

RETHINKING SEARCH AND SEIZURE IN A POST-9/11 WORLD

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In 2007, I presented a paper to the International Society for the Reform of Criminal Law in Vancouver, British Columbia, where I argued that 9/11 was responsible for many of the significant post-9/11, pro-Government Fourth Amendment decisions. My primary focus was upon three cases: *Hiibel*,¹ *Hudson*,² and *Harris*.³ Subsequently, the *Elon Law Review* published my remarks as a brief essay.⁴

Today, upon reflection, I have come to believe that 9/11 may not have been primarily responsible for all of these decisions. Rather, they may more likely be attributable to the proclivities of the Supreme Court, and, at least some may well have come out the same way if 9/11 had never occurred. This essay is divided into two parts. In Part I, I shall discuss the extent that I now believe 9/11 was responsible for our post-9/11 decisions. In Part II, I shall discuss what our reasonable expectations at airports ought to be.

I

Starting with *Hudson*,⁵ I have come to believe that 9/11 had little or nothing to do with the decision. *Hudson* was a decision not to take the exclusionary rule seriously. Its

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¹ *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

² *Hudson v. Michigan*, 547 U.S. 586 (2006).

³ *Scott v. Harris*, 550 U.S. 372 (2007).

⁴ Arnold H. Loewy, *Search and Seizure in a Post-9/11 World*, 1 *ELON L. REV.* 181 (2009).

⁵ *See generally Hudson v. Michigan*, 547 U.S. 586 (2006).

rationale was frighteningly simple. It goes something like this: If the exclusionary rule applies in a no-knock situation, the police are likely to be extra careful in their duty to knock. Hence, some may knock even when it is not necessary and thus risk losing evidence that could quickly be destroyed, or perhaps even risk being killed.

Is this rationale related to 9/11? Well, perhaps. It is certainly plausible that the Court was worrying about deterring the police from catching terrorists. So, by giving the police added incentive to violate (or at least play fast and loose with) the knock-and-announce rule, it would be easier to catch terrorists. But, I am inclined to believe that the Court was far more general in its view of the case. It appears to me that it simply weighed the value of creating incentive to take the knock-and-announce rule seriously against the potential loss of evidence and plausible danger to the police,⁶ and decided the Fourth Amendment interests lose.

In belatedly reaching this conclusion, I give more emphasis to the exclusionary rule trend that preceded *Hudson* by more than three decades. As early as 1974, in *United States v. Calandra*,⁷ the Court began applying a cost/benefit analysis to exclusionary rule questions. And, more often than not, the Court overstated the cost or understated the benefit, or both, when applying the exclusionary rule.

To be sure, prior to *Hudson*, the Court had never held that a bad faith violation of a known Fourth Amendment duty failed to trigger the exclusionary rule.⁸ So for that reason, coupled with the Court's incredibly gross undervaluing of the importance of police taking the Fourth Amendment (including

⁶ I say plausible because I think it is highly unlikely that if the police actually followed the rule (as, ironically, they did in *Hudson*), which requires reasonable suspicion that the evidence might be destroyed or that the suspect possesses a weapon, there is any need to dispense with the knock-and-announce rule.

⁷ *United States v. Calandra*, 414 U.S. 338, 348-49 (1974).

⁸ In fact, the violation in *Hudson* was not a bad faith violation. Indeed, I seriously doubt that it was a violation at all (but for the State's ill-advised concession that there was a violation). Nevertheless the opinion was written in such a way that it covers bad faith violations. Of course, the Court had previously given its blessing to good faith exceptions to the exclusionary rule. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984).

the knock-and-announce rule) seriously,⁹ I do view *Hudson* as something of a jurisprudential disaster. Nevertheless, I am now inclined to think that it was not a 9/11-caused jurisprudential disaster.

This conclusion is buttressed by the more recent case of *Herring v. United States*,¹⁰ where the Court required more than a negligent error to trigger the exclusionary rule. In *Herring*, a case as unrelated to 9/11 as one could imagine,¹¹ the Court continued its excessive refusal to apply the exclusionary rule by arguing that the cost of the rule was too great because it freed a criminal due to the constable's blunder.

Two things about *Herring* stand out. First, under the exclusionary rule, the criminal would not have gone free because of the constable's blunder. Rather, he would have gone free because had the constable not blundered, the criminal never would have been arrested in the first place; i.e., if the police clerk had cleared her docket appropriately, the arresting officer would not have heard of Herring's erroneous arrest warrant, and he would not have arrested him.¹² Second, 9/11 had little, if anything, to do with the result.

