SEARCH AND SEIZURE—SEARCH OF POTENTIAL AIRLINE PASSENGER AND HIS IMMEDIATE POSSESSIONS DOES NOT VIOLATE FOURTH AMENDMENT WHERE CONSENT OF PERSON TO BE SEARCHED IS FIRST OBTAINED.—*United States v. Davis* (9th Cir. 1973).

On March 16, 1971, the defendant checked in at San Francisco International Airport intending to board a TWA flight for Bangkok, Thailand, with an intermediate stop in Los Angeles. As the defendant approached the loading gate, a TWA employee told him a search would have to be made. The employee simultaneously reached for the defendant's briefcase, opened it, and found a gun. A United States Customs Security agent was summoned and the gun was turned over to him. The security agent and a United States deputy marshall led the defendant to a nearby room and searched his person.

The defendant was charged with a minor offense, attempting to board an aircraft while in possession of a concealed deadly or dangerous weapon.[1] He pled not guilty and moved to suppress the evidence as obtained by means of an unreasonable search and seizure. At a hearing before a United States magistrate the motion was denied on a finding of implied consent and the defendant was found guilty. The district court affirmed. On appeal, *held*, reversed and remanded. Searches conducted as part of an airport screening program "are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft."[2] A remand is necessary to determine whether the defendant consented to the search. *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973).

In response to the first hijacking of an American commercial aircraft in 1961,[3] Congress made air hijacking and other related activities federal crimes.[4] Authority was conferred upon the Federal Aviation Administrator to prescribe "such reasonable rules and regulations, or minimum standards, governing other practices, methods and procedures, as the Administrator may find necessary to provide adequately for national security and safety in air commerce."[5] The number of attempted hijackings increased in the late 1960's, reaching a peak of forty in 1969, thirty-three of which were successful. In 1970 there were twenty-six attempts on American planes and in 1971 twenty-

1. 49 U.S.C. § 1472(1) (1970).
2. United States v. Davis, 482 F.2d 910-11 (9th Cir. 1973).
3. *See* J. AREY, THE SKY PIRATES 49-55 (1972) [hereinafter cited as AREY]. For a table showing all hijacking attempts from 1930 to mid-1971, see AREY, at 315-54. For a general summary of the history of hijacking in the United States, *see* McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORD. L. REV. 293, 294097 (1972) [hereinafter cited as McGinley & Downs].
4. 49 U.S.C. § 1472(i)-(m) (1970), *as amended* 49 U.S.C.A. § 1472(i)-(m) (1972 Supp.).
5. 49 U.S.C. § 1421(a)(6) (1970).

seven attempts. In the first eight months of 1972 there were twenty-nine attempts, of which eight were successful.[6]

In February, 1969, the FAA began an investigation of new methods of preventing air hijackings.[7] The most important aspects of the system that was developed included the use of a "profile" of the average potential hijacker,[8] the use of a magnetometer to detect the presence of metal on a passenger, an identification check and questioning of the passenger, and finally a weapons search of the passenger and his carry-on luggage.[9] This system was put into operation at airports all over the nation. On December 5, 1972, in response to the need for stricter controls, the FAA ordered that searches of all carry-on luggage and magnetometer screening of all passengers be instituted by January 5, 1973.[10] The constitutionality of searches resulting from airport security procedures has been the subject of consideration in a number of decisions.

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[11]

Only those searches and seizures which are unreasonable are forbidden under the Constitution.[12] The fourth amendment requires that whenever possible an "impartial magistrate should make the initial determination whether probable cause exists to justify an intrusion upon the sanctity of the person or the home."[13] The United States Supreme Court, however, has recognized certain well established exceptions to the warrant requirement.[14]

As a practical matter, time limitations preclude the obtaining of a search warrant for airport searches.[15] Therefore, to be constitutionally valid, either a new exception to the warrant requirement must be established or the search must be found to fit within one of the recognized exceptions. The circumstances surrounding an airport search do not, in the typical case, justify a warrantless search as "incident to a lawful arrest,"[16] as involving "hot pursuit,"[17]

