# Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight

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TABLE OF CONTENTS



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## I. INTRODUCTION

Air travel, now considered to be the safest and most timely manner of traversing global distances, has proven to be an effective way to transport illicit drugs, and at times to be the unwitting tool of terrorists. "[A]n aircraft flying many passengers in splendid and detached isolation thousands of feet in the air is especially vulnerable; in flight it operates in a delicate balance, subject to catastrophe and destruction if that balance is in any way disrupted."[1] Police officials in each country have developed strategies to combat terrorism and the movement of illicit substances.

In the United States, the Fourth Amendment of the Constitution,[2] the heart of the Bill Rights,[3] and perhaps the cornerstone of freedom,[4] has been interpreted to define and redefine the limits of intrusion the police may legally take in their search for drugs and criminals. The right to be free from unreasonable searches and seizures precedes the Revolution. An oft quoted passage by William Pitt, Lord Chatham, cited since the time of our founding fathers, defends this protection:

> The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter it; but the King of England can not. . . . All his power dares not cross the threshold of that ruined tenement![5]

Justice Story has said that "[t]his provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property."[6] Justice Brandeis, in his prophetic dissent in *Olm-*

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1. PAUL S. DEMPSEY ET AL., AVIATION LAW 9-3 (1992).

2. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991), expounding that the Bill of Rights empowers and deploys constitutional principles. At page 1132, Professor Amar urges, "[t]he main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impead popular majorities, but to empower them."

3. "The security of one's privacy against arbitrary intrusion by the police is — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' . . . . " Justice Frankfurter speaking for the majority in Wolf v. Colorado, 338 U.S. 25, 27 (1949).

4. 'Writs of Assistance', at the time of the Revolution, empowered English revenue officers to search, in their discretion, for smuggled goods. When this was debated and resisted in 1761, in Boston, John Adams said, "Then and there the child of independence was born." Boyd v. United States, 116 U.S. 616, 625 (1886). That Court opined further that the pronouncements of Lord Camden in Entick v. Carrington and Three Other King's Messengers, 19 How. St. Tr. 1029 (1765) were the underlay the penning of the Fourth Amendment, *Id.* at 626-27, for example "[e]very invasion of private property, be it ever so minute, is a trespass." *Id.* at 627.

5. Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 931 (1985) (quoting C. GOODRICH, SELECT BRITISH ELOQUENCE 65 (1852)).

6. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1005 at 709 (reprinted with an Introduction by Ronald D. Rotunda and John E. Nowak 1987).

*stead*,[7] declared, about the "sanctities" of the home and "privacies" of life, "the offense . . . is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[8]

With respect to air travel, the Fourth Amendment directly impacts the legality of searches at immigration, the permissibility of drug testing of air carrier personnel and pilots in particular, and the use of aircraft for domestic criminal surveillance.

Law and order demand that the airways be free of criminals endangering the lives of innocent passengers in hijackings and other terrorist activities. Yet, most of the criminals apprehended in weapons searches at airports are unarmed. Most of the weapons searches uncover illicit drugs rather than weapons.

It would technically be possible to implant felons with microchips via hypodermic injections, which would announce their status as felons as they passed through airport arrival and departure gates.[9] This possibility demonstrates the tension between the needs of society in preventing terrorism and illicit drug traffic and the needs to preserve for the common citizen the liberties and freedoms guaranteed by the Constitution and the Bill of Rights.[10] This paper will explore the pronouncements of the United States Supreme Court and federal courts in relation to these issues.

## II. The Scope of Fourth Amendment Protection

The Fourth Amendment to the Constitution provides as follows:

> 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.[11]

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7. Olmstead v. United States, 277 U.S. 438 (1928).

8. *Id.* at 474-475 (Brandeis, J. dissenting).

9. Based on a telephone interview with John Howard, D.V.M., Gallup, New Mexico on April 10, 1994. Pets are implanted with microchips which transmit a 10 digit code when scanned. Cost - $350. For humans, it could be a felony to remove an implanted chip.

10. Sanford L. Dow, *Comment, Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward*, 58 J. Air L. & Com. 1149, 1179 (1993) (arguing the government's interest in safety can outweigh the individual's interest in freedom "from certain aspects of government scrutiny"); Michael R. Cogan, *Comment, the Drug Enforcement Agency's Use of Drug Courier Profiles: One Size Fits All*, 41 Cath. U.L. Rev. 943, 947 (1992) (acknowledging the war on drugs and advocating protection of individual rights of freedom).

11. U.S. Const. amend. IV.

American Constitutional criminal procedure is federal common law. Since *Marbury v. Madison*,[12] the U.S. Supreme Court has held, under the Supremacy Clause, the Court to be the final arbiter of the United States Constitution. Thus, with the elegant yet open-ended language of the Constitution and particularly, the Bill of Rights, the Supreme Court has increasingly molded and delimited the rights of the American people.

Each state may afford a citizen greater rights than those guaranteed under federal law, but not less.[13] Since each federal and state court may apply the rulings of the Supreme Court differently, the applicable cases of the Supreme Court are the settled law of the land and must be the main focus of any investigation into the application of the Bill of Rights.

Two cases, *Katz v. United States*[14] and *Soldal v. Cook County*,[15] define the current envelope of the Fourth Amendment's application to cases as of this writing. Although not specifically concerned with aviation, these cases underly all present cases. If, for heuristic purposes, you think of the Fourth Amendment as the point of an inverted pyramid, then these two cases rest directly upon the Fourth Amendment.

In 1967, the U.S. Supreme Court confronted the problems of the development of modern technology in *Katz v. United States.*[16] FBI agents had attached electronic recording devices to the outside of a telephone booth in which the subject, Katz, had made incriminating statements with regard to his bookmaking activities.[17] Justice Stewart, speaking for the Court, declared, "the protection of a person's general right to privacy — his right to be let alone by other people — is like the protection of his property and of his very life. . . ."[18] The Court held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[19]

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12. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

13. U.S. Const. amend. XIV, sec. 1. Through the process that is known as *selective incorporation*, most of the protections of the Bill of Rights have been applied to the states, such that a state may provide more protection than that required by the Bill of Rights, but not less. The Tenth Amendment of the U.S. Constitution secures some autonomy for the states from the federal government. The case of Michigan v. Long, 463 U.S. 1032 (1983), holds that (1) states must give the same or greater procedural protections to an accused than the federal government, (2) to do this states must use their own constitution, statutes and case law, and (3) a court must state that its opinion was based on adequate and independent state grounds.

14. Katz v. United States, 389 U.S. 347 (1967).

15. Soldal v. Cook County, 113 S.Ct. 538 (1992).

16. Katz v. United States, 389 U.S. 347 (1967).

17. *Id.* at 348.