Hiibel is a case that more clearly is related to 9/11. Decided just two and a half years after the 9/11 tragedy, the Court held that one upon whom there is reasonable suspicion must identify himself.¹³ The problem with the case was not so much the duty of a suspicious person to identify himself as it was the person's understanding of why he was being asked for identification. Although the Court emphasized the suspect's almost taunting the police by asking to be arrested, it never

⁹ See Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH L. REV. 1 (2010).

¹⁰ *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

¹¹ A police officer bent on arresting a man who had come to the station to claim property, first asked his clerk if there were any arrest warrants outstanding on the man. Upon hearing there were none, he asked her to check with the clerk of the neighboring county, who found that there was one. Acting on that information, the officer arrested the man and found illegal weapons and drugs. The warrant turned out to have been recalled and thus was not currently valid. The error was that of a police clerk. *Id.* at 698.

¹² See Loewy, *supra* note 9, at 8-9.

¹³ *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

came to grips with the police officer's refusal to answer the suspect's question of why he wanted identification.

One cannot read the Supreme Court's opinion without a sense that a policeman's ability to obtain identification from a suspicious person is a paramount need that should cause all else to yield. Even more clearly, the Nevada Supreme Court opinion reeked of 9/11:

Most importantly, we are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled. Terrorism is "changing the way we live and the way we act and the way we think." During the recent past, this country suffered the tragic deaths of more than 3,000 unsuspecting men, women, and children at the hands of terrorists; seventeen innocent people in six different states were randomly gunned down by snipers; and our citizens have suffered illness and death from exposure to mail contaminated with Anthrax. We have also seen high school students transport guns to school and randomly gun down their fellow classmates and teachers. It cannot be stressed enough: "This is a different kind of war that requires a different type of approach and a different type of mentality." To deny officers the ability to request identification from suspicious persons creates a situation where an officer could approach a wanted terrorist or sniper but be unable to identify him or her if the person's behavior doesn't rise to the level of probable cause necessary for an arrest."¹⁴

So, I am inclined to still believe that *Hiibel* is largely attributable to 9/11.

*Scott v. Harris*¹⁵ is somewhere in between. To be sure, yielding to authority, and not running from it, seemed far more important to the Court than it did in the pre-9/11 opinion of

¹⁴ *Hiibel v. Sixth Jud. Dist. Ct.*, 59 P.3d 1201, 1206 (Nev. 2002) (footnotes omitted).

¹⁵ *Scott v. Harris*, 550 U.S. 372 (2007).

Tennessee v. Garner.¹⁶ On the other hand, some of the Justices seemed to have been swayed by a car chase video,¹⁷ which in Justice Stevens¹⁸ and my view, clouded their judgment. I do think that *Harris*, like *Hiibel*, shows a Court demanding more respect from the citizenry to the police than might have been the case in an earlier world.

So, I do think that *Harris* would have been decided differently without 9/11 and without the video. Although both may have been a factor, I am inclined to give more weight to the video. Still, I do not think that 9/11 was irrelevant.

Perhaps the ultimate reason that I've backed off from blaming 9/11 is due to the cases that have cut in the opposite direction. *Brendlin v. California*¹⁹ unanimously allowed a passenger to have standing to challenge a seizure of an automobile in which he was riding. While entirely consistent with past doctrine, it certainly was not preordained thereby.²⁰

Even more significant, the recent case of *Arizona v. Gant*²¹ overruled (or some would say artificially distinguished) past precedent allowing police to search vehicles incident to a valid arrest. Under the Court's new *Gant* rule, the police would have to have reason to believe that evidence of a crime could be found in a car before the search would be permissible. While a perfectly sensible decision, it runs counter to what one might have suspected, if the ghost of 9/11 were pulling the Court's strings.

So, I have come to conclude that 9/11 may not be as major a factor in the Court's search and seizure decisions as I once believed.

¹⁶ *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁷ A video of the car chase in *Scott v. Harris*, 550 U.S. 372 (2007), was especially powerful for much of the Court, convincing it that the force used to terminate the chase was appropriate.

¹⁸ See *Harris*, 550 U.S. at 395-96 (Stevens, J., dissenting).

¹⁹ *Brendlin v. California*, 551 U.S. 249, 251 (2007).

²⁰ In *Rakas v. Illinois*, the U.S. Supreme Court held that a passenger in an automobile with the permission of the owner could not challenge the constitutionality of a search of that automobile. 439 U.S. 128, 133, 148-49 (1978).