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6. *See* McGinley & Downs, *supra* note 3, at 294-95.
7. *See* AREY, *supra* note 3, at 234.
8. The "profile" is a compilation of certain attributes believed to be exhibited by potential hijackers. It is based on a study of the behavioral characteristics of known air hijackers. United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).
9. *See, e.g.*, United States v. Lopez, 328 F. Supp. 1077, 1082-84 (E.D.N.Y. 1971); McGinley & Downs, *supra* note 3, at 301-06; AREY, *supra* note 3, at 234-46.
10. *See* Department of Transp. Press Release No. 72-72, Aug. 1, 1972, *cited in* United States v. Davis, 482 F.2d 901-02 n.24 (9th Cir. 1973).
11. U.S. CONST. amend. IV.
12. United States v. Moreno, 475 F.2d 44, 50 (5th Cir. 1973).
13. *Id.* at 49. *See also, e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1968).
14. *See The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 193 (1968). *See also e.g.*, Vale v. Louisiana, 299 U.S. 30, 35 (1970); Terry v. Ohio, 392 U.S. 1, 20 (1968); Katz v. United States, 389 U.S. 347, 357 (1967).
15. United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971).
16. *See* Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950).
17. *See* Warden v. Hayden, 387 U.S. 294 (1967).

or because of a need for immediate action to prevent the destruction of evidence.[18] Prior to *United States v. Davis*,[19] with few exceptions,[20] the courts that had considered the issue had found the most appropriate exception to be the "stop and frisk" doctrine authorized by *Terry v. Ohio*.[21]

In *Terry* an experienced police officer became suspicious of two men whose actions led him to believe they were "casing" a robbery and might be armed. The officer approached the men on the street, identified himself and asked for their names. When they mumbled something in return, he spun the defendant around and patted down his outer clothing, finding a pistol. The defendant was charged with carrying a concealed weapon and was convicted.[22] The United States Supreme Court rejected the defendant's contention that the weapon was seized by means of an unreasonable search. The Court decided that in the interest of effective law enforcement and for the protection of the investigating officer and others, the officer may conduct a limited pat-down search for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[23] The investigating officer must be in possession of specific and articulable facts which would convince a man of reasonable caution that the action taken was appropriate.[24]

The concept of reasonable suspicion expressed by the *Terry* Court was first applied to airport searches in *United States v. Lopez*.[25] Defendant Lopez had fit the "profile," activated the magnetometer, and had failed to produce adequate identification. A federal marshall searched his outer clothing and found heroin. While the search was held invalid because an ethnic characteristic had been used in the "profile,"[26] the court upheld the constitutionality of the anti-hijacking system when properly used. Based on the *Terry* doctrine, the court stated that in determining the reasonableness of the airport procedure a reviewing court should consider the facts then available to the law enforcement officer, the probability that the suspect was armed and dangerous, and whether that probability justified the "frisk" in light of the degree of intrusion and the risk of harm to the officer and others.[27]

In *United States v. Bell*,[28] the defendant was searched after he had matched the behavioral "profile," activated the magnetometer, and had identified himself as being free on bail on criminal charges. The court relied on

18. *See* Schmerber v. California, 384 U.S. 757 (1966).
19. 482 F.2d 893 (9th Cir. 1973).
20. *See* United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973) (either consent or "compelling circumstances" is required); United States v. Clark, 475 F.2d 240 (2nd Cir. 1973) (same); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972) (either probable cause or consent required for luggage search).
21. 392 U.S. 1 (1968).
22. State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).
23. Terry v. Ohio, 392 U.S. 1, 27 (1968).
24. *Id.* at 21-22.
25. 328 F. Supp. 1077 (E.D.N.Y. 1971).
26. *Id.* at 1101.
27. *Id.* at 1097.
28. 464 F.2d 676 (2nd Cir. 1972).