18. *Id.* at 350-351 (citing Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

19. *Id.* at 353.

Prior to *Katz*, searches had been defined in terms of a physical trespass. The Court thus redefined the scope of the protection of the Fourth Amendment from freedom from the invasion of trespass to freedom from unwarranted invasion of one's right to privacy. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[20]

In *Katz*, something was gained: the extension of the Fourth Amendment into the reasonable expectation of privacy. However, perhaps something was lost as well: the right to demand a particularized warrant whenever the government contemplated a trespass. Justice Harlan, in his concurrence to *Katz*, equated "electronic" to "physical intrusion" as potentially violative of the Fourth Amendment.[21] Implicit in this interpretation is the warning to not abandon the concept of trespass. This warning has gone unheeded.

In *Soldal v. Cook County*,[22] the Court considered whether a seizure was protected by the Fourth Amendment even when no privacy interest was implicated. The Soldal family resided in a mobile trailer. Rather than pursue a conservative and legal course of court-ordered eviction, the owner of the trailer park, enlisting the aid of the local sheriff, simply hooked the Soldal's home to a tractor and wrenched it off the premises, tearing the canopy, and the electrical, water, sewage and telephonic hookups.[23] The Court quipped that this gave new meaning to the term "mobile home."[24] Here, the sheriff was not taking the property *per se*, but rather exercising control and domain over the mobile home for purposes of eviction.

The Court reversed the court of appeals, holding that this, in fact, was a seizure under the Fourth Amendment, even though there was no search.[25] Thus, while *Katz* modified the concept of an unreasonable search to include those areas where the suspect had a reasonable expectation of privacy, *Soldal* held onto the idea that seizure is the taking into possession of a person or property that had been under the control of another.

## III. Consensual Searches of Passengers

In the War on Drugs, airport lobbies have become one of the major battlefields between the drug enforcement agencies and the drug couriers. Police often confront those who they feel may be carrying illicit

20. *Id.* at 359.
21. *Id.* at 360-61.
22. Soldal v. Cook County, 113 S.Ct. 538 (1992).
23. *Id.* at 541.
24. *Id.* at 543.
25. *Id.* at 547.

drugs. The officer may ask the suspect to allow a search of his or her luggage. Generally, when the suspect truly 'consents' to the search, the officer need not obtain a warrant nor show probable cause to justify the search.

### A. The Standard of Consent

The Court has provided some guidelines as to what constitutes consent. In *Schneckloth v. Bustamonte*,[26] the Court rejected a traditional waiver approach to consent; a knowing and intelligent relinquishment of one's rights does not necessarily constitute consent. Justice Stewart, speaking for the Court, held that consent to a search must be demonstrably voluntary, and not the result of "duress or coercion, express or implied."[27]

*Florida v. Bostick*[28] also provides some guidance as to what constitutes consent. In this case, armed police in special uniforms would 'work the buses' by entering a bus, and asking passengers to submit to a search of their luggage. The Court held that the test of whether a passenger consents to a search is whether, taking into account the totality of the circumstances, a reasonable passenger would feel free to "decline the request and terminate the encounter."[29] The Court specifically held that this rule applied to an "airport lobby" as well as city streets or buses.[30]

Various police and drug enforcement agencies have utilized the 'consensual search' as an effective means of intercepting drugs. The agents will scan passengers at airports for those matching various factors of a "drug courier profile", and approach candidates.

In *United States v. Mendenhall*,[31] DEA agents in an airport approached a woman, Mrs. Mendenhall, whose behavior fit the "so-called 'drug courier profile.'"[32] She was asked to accompany the agents to the airport DEA office, and was asked to submit to a strip search. She stated she had a plane to catch, and was told that if no drugs were found, she could leave. During the course of the search she handed over two pack-

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

27. *Id.* at 248. The court warned that "voluntariness is a question of fact to be determined from all the circumstances." *Id.* at 248-49.

28. Florida v. Bostick, 501 U.S. 429 (1991).

29. *Id.* at 433.

30. *Id.* at 436. Justice Marshall, dissenting, stated: "[i]n my view, the Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of intrastate or interstate buses." *Id.* at 450.

31. United States v. Mendenhall, 446 U.S. 544 (1980).

32. *Id.* at 548, n. 1. Mrs. Mendenhall was the last person off the flight from Los Angeles, was enroute to Detroit on a different airline, appeared nervous, scanned the area, and had no baggage. *Id.*

ets of heroin.[33] Justice Stewart, speaking for a divided Court, held that Mrs. Mendenhall's consent, in light of the totality of the circumstances, and despite testimony by one of the agents that Mrs. Mendenhall was in fact not free to leave,[34] gave her consent "freely and voluntarily."[35]

In *Florida v. Royer*,[36] two detectives approached a traveler, Royer, and requested his airline ticket and driver's license. In the course of questioning him, they invited him to accompany them to a small room. There, he gave the detectives keys to open one of his suitcases, which had been retrieved by the detectives, and allowed the detectives to force open the other. Drugs were discovered. The Court found that the procedure used was coercive, and that the holding of the driver's license, tickets and luggage precluded Royer from terminating the encounter. The Court suggested that with the use of less coercive means and the utilization of a "dog-sniffing" procedure to establish probable cause, the encounter would have passed muster.[37]

As the above cases illustrate, many drug carriers appear to submit to searches, like lambs led to the slaughterhouse. In *United States v. Berry*,[38] the Fifth Circuit court noted: "We think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs and even show where they have hidden drugs. . . ."[39]

Judge Becton of the North Carolina Court of Appeals addressed this issue in a law review article:

> [T]he agent was always careful to give the suspect the impression that he was never under arrest or in custody during the contact and was always free to go. Regardless of whether this was true, it was certain that the agent would testify to this sequence of events at trial.[40]

Judge Becton concludes, "to instill any meaning into the second tier of police-citizen encounters — brief seizures — 'reasonable suspicion' must mean more than a subjective judgment based on an amorphous statistical data so obviously susceptible to bias, misuse, and arbitrary enforcement."[41]

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33. *Id.* at 548-49.

34. *Id.* at 575 (Justice White, joined by Justices Brennan, Marshall, and Stevens, dissenting).

35. *Id.* at 559-60.

36. Florida v. Royer, 460 U.S. 491 (1983).

37. *Id.* at 507. To the suggestion of an alternate approach, (then) Justice Rehnquist responded: "[I]f my aunt were a man, she would be my uncle." *Id.* at 528.

38. United States v. Berry, 670 F.2d 583 (5th Cir. 1982).

39. *Id.* n.16 at 598.

40. Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye"*, 65 N.C.L. REV. 417, 428 n.63 (1987 ) (quoting Philip S. Greene and Brian W. Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 272-273 (1982)).

41. *Id.* at 473.

### B. Administrative Searches

The government has defined administrative searches as an exception to the Fourth Amendment requirements, since searches in this context may proceed without probable cause, with or without a search warrant. Rather, the search proceeds on the basis of the government's need to oversee a highly regulated activity.

In 1972, the President ordered the screening of all airline passengers, and accordingly, the FAA ordered that all passengers and carry-on baggage be screened by January 5, 1973.[42] The Ninth Circuit, considered the screening of airline passengers in *United States v. Davis*.[43] The *Davis* Court stated:

> [S]earches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence for a crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.[44]

The *Davis* Court recalled that "screening searches of airline passengers" were in fact regulatory searches in furtherance of an "administrative purpose, namely, to prevent the carrying of weapons or explosives aboard. . . ."[45] However, if contraband was discovered in this course of action, the search would not necessarily be rendered unconstitutional.[46]

The searching authorities often discover contraband in these 'administrative' screenning searches of airline passengers. The Ninth Circuit cited statistics from newspapers which revealed that less than 20% of the arrests have been for offenses relating to aircraft security.[47] The court quoted the Director for Security for Pan American World Airways as follows: "We've shaken down any number of people we have found to be thoroughly undesirable to have aboard an airplane . . . . Narcotics! — we're knocking off people day after day. . . . "[48] The federal court worried about the passenger's right to travel and his right to privacy,[49] suggesting that passengers be allowed to retreat from the search by refusing to board.[50]

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42. 14 C.F.R. § 121.538 (1972).
43. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).
44. *Id.* at 908.
45. *Id.*
46. *Id.*
47. *Id.* at 909 (citing New York Times, Nov. 26, 1992 at 1).
48. *Id.* (quoting James A. Arey, The Sky Pirates 242 (1972)).
49. *Id.* at 913.
50. *Id.* at 911.

## IV. SEARCH OF PASSENGER'S LUGGAGE AND EFFECTS

Although the Supreme Court has never directly addressed warrantless searches of aircraft,[51] numerous cases exist with regard to warrantless searches of automobiles, boats, mobile homes,[52] and airport lobbies. In *Coolidge v. New Hampshire*,[53] the Court held that "'exigent circumstances' justify the warrantless search of 'an automobile stopped on the highway,' where there is probable cause.... 'The opportunity to search is fleeting.'"[54] The *exigent circumstance* exception has often been invoked to justify searching the luggage of passengers in transit, who may be transporting illicit drugs.

In *United States v. Place*,[55] a passenger, Place, refused to consent to a search of his luggage upon his arrival at La Guardia airport in New York. A Drug Enforcement Administration (DEA) agent seized his luggage and transported it to Kennedy Airport where 90 minutes later a narcotics detection dog reacted positively to a sniff of the luggage.[56] The Court held that the initial seizure was justified, but that a 90 minute seizure of Place's luggage, without probable cause, rendered the seizure unreasonable under the Fourth Amendment. Justice O'Connor, writing for the Court, applied a balancing approach derived from *Terry v. Ohio*[57], balancing the government's exigent interest in fighting the war on drugs against the intrusion of the individual's rights protected under the Fourth Amendment.[58]

In another case, the Fifth Circuit allowed for the validity of airport preboarding security searches based on the need to "thwart air piracy and protect passengers and crew."[59] The court warned this should not "turn into a vehicle for warrantless searches for evidence of other crimes."[60]

51. Sharon A. Alexander, *Comment, Plane View Doctrine? Private Aircraft Searches*, 55 J. AIR L. & COM. 443 (1989).

52. *Id.*

53. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

54. *Id.* at 460 (quoting Chambers v. Moroney, 399 U.S. 42, 51 (1970)).

55. United States v. Place, 462 U.S. 696 (1983).

56. *Id.* at 698-99.

57. *See* Terry v. Ohio, 392 U.S. 1 (1968).

58. United States v. Place, 462 U.S. 696, 705-09. Justice Brennan joined by Justice Marshall concurred only in the result: "[S]eizure implicates a protected Fourth Amendment interest. For this reason, seizures of property must be based on probable cause." *Id.* at 716.

59. United States v. Gorman, 637 F.2d 352, 353 (5th Cir. 1981) (citing United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); United States v. Cyzewski, 484 F.2d 509, 512 (5th Cir. 1973)).

60. *Id.*

In 1971, in *United States v. Lopez*,[61] a federal trial court explored the hijacker profile,[62] and the use of the flux-gate magnetometer.[63] District Judge Weinstein distinguished the magnetometer from a *Katz* wiretap, since no communication of the subject - "internal or external" - was involved.[64] The *Lopez* court did not adequately address whether an expectation of privacy had been abridged, but explained that the courts were there to prevent abuse.[65] However, said the court, "[e]ven the use of the magnetometer might be an objectionable intrusion were it not accompanied by an antecedent warning from the profile . . . ."[66]

Subsequently, the Fourth Circuit, in *United States v. Epperson*,[67] found that the use of the magnetometer was justified: "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."[68] The *Epperson* court admonished that "reasonableness is still the ultimate standard"[69] and that reasonableness was determined by balancing governmental interests versus the rights to privacy.[70]

At first, only carry on luggage was x-rayed, however, eventually all luggage became suspect.[71] In the 1984 case of *United States v. Herzbrun*,[72] the court held that "airport security checkpoints . . . . have long [been] held . . . like international borders, [to be] 'critical zones' in which

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

62. *See* Drug Courier profile, *infra*. The *Lopez* court stated:

> Employing a combination of psychological, sociological, and physical sciences to screen, inspect and categorize unsuspecting citizens raises visions of abuse in our increasingly technological society. Proposals based upon statistical research designed to predict who might commit crimes and giving them the special attention of law enforcement agencies is particularly disturbing.

*Id.* at 1100.

63. A magnetometer is a device which detects the presence of magnetic materials by their influence on the local magnetic field. It is often used to screen for weapons at airports. The court took judicial notice of the magnetometer. *Id.* at 1085. "We need not fear that approving use of the magnetometer to search by means of unseen electromagnetic lines of force foretells approval of more frightening systems: for example, one searching the brain waves [magnetoencephalography] . . . to determine if they are tense or frightened . . . . " *Id.* at 1100.

64. *Id.* at 1101.

65. *Id.*

66. *Id.* at 1100.

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

68. *Id.* at 771.

