you can. Then, in addition—and I want to stress this—through the use of public information to make this as vivid as possible to the right people so they would perceive these obstacles as maximally discouraging." *Id.* at 270. Dr. Dailey also said: "Our thought here is that if we are really successful in this we will never catch anybody, because they'll be afraid to try and therefore won't try; but that if they do try, to make every effort to catch as many as possible . . . knowing that we can't catch all of them. Some are bound to slip through the screen. No matter what, even if your policy were one hundred percent search, after a couple of weeks people would let down and be careless and there would still be some of them that would get through." *Id.*

82. *Id.* at 241.

83. See notes 17-20 *supra* and accompanying text.

patterns of behavior or do not come within the profile. Accordingly, the latter are not being deterred or detected by the present system.

V. AIRPORT SEARCH AND SEIZURE DECISIONS

Arrests arising from the anti-hijacking procedures are becoming increasingly frequent and the great majority are unrelated to attempts at skyjacking. In the last twenty-two months, almost 6,000 passengers have been arrested as a result of airport searches. Between January and November, 1972, more than 3,000 persons were arrested, including 1,350 persons in the three-month period between July and October, 1972. Of those arrests, fewer than 20 percent were for carrying concealed weapons or for other crimes possibly related to skyjacking. Approximately one-third of the arrests related to possession of drugs, one-third involved charges of illegal entry, and the remainder ranged from parole violation to forgery.⁸⁴ Many of the defendants involved in these arrests have claimed that the airport security measures currently in use have violated their rights under the Constitution, particularly the fourth amendment.

A. *The Fourth Amendment*

The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸⁵

Generally, searches are per se unreasonable, without prior judicial authorization, subject only to a few well-delineated exceptions.⁸⁶ As a practical matter, no warrant can be obtained for an airport search. Even if facts composing probable cause were discovered at the airline boarding gate, time limitations would effectively preclude the obtaining of a search warrant.⁸⁷

Typically, airport searches cannot be justified on the basis of implied consent,⁸⁸ as "incident to an arrest,"⁸⁹ as involving "hot pursuit,"⁹⁰ or because of the danger of imminent destruction of evidence.⁹¹ Moreover,

84. N.Y. Times, Nov. 26, 1972, § 1, at 1, col. 1.

85. U.S. Const. amend. IV.

86. See The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 193 (1968).

87. United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971).

88. Id. at 1092-93.

89. See *Chimel v. California*, 395 U.S. 752 (1969).

90. See *Warden v. Hayden*, 387 U.S. 294 (1967).

91. See *Schmerber v. California*, 384 U.S. 757 (1966).

no apparent offense is committed in the presence of the officer,⁹² nor is any contraband in plain and open view.⁹³

Since these foregoing traditional exceptions to the warrant rule are not applicable to the airport search, the only justifiable exception is the protective "frisk" for weapons authorized by *Terry v. Ohio*.⁹⁴ Accordingly, each case that has focused on the constitutional problems surrounding airport searches has utilized *Terry* as its touchstone.

B. *The Terry Doctrine*

In *Terry v. Ohio*, an experienced police officer observed Terry and two co-defendants walking repeatedly back and forth in front of a store, looking into the window and conferring with one another. The officer became suspicious, believing the men were "'casing a job, a stick-up,'"⁹⁵ and considered it his duty as a law officer to investigate further. The officer approached the defendants, identified himself, and asked their names. When the men mumbled something, the officer spun Terry around, patted him down the outside of his clothing and felt a bulge in his coat pocket which proved to be a gun. Terry was arrested and convicted of carrying a concealed weapon.⁹⁶

The Supreme Court affirmed the conviction over Terry's objection that the weapon was seized by means of an unreasonable search. The Court rejected the theory that a "stop-and-frisk" falls outside the category of searches subject to fourth amendment limitations because it involves a lesser restraint than a traditional search.⁹⁷

Although the reasonableness of a search was traditionally anchored to the fourth amendment requirement of probable cause, the Court in *Terry* introduced the concept of reasonable suspicion, and distinguished it from probable cause as an admittedly lesser standard justifying a lesser governmental intrusion into an individual's constitutionally protected area. The Supreme Court explicitly rejected the contention that a protective weapons search could only be performed as incident to an arrest on "probable cause,"⁹⁸ but, at the same time, it refused to sanction frisks on mere "inarticulate hunches."⁹⁹ The Court concluded that governmental interest in the prevention of crime and the interest of the individual law enforcement officer in self-protection from attack by individuals, whom

92. See *Sibron v. New York*, 392 U.S. 40 (1968).

93. See *Harris v. United States*, 390 U.S. 234 (1968).

94. 392 U.S. 1 (1968).

95. *Id.* at 6.

96. *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

97. 392 U.S. at 31.

98. *Id.* at 26-27.