Chief Justice Warren's statement in *Terry* that there is " 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' "[29] Since the need to prevent hijackings is substantial and the invasion of the defendant's privacy was "insignificant," the search was upheld as reasonable.[30] In *United States v. Epperson*,[31] a personal frisk based on nothing more than the activation of the magnetometer was held reasonable. The court decided that the use of the magnetometer was justified because the governmental interest involved outweighed the relatively slight invasion of privacy.[32] The subsequent frisk was reasonable in light of the information developed by the magnetometer.[33] The Third Circuit Court of Appeals in *United States v. Lindsey*,[34] decided that due to the "enormous consequences which may flow" from an airplane hijacking, "the level of suspicion required for a *Terry* investigative stop and protective search should be lowered."[35] A recent case in the Fifth Circuit took a similar interpretation of the *Terry* standard, stating that "reasonableness does not require that officers search only those passengers who meet a profile or who manifest signs of nervousness or who otherwise appear suspicious."[36] In another case decided the same day, the Fifth Circuit Court of Appeals recognized that an airport search could be greater in degree than the "frisk" authorized by *Terry*.[37] Unlike *Terry*, reasonableness does not always require the federal officer to limit himself to a "pat-down" search.[38]

The cases, discussed above, have upheld airport searches only by increasingly broad interpretations of the *Terry* doctrine. *Terry* dealt with a street confrontation between a citizen and a policeman. The Supreme Court authorized a limited weapons search only when the investigating officer personally observed unusual conduct which reasonably led him to believe that criminal activity could be imminent and that the suspect involved might be armed and dangerous.[39] The justification for the search is the "protection of the police officer and others nearby" from immediate assault.[40] Therefore, the search is limited in scope to a patting down of the outer clothing in an attempt to discover weapons.[41] Airport searches of handbags and other carry-on luggage would seem to fall outside the scope of a *Terry* "frisk." Moreover, the fact that airport searches are conducted not for the immediate protection of the

29. Terry v. Ohio, 392 U.S. 1, 21 (1968) *quoting* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).
30. United States v. Bell, 464 F.2d 667, 674 (1972).
31. 454 F.2d 769 (4th Cir. 1972).
32. *Id.* at 771.
33. *Id.* at 772.
34. 451 F.2d 701 (3rd Cir. 1971).
35. *Id.* at 703.
36. United States v. Skipworth, 482 F.2d 1272, 1276 (5th Cir. 1973).
37. United States v. Legato, 480 F.2d 408, 411 (5th Cir. 1973).
38. *Id.* at 411. *But see*, United States v. Ruiz-Estrella, 481 F.2d 723 (2nd Cir. 1973).
39. Terry v. Ohio, 392 U.S. 1, 29-30 (1968).
40. *Id.* at 29. *See also* 392 U.S. at 24, 26, 27, 30.
41. *Id.* at 30.

officer or other bystanders, but for the protection of airplane passengers, removes the hijacking situation from the realm of self-protective searches.

The Supreme Court in *Terry* also emphasized that the right to conduct the search is premised on the officer's possession of "specific and articulable facts" which warrant a belief that the suspect is armed and dangerous.[42] "Inarticulate hunches" are not sufficient.[43] The courts basing their decision on *Terry* have relied on the use of the "profile," the magnetometer and identification checks to supply the necessary "specific and articulable facts." This reliance is open to some question. The "profile" is nothing more than a compilation of behavioral characteristics thought to be exhibited by hijackers. It has been admitted that the value of the "profile" lies more in deterrence than in detection.[44] The magnetometer cannot detect weapons made of material other than metal and it cannot distinguish ordinary metal objects from metal weapons. Because it will react to a variety of metal objects carried by passengers, it is activated by approximately fifty percent of all those who pass by it.[45] With regard to identification checks, it can hardly be said that everyone who cannot furnish adequate identification has an intent to hijack a plane. It is not surprising that ninety-four percent of the persons searched under the anti-hijacking system were found not to be carrying weapons at all.[46] It would not seem unreasonable under these circumstances to characterize the officer's belief as nothing more than a hunch. When the requirement of "specific and articulable facts" establishing reasonable cause is removed from the *Terry* standard, it would be a short step toward allowing government agents to stop and search anyone in a high crime area.