69. *Id.* (quoting Camara v. Municipal Court, 387 U.S. 523 (1966)).

70. *Id.*

71. Stephen P. Hallbrook, *Firearms, the Fourth Amendment, and Air Carrier Security*, 52 J. AIR L. & COM. 585 (1987).

72. United States v. Herzbrun, 723 F.2d 773 (11th Cir. 1984).

special [F]ourth [A]mendment considerations apply."[73] That case involved a traveler, Herzbrun, who was stopped and had his shoulder bag seized after he retreated from a security checkpoint, exclaiming, "I don't want to fly."[74] The court held that Herzbrun had no constitutional right to revoke his consent to a search.[75] The court cited *United States v. Skipwith*,[76] which "stands for the proposition that travelers who enter an airport security area may be searched on mere suspicion."[77]

In 1984, the Sixth Circuit applied the automobile exception to a four-engine DC-6, to allow the evidence of smuggled drugs.[78] The court noted that although the Supreme Court had not decided this issue, the Eleventh Circuit upheld a warrantless search perceiving "no difference between the exigent circumstances of a car and an airplane."[79] Many other cases had similar findings including *United States v. Brennan*,[80] which found that "the mobility of a plane is sufficient to justify a warrantless search."[81]

## V. Seizure of Passengers — The Drug Courier Profile

The court in *United States v. Lopez*[82] linked the use of the magnetometer[83] to suspicions aroused by a hijacker profile. The use of magnetometer screening became mandatory and the use of profiles expanded.[84] *Lopez* explored the escalating steps of a stop: establishing severe legal penalties, placing warnings and notice, developing a profile, magnetometer readings, interview by airline personnel, interview by Marshal, and full frisk.[85]

In the 1972 landmark Second Circuit opinion of *United States v. Bell*[86] Judge Friendly explained:

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73. *Id.* at 775.
74. *Id.* at 775.
75. *Id.* at 778.
76. United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).
77. United States v. Herzbrun, 723 F.2d 773, 776 (11th Cir. 1984).
78. United States v. Nigro, 727 F.2d 100 (6th Cir. 1984).
79. *Id.* at 106 (quoting United States v. Rollins, 699 F.2d 530, 534 (11th Cir. 1983)).
80. *Id.* (citing United States v. Brennan, 538 F.2d 711, 721-22 (5th Cir. 1976)).
81. *Id.* In 1991, a United States District Court rejected an attempt by customs to exempt, under the border search exception to the Fourth Amendment search requirements, a search of a flight from San Juan to Miami. United States v. Maldonado-Espinosa, 767 F. Supp. 1176 (D. Puerto Rico 1991).
82. United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).
83. *Supra*, note 63.
84. See generally, Cogan, *supra* note 10. In 1989, one pair of agents was reported to have detained 600 suspects using the drug courier profile. This resulted in 10 arrests and 590 warrantless, unnecessary and unreasonable searches. *Id.* at 975-976 (citing United States v. Hooper, 935 F.2d 484, 499-500 (2d. Cir. 1991) (Pratt, J., dissenting), *cert. denied*, 112 S.Ct. 663 (1991)).
85. *Lopez*, 328 F. Supp. at 1082.
86. United States v. Bell, 464 F.2d 667 (2d Cir. 1972).

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness. . .
>
> Since all air passengers and their baggage can thus be constitutionally searched, there is no legal objection to searching only some. . . .[87]

Henceforth, the utilization of the hijacker, and then the drug courier profiles has seldom been questioned except in law review articles and dissents. In *United States v. Moreno*,[88] the Fifth Circuit, citing the possibility that a hijacker is "a deeply disturbed and highly unpredictable individual - a paranoid, suicidal [violent] schizophrenic,"[89] admonished that airport security was not alone sufficient to justify a warrantless airport search.[90]

The Fifth Circuit applied *Moreno* in *United States v. Legato*.[91] In 1971, in Miami, the FBI received an anonymous telephone tip that a bomb would be smuggled on board a 4:00 P.M. Chicago airline departure. The suspects in *Legato* were carrying an orange shopping bag at the airport. They were stopped, searched, and found to be carrying heroin, and subsequently convicted. The Fifth Circuit court applied a 'critical zone' and exigent circumstances argument justifying the detention,[92] and a 'consent' theory justifying the search.[93]

Concurring only in the result, Judge Goldberg stated:

> The exigencies of skyjacking and bombing, however real and dire, should not leave an airport and its environs an enclave where the Fourth Amendment has taken its leave. It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding. Seeking to prevent or detect crime, standing alone, has never justified eroding right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment.[94]

The reasonableness of searches continued to be tested as it was in *United States v. Kroll*.[95] The problem with drug courier profiles is that the parameters fluidly vary from case to case. In *United States v. Soko-*

87. *Id.* at 675 (Friendly, C. J., concurring).

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

89. *Id.* at 48.

90. *Id.*

91. United States v. Legato, 480 F.2d 408 (5th Cir. 1973).

92. *Id.* at 410-12.

93. *Id.* at 413.

94. *Id.* at 414 (Goldberg, Circuit Judge, specially concurring).

95. *United States v. Kroll*, 481 F.2d 884 (8th Cir. 1973) (where a United States marshall found drugs while performing a warrantless search of a briefcase for weapons after the suspect was determined to fit the hijacker profile and his briefcase hinges set off the magnetometer).

*low*[96], another drug courier profile case, Justice Marshall, dissenting, explained that "a suspicion is not reasonable unless officers have based it on 'specific and articulable facts.'"[97]

Justice Marshall then enumerated a series of profile cases and the articulable facts that they were based upon. Profiles included the following factors: first to deplane, last to deplane, deplaned in middle; one-way ticket, round-trip ticket, non-stop flight, changed planes; no luggage, gym bag, new suitcases; traveling alone, traveling with companion; acted nervously, acted too calmly.[98] Some have suggested that the drug courier profile has met mixed acceptance by the appellate courts in that it fails to limit the discretion of the officers.[99]

## VI. Passengers from Abroad

### A. Border Search

Aviation is unique in that of all the means to travel, only the airport provides an international gateway at landlocked, inner continental locations. Thus, Atlanta, Chicago, Denver, Moscow and Paris are as much international ports of entry as are New York and San Francisco. The international border crossing may take place deep in the heartland of a nation. In the United States, courts and government agencies, such as Customs, have traditionally taken greater liberties in protecting their borders than in protecting individuals once admitted to the country.