99. *Id.* at 22.

he reasonably suspects to be armed and whose conduct he is legitimately investigating, are sufficient to justify a limited search for weapons.¹⁰⁰

To be legitimately investigating, the police officer must be possessed of facts, rather than inarticulate hunches. These concepts are highlighted by contrasting *Terry* and a case decided by the Supreme Court on the same day, *Sibron v. New York*.¹⁰¹ In *Sibron*, a police officer had observed the defendant talking with a number of known narcotics addicts over a period of eight hours. Relying solely on these observations, the police officer confronted Sibron and said: " 'You know what I am after.' "¹⁰² Sibron mumbled a reply, and as he began to reach into his pocket, the officer intercepted his hand, reached into the same pocket and discovered envelopes containing heroin.¹⁰³ Sibron was subsequently convicted of unauthorized possession of narcotics.¹⁰⁴

The Supreme Court reversed Sibron's conviction, finding that the police officer did not have probable cause to arrest, and that the frisk was unreasonable because the officer did not have sufficient facts to warrant a belief that Sibron was armed and dangerous.¹⁰⁵

As a means of limiting the scope of stop-and-frisk and thereby avoiding the unreasonableness found in *Sibron*, the *Terry* Court articulated three factors to be balanced in determining reasonable suspicion:

In order to assess the reasonableness of [the officer's] conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.¹⁰⁶

Accordingly, in each airport search, one must examine (1) the governmental interest justifying the need to search, (2) the extent of invasion the search entails, and (3) the specific, articulable facts reasonably war-

100. *Id.* at 30-31.

101. 392 U.S. 40 (1968)

102. *Id.* at 45.

103. *Id.*

104. *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (mem.).

105. 392 U.S. at 62-64.

106. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) (footnotes omitted).

ranting the intrusion. With these *Terry* criteria as background, we turn now to a discussion of the cases that have considered the validity of airport searches within the framework of the anti-hijacking screening system.

*United States v. Lopez*¹⁰⁷ was the first case to consider the constitutionality of airport screening procedures. A thorough decision, highly descriptive of the screening procedures, *Lopez* has frequently been cited in subsequent cases in this area.¹⁰⁸

Defendant Lopez was designated a "selectee" at the time of the check-in and was about to board a flight when he activated a magnetometer. He was then requested to produce identification by the monitoring federal marshal. Upon failing to produce satisfactory identification, Lopez' outer clothing was frisked and an envelope measuring approximately four inches by six inches by three-fourths of an inch was taken from him. He was thereupon arrested and charged with concealing and facilitating the transportation of heroin.¹⁰⁹

A motion to suppress the evidence was granted and the case dismissed because the airline had added, to the approved FAA profile, an ethnic characteristic and other criteria calling for an individual decision based on the personal judgment of an airline employee.¹¹⁰ The court found that these changes destroyed the essential neutrality and objectivity of the approved profile.¹¹¹ Nevertheless, it upheld the current anti-hijacking system, properly supervised, as constitutional and sufficiently accurate in detecting illegal conduct to warrant the type of temporary investigative detention and "frisk" deemed valid in *Terry v. Ohio*.¹¹²

However, in considering the utilization of the magnetometer, Judge Weinstein noted in *Lopez*:

Even the use of the magnetometer might be an objectionable intrusion were it not accompanied by an antecedent warning from the profile indicating a need to focus particular attention on the subject. We do not now decide whether, in the absence of some prior indication of danger, the government may validly require any citizen to pass through an electronic device which probes beneath his clothing and effects to reveal what he carries with him.¹¹³

107. 328 F. Supp. 1077 (E.D.N.Y. 1971).

108. E.g., *United States v. Bell*, 464 F.2d 667, 669 (2d Cir.), cert. denied, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972); *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir.), cert. denied, 406 U.S. 947 (1972); *United States v. Edmunds*, Crim. No. 71-251 at 13 (E.D.N.Y., filed Jan. 24, 1972); *People v. Erdman*, 69 Misc. 2d 103, 106-07, 108, 329 N.Y.S.2d 654, 658, 659 (Sup. Ct. 1972).

110. *Id.* at 1101.

111. *Id.*

112. 392 U.S. 1 (1967).

113. 328 F. Supp. at 1100.

Subsequent to *Lopez*, an airport situation arose which presented another court with the precise issue that had been avoided in *Lopez*—namely, whether the use of the magnetometer is by itself a search under the fourth amendment. In *United States v. Epperson*,¹¹⁴ a defendant was charged with attempting to board an aircraft engaged in interstate commerce while carrying a concealed weapon. Epperson gave his flight ticket to an airline employee at the gate and proceeded toward the plane, activating the magnetometer. Because of the activation, defendant was searched by a United States marshal and a loaded pistol was found on his person.¹¹⁵ Since there had been no prior profile designation of defendant as a “selectee,” the sole basis for stopping and frisking Epperson was his activation of the magnetometer. The court concluded that the use of a magnetometer in these circumstances did constitute a “search,” but that the Constitution forbade only those searches that were unreasonable:

To require a search warrant as a prerequisite to the use of a magnetometer would exalt form over substance, for it is beyond belief that any judicial officer would refuse such a warrant with or without a supporting affidavit. The danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances. . . .

We think the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and precriminal events, fully justified the minimal invasion of personal privacy by magnetometer.¹¹⁶

On the issue of the reasonableness of the subsequent frisk, the court held that once the magnetometer indicated a large amount of metal, the personal frisk was justified because of the marshal's reasonable fear that the safety of the other passengers was in danger.¹¹⁷ The court, relying on *Terry*, affirmed defendant's conviction, stating 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 4th Amendment.”¹¹⁸

The rationale of the *Epperson* court was followed in *United States v. Slocum*,¹¹⁹ wherein the defendant met the profile and also activated the

114. 454 F.2d 769 (4th Cir.), cert. denied, 406 U.S. 947 (1972).

115. 454 F.2d at 770. It should be noted that all passengers were required to pass by the magnetometer to board the airplane. *Id.*

116. *Id.* at 771.