Rather than accept a standard which has become meaningless when taken out of its original context, the Ninth Circuit Court of Appeals, in *United States v. Davis*,[47] adopted a rationale much more appropriate to airport searches. The court held that "airport screening searches of the person and immediate possessions of potential passengers for weapons and explosives are reasonable under the fourth amendment provided each prospective boarder retains the right to leave rather than submit to the search."[48] A similar type of "consent" requirement had been expressed in a previous case, *United States v. Meulener*.[49] In that case the defendant, who had met the "profile" and had activated the magnetometer, was ordered by a deputy marshall to open his suitcase. The search revealed narcotics. The marshall did not ask what was in the suitcase before searching it, nor did he conduct an initial pat-down of the

42. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.
43. 392 U.S. 1, 22 (1968).
44. Interview with Frank Cardman, Director of Security, Pan American World Airways, *cited in* AREY, *supra* note 3, at 242.
45. United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971).
46. *Id.* at 1084.
47. 482 F.2d 893 (9th Cir. 1973).
48. *Id.* at 912.
49. 351 F. Supp. 1284 (C.D. Cal. 1972).

defendant's outer clothing. The district court held that the defendant's fourth amendment rights were violated when he was not informed of his right to avoid the search by not boarding the plane.[50] The court recognized that in "appropriate circumstances" the *Terry* standard would justify an airport search, but the use and scope of such a search is strictly limited by the requirements set out in the *Terry* decision.[51] When these requirements are not met, an airport search is justified only if incident to a lawful arrest or if consent can be established.[52]

The *Davis* decision does not state what constitutes effective consent. However, reference was made to a recent United States Supreme Court decision, *Schneckloth v. Bustamonte*,[53] where it was stated:

> [T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.[54]

Whether the potential passenger's consent must be express or may be implied from the circumstances is not decided in *Davis*.[55] However, it is apparent that consent must be freely and voluntarily given and mere "acquiescence to a claim of lawful authority" is not sufficient.[56]

The "consent" rationale advanced by the *Davis* court is a welcome departure from prior case law for a number of reasons. First, the decision is in complete accord with the recent FAA directives requiring all passengers and their carry-on luggage to be screened.[57] Since everyone is certain to be searched before they can board a flight, the chances of successful hijacking are greatly reduced. Second, because the search procedure is indiscriminate, the decision to search a particular passenger is not "subject to the discretion of the official in the field."[58] This reduces the possibility of the screening procedure being used for purposes of harassment or discrimination against a particular person or group. Third, the "consent" doctrine eliminates much of the uncertainty surrounding the *Terry* rationale. A vague constitutional standard does not afford a great deal of protection. The "consent" rationale will lead to more consistent application in the field and more consistent decisions in the courts.

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50. *Id.* at 1286.
51. *Id.* at 1289.
52. *Id.* at 1287.
53. 93 S. Ct. 2041 (1973).
54. *Id.* at 2047-48.
55. In *Davis* the court recognized that warning signs, pre-boarding announcements and the screening procedure itself may justify an inference that the defendant was willing to submit to a search. This determination was the subject of the remand to the lower court. 482 F.2d at 914.
56. Bumper v. North Carolina, 391 U.S. 543, 549 (1968).
57. *See* Department of Transp. Press Release No. 72-72, Aug. 1, 1972, *cited in* United States v. Davis, 482 F.2d 901-02 n.24 (9th Cir. 1973).
58. Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

Furthermore, the "consent" rationale is consistent with the constitutional right to travel. It has long been recognized that the right to travel without unreasonable government interference is a constitutionally protected right.[59] However, this right is by no means absolute. The right to use the highways is restricted by licensing requirements and obligations to pay tolls and the right may be removed for failure to comply with highway safety regulations. Passport requirements also restrict travel but are justified by considerations of national security.[60] These examples illustrate instances where restrictions may be put on the right to travel, provided the restrictions are "necessary to promote a compelling governmental interest."[61]

The potentially catastrophic consequences of hijacking certainly give the government a "compelling" interest in protecting the public. Airport screening searches are both reasonable and necessary in promoting this interest.[62] The "consent" procedure adopted in *Davis* avoids the necessity of stretching the *Terry* doctrine to cover airport searches and provides an effective method of combatting air hijacking. Rather than restricting the public's right to travel, the *Davis* decision represents a step toward insuring that those who do travel will travel safely.