Recognizing that the First Congress noted the difference between searches of a dwelling and those of a movable vessel, the Supreme Court in *United States v. Carroll*[100] stated the impracticability of obtaining a warrant when the subject was in transit.[101] In 1961 the Ninth Circuit applied this doctrine in *Witt v. United States*:[102] "No question of whether

96. United States v. Sokolow, 490 U.S. 1 (1989) (Marshall, J. joined by Brennan, J., dissenting).

97. Sokolow, 490 U.S. at 12 (Marshall, J. joined by Brennan, J., dissenting, quoting Terry v. Ohio, 392 U.S. 1, 21 (1968), citing United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975)).

98. *Id.* at 13-14.

99. Cogan, *supra* note 10, at 960 n.117 (1992) (quoting Wayne R. LaFave, *Controlling Discretion by Administrative Regulation: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 482 (1990)).

100. Carroll v. United States, 267 U.S. 132, 151 (1925).

101. *Id.* at 153. Note the familiar dissent by Justice McReynolds, concurred in by Justice Sutherland: "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods." *Id.* at 163.

102. Witt v. United States, 287 F.2d 389 (9th Cir. 1961), *cert denied*, 366 U.S. 950 (1961).

there is probable cause exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person. . . ."[103]

### B. Detention at the Border

The extent of the police power is broadened at the border even under less than articulable suspicion. In *United States v. Montoya de Hernandez*,[104] Mrs. Montoya de Hernandez was suspected by customs officials of being a "'balloon swallower', one who attempts to smuggle narcotics hidden in her alimentary canal."[105] The suspect was detained for over 16 hours, while female officers observed her and waited for her to move her bowels. She refused all food and drink and complained of the indignity. The customs officials chose not to seek a warrant to x-ray her distended stomach.[106]

Justice Rehnquist, delivering the opinion of the Court, explained: "Since the founding of our Republic, Congress has granted the executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[107] The Court held that the detention at the border, beyond the scope of a routine customs search and inspection, was justified if the agents, considering all the facts, reasonably suspected the traveler was "smuggling contraband in her alimentary canal."[108] Justice Rehnquist concluded:

> [T]he detention was not unreasonably long. . . . At the border, customs officials have more than merely an investigative law enforcement role. They are also charged . . . with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives.[109]

Mrs. Montoya de Hernandez did not agree. Justice Brennan, joined by Justice Marshall, dissenting, quoted Mrs. Montoya de Hernandez, during her detention: "I will not submit to your degradation and I'd rather die."[110] He reported that she was kept in a small uncarpeted room with no bed for nearly 24 hours. She spent most of her time crying and looking at pictures of her children. Her requests to call home, to speak to her

103. *Id.* at 391.
104. United States v. Montoya de Hernandez, 473 U.S. 531 (1985).
105. *Id.* at 534.
106. *Id.* at 536.
107. *Id.* at 537.
108. *Id.* at 541.
109. *Id.* at 544.
110. *Id.* at 546 (Brennan, J., dissenting).

children, to contact an attorney, were all denied. She was strip searched twice. After 27 hours in detention, a warrant was obtained for a body cavity search and two balloons of cocaine were located. Eighty-six more appeared over the next four days.[111]

Justice Brennan was most concerned that this episode had taken place "based on nothing more than the 'reasonable suspicion' of a low ranking investigative officer . . . unmonitored. . . ."[112] without warrant or probable cause.[113] Those who conduct border searches should not be the sole judges.[114] Most disturbing, Justice Brennan recounts that one physician who had "conducted many 'internal searches' — rectal, vaginal and stomach pumping — estimated that he had found contraband in only 15 to 20 percent of the persons he had examined."[115]

## VII. Drug Testing of Pilots

In 1989, the Federal Aviation Administration (FAA) issued a final rule mandating urinalysis drug testing of airline and aircharter personnel who perform security-related or safety-sensitive tasks.[116] In 1988, the Department of Transportation (DOT) predicted a positive test rate of 7.5% of all aviation employees tested for illegal substances.[117] This proved to be far from true: "[A]n analysis of 120,642 drug tests conducted over a six-month period in 1990, showed positive findings in only 0.47% of the tests completed."[118]

The constitutionality of drug-testing has been tested in the 1989 cases *Skinner v. Railway Labor Executives' Association*[119] and *National Treasury Employees Union v. Von Raab.*[120] In *Skinner*,[121] the Federal Railroad Administration promulgated rules requiring drug and alcohol testing of any employee involved in a train accident or incident or who, by dint of some infraction, is suspected by a supervisor of drug or alcohol use. Railroad employees challenged the regulation. The U.S. Supreme Court held that 'covered' employees in regulated industries have a diminished expec-

111. *Id.* at 548 (Brennan, J., dissenting).

112. *Id.* at 549 (Brennan, Marshall, JJ., dissenting).

113. *Id.* at 550 (Brennan, Marshall, JJ., dissenting).

114. *Id.* at 556 (Stevens, J., dissenting).

115. *Id.* at 557 (Stevens, J., dissenting).

116. Suzanne Kalfus, *Government Drug Testing, Part I*, Airline Pilot, Feb., 1989, at 16.

117. Carroll E. Dubuc, Jacqueline Fitzgerald Brown, *Drug Testing in Aviation: The Double Standard Continues*, 21 Trans. L.J. 43, 46 (1992) (citing *Washington Roundup: The 7.5% Solution*, Aviation Week & Space Tech., March 7, 1988, at 15).

118. *Id.* (citing *Washington Roundup, supra* note 117).

119. Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).

120. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

121. Skinner, 489 U.S. 602.

tation of privacy,[122] and that the likelihood of testing of those in 'safety-sensitive' positions would deter them from drug use.[123] Thus the "[g]overnment's compelling interests outweigh privacy concerns"[124] and testing is not "an undue infringement on the justifiable expectations of privacy of covered employees."[125]

Joined by Justice Brennan, Justice Marshall dissented, noting that notwithstanding the importance of ridding society of drugs, the "[g]overnment's deployment . . . of a particularly Draconian weapon . . . the compulsory collection and chemical testing of railroad worker's blood and urine [may not] comport with the Fourth Amendment."[126] Justice Marshall suggested that perhaps the Department of Transportation could collect the specimens subsequent to an accident (upon reasonable suspicion) but not analyze them unless a warrant was issued upon probable cause,[127] which would be corroborated either by a witness or a co-worker's report of malfeasance.[128]

In *Von Raab*,[129] Justice Kennedy, speaking for the majority of the Supreme Court, upheld drug testing of U.S. Customs officials. Unlike *Skinner*,[130] where the testing was predicated upon either an accident or suspicion of drug or alcohol use, the drug testing in *Von Raab* was triggered by a Custom employee's request for transfer to a sensitive position. A sensitive position was one where the agent would be either (1) armed, (2) in contact with drugs, or (3) privy to secret information. Within the Customs Service, almost every post involves at least one of these three, thus any Customs employee seeking advancement or transfer would be tested.