117. *Id.* at 772.

118. *Id.*

119. 464 F.2d 1180 (3d Cir. 1972).

magnetometer when he attempted to board an aircraft. The marshal stopped Slocum and requested identification. When the defendant was unable to produce any identification, he was frisked by the marshal who found nothing which could have activated the magnetometer. The marshal then turned his attention to defendant's hand luggage and found a rolled-up sock containing a "definite foreign substance," which, upon inspection, proved to be cocaine.¹²⁰

In upholding Slocum's conviction for possession of narcotic drugs, the court, relying on *Epperson*, held that a magnetometer search per se was justified "within the context of a potential hijacking."¹²¹ The court, noting that the use of the profile should not be "considered as an attempt to establish probable cause and, therefore . . . subject to scrutiny according to Fourth Amendment standards,"¹²² found the search to be reasonable in view of defendant's lack of identification and failure to explain what caused the activation of the magnetometer.¹²³

In *United States v. Bell*,¹²⁴ defendant Bell was convicted of a failure to pay a tax on narcotics.¹²⁵ At the airport, Bell matched the behavioral "profile" and also activated the magnetometer. A federal marshal then approached him and, after ascertaining Bell's lack of identification and his criminal background,¹²⁶ searched him and found a quantity of heroin.¹²⁷ Defendant's motion to suppress the evidence was denied¹²⁸ and his conviction subsequently affirmed.¹²⁹

120. *Id.* at 1181.

121. *Id.* at 1182.

122. *Id.* at 1183.

123. *Id.*

124. 464 F.2d 667 (2d Cir.), cert. denied, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972); accord, *United States v. Edmunds*, Crim. No. 71-251 (E.D.N.Y., filed Jan. 24, 1972), in which the behavior pattern profile was applied to the defendants at the time they bought their tickets. Subsequently, "[w]hile the evidence about precisely what happened is not altogether satisfactory," (*id.* at 8) the United States marshal applied the magnetometer and searched both defendants. The search resulted in the discovery of heroin in defendants' topcoats. Interestingly, there was no satisfactory evidence that either defendant had anything on their persons which would account for the activation of the magnetometer. In denying the motion to suppress the evidence, the district court stated that "[t]he present record is wholly devoid of any evidence that could support an inference that either defendant was subjected to a procedure that was not strictly related to safety in flight considerations and rationally related to their assurance." *Id.* at 13.

125. 464 F.2d at 668 n.1.

126. Bell had two previous convictions, "and at the time of his arrest [by the marshal], stated that he was out on bail from the Tombs for attempted murder and narcotics charges." *Id.* at 672.

127. *Id.* at 669.

128. 335 F. Supp. 797 (E.D.N.Y. 1971).

129. 464 F.2d 667 (2d Cir. 1972).

Persuaded by Judge Weinstein's opinion in *Lopez*,¹³⁰ the district court found the anti-hijacking system constitutional.¹³¹ The profile selection was held to have been applied without any ethnic or political prejudice and without any additions or subtractions.¹³²

On the issue of the search, the district court expressed some reservation had the marshal's search been based *only* on the magnetometer since that device was activated by approximately 50 percent of all passengers.¹³³ However, the court concluded that "the magnetometer must be viewed within the context of the anti-hijacking system,"¹³⁴ and "is only one of a series of screening procedures; a procedure that serves as much as a deterrent to air piracy as it does a detector."¹³⁵

The Second Circuit affirmed the findings of the district court.¹³⁶ Writing for a unanimous court, Judge Mulligan characterized as "baseless" Bell's contention that the use of the magnetometer constituted an unreasonable search, since "[n]one of the personal indignities of the frisk discussed by Chief Justice Warren in *Terry* [were] present."¹³⁷ Furthermore, in view of the magnitude of the crime sought to be prevented and the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer was considered to be a reasonable precaution.¹³⁸

In contrast to the above decisions, other cases arising in the context of the anti-hijacking system have not reached the question of the system's constitutionality.

Illustrative of such decisions is *United States v. Lindsey*,¹³⁹ decided by

130. 328 F. Supp. 1077 (E.D.N.Y. 1971).

131. 335 F. Supp. at 799.

132. *Id.* at 800-01.

133. *Id.* at 802.

134. *Id.*

135. *Id.*

136. 464 F.2d 667 (2d Cir. 1972).

137. *Id.* at 673 (citation omitted). Judge Joseph A. Gillis, a Detroit magistrate, was selected for a search by the FAA profile as he attempted to board a Delta Airlines flight on December 21, 1971. Judge Gillis was "permitted to board after further checking showed no indication of a weapon or any criminal intent." However, the judge was so upset over the incident that he complained to the Civil Aeronautics Board and demanded a copy of the tariff giving the airlines authority to conduct the search. The incident came to light because Judge Gillis released two persons accused of assault and attempted rape shortly before the pair hijacked a plane at Houston, Texas, by shooting the ticket agent at the gate. N.Y. Post, Nov. 13, 1972, at 4, col. 4.

138. 464 F.2d at 673.

