St. Mary's Law Journal

Volume 6 | Number 1 Article 13

3-1-1974

Airport Security Measures Allow Warrantless Search of Checked Luggage.

Robert M. Spurlock

age employee. The question remains, was there a possibility that one or two employees did not perceive the distinction and considered the signing of the cards as tantamount to a vote for the union? In an election as close as the one in the instant case, such an occurrence would indeed have an "appreciable effect" on the outcome of the election.

Derek Bok, a noted authority in labor law, states that there are three basic questions an employee must ask in deciding whether or not to support a union:

> Are the conditions within the plant unsatisfactory? To what extent can the union improve on these conditions? Will representation by the union bring countervailing disadvantages as a result of dues payments, strikes, or bitterness within the plant?[58]

The *Savair* decision deals with the last of these questions and concludes that the waiver of initiation fees precludes employees from arriving at a rational decision free from extraneous and unwarranted interference. The effect of the decision is to provide employees with the opportunity to accurately assess the disadvantages of joining the union unhampered by the extraneous consideration of whether to join the union before or after the election so as to avoid the disadvantage of paying an initiation fee. In invalidating this long accepted union practice, the Supreme Court has set a specific guideline by which unions are to conduct their activities during representative elections.[59] The decision makes it clear that the portion of Section 7 of the National Labor Relations Act which gives employees the right to refrain from union activities should be enforced to the same extent as is that part of section 7 which gives employees the right to organize bargaining units. By granting equal importance to both aspects, the right to organize and the right to refrain from organizing, the Court has moved further toward the goal of insuring greater impartiality in union elections.

William R. Garmer

CRIMINAL LAW—Search and Seizure—Airport Security Measures Allow Warrantless Search of Checked Luggage

United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973).

Donald A. Cyzewski and James P. Herbert were preparing to board an

58. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38, 49 (1964).

59. The decision does not preclude a labor union from abolishing initiation fees across the board; it merely requires that if the union has initiation fees then it cannot waive them for a particular election. NLRB v. Savair Mfg. Co., — U.S. —, —, 94 S. Ct. 495, 500-01, 38 L. Ed. 2d 495, 504 (1973).

Eastern Airlines flight at Tampa International Airport when they were designated by the ticket agent as "selectees" under the Federal Aviation Administration's Behavior Pattern Profile for distinguishing potential aircraft hijackers. When asked for identification by United States Marshals, they produced only an airline ticket bearing the names J. Scalzi and J. Daly and explained that their identification papers were in luggage which had been checked for loading aboard their flight. The deputies instructed the airline to retrieve the luggage and took Herbert and Cyzewski to the marshal's office at the airport. When their luggage arrived at the office, both defendants produced identification bearing their real names. They refused to permit inspection of the luggage, but agreed to magnetometer checks. The magnetometer detected no metal on Herbert's person but metal was detected when he passed through the device with his bag. Herbert stated that the only metal objects in his bag were buckles on a pair of shoes, and offered to be subjected to the magnetometer test again after the shoes were removed. Without receiving a reply from the marshals, he unzipped the bag and placed his hand inside it. At this point the bag was taken from him and found to contain five pounds of marijuana. The district court, in a pretrial hearing, suppressed as evidence the five pounds of marijuana and the government appealed.[1] Held—*Reversed.* Airport security measures are reasonable insofar as they permit government agents to determine whether a suspect presents an immediate danger to air commerce. The search may continue until the law enforcement official is satisfied that no harm will come from allowing the passenger to board the plane. This includes the retrieval of checked baggage from the airplane and the warrantless search of it, if this is necessary to clearly establish the suspect's innocence to the officers.[2]

Airport searches have rapidly developed into a major exception to the requirement of a search warrant based upon probable cause for a government search of private property.[3] In an effort to thwart hijackings, the government and the airlines have developed a method of screening all persons

1. 18 U.S.C. § 3731 (1970), allows an appeal by the United States to a court of appeals from a district court order suppressing evidence in a criminal proceeding where jeopardy has not attached.