The U.S. Supreme Court held that in this circumstance a warrantless search with no probable cause was acceptable.[131] Here, the employee was already on notice that drug testing would be required, so "a warrant would provide little or nothing in the way of additional protection of personal privacy."[132] Further, a probable cause analysis is related to a criminal investigation,[133] whereas when the Government acts in a routine

122. *Id.* at 627-28.
123. *Id.* at 630.
124. *Id.* at 633.
125. *Id.*
126. *Id.* at 635 (Marshall, Brennan, JJ., dissenting). "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great." *Id.*
127. *Id.* at 642-43 (Marshall, Brennan, JJ., dissenting).
128. *Id.* at 654 (Marshall, Brennan, JJ., dissenting).
129. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
130. *Skinner*, 489 U.S. 602.
131. *Id.* at 666-69.
132. *Id.* at 667.
133. *Id.*

administrative fashion such as in this situation, it "seeks to prevent the development of hazardous conditions."[134] "It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."[135] Justice Scalia, dissenting, found this practice an affront to both the Fourth Amendment and to personal privacy and dignity.[136]

The doctrine of warrantless searches lacking in probable cause has been expanded to random sobriety checkpoint programs. The constitutionality of these programs was attacked in *Michigan Dep't of State v. Sitz*.[137] Despite admissions that the sobriety checkpoints resulted in approximately a 1% arrest rate of the drivers that were stopped,[138] the Court found that the brief stops did not violate the Fourth Amendment. The Court held that the worthy goal of preventing drunken driving outweighed the impositions of the brief stops.[139]

Justice Stevens, dissenting, was deeply concerned that this decision gave no freedom from "suspicionless unannounced investigatory seizures."[140] Additionally, he expressed that the "sobriety checkpoints are elaborate, and disquieting publicity stunts."[141] Finally, Justice Stevens warned that the Court was "transfixed by the wrong symbol — the illusory prospect of punishing countless intoxicated motorists — when it should keep its eyes on the road plainly marked by the Constitution."[142]

The FAA-mandated random drug testing of airline and aircharter personnel has been vigorously refuted by the Air Line Pilots Association (ALPA). When first proposed, ALPA submitted a brief to the FAA[143] urging that widespread mandatory drug testing was not only an affront to the dignities and liberties of the pilots and airline personnel, but would be

134. *Id.* at 668.

135. *Id.* at 670.

136. *Id.* at 680 (Scalia, J., joined by Stevens, J., dissenting). Justice Scalia stated:

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

*Id.* at 687 (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

137. Michigan Dep't of State v. Sitz, 496 U.S. 444 (1990).

138. *Id.* at 455.

139. *Id.*

140. *Id.* at 473 (Stevens, J., dissenting).

141. *Id.* at 475.

142. *Id.* at 477.

143. Before the Department of Transportation, Federal Aviation Administration, In the Matter of: Notice of Proposed Rulemaking — Antidrug Program for Personnel Engaged in Specific Aviation Activities, Docket No. 25148, Notice No. 86-41, Comments of the Air Line Pilots, Association. [Hereinafter "ALPA-1986".]

ineffective and a poor investment. ALPA explained that the profession of piloting tends to self-select a "proud" body of men and women who are "concerned about health and safety."[144]

The brief cited statistics showing that over a ten year period of "4376 deceased pilots, . . . only 28 — or approximately 6/10 of 1 percent — had evidence of illegal drugs in their bodies."[145] The ALPA brief mathematically posited that in a statistical operation such as drug testing, with a systematic error relatively high with respect to the number of true positive results, the number of false positives will greatly exceed the true positives found.[146] Considering the consequences of a false positive test result — legally, financially, and with respect to the employer, a patently unjust situation occurs. Considering the enormous cost of the drug-testing program,[147] the action is unreasonable.

ALPA, in turn, presented its own alcohol and drug program, which had had a 93% long term success rate of rehabilitating 800 (primarily) alcohol-dependent pilots.[148] The program (Human Intervention and Motivation Study Program - "HIMS") teaches co-workers to identify the signs of alcoholism and drug-abuse. It then orchestrates an intervention by co-workers, family, an airline representative, and a physician to urge the pilot to seek and accept treatment.[149]

As ALPA described, "[t]he HIMS program works because it is compassionate and nonpunitive, because it is implemented by the pilots themselves, because it puts management, government, and labor into a cooperative relationship, and because it emphasizes education and rehabilitation rather than testing and enforcement".[150] ALPA admonishes the FAA by asserting that a drug-testing program which may simply identify the abuser is problematic: "[s]ooner or later he will end up in some other job or situation where he can cause harm to himself or to others . . . . Thus, some form of rehabilitation is essential — not only for the sake of the employee, but also for the sake of society."[151]

In *Bluestein v. Skinner*,[152] the Ninth Circuit upheld the FAA order for random drug testing. The *Bluestein* court reasoned that in light of the fact that drugs had been found in the bodies of pilots involved in two airplane crashes, and since "the harm that can be caused by an airplane crash is surely no less than the harm that might be caused by drug impair-

144. ALPA-1986, *supra* note 143, at 9.
145. *Id.*
146. *Id.* at 9-11 and Appendix A.
147. ALPA estimated the total cost to be $280 million or more per year. *Id.* at 17.
148. *Id.* at 19.
149. *Id.* at 18.
150. *Id.* at 19.
151. *Id.* at 21.
152. Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990).

ment in the course of Custom Service employment,"[153] then the drug testing program was at least as valid as the one in *Von Raab*.[154] The Ninth Circuit concluded this even though the Custom Service's testing followed five days notice and the testing mandated by the FAA was random.[155]

ALPA has recently argued in a brief to the Department of Transportation that the implementation of the drug testing program produces manifestly unfair results.[156] The brief recommends the following: split testing to provide fewer false positives and viable defenses in the occurrence of an alleged false positive; a 0.04% minimum level for reporting and sanctions due to test inaccuracies; and a medical review to validate the test and explore possibilities of inadvertent ingestion and explainable false-positives.[157]

Additionally, ALPA urges the FAA to modify the rule which holds a superior liable for the substance abuse of a subordinate, even if the subordinate was never observed by the superior.[158] Another standard that ALPA contests involves the sanctioning of employees based on "an appearance of alcohol misuse."[159] ALPA points out that this practice can lead to obvious abuse by a disgruntled co-worker, supervisor, or even contractor.[160] ALPA asserts that random drug testing should be abolished, but if it is not, that the maximum random testing should not exceed 10% of employees for all substances combined.[161]

The war on drugs may be the direct cause of the erosion of Fourth Amendment rights.[162] The expansion of the 'special needs' exception, from possessions to people in *Skinner*, "completely eliminates the prob-

153. *Id.* at 456.

154. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

155. Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990).

156. Before the Department of Transportation, In the Matter of: Proposed Rulemaking Limitation on Alcohol Use by Transportation Workers; Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities; Procedure for Transportation Workplace Drug and Alcohol Testing Programs, Comments of the Airline Pilots Association, Docket No. 48513 and Docket No. 25148 and Notice No. 92-19.

157. Such as due to alcohol in pastries or the consequence of metabolic changes effected by sanctioned medication. *Id.* at 16-22.

158. *Id.* at 25-27.

159. *Id.* at 21.

160. *Id.* at 22. In this instance, a pilot must rush to have a blood sample taken to clear his/her name - if there is an opportunity. *Id.*

161. *Id.* at 35.

162. Andrea Lewis, *Comment, Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOKLYN L. REV. 1013, 1016, 1019 (1990). *See also* Loree L. French, *Note, Skinner v. Railway Labor Executives' Association and the Warrant-Probable Cause Requirement: Special Needs Exception Creating a Shakedown Inspection?*, 40 CATH. U.L. REV. 117 (1990).

able cause requirement for civil searches."[163] Testing individuals without probable cause or a search warrant can have dire consequences. The results of such testing can result in revelations to others, including employers, insurance companies, or police, or even to the individual about sensitive matters such as the existence of prescription drugs in their body, pregnancy, diabetes, or even that that individual has contracted the AIDS virus.[164] Any of these revelations can have dire consequences on one's insurance, employment or peace of mind.

Four possible types of testing exist: preemployment, post-accident, random, and with probable cause.[165] Certainly, random testing is the most invasive of an individual's rights.[166] Random drug testing involves enormous and "exorbitant" costs, yet results in minimal results.[167] The DOT estimates costs to be $1.34 billion over 10 years with a detection rate of less than one half of one percent of those tested.[168] ALPA recommends that if there were a rash of drug-induced pilot-caused casualties, Congress mandate post-accident testing rather than permit the FAA's random drug testing program.[169]

## VIII. Police Aerial Investigation

In *Dow Chemical Co. v. United States* (*Dow Chemical*),[170] the EPA inspected a 2000 acre chemical plant owned by DOW Chemical Co. (Dow Chemical). When Dow Chemical denied a request for a second inspection by Environmental Protection Agency (EPA) enforcement personnel, rather than seek an administrative search warrant, the EPA employed "a commercial aerial photographer, using a standard, floor-mounted, precision aerial mapping camera, to take photographs of the facility from 12,000, 3,000, and 1,200 feet."[171]

163. *Lewis, supra* note 162, at 1025 (citing Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting (quoting New Jersey v. T.L.O., 469 U.S. 325, 357-358 (1985) (Brennan, J. concurring in part and dissenting in part))).

164. *Id.*, n.115 at 1037. Lewis points out that during 1985-1987, in addition to the drug screening tests of all applicants to the Washington D.C. police department, the department was secretly testing all female applicants for pregnancy. *Id.* (citing McNulty, *Bush Urges Spot Drug Tests*, Chicago Tribune, Apr. 9, 1989, at 1).

165. *Lewis, supra* note 162, at 1040. Lewis refers to "reasonable" cause rather than "probable" cause.

166. *Id.* at 1041.

167. Carroll E. Dubuc, Jacqueline Fitzgerald Brown, *Drug Testing in Aviation: The Double Standard Continues*, 21 Trans. L.J. 43, 87-88 (1992).

168. *Id.*

169. *Id.* at 83-90.

170. Dow chemical Co. v. United States, 476 U.S. 227 (1986).

171. *Id.* at 229.

Chief Justice Burger delivered the opinion of the Supreme Court, holding that the warrantless EPA investigation of Dow Chemical was allowed under the Fourth Amendment.[172] Burger explained that since environmental standards can not be enforced in a library, and since the area observed did not fall under the protection of a person's curtilage (it was an "industrial curtilage", something rather closer to an "open field"),[173] this investigation was more like one conducted by the naked eye from an airplane or a neighboring hill. Dow also argued that this invasion of its privacy would be precluded by trade secret law.[174] The Court held that the needs of a government agency are not comparable to unfair competition under state trade secret laws which would preclude such a search.[175] The Court appeared to distinguish the enhanced sense of sight utilized by aerial surveillance from the extended sense of hearing formed in wiretapping as precluded by *Katz*. Nevertheless, the search did not fall under Fourth Amendment protections. "We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."[176]

In *California v. Ciraolo*,[177] the companion case to *Dow Chemical*, the Supreme Court found that a warrantless aerial search of the curtilage of a home surrounded by two fences was not an invasion of the owner's expectation of privacy. After an anonymous tip that Ciraolo was growing marijuana plants in his backyard, and after the police could not see them over two fences, six feet and ten feet high, the Santa Clara police secured a private plane and photographed ten-foot tall plants from an altitude of 1,000 feet above ground level using a 35 millimeter camera.[178] The Court held that there was no Fourth Amendment violation, in part because the police officers had violated no FAA rules in their flight, and thus were legally permitted to be in the airspace where the observations and photographs were made.[179]

In dissent, Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, questioned whether aerial surveillance could be justified by the mere fact that it took place in legally navigable airspace.[180] "A home is a place in which a subjective expectation of privacy virtually always will

172. *Id.* at 227.
173. *Id.* at 235-239.
174. *Id.* at 231.
175. *Id.* at 231-32.
176. *Id.* at 239.
177. California v. Ciraolo, 476 U.S. 207 (1986).
178. *Id.* at 209.
179. *Id.* at 213.
180. *Id.* at 216-17.

be legitimate."[181] Furthermore, "[w]arrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this rule."[182]

In *Florida v. Riley*,[183] the Court extended its permissive rulings on aerial searches. It determined that a helicopter surveillance at an altitude of 400 feet above a greenhouse, within the curtilage of a mobile home, was not unreasonable under the Fourth Amendment. Justice White explained that such flights at 400 feet were legal, not sufficiently rare as to raise questions about the reasonable expectations of privacy, nor low enough to reveal intimate details of the subject's life.[184] Justice O'Connor suggested a possibility that the Court may limit surveillance flights to no lower than 400 feet, below which reasonable expectations of privacy may be invaded.[185] But Justice Brennan, dissenting, quoted George Orwell's *1984*:

> In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[186]

## IX. Conclusion

In conclusion, the Fourth Amendment impacts nearly all aspects of flight. Flight impacts the entire fabric of life in modern society. The aviation industry is a viable laboratory to test the reaches of our extant freedom and a paradigm for the pervasive advances of technology that could not have been envisioned by the framers.