139. 451 F.2d 701 (3d Cir. 1971), cert. denied, 405 U.S. 995 (1972); cf. *People v. Erdman*, 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972), wherein defendant passed through a magnetometer, as required of all passengers, without incident while boarding an

the Third Circuit Court of Appeals. A marshal from the Anti-Hijacking Task Force was "monitoring" a flight from Newark Airport, when the defendant rushed to the ticket agent and presented a ticket which was in a name other than that by which he identified himself to the agent. Because of this conduct, the airline agent signaled to the marshal to watch the defendant. Observing that the defendant was nervous and anxious, the marshal approached Lindsey and asked for identification whereupon the defendant produced a draft card and a social security card bearing different names. Noticing that the defendant had two large bulges in his coat and fearing they might be weapons, the marshal "patted down" defendant's outer clothing and found two bags of heroin.¹⁴⁰

The court affirmed the denial of the defendant's motion to suppress the evidence on the ground that the extremely anxious behavior of the defendant, and especially the use of four different names, provided a sufficient basis for the marshal's action "in the context of an airline boarding" and satisfied the *Terry* requirement.¹⁴¹ Although there was some evidence that a behavior pattern profile was used, and the court noted that there were "substantial issues" posed by the use of such a device, it found no need to reach those issues because "the justifiable bases for the search were largely independent of the Profile."¹⁴²

VI. THE CONSTITUTIONALITY AND EFFICACY OF THE PRESENT ANTI-HIJACKING SYSTEM

A. *Constitutionality*

The cases, discussed above, have upheld the anti-hijacking system only by increasingly broad interpretations of the *Terry* doctrine. In each case, the court faced the problem whether the airport marshal, at the time he stopped to frisk the embarking passenger, had knowledge of "specific and articulable facts" warranting the particular search, as required by *Terry*,¹⁴³ or whether the frisk was based on nothing more than

aircraft. Customs officials, however, noticed a bulge in his pocket and patted him down. They inquired about the bulge and when informed it was a pair of "gloves," they asked for them. Erdman surrendered the gloves which when unrolled revealed marijuana. The court noted there was no justification for the search except the bulge and found that to be insufficient. Consequently, since the prosecution could not prove that defendant consented to the search from his conduct or his presence at the boarding gate, the court held that the evidence was inadmissible. *Id.* at 104-06, 329 N.Y.S.2d at 655-58.

140. 451 F.2d at 702-03.

141. *Id.* at 704.

142. *Id.*

143. 392 U.S. at 21.

a series of "inarticulate hunches."¹⁴⁴ Statistics indicate that fourteen out of every fifteen persons of those searched under the present anti-hijacking system were found not to be carrying weapons.¹⁴⁵ It would, therefore, seem not unreasonable to characterize the circumstances, relied upon to justify these searches, as hunches.

The *Lopez* court sustained the constitutionality of the anti-hijacking system by relying heavily on the profile to provide some factual basis on which to hinge the magnetometer search and the subsequent stop-and-frisk. But as already noted, the profile is simply a compilation of innocuous characteristics which, when taken together, do not purport to identify potential hijackers. Rather than being a psychological measurement, the profile is merely a means of classifying a person "as somebody who should be looked at further."¹⁴⁶

Mere statistical information that a person demonstrates certain normal and innocuous characteristics, which may have been coincidentally exhibited by a large number of prior skyjackers, can scarcely be considered sufficiently suspicious to justify an intrusion into the right of privacy.¹⁴⁷ Otherwise, it is only a short step to suggest that a profile or composite description of the typical mugger or narcotics addict be prepared for distribution to the police for use in high crime areas. To suggest further that the police then stop and search anyone matching the profile, and who also appears nervous, etc., would be to invite immediate criticism.

Later cases like *Epperson* and *Slocum* appear to have abandoned the need for a factual basis insofar as the magnetometer search is concerned. These cases justify the magnetometer search as "reasonable" in view of the exigent circumstances and the minor inconvenience to travelers, and further sustain the reasonableness of the subsequent stop-and-frisk on the basis of the magnetometer. Yet, as previously indicated, the magnetometer not only fails to detect non-ferrous weapons such as explosives, acids, plastic, glass or non-ferrous knives, but is activated by approximately 50 percent of all embarking passengers, with such innocuous items as coins, shoe plates, watches and keys.¹⁴⁸

Thus, the results of a magnetometer search can provide no more than a hunch as a basis for a subsequent frisk. By omitting the need for specific articulable facts, the three-factor rule in *Terry* has been truncated

144. *Id.* at 22.

145. *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

146. *Arey* 241.

147. Cf. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *Harv. L. Rev.* 1329 (1971).

148. *United States v. Bell*, 335 F. Supp. 797, 802 (E.D.N.Y. 1971)

to a two-factor rule whereby anyone may be stopped-and-frisked, provided the governmental interest is substantial and the personal intrusion slight, and regardless of whether there exist any "specific and articulable" facts.

Moreover, there are recent indications of a still further expansion of *Terry* by omitting consideration of the extent of invasion the search entails. The concurring opinion of Chief Judge Friendly in *Bell* would deem the danger of airline hijacking sufficient, in and of itself, to justify an airport search under present screening procedures, or indeed under "wider or less precise measures when and if these should prove to be needed."¹⁴⁹ Furthermore, Judge Friendly would have "no difficulty in sustaining a search that was based on nothing more than the trained intuition of an airline ticket agent or a marshal of the Anti-Hijacking Task Force"¹⁵⁰

Judge Friendly's concurrence so alarmed Judge Mansfield, that the latter in his concurring opinion quoted an earlier admonition that "'[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.'"¹⁵¹ Judge Mansfield agreed that air hijacking was a serious threat to the safety of the public, but did not agree that this justified "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."¹⁵²

Judge Mansfield analogized the danger of air hijackings to the sharp increase in the rate of serious crimes in major cities, and suggested that if the former constituted adequate grounds for a broad expansion of police power, searches of persons or homes in high crime areas based solely upon the "trained intuition" of the police could also be justified. "With the door thus opened," said Judge Mansfield, "a serious abuse of individual rights would almost inevitably follow."¹⁵³

It is interesting to compare Judge Friendly's comments in *Bell*,¹⁵⁴ an airport search case, with those in *Adams v. Williams*,¹⁵⁵ a street search situation. In *Adams*, Judge Friendly dissented, in pertinent part:

149. 464 F.2d at 675.