2. United States v. Cyzewski, 484 F.2d 509, 513-14 (5th Cir. 1973).

3. The fourth amendment 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.

U.S. CONST. amend. IV. Some recognized exceptions to the warrant requirement include (1) searches incident to a lawful arrest, Chimel v. California, 395 U.S. 752, 763 (1969); (2) "hot pursuit" of a suspected criminal, Warden v. Hayden, 387 U.S. 294 (1967); (3) danger of destruction of known evidence, Schmerber v. California, 384 U.S. 757 (1966); (4) searches to which the subject has given his consent, Zap v. United States, 328 U.S. 624 (1946); (5) the "automobile exception," Carroll v. United States, 267 U.S. 132 (1925).

who travel aboard commercial airlines in the United States.[4] Basically, the system consists of a "hijacker personality profile" containing characteristics common to past hijackers,[5] a magnetometer search,[6] and, if warranted by these screenings, a request for identification and a frisk by a law officer. Current Federal Aviation Administration regulations require that all passengers be subjected to a magnetometer search and that all carry-on luggage be searched prior to boarding.[7]

In the first case to uphold the constitutionality of this system, *United States v. Lopez*,[8] the federal district court relied on the protective "stop and frisk" procedure held to be constitutional in *Terry v. Ohio*.[9] The *Terry* decision held that an officer with reasonable grounds for believing that a crime has been committed and that the suspect may be armed and dangerous, may conduct a narrowly limited search of the individual even though there is no probable cause for an arrest.[10] There are two requirements for this type of warrantless search: first, there must be "specific and articulable facts" which justify a belief that the suspect may be armed,[11] and secondly, the search must be limited in scope to what is necessary to accomplish its justification.[12] In *Lopez* the defendant was designated as a selectee on the basis of the psychological profile and he was frisked when he was unable to produce proper identification. The heroin discovered in the frisk was suppressed as evidence because the airline had destroyed the objectivity of the profile by eliminating one approved criterion and adding two unauthor-

4. The methods of anti-hijack screening have differed from time to time and among different airlines. For a detailed discussion of the application of these procedures, see United States v. Lopez, 328 F. Supp. 1077, 1082-85 (E.D.N.Y. 1971); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1040-41 (1971); Note, *The Antiskyjack System: A Matter of Search—or Seizure*, 48 Notre DAME LAW. 1261, 1262-66 (1973).

5. *See* United States v. Lopez, 328 F. Supp. 1077, 1082-85 (E.D.N.Y. 1971). The particular characteristics contained in the profile are necessarily secret. A consideration of the characteristics conducted *in camera* in *Lopez* found the profile to be a "highly effective procedure for isolating potential hijackers." *Id.* at 1086. For a commentary on the profile by the psychologist who is primarily responsible for developing it, see Dailey, *Development of a Behaviorial Profile for Air Pirates*, 18 VILL. L. REV. 1004 (1973).

6. The magnetometer is a device for detecting the presence of metal. It can be calibrated to flash a warning light when a person carrying the amount of metal in a small pistol passes through its magnetic field. United States v. Bell, 335 F. Supp. 797, 801 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir. 1972).

7. Emergency order of F.A.A., Dept. of Transp. Press Release No. 103-72 (Dec. 5, 1972), reprinted in part in United States v. Davis, 482 F.2d 893, 902 n.25 (9th Cir. 1973). *See* 14 C.F.R. §§ 107, 121.538 (1973). The order for mandatory search procedures came at the direction of the President in response to two particularly violent and dangerous hijackings. 37 Fed. Reg. 25934-935 (1972).

8. 328 F. Supp. 1077 (E.D.N.Y. 1971).

9. 392 U.S. 1 (1968).

10. *Id.* at 30.

11. *Id.* at 21.

12. *Id.* at 19-20, 25-26.

ized characteristics,[13] but the system itself was upheld as a reasonable and necessary means of preventing hijackings.

The *Terry* reasoning has been the most significant basis for upholding airport searches involving the anti-hijacking system.[14] In *United States v. Epperson*,[15] it was held that the use of a magnetometer constituted a search within the meaning of the fourth amendment, but that "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."[16] When Epperson did not satisfactorily explain a high magnetometer reading, a frisk which revealed a loaded pistol was "entirely justifiable and reasonable under *Terry*."[17] Another aspect of the *Terry* reasoning was recognized in *United States v. Kroll*,[18] where a search of carry-on luggage was rendered invalid because it "exceeded the scope of the search permissible under the circumstances."[19] At the airline boarding gate Kroll was ordered to open the file section of his attache case, where an envelope containing a small quantity of amphetamine was discovered. The court found that given the state of the art of miniaturization existing when the incident occurred, a search of the envelope was unreasonable.[20] This is consistent with the *Terry* principle that the scope of a warrantless search must be reasonably related to the circumstances which justify it.