A direct consequence of the growth of technology is the increasing sophistication and insidiousness of criminal activity. Dissenting in *Terry v. Ohio*,[187] Justice Douglas proclaimed:

> To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

* * * *

181. *Id.* at 220 (citing United States v. Karo, 468 U.S. 705, 713-15 (1984)).

182. *Id.* at 225 (quoting United States v. Karo, 468 U.S. 705, 717 (1984)).

183. Florida v. Riley, 488 U.S. 445 (1989).

184. *Id.*

185. *Id.* at 451.

186. *Id.* at 466 (Brennan, J., dissenting, quoting George Orwell, Nineteen Eighty-Four 4 (1949)).

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

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.
>
> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.[188]

Thus, aviation can be seen to be directly affected by the Fourth Amendment. The Fourth Amendment is defined and delimited by the exigencies and technologies of the modern world, particularly as characterized by aviation. Aviation, by providing fast, safe transportation to the citizens of the world, by providing a platform to view the earth and its inhabitants as never before envisioned by our ancestors, and by providing a means to shrink the globe such that international borders are only hours away, can be seen to directly impact the interpretation of the Bill of Rights of the United States Constitution and thus define the reaches of liberty.

Justice Brandeis has explained: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[189]

With regard to the Fourth Amendment, the United States government, at times, I submit, appears to be divided, if not confused. "We must never forget . . . that it is a constitution we are expounding."[190]

Exceptions to the Fourth Amendment abound. For example, "[t]he three exceptions to the warrant requirement applicable to sniff searches are the consent exception, the search incident to a valid arrest exception, and the exigent circumstances exception."[191] A 1992 law review essay stated, regarding the Bill of Rights, "I felt certain that the promise of these decisions (cases in the 1960s) could only be embellished upon and never seriously eroded. Boy was I wrong!"[192]

Perhaps to save the Fourth Amendment, the Supreme Court must interpret it in a binary analysis. One commentator, Professor Craig Bradley, posits two models of the Fourth Amendment:[193] either (1) abandon

188. *Id.* at 38-9 (Douglas, J., dissenting).

189. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

190. *Id.* at 471 (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)).

191. William F. Timmons, *Comment, "Re-examining the Use of Drug-Detecting Dogs Without Probable Cause"*, 71 GEO. L.J. 1233, 1249 (1983).

192. J. Steven Becket, *Essay on the Bill of Rights: Whatever Happened to the Bill of Rights? A Criminal Defense Lawyer's Perspective*, 1992 U. ILL. L. REV. 213, 214 (1992).

193. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

all particularized guidelines for the application of the Fourth Amendment and simply require the police to be "reasonable" at all times, using a tort law form of reasonableness, or (2) require that a warrant always be required for every search and seizure "when[ever] it is practicable to obtain one."[194] Professor Bradley notes that, as the Fourth Amendment stands, the law is confusing, replete with exceptions, and hard to apply.[195]

Current Fourth Amendment theology is replete with balancings of public and private interests. This is nowhere more apparent then in aviation, where the public interest of the safety of the masses of people relying on air travel is balanced against the interests of the privacy of the individual. Professor T. Alexander Aleinikoff, in a law review articles, states that law, whether it is formed by Congress or judge-made, reflects the values of society. "A judge is to give effect in general not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind."[196] The professor concludes that "balancing is not inevitable. To balance the interests is not simply to be candid about how our minds, — and legal analysis — must work."[197] Balancing is too simplistic to deal with the rich textures of constitutional imperatives, and has become "rigid and formulaic. It gives answers but fails to persuade. . . . Constitutional law is suffering in the age of balancing."[198]

In recent times, the decision was made to wage a war on drugs.[199] The opinions of the Supreme Court have pendulum swung from the liberalism of the Warren Court to the reformation of the Rehnquist Court.[200] Whereas the Warren Court placed a premium on individual rights, the Rehnquist Court has reversed priorities, placing the Fourth Amendment ban on unreasonable searches and seizures at the bottom of the hierarchy, and the "belief that the ultimate mission of the criminal justice system is to convict the guilty and let the innocent go free" at the apex.[201] Both extremes reflect the needs defined by our society - to be free and to be free from debilitating crime. It may be that a 'war on drugs' is incompatible with a Fourth Amendment as envisioned by our forefathers. Pro-

194. *Id.* at 1471. This second model allows for telephone and voice recorded warrants where necessary. *Id.* Were this adopted, mobile fax warrants would be feasible!

195. *Id.* at 1472-75.

196. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 974 n. 195 (1987) (quoting B. CARDOZO, THE Paradoxes of Legal Science 55 (1928)).

197. *Id.* at 1001.

198. *Id.* at 1005.

199. Lewis, *supra* 1019 n.24-25 (1991) (citing, for example, *President Reagan's Radio Address to the Nation*, WEEKLY COMP. PRES. DOC. Oct. 2, 1982, at 1249, 1250 and Exec. Order No. 12,564. 3 C.F.R. 224 (1986), reprinted in 5 U.S.C. § 7301 app. at 220 (1988)).

200. CHARLES H. WHITEBREAD AND CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 1.02 at 4 (1993).

201. *Id.*

fessor Charles Whitebread points out that of all the Constitutional rights, only a Fourth Amendment right can be voluntarily waived (e.g. a 'consensual' search at the airport) without knowing that one possessed that right.[202]

It is at this time, before the millennium, that we must evaluate the direction that our country is targeted to follow: whether we as a people find the erosion of Fourth Amendment rights to be reasonable and necessary for our evolution, or whether we as a nation are capable of living healthy lives with the heightened responsibility that obtains, without 'big brother' always looking over our shoulders.

Nowhere is there found a better stage to define the limits and parameters of the Fourth Amendment than in those areas of life touched upon by aviation, flying, the natural and inevitable paradigm of freedom itself. Two thirds of a century ago Justice Brandeis declared:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[203]

Perhaps our society is too immature, too weak-willed, to prone to the violence of terrorism and the decadence of drug abuse to enjoy the visions of liberty promised by the Framers. Or perhaps, more enlightened prevention and rehabilitation programs, as those of ALPA[204] are not only less likely to infringe on the civil liberties of the Constitution and the Bill of Rights, but also are more pragmatic and effective than the war on drugs. We, the people, must decide.

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202. *Id.*
203. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
204. *See* discussions relating to ALPA, *supra*, at 29-30.