150. *Id.*

151. *Id.* at 676, citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).

152. 464 F.2d at 675.

153. *Id.* at 676.

154. See text accompanying notes 149-50 *supra*.

155. 436 F.2d 30 (2d Cir. 1970), *rev'd per curiam*, 441 F.2d 394 (2d Cir. 1971), *rev'd*, 407 U.S. 143 (1972). In this case, a police officer received an unverified tip from an in-

To begin, I have the greatest hesitancy in extending *Terry* to crimes like the possession of narcotics There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true.

. . . .

. . . If [*Terry*] is to be extended to [possessory offenses] at all, this should be only where observation by the officer himself or well authenticated information shows "that criminal activity may be afoot." . . . I greatly fear that if the decision here should be followed, *Terry* will have opened the sluiceways for serious and unintended erosion of the protection of the Fourth Amendment.¹⁵⁶

The *Terry* doctrine stands as the significant exception to the probable cause requirement of the fourth amendment. Thus, it might have been expected that the courts would have interpreted, as strictly as possible, the factual requirements for the standard of reasonable suspicion. Instead, the particular conditions currently prevailing at airports have resulted in a removal of *Terry* from its factual setting. For, if the reasonableness of a search is to be measured solely by the urgency of the government's interest, without requiring facts to warrant the intrusion, the concepts of reasonable suspicion and probable cause become dependent upon and defined by each new public crisis to the point where the protections afforded by the fourth amendment no longer exist.

We do not believe that *Terry* can constitutionally be expanded to cover the airport anti-hijacking situation, and attempts to do so can only lead to a potentially serious dilution of the protections embodied in the fourth amendment. As stated in *Camara v. Municipal Court*,¹⁵⁷ "public interest would hardly justify a sweeping search of an entire city" ¹⁵⁸ Neither should public interest justify a sweeping search of all air passengers.

The present airport screening procedures present other difficulties which arise within the context of the trial. An immediate constitutional question is raised by the alleged compelling national urgency to protect the confidentiality of the behavior profile. The reason for this secrecy is that "it would not only be possible but relatively simple for a prospective hijacker to avoid the initial designation were any of the norms employed to become generally known."¹⁵⁹

formant that a man in a specific automobile at a particular location was carrying both a gun in his waistband and a quantity of narcotics. The police officer approached the automobile, immediately reached in through the open window, and seized the gun from the defendant's waistband. He thereupon arrested the defendant and commenced a search for narcotics which were found in the defendant's wallet and pocket

156. 436 F.2d at 38-39.

157. 387 U.S. 523 (1967).

158. *Id.* at 535.

159. *United States v. Bell*, 464 F.2d 667, 670 (2d Cir.), cert. denied, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972)

As a result, the presentation of profile evidence in the prosecution's case is presented before the presiding judge, without the presence of the public and the defendant, and limited to counsel. This procedure will continue to raise the allegations, as it did in *Bell*, *Slocum*, and *Lopez*, that the defendant is being denied the right to a public trial,¹⁶⁰ to the confrontation of witnesses,¹⁶¹ and to the effective assistance of counsel.¹⁶²

Exclusion of the public has previously been found constitutionally permissible where it was deemed necessary to protect the defendant,¹⁶³ where there has been harassment of witnesses,¹⁶⁴ and to preserve order in the courtroom.¹⁶⁵ The exclusion of the public, for the profile portion of the trial, in order to protect the air-traveling public, is probably a substantial enough consideration to qualify as another exception to the public trial requirement, and the airport search cases considering this issue have so held.¹⁶⁶

A more complex question is presented in defendant's claim of a sixth amendment violation because he is not confronted with the witnesses against him during the presentation of the profile testimony.¹⁶⁷ Nevertheless, the courts that have examined this contention have stressed that the witness testifying outside defendant's presence did so in the presence of the trial judge, who could observe his demeanor and determine his credibility.¹⁶⁸ In addition, counsel for defendant has the opportunity to cross-examine.¹⁶⁹ Therefore, it can be expected that courts will continue to hold that such testimony is "not the extrajudicial statement of the unavailable witness which normally provokes the invocation of the confrontation guarantee."¹⁷⁰

Furthermore, courts have stressed that this exclusion of the witness occurs at a suppression hearing and not at trial, and that suppression hearings are concerned with the legality of the seizures of contraband and

160. See *In re Oliver*, 333 U.S. 257 (1948).

161. See *Salinger v. United States*, 272 U.S. 542 (1926).

162. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

163. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965).

164. *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970).

165. *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 (1966).

166. See, e.g., *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

167. *United States v. Bell*, 464 F.2d 667, 670 (2d Cir. 1972).

168. *Id.* at 671.

