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MEMORANDUM FOR THE HONORABLE
Egil Krogh, Jr.
Deputy Assistant to the President

Re: Random Searches to Prevent Skyjacking

Introduction

This is in response to your memorandum of August 8, 1972, inquiring about possible constitutional problems presented by a proposal to conduct random searches of the personal effects and carry-on baggage of a certain percentage of boarding airline passengers. We understand that such searches might include an exterior pat-down ("frisk") for weapons.

The present FAA system for deterring and detecting potential hijackers has been sustained over constitutional objections. United States v. Lopez, 328 F. Supp. 1077 (S.D.N.Y. 1971). Its essential features are as follows. All boarding passengers are screened against a "profile" based on physical and behavioral characteristics of known hijackers, and all are required to pass through a magnetometer. About 1 percent of the passengers fit the profile, and half of these activate the magnetometer. Those who both fit the profile and activate the magnetometer (called "selectees") are taken aside and questioned. If the questioning does not dispel suspicion, they are asked to submit to a frisk, to which they usually assent.

We understand that the present FAA system is quite effective, but that it is not uniformly employed by the airlines, due primarily to shortages of trained personnel, lack of equipment, and reluctance to offend passengers and delay flights. We do not know whether the proposed random

searches would supplement or supplant the FAA system, or whether they are being considered as an interim measure pending further refinement and implementation of the FAA system. As discussed below, these factors would bear upon the constitutionality of the proposed random searches.

Summary of Conclusions

1. Random searches of carry-on baggage, purses, and similar containers, not including frisks of the person, stand a good chance of surviving constitutional attack. Assuming feasibility, such searches could be conducted of all boarding passengers.

2. Frisking the person of all or a random number of boarding passengers would be of doubtful constitutionality. Resolution of this question would depend largely upon whether the present FAA system or similar techniques, fully implemented, prove to be ineffective. If so, body frisks might be sustained, at least as an interim measure.

Preliminary Considerations

Before discussing the basic constitutional question--whether warrantless searches of boarding airline passengers are "reasonable" within the meaning of the Fourth Amendment--two possible ways of avoiding that question warrant consideration. First, the Fourth Amendment's prohibition of unreasonable searches applies only to the federal and State governments; it does not apply to the airlines acting alone, as private commercial enterprises. Thus, if the proposed searches were not required by federal law and were not performed by federal employees, it could at least be argued that the Fourth Amendment has no application. We seriously doubt, however, whether the constitutional problem can be avoided under this approach. In determining questions of Fourth Amendment applicability in this context, the courts would undertake a realistic assessment of the situation, looking through form to substance. See, e.g., Corngold v. United States, 367 F. 2d 1 (C.A. 9,

1966) For example, the fact that federal law did not require the searches would not be determinative. A showing that the federal government was encouraging, financing, or otherwise substantially participating in a search program in the highly regulated airlines industry would probably subject that program to Fourth Amendment limitations. Cf. Lombard v. Louisiana, 373 U.S. 267 (1963). In view of the airlines' failure, to date, fully to implement the present FAA system, it would probably require considerable prodding from the federal government before a meaningful search program would be undertaken. We believe, therefore, that the proposed search program would be deemed subject to the Fourth Amendment.

Second, there is the possibility of waiver of Fourth Amendment rights by passengers who consent to search. See Zap v. United States, 328 U.S. 642 (1946). The consent concept is not wholly unrealistic in this context, since most airline passengers have a practical (if not wholly satisfactory) alternative to air travel. Generally speaking, those who do not wish to submit to a search may travel by ship, train, bus, or car. However, the courts have traditionally viewed waivers of constitutional rights with skepticism. The burden is on the government to prove that an alleged voluntary consent was "unequivocal, specific and intelligently given." United States v. Smith, 308 F. 2d 657, 663 (C.A. 2, 1962). Under these relatively stringent tests, a recitation of consent printed on the airline ticket would not suffice. A consensual search system would need to employ a signature form directed expressly to the search, which would, of course, entail significant administrative inconveniences. And even under such a system, "consent" would be artificial in many situations. Businessmen who have come to rely on jet travel, and others who need to get someplace in a hurry, would have no real choice but to sign the consent form. Thus, in a variety of situations, it might be claimed that consent was not voluntarily given, and some such claims might well be sustained. Since it would be desirable to establish a uniform system realistically applicable to all passengers, we do not believe that the system should rest exclusively on consent.