The Court of Appeals for the Fifth Circuit has, within the last year, developed its own line of airport-search cases. These decisions have both lowered the threshold of suspicious conduct required to inititate a *Terry* search and increased its permissible scope. In *United States v. Moreno*[21] a search

13. United States v. Lopez, 328 F. Supp. 1077, 1101-02 (E.D.N.Y. 1971). One of the added characteristics contained an ethnic element which the court felt raised equal protection problems, and the second added element required the individual judgment of the airline employee. Thus, the initial reason for conducting the search lacked the "essential neutrality and objectivity of the approved profile." *Id.* at 1101.

14. United States v. Fern, 484 F.2d 666, 668-69 (7th Cir. 1973); United States v. Moreno, 475 F.2d 44, 47 (5th Cir.), *cert. denied*, 42 U.S.L.W. 3196 (1973); United States v. Bell, 464 F.2d 667, 672-74 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1973); United States v. Epperson, 454 F.2d 769, 772 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); United States v. Lindsey, 451 F.2d 701, 703 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972); United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971); *cf.* United States v. Ruiz-Estrella, 481 F.2d 723, 729-30 (2d Cir. 1973); United States v. Meulener, 351 F. Supp. 1284, 1292 (C.D. Cal. 1972). *Contra*, United States v. Davis, 482 F.2d 893, 905-08 (9th Cir. 1973). The Court of Appeals for the Eighth Circuit has held in several cases that searches of luggage conducted *by airline employees for the airline's own purposes* are private searches, and thus beyond the reach of the fourth amendment. *See, e.g.*, United States v. Echols, 477 F.2d 37, 39-40 (8th Cir.), *cert. denied*, 42 U.S.L.W. 3195 (1973).

15. 454 F.2d 769 (4th Cir.), *cert denied*, 406 U.S. 947 (1972).

16. *Id.* at 771.

17. *Id.* at 772.

18. 481 F.2d 884 (8th Cir. 1973).

19. *Id.* at 886.

20. *Id.* at 887 & n.4.

21. 475 F.2d 44 (5th Cir.), *cert. denied*, 42 U.S.L.W.3196 (1973).

which revealed heroin was upheld even though the defendant had not been designated as a selectee according to the behavioral profile, had not been subjected to a magnetometer search, and had not presented himself for boarding at an airline gate.[22] The court ignored the neutrality of the profile designation which was emphasized in *United States v. Lopez*[23] and the less intrusive magnetometer search for weapons, and stated that "the airport, like the border crossing, is a critical zone in which special fourth amendment considerations apply."[24] Moreno's nervousness (he changed waiting lines several times at one ticket counter and finally changed airlines, and he seemed especially apprehensive about a bulge in his coat), and the lies he told concerning his destination in a taxicab trip and the date of his arrival in San Antonio were deemed sufficient to justify a search *when viewed in the context of the aircraft hijacking menace.*[25]

The most important aspect of the *Moreno* decision is the extent of the search which is now apparently authorized to effect airport security.[26] The court recognized that "modern technology has made it possible to miniaturize to such a degree that enough plastic explosives to blow up an airplane can be concealed in a toothpaste tube."[27] This capability on the part of hijackers, coupled with the court's statement that the primary purpose of the search is not to protect the officers conducting it but to protect airline passengers,[28] could be used to justify a search considerably more extensive than a *Terry* pat-down search.

Several months after the *Moreno* decision, the court, in *United States v.*

---

22. The importance of these distinctions is made clear in United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973), where "mere suspicion" is held sufficient to uphold a boarding-gate search.

23. 328 F. Supp. 1077 (E.D.N.Y. 1971).

24. United States v. Moreno, 475 F.2d 44, 51 (5th Cir.), *cert. denied*, 42 U.S.L.W. 3196 (1973).

25. *Id.* at 50-51.

26. The actual search of Moreno was only slightly more than a pat-down search. His coat was removed for a search of its pockets. *Id.* at 50-51.