169. *Id.* at 672; *United States v. Lopez*, 328 F. Supp. 1077, 1088 (E.D.N.Y. 1971).

170. 464 F.2d at 671.

not with the question of defendant's guilt or innocence.¹⁷¹ In *Bell*, the minutes of the suppression hearing became the trial record. The court noted that this was done by stipulation of counsel.¹⁷² Still, it remains to be seen how a case involving profile testimony given at trial would be decided.

The courts in airport seizure cases have not yet decided the issue that the *in camera* hearing does nothing to preserve the defendant's confidence in the fairness of the judicial system. Regardless of prejudice to a defendant's case, his presence is essential simply to assure him that the process which convicted him was fundamentally fair.¹⁷³

Another constitutional problem presented by airline screening procedures is the necessity of giving warnings, as required by *Miranda v. Arizona*,¹⁷⁴ if a prospective defendant is being subjected to "custodial interrogation" by the United States marshal or by the airline representatives acting as government agents. In *Bell*, Judge Mulligan, although finding that the *Miranda* issue was not properly raised on the appeal, nevertheless indicated that "[a]t this stage there was no obligation to give such warnings."¹⁷⁵

However, it may be anticipated that in other cases of a similar nature, the *Miranda* issue will be raised. This is especially true since it has been held that airline employees acted as government agents "insofar as they designated 'selectees' and alerted Marshals."¹⁷⁶ Since marshals and airline personnel are not advising passengers, who may have activated magnetometers or matched profiles, that they may choose not to fly, it may be that "custodial interrogation"¹⁷⁷ aptly describes the situation of a prospective airline traveler stopped by the marshal at the boarding ramp and involuntarily searched.

B. *Efficacy*

In addition to doubts about the constitutionality of the anti-hijacking system, we also have serious reservations about its effectiveness. The system was designed primarily to deter potential skyjackers by erecting a series of obstacles which an air passenger would have to traverse before boarding the airplane. This system was based on the assumption that the

171. *Id.* at 671-72.

172. *Id.* at 671.

173. See *Lewis v. United States*, 146 U.S. 370, 372 (1892).

174. 384 U.S. 436 (1966).

175. 464 F.2d at 674.

176. 328 F. Supp. at 1101.

177. Custodial interrogation was defined in *Miranda* as questioning after a defendant has been "deprived of his freedom of action in any significant way." 384 U.S. at 445.

psychology of a typical potential skyjacker is that of a "loser" or "failure" who would be easily dissuaded by a series of impediments. Thus, the very existence of such a system should theoretically be able to *deter* potential skyjackers.

Yet, the system and particularly the profile, as it operates to *detect* skyjackers, is based on the mere behavior of the typical skyjacker as he presents himself for boarding, rather than upon more intricate psychological manifestations. It is doubtful whether the behavior of embarking passengers, particularly if economic considerations are involved, provides sufficient insight into criminal propensities to supply a dependable basis for searching them.

There are other difficulties. Under the present system, the behavioral profile is applied at check-in counters by airline personnel who, at the same time, are checking tickets, weighing luggage, and answering requests for information. These airline employees, while focusing on certain simple, obvious characteristics provided by the profile, may well be diverted from noticing other significant manifestations. Their application of the profile is likely to be mechanical and perfunctory, and accordingly, their assessment of the embarking passenger may bear little relationship to his skyjacking potential.

While the present system may have had some effect in deterring the "failure" or "loser" personality from attempting a hijacking, there has been little statistical indication that the system has been able to successfully detect potential hijackers who actually attempt to board the airplane.¹⁷⁸ After all, approximately 94 percent of those frisked were found not to be carrying concealed weapons,¹⁷⁹ and of those arrested for crimes as a result of the anti-hijacking system only 17 percent were charged with carrying concealed weapons.¹⁸⁰

Moreover, the number of skyjackings since 1970 has remained fairly constant, despite the ready acceptance and rapid expansion of the anti-hijacking system throughout the country. It has become a familiar situation, following each new air hijacking, for the FAA to allege that the hijacker met the profile but that it was not properly applied, while the airline claims the reverse. We think the present anti-hijacking system is neither good law nor good law enforcement, and that an alternative system must be developed.

178. Dr. Hubbard, on the other hand, claims the system may only increase skyjacking by challenging the skyjacker-prone personality. *Perilous War on the Skyjacker*, *Life*, Aug. 11, 1972, at 26, 27, 29

179. *United States v. Lopez*, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

180. *Fenello* 33.

VII. A REASONABLE APPROACH

Efforts have been made to justify the reasonableness of airport searches on the basis of the *Terry* doctrine.¹⁸¹ But *Terry*, anchored to the ability of the experienced police officer to recognize suspicious conduct, was not meant to be extended to the inarticulate hunches supplied by the behavioral profile and magnetometer as interpreted by airline personnel unschooled in the nuances of law enforcement. Nevertheless, if the present screening system is to be discarded, an alternative strategy must be devised to protect air commerce from the unacceptable risk of skyjacking.

A. *Federal Airport Security Force*

The airline industry claims that policing the airports is a responsibility of the federal government.¹⁸² On the other hand, the federal government alleges that it is the responsibility of the airlines to provide the necessary funding for law enforcement at the airport.¹⁸³ The present anti-hijacking system has consequently evolved from these fiscal difficulties and jurisdictional disputes. While this system may emphasize relatively low cost and administrative facility, it is questionable whether prime consideration is being accorded the safety of the air traveler.