"Reasonableness" of Warrantless Searches to Prevent Skyjacking

The Fourth Amendment to the Constitution prohibits "unreasonable searches and seizures." The Amendment requires that the government, ". . . whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio, 392 U.S. 1 (1968). And warrants may only be issued upon a showing of probable cause to believe that a crime has been committed. The warrant procedure is, of course, not feasible with respect to the proposed random searches. The need for immediate action precludes prior application for a warrant, see Carroll v. United States 267 U.S. 132 (1925), and, by hypothesis, no showing of probable cause could be made with respect to any particular airline passenger picked at random, as distinguished from a "selectee" under the present FAA system. Indeed, there will be no objective basis for suspicion--let alone probable cause--with respect to about 99 percent of those picked at random for search.

Supreme Court decisions have, however, delineated a few situations in which warrantless searches are deemed "reasonable" and therefore constitutional. The Court applies a balancing test, weighing the governmental interest allegedly justifying the search against the personal invasion it entails. See Terry v. Ohio, supra. In balancing these interests, many factors should be taken into account, including the seriousness of the offense, the extent of the search, the degree of community stigma attached to the search, activities of the suspect, and similar factors. See United States v. Lopez, supra at 1094, and authorities cited. Although there appear to be no judicial decisions directly analogous to the random search procedure contemplated here, application of these general balancing principles suggests that a persuasive argument can be made in support of searches of hand luggage, purses, etc., not including a body frisk. Body frisk procedures would raise more difficult questions.

The reasonableness argument would turn largely on the following considerations:

1. Seriousness of the offense. A single act of air piracy threatens death to scores of helpless people. We need not belabor the point, since the courts have recognized the gravity of the offense and the magnitude of the current problem. See, e.g., United States v. Epperson, 454 F. 2d 769 (C.A. 4, 1972). Supreme Court decisions have not, generally speaking, articulated the principle that tests of probable cause or suspicion, and degrees of official intrusion based upon them, vary under the Fourth Amendment depending upon the seriousness of the offense. Under the decided cases, the quantum of proof required for probable cause to search a suspected chicken thief appears to be the same as that required for a suspected assassin. Justice Jackson, joined by Justices Frankfurter and Murphy in a dissenting opinion in Brinegar v. United States, 338 U.S. 160, 180, 183 (1949), deplored this failure to differentiate in these words--

> [I]f we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

Justice Jackson's kidnapping example, while presenting a stronger justification for a search, has obvious parallels to the proposed airline searches.

Recent commentary supports the view that seriousness of the offense should be a major consideration in determining Fourth Amendment reasonableness (see e.g., LaFave, "Street Encounters and the Constitution," 67 Mich. L. Rev. 40, 57 (1968); Player, "Warrantless Searches and Seizures," 5 Geo. L. Rev. 269, 277 (1971)), and that concept is implicit in the Court's 1968 Terry decision. We believe that the present Supreme Court would attach significant weight to the seriousness of air piracy in assessing the reasonableness of searches designed to detect and deter it.

2. Slight justifiable expectations of privacy. The Fourth Amendment has come to be viewed as a protection for "justifiable" expectations of privacy. Such expectations are strong with respect to the home, most places of personal business, telephone conversations, and the like. Justifiable expectations of privacy decrease in relation to narrow areas of activity in which a person is not required to engage, and in which he knows, in advance, that his privacy will not be respected. Just last term, the Supreme Court sustained warrantless, non-consensual searches of the business premises of gun dealers, noting that they posed "only limited threats to the dealer's justifiable expectations of privacy." United States v. Biswell, No. 71-81, 40 U.S. Law Week 4489 (1972). So here, although it is somewhat artificial to say that all prospective travelers seeking to board an airplane with knowledge of federal search requirements thereby "consent" to search, the substantial element of choice in modes of travel lessens the air traveler's justifiable expectations of privacy, particularly in view of the prevalence of air piracy today and the need for an effective detection system.

3. Lack of resulting social stigma. Virtually all judicial decisions involving searches and frisks have involved persons suspected of commiting crimes. In this context, searches, particularly frisks, are typically viewed by the courts as degrading and humiliating experiences. See, e.g., Terry v. Ohio, supra at 16. This is

especially true with respect, for example, to an on-the-street frisk, where one citizen is singled out, stopped and handled by the police in the presence of others, because implicit in the procedure is an accusation of criminal conduct which becomes known in the community. There would be no comparable humiliation involved in searches of a random number or of all airline boarding passengers, so long as the general public knows of the random procedure--i.e., there would be no implicit accusation of crime by virtue of the search. Indeed, one court has observed that the average passenger is likely to view search procedures as a "welcome reassurance of safety." United States v. Epperson, supra at 772.