27. *Id.* at 49. The court in United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972), *aff'd*, 481 F.2d 884 (8th Cir. 1973), where a search valid at its inception was held illegal because of its scope, held that a general search was authorized to prevent a passenger from carrying a weapon aboard an airplane, and that a general search would allow inspection of only "that which may *reasonably* be deemed to conceal a weapon or explosives." *Id.* at 153. Thus, a search of an envelope found in an attache case was held to be unreasonable. This decision, however, was expressly limited to the state of technology that existed at the time of the search. The court felt "that miniaturization of explosives . . . [might] invalidate the principles expressed in its opinion." United States v. Kroll, 481 F.2d 884, 887 n.4 (8th Cir. 1973), *quoting* an amendment to the district court's decision.

28. United States v. Moreno, 475 F.2d 44, 51 (5th Cir.), *cert. denied*, 42 U.S.L.W. 3196 (1973). This is consistent with the language in *Terry* that an officer may conduct a limited search "for the protection of himself *and others* in the area . . . ." Terry v. Ohio, 392 U.S. 1, 30 (1968) (emphasis added). *Contra*, United States v. Davis, 482 F.2d 893, 906-07 (9th Cir. 1973).

Skipwith,[29] gave definition to the comparison of airport searches to border searches made in *Moreno* by holding:

> [W]hile *Moreno* established that searches of certain persons in the general airport area are to be tested under a case-by-case application of the reasonableness standard, . . . those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion.[30]

The panel which decided *Skipwith* weighed three factors in arriving at this conclusion: public necessity, efficacy of the search, and degree of intrusion. With a reference to the *Moreno* decision and the dangers of air piracy discussed there, a search conducted to discover the nature of a bulge in Skipwith's pocket was upheld. The court also rejected Skipwith's contention that a limited form of the exclusionary rule should apply to airport searches where drugs are discovered, since the search was not intended to discover drugs and could not have been conducted for that purpose.[31]

While the courts have been fairly consistent in applying the *Terry* reasoning to air security searches, at least one court has taken a different approach. The Court of Appeals for the Ninth Circuit has rejected the stop-and-frisk rationale as inapposite to airport searches[32] and instead, has adopted the standards for "administrative" searches as appropriate for the airport security system.[33] The court found the purpose in conducting air passenger searches to be in furtherance of a general regulatory scheme "to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings."[34] An important element in this approach is that a person must be given an opportunity to avoid the search by electing not to board the aircraft. This is necessary to limit the search to what is required to satisfy the administrative need which justifies it.[35]

The *Cyzewski* decision is expressly recognized by the Court of Appeals for the Fifth Circuit as going a step beyond any previously sanctioned airport security search. Defendants' checked luggage was retrieved from the

---

29. 482 F.2d 1272 (5th Cir. 1973).

30. *Id.* at 1276. *See* Note, 71 COLUM. L. REV. 1039, 1050-52 (1971), for a discussion of the applicability of customs searches to the airport security system.

31. United States v. Skipwith, 482 F.2d 1272, 1277-79 (5th Cir. 1973). Aldrich, J., in his dissenting opinion advocates the suppression of "proceeds towards which the search was not, and could not have been independently, directed." *Id.* at 1280.

32. United States v. Davis, 482 F.2d 893, 905-08 (9th Cir. 1973).

33. *Id.* at 908.

34. *Id.* at 908.

35. *Id.* at 910-12; *accord*, United States v. Meulener, 351 F. Supp. 1284, 1288-91 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972); *see* United States v. Ruiz-Estrella, 481 F.2d 723, 728-29 (2d Cir. 1973). *Contra*, United States v. Skipwith, 482 F. 2d 1272, 1277 (5th Cir. 1973). Judge Aldrich terms the right-to-leave argument a "heads-I-win, tails-you-lose" proposition. *Id.* at 1281 (dissenting opinion).

airplane and searched—bags to which they could not have had access during the flight even if they had contained weapons. The justification for this encroachment upon traditional fourth amendment protections is the "ubiquitous hijacking menace."[36] The court was forced to stray from the original *Terry* reasoning which allowed a protective warrantless search based on specific facts,[37] and instead to rely on the "prophylactic purpose of the security system: . . . to thwart potential hijackings by deterrence."[38] There can be no doubt that deterring hijacking attempts by giving notice to airline passengers that they are subject to a search is an important aspect of the security system. Deterrence, however, cannot be used as the justification for a search when there is no reasonable relation between the search and preventing a hijacking.