Law enforcement is not the business of the airlines, whose employees may have had little or no training in crime detection or in airport security methods. We think it is appropriate to return the responsibility for detecting such criminal activity as armed potential skyjackers to experienced law enforcement officials funded by the federal government. Such law enforcement officials should perform their duties within the traditional constitutional limitations imposed on searches by the fourth amendment and on frisks by *Terry*.

If the responsibility for airport law enforcement were entrusted to a federal airport security force, the profile would be merely an addition to the investigatory techniques utilized by a law enforcement officer able to devote full time to the job of stopping air hijackers. Upon observing suspicious behavior on the part of a passenger, the law enforcement official could, within the limits set forth in *Terry*, stop, question and ultimately frisk a suspect without raising the numerous constitutional problems which beset the present system.

181. *United States v. Bell*, 464 F.2d 667, 673-74 (2d Cir.), cert. denied, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972); *United States v. Epperson*, 454 F.2d 769, 770-72 (4th Cir.), cert. denied, 406 U.S. 947 (1972); *United States v. Lopez*, 328 F. Supp. 1077, 1092-98 (E.D.N.Y. 1971)

182. See 118 Cong. Rec. 15,622 (daily ed. Sept. 21, 1972).

183. See *Id.*

The airport security force would, in addition to providing a more realistic opportunity to detect potential skyjackers, offer other advantages: a) federal airport officials would constitute a highly visible show of authority thereby providing a psychological deterrent to the potential skyjacker; b) in the event a potential skyjacker attempted to board an aircraft by force, a federal airport official would be promptly available to protect life and property; c) an organized and effective federal force would be privy to information available to and through law enforcement agencies concerning extremist groups or known criminals who might attempt a skyjacking.

A skyjacking which occurred on October 29, 1972 in Houston, Texas dramatically highlighted the need for the proposed system of prevention. Four skyjackers armed with pistols and a shotgun killed an Eastern Airlines gate agent and wounded another employee at Houston Intercontinental Airport before diverting a jet and its 29 passengers to Cuba.¹⁸⁴ An Eastern Airlines spokesman indicated that all of the passengers had passed through a "hijack deterrent system."¹⁸⁵

Subsequently, it appeared that the FAA had issued an alert to all airlines, two days before this incident, that there might be a skyjacking attempt by at least two fugitives who were being sought in connection with a murder and attempted bank robbery in Virginia. Eastern Airlines claimed it had received no such warning.¹⁸⁶ However, an airline trade association claimed that the government warning had gone out to all members two days before the skyjacking.¹⁸⁷ It was noted that "[t]he general view of aviation experts was that the skyjacking might have been prevented only if an armed and uniformed Federal marshal or other police official had been on duty at the gate. He might have served as a psychological deterrent."¹⁸⁸

B. *Other Proposals*

While the authors believe that a federal security force is the only viable solution to the threat of skyjackers, there are other proposals which merit attention.

1. *Express Consent*

Since fourth amendment constitutional rights may be waived by contract or by consent, as long as that consent is unequivocal and unam-

184. N.Y. Times, Oct. 30, 1972, at 1, col. 2.

185. Id. at 9, col. 1.

186. N.Y. Times, Oct. 31, 1972, at 1, col. 2.

187. Id.

188. Id. at 9, col. 1.

biguous, and not in any way the result of fraud, duress or coercion,¹⁸⁹ it has been suggested that a passenger's right to air travel could be conditioned on his consenting to being searched prior to embarkation.¹⁹⁰ A passenger could be given a *Miranda* type warning that he need not submit to a pre-flight search but, that without such, he would not be allowed to board the aircraft. At this point, a passenger, not wishing to expose himself to a search, could decline to board. If the passenger elected to proceed, he would be deemed to have consented to a search. This strategy would protect air commerce, obviate the need for a secret profile, and eliminate *in camera* hearings.

However, this general consent approach raises the question whether the constitutional right to travel may be predicated on the relinquishment of fourth amendment rights.¹⁹¹ Although, generally, the government may place qualifications on the grant of a privilege, it may not when the precedent qualification is the relinquishment of a constitutional right. If such principles control the government in the grant of a privilege, they would appear more binding when applied to a recognized constitutional right such as the right to travel.¹⁹² It is hardly persuasive to suggest that there are alternative modes of travel since, in many situations, flying may be the only practical means of transportation.

2. Placing Airport Searches in a Sui Generis Position Analogous to Border Searches

Border searches have been held to qualify as express exceptions to the reasonableness requirement of the fourth amendment: "‘unsupported or mere’ suspicion alone is sufficient to justify [a border] search for purposes of Customs law enforcement."¹⁹³ Thus, in conferring upon customs officers such broad authority, the Congress has in effect declared reasonable a search conducted by customs officials in lawful pursuit of unlawful imports.¹⁹⁴ The validity of the distinction between customs searches and those conducted by police officers in the ordinary case, is based on the fact that the purpose of a customs search is not to apprehend persons,

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

190. Cf. *Airport Security Searches and the Fourth Amendment*, 71 Colum. L. Rev. 1039, 1047 (1971); 328 F. Supp. at 1093.

191. See *United States v. Guest*, 383 U.S. 745, 759 (1966).

192. *Airport Security Searches and the Fourth Amendment*, 71 Colum. L. Rev. 1039, 1049 (1971).