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59. "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

60. Zemel v. Rusk, 381 U.S. 1 (1965).

61. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

62. *See* 49 U.S.C. § 1511 (1970) which provides: "Subject to reasonable rules and regulations prescribed by the Administrator, [of the Federal Aviation Administration] any air carrier is authorized to refuse transportation to a passenger . . . when, in the opinion of the air carrier, such transportation . . . might be inimical to safety of flight."

WILLS—COLLISION INSURANCE PROCEEDS RESULTING FROM ACCIDENT WHEREIN DECEDENT WAS KILLED AND DECEDENT'S AUTOMOBILE, WHICH WAS THE SUBJECT OF A SPECIFIC BEQUEST IN DECEDENT'S WILL, WAS TOTALLY DESTROYED, PASS TO THE SPECIFIC LEGATEE AND THERE IS NO ADEMPTION OF THE BEQUEST OF THE VEHICLE.—*In re Estate of Wolfe* (Iowa 1973).

Testator, by his will, bequeathed to his brother any automobile which he owned at the time of his death. Testator was fatally injured in an automobile accident on June 6, 1971. His automobile, a 1969 Buick Electra, was rendered a total loss. Pursuant to a settlement agreement, the insurance proceeds were paid to the executor of testator's estate. A dispute arose regarding whether the insurance proceeds should be distributed to the specific legatee or to the residuary legatee. The district court awarded the insurance proceeds to the specific legatee; the residuary legatee appealed. *Held,* affirmed. The automobile insurance proceeds from the accident wherein the automobile, which had been the supporting personalty of a specific bequest in testator's will, was totally destroyed, pass to the specific legatee. There is no ademption of the bequest of the vehicle. *In re Estate of Wolfe,* 208 N.W.2d 923 (Iowa 1973).

The traditional rule of ademption[1] is that when real or personal[2] property which has been specifically given under a will is later destroyed or disposed of so that it does not exist as part of the testator's estate at the time of his death, nothing else may be substituted for that which was originally given.[3]

In re Wright's Will,[4] a New York case, exemplifies what has been termed the "identity" theory of the doctrine of ademption. Under the identity theory, the testator's intention is not considered when deciding the question of ademption.[5] Rather, the bequest fails and the legatee takes nothing if the specifically bequeathed property has been given away, sold, or destroyed during the testator's lifetime.[6] Applying this rule, the Oklahoma supreme court in *In re Barry's Estate*[7] held that, though the testatrix died within eight hours after the automobile collision, the legatee of the specifically bequeathed automobile was entitled to receive only the salvage value of the vehicle and not the proceeds

1. Stake v. Cole, 257 Iowa 594, 599, 133 N.W.2d 714, 716 (1965) (defining ademption as "a taking away").
2. Newbury v. McCammant, 182 N.W.2d 147, 150 (Iowa 1970) (noting that both real and personal property are equally subject to ademption).
3. Stake v. Cole, 257 Iowa 594, 599, 133 N.W.2d 714, 716 (1965); *In re* Estate of Bierstedt, 254 Iowa 772, 775, 119 N.W.2d 234, 236 (1963); *see* Warren, *The History of Ademption,* 25 IOWA L. REV. 290 (1940).
4. 7 N.Y.2d 365, 165 N.E.2d 561, 197 N.Y.S.2d 711 (1960).
5. *See* 6 BOWE-PARKER: PAGE ON WILLS § 54.15 (New Rev. Treatise 1962). Page, *Ademption by Extinction: Its Practical Effects,* 1943 WIS. L. REV. 11.
6. *In re* Wright's Will, 7 N.Y.2d 365, 368, 165 N.E.2d 561, 562, 197 N.Y.S.2d 711, 713 (1960); *see* Warren, *The History of Ademption,* 25 IOWA L. REV. 290, 314 (1940).
7. 208 Okla. 8, 252 P.2d 437 (1952).