To accomplish the protective purpose of an airport search, the court could have required that Cyzewski and Herbert be subjected to a magnetometer test and frisk before being allowed to board. Since this procedure would have obviated any armed hijacking attempt by the "suspects," it should have been sufficient, under the *Terry* rationale, to allow them to continue on their way. The procedure followed in the search of defendants' checked luggage appears to go beyond even the court's own expansive interpretation of the reasonableness of an airport search:

> Airport security measures are reasonable . . . insofar as they permit government agents to determine whether a suspect presents an immediate danger to air commerce. The search may continue until the law enforcement official satisfies himself that no harm would come from the passenger's boarding. . . . Only when it becomes unreasonable for the suspect's innocence to be further questioned does the security search itself become unreasonable.[39]

Judge Thornberry, dissenting in *Cyzewski*, states: "Unless the nexus between the checked luggage and the danger of air piracy is established, the 'protective search' rationale cannot be properly used to uphold a checked luggage search."[40]

In several other recent cases involving the search of baggage at airports,[41] convictions for the possession of narcotics were overturned despite the fact that the officers had probable cause to conduct a search. The court rejected these cases as authority for the *Cyzewski* decision because they are unre-

36. United States v. Cyzewski, 484 F.2d 509, 511 (5th Cir. 1973).

37. In the language of the Supreme Court "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry v. Ohio, 392 U.S. 1, 19 (1968).

38. United States v. Cyzewski, 484 F.2d 509, 514 (5th Cir. 1973).

39. *Id.* at 513-14.

40. *Id.* at 518 (dissenting opinion).

41. United States v. Lonabaugh, — F.2d — (5th Cir. 1973); United States v. Soriano, 482 F.2d 469 (5th Cir. 1973); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973).

lated to antihijacking security measures, but they bear a strong similarity to the situation faced by the deputies after attention was focused upon Herbert's and Cyzewski's luggage. These decisions hold that officers were justified in seizing the suitcases, but that a warrant was constitutionally required before they could be searched. It should be emphasized here that the deputies in *Cyzewski* were operating with considerably less than probable cause,[42] but even assuming that the suspicion created by the defendants could justify a search, a warrant should have been required before it was carried out.[43] Judge Thornberry cautions that increased reliance upon the dangers of hijacking has caused an inversion of fourth amendment values. The need for "security" has allowed search, rather than privacy, to become the norm.[44]

The Court of Appeals for the Fifth Circuit has moved along a continuum in a series of decisions, using each case upholding a warrantless airport search as a steppingstone to further extend the range of permissible intrusion. The result, culminating in the instant case, is that the airport has become an area where there are virtually no fourth amendment restrictions on searches conducted in the name of hijack prevention. "Exigent circumstances" have allowed officers to conduct warrantless searches under certain carefully defined circumstances, but a warrant has been consistently required where there were no circumstances which made obtaining a warrant unreasonable. Under the "airport exception," the standard for initiating a search has been diluted to mere suspicion. In addition, the determination of the permissible scope of the search now rests with the officer conducting it,[45] rather than being "strictly tied to and justified by" the reason for its inception.[46]

In a decision subsequent to *Cyzewski*, the court indicates that the precedent of approving a checked luggage search will not be followed blindly.[47] In that case, Michael Palazzo and his traveling companion had attracted the attention of a deputy marshal by their nervous appearance, by an exchange of money in the waiting room, and other suspicious conduct. Marshal Granados' suspicions were further aroused when a search of Palazzo revealed two baggage claim stubs, after he claimed he had no luggage. Since no weapons were discovered in thorough personal searches of the men, they

42. The court appears to have relied in part on the defendant's refusal to permit an inspection of the bags as justification for the search. United States v. Cyzewski, 484 F.2d 509, 514 (5th Cir. 1973).

43. *Id.* at 518 (dissenting opinion). See United States v. Palazzo, 488 F.2d 942, 947 (5th Cir. 1974).

44. United States v. Cyzewski, 484 F.2d 509, 517-18 (5th Cir. 1973) (dissenting opinion).

45. "Only when it becomes unreasonable for the suspect's innocence to be further questioned does the security search itself become unreasonable." *Id.* at 514.

46. Terry v. Ohio, 392 U.S. 1, 19 (1968).

47. United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974).