4. Extent of the search. This is a critical factor in assessing reasonableness. In our judgment, a search of carry-on baggage, purses, etc., not including a body search, would be viewed by the courts as a limited and justifiable intrusion under the circumstances, and therefore constitutional. There is, however, a considerable difference between looking in passengers' briefcases and purses and patting them down, armpit to groin. There is likely to be a strong emotional reaction by many people against body frisk procedures, and therefore the courts would view such procedures with real concern.

5. Availability of effective and less drastic procedures. Courts are more likely to find random search procedures "reasonable" if they can be persuaded that they are essential. Thus, common sense would lead the courts to accept the need for searches of effects and body frisks, if no other effective detection technique is reasonably available. Since air piracy is a carefully planned affair, and since a random search policy limited to effects would be publicly known, a search of effects alone would be relatively useless. Potential skyjackers would conceal weapons on their persons.

In this connection, the effectiveness of the present FAA system, if fully implemented, would be of crucial importance. Under that system, less than 1 percent of boarding

passengers are searched. The Lopez court describes the system as "highly effective in narrowing the group which needs particular attention," and notes that "no flight fully protected by the program has been hijacked." 328 F. Supp. at 1084. We do not know the extent to which the FAA system has been implemented, and are in no position to evaluate its effectiveness. However, both questions would be raised and searchingly explored in constitutional challenges to random search techniques. If it were shown that full implementation of the FAA system would detect, say, 90 percent of the potential hijackers, random body frisks would probably be held unconstitutional. In the nature of things, no detection system will be perfect, and it seems unlikely that random searches would be as much as 90 percent effective. Because of the much less intrusive nature of searches of effects, they might be upheld as a reasonable supplement to the FAA procedure, but, as noted earlier, they would be relatively useless without a body frisk.

It is possible that random searches, including body frisks, might be upheld as interim measures pending full implementation of the FAA system. Should practical considerations--e.g., lack of equipment and trained personnel--preclude such implementation for another year or two, use of random search procedures in the meantime might well be sustained.

Although we have found no directly analogous precedents for the proposed random search procedures, a few related precedents and established practices lend some support to their validity. Since 1789, customs officials have been authorized to conduct without probable cause full searches of persons entering the United States. This authority has been extended in some cases to searches of body cavities, by probing or administration of emitics, although recent decisions have begun to place limits on such searches. See United States v. Guadalupe-Garza, 421 F. 2d 876 (C.A. 9, 1970). It is not uncommon to search all persons seeking to attend trials of criminals where there is reason to anticipate violence. Similarly, some prisons and jails presumably search visitors before they are allowed to see

certain inmates. Apparently, such reasonable security precautions have not been challenged in the courts.

"Random" searches can be conducted in various ways. While it is theoretically possible to search every third or fifth boarding passenger, such a system would be difficult to enforce in practice. The person presenting himself in that order may turn out to be a child or quite elderly, and the clerk on duty might reasonably skip him. And the considerable milling around that occurs at airport gates would further complicate efforts to enforce a true random system. Owing to these factors, we would be concerned that an allegedly "random" system would, in practice, degenerate into searches at the whim of the clerk at the gate. Some of them might actually restrict their attentionnto blacks, hippies, etc. The court in United States v. Lopez, supra, dismissed indictments on constitutional grounds because the FAA's "neutral and objective" profile had been perverted by the airline's adding an ethnic element, and authorizing subjective judgments by the clerk on the line. In view of these possible problems, consideration should be given to searching everyone on flights picked at random, rather than attempting to search some people at random on all flights.

Many of the judicial decisions which appear to raise the most serious doubts about the proposed random searches, particularly decisions requiring adoption of less intrusive procedures where constitutional rights are involved, were rendered by the Warren court. In our judgment, the Supreme Court, as presently constituted, would be significantly more receptive to the proposed searches than the Court of four years ago.

The Department's Criminal Division has reviewed this question independently and has supplied us with a staff memorandum. Our conclusions are in substantial agreement.

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