193. *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir.), cert. denied, 385 U.S. 977 (1966).

194. *People v. Furey*, 42 Misc. 2d 579, 580-81, 248 N.Y.S.2d 460, 462-63 (Sup. Ct. 1964).

but to seize contraband property unlawfully brought into the United States.¹⁹⁵

Airport searches are arguably analogous to border searches in that the objective in each case is the discovery of contraband rather than the detection of past crime.¹⁹⁶ However, it must be recognized that, historically, border searches have applied only to persons entering the country, not to those travelling within or leaving it.¹⁹⁷ To place airport searches in a special category would certainly be a more direct and effective approach to the problem than an ineffective and unconstitutional expansion of the *Terry* rationale. Nevertheless, we regard such approach as premature since there has been no attempt made to utilize conventional law enforcement methods in this area.

3. Frisk Limited to Weapons

The argument has been advanced that if the right to frisk is based on a reasonable fear that the suspect is armed, then if a frisk discloses a weapon, the weapon alone should be seized and the suspect prosecuted. For example, in his dissent in *People v. Sibron* Judge Van Vooris of the New York Court of Appeals stated:

If we go beyond that, then frisking a suspect, which can be done in practice (though not in theory) at the officer's whim, will become a pretext for the general search of the person, without probable cause, which the Fourteenth Amendment was designed to prevent. The power to frisk is an exception to the probable cause rule in search and seizure, and is not a search at all except for the discovery of a dangerous weapon concealed upon the person. There it should end, for all purposes.¹⁹⁸

However, this theory would artificially encumber the rule that if a search is valid at its inception, and if properly circumscribed, an officer need not ignore evidence of other crimes which he uncovers during the

195. See *Alexander v. United States*, 362 F.2d at 381-82.

196. *Airport Security Searches and the Fourth Amendment*, 71 Colum. L. Rev. 1039, 1050-51 (1971).

197. *Boyd v. United States*, 116 U.S. 616 (1886).

198. *People v. Sibron*, 18 N.Y.2d 603, 606, 219 N.E.2d 196, 198, 272 N.Y.S.2d 374, 377 (1966) (Van Voorhis, J., dissenting), rev'd, 392 U.S. 40 (1968).

It has further been contended that since *Terry* defines the frisk as a limited exception to the probable cause requirement of the fourth amendment, "[a] ruling that only a hidden weapon may be introduced into evidence might at least eliminate any incentive for police to use the 'self-protective' frisk as a vehicle for evidentiary searches in the absence of probable cause. . . . [T]o exclude all contraband but weapons discovered during a frisk should in no way frustrate legitimate police activity which is justified in this context only as a means of protecting the officer." *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 186 (1968) (footnotes omitted).

course of the search.¹⁹⁹ In addition, it would create still another exclusionary category to admissible evidence and might result in the inability to prosecute those who fortuitously possessed evidence of other crimes while submitting to an airport search. An approach with such far-reaching effects on law enforcement should be adopted only after its implications have been thoroughly weighed.

VIII. CONCLUSION

Air hijacking will cease to be a problem when the nations of the world agree to refuse sanctuary and to return the skyjacker to the prosecuting authorities in his own country. Of the 239 hijackings which occurred world-wide between January 1, 1968 and July 24, 1971, at least 151, or 63 percent, were intended for Cuba; 126 were successful. Of the 106 American planes on which skyjackings have been attempted during this period, 79 attempts, or 75 percent, were intended for Cuba.²⁰⁰

Although Cuba is the principal haven for successful air hijackers,²⁰¹ there are indications that Fidel Castro is not especially pleased with this distinction and is ready to enter into agreements with the United States which are in keeping with the 1970 Hague Convention.²⁰² If these proposed agreements should become a reality, a major step would be taken in reducing the threat of skyjackings to United States airlines.

However until the day when international cooperation completely forecloses asylum to the skyjacker, it is submitted that only an effective federal airport police force can constitutionally contain the threat of skyjacking.²⁰³

199. *Abel v. United States*, 362 U.S. 217 (1960); *Harris v. United States*, 331 U.S. 145 (1947), overruled on other grounds, *Chimel v. California*, 395 U.S. 752 (1969).

200. *Arey* 320-54. See text accompanying notes 53-59 *supra*.

201. A second major hijacking trouble area, is comprised of the Arab countries of the Middle East and North Africa. Few of these countries have entered into the Hague Convention and, under present circumstances, it seems unlikely that even a few of these Arab countries could be induced to enter the Convention.

202. On November 15, 1972, the governments of the United States and Cuba announced that they would begin negotiations, conducted through the Swiss Government, to curb airlines hijacking. *N.Y. Times*, Nov. 16, 1972, at 1, col. 8; *N.Y. Times*, Nov. 21, 1972, at 1, col. 6.

203. After this article was written, the federal government announced that, by January 5, 1973, every piece of luggage carried aboard U.S. airliners would be searched and every passenger screened for weapons by electronic metal detectors. By February 5, 1973, the government plans to station armed local law-enforcement officers at all boarding areas in each of the country's commercial airports. *N.Y. Times*, Dec. 6, 1972, at 93, col. 1. A recent federal district court decision focused upon certain of the problems discussed in this article. In *United States v. Meulener*, Crim. No. 10931 (C.D. Cal., filed Dec. 4, 1972) a California district court held that no passenger, or his carry-on luggage may be searched without express, voluntary consent.