²¹ *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

II

The most obvious place where 9/11 rears its ugly head is in airport searches. Cases like *Florida v. Royer*,²² where we worried about the level of suspicion necessary to search a suitcase at an airport, seem so quaint. In *Royer*, the Court held that in the absence of probable cause to arrest, or consent obtained when the defendant was not detained for too long (and in *Royer*, fifteen minutes was too long), the police could not search Royer's checked luggage. Today, on the other hand, travelers are warned not to lock their checked luggage so that TSA officials will not have to break the lock should they choose to search the checked luggage.

To be sure, there is a difference between the *Royer* search, which was for evidence of crime, and today's TSA searches, which are for ensuring the safety of air travel. But the bottom line is the same. The correct response to the question of how much reasonable expectation of privacy does one have on his checked airline luggage is zero.

Well, is this a good thing? I guess, most reluctantly, I have to say "yes." I know in advance not to put anything in a suitcase that I don't want others to see. By knowing that rule in advance, I am less likely to be embarrassed by the discovery of anything that I strongly do not want strangers to see. Also, the zero expectation of privacy is limited to the TSA. I do not believe that in a case like *Royer* the DEA agents are permitted to search his suitcase without probable cause or consent. Of course, I suspect that in future *Royer*-like cases, the police will simply ask the TSA to "randomly" search the traveler's bag, and that would be the end of it.

Safety is obviously on the government's side of the balance. I am sure that bombs are found in only an infinitesimal number of searched bags. On the other hand, the *in terrorem* effect of these random searches may have deterred some unknown number of would-be bombers. Is it worth the trade-off? Frankly, it's a close call. I am less than thrilled when I arrive somewhere with a suitcase filled with wrinkled clothes, following a TSA search. (For this reason, I try to avoid checking

²² *Florida v. Royer*, 460 U.S. 491, 493-94 (1983).

luggage, even though my “platinum” status with American Airlines lets me check it at no extra charge.) Still, at least for now, I am inclined to think that the safety trade-off is worth it.

I do question the need for shoe removal. So far as I know, there has never been an attempted shoe bomber in the United States. Richard Reid, the famous shoe bomber who caused all this inconvenience, left from Charles De Gaulle Airport in Paris. Ironically, the last time I passed through security at Charles De Gaulle (which was after the attempted shoe bombing), I was *not* required to remove my shoes.

Of course, one could argue that the harm of a shoe bomber is so great that the added inconvenience really is worth the candle. Surely one would not want to be the executive in charge of eliminating the requirement when (if) a successful shoe bombing should occur.²³ Yet, since Reid’s abortive attempt, so far as I know, there has not been another attempt even though few, if any, European Airports practice routine shoe removal, even on international flights.

Some of the post-9/11 airport seizure rules are downright silly. Sometimes soft cheese is confiscated and sometimes it isn’t. A package of dry ice to keep food cold is forbidden, but a package of frozen food, which does the same job, is ok. One cannot bring a bottle of water through security because it could contain a corrosive liquid that could blow up the plane. Ironically, three days before 9/11, I was flying from Dallas to Austin with a bottle of water. Before boarding the plane, the ticket agent asked me to take a drink of water from the bottle. That seems like such a sensible alternative to confiscating the water that I have to wonder why TSA hasn’t thought about it.

Whether the no water rule, along with limited toothpaste size and other annoyances, are actually seizures is a tougher question. The government doesn’t actually seize it, it just doesn’t let you take it on the plane. It seems to me that the government could (and ought to) be more reasonable on things like this. But whether I can find a home for this preference in

²³ I thank Professor William Pizzi of the University of Colorado for this helpful insight.

the Fourth Amendment is surely a closer call that may never be litigated.

The question upon which I would like to focus the remainder of my essay is whether an individual upon being told that he has been randomly chosen to be frisked or to have his bag searched has the option of leaving the airport rather than submitting to the search. In this section, I am not discussing the case of a person whose x-ray triggers a need for an additional search or whose behavior triggers reasonable suspicion. Rather, my focus is on the person who has triggered no suspicion, but is randomly chosen for a further search.

To illustrate, on a flight from Lubbock to Dallas, I was told that I was selected for a random frisk and was asked if I consented. Having previously been told that if I say “no” I wouldn’t be permitted to fly,²⁴ I said, “I don’t consent, but if you think that you have the power to frisk me without my consent, I won’t interfere.” Evidently he so thought, since he conducted the frisk.²⁵

But suppose that I had said, “No, you may not frisk me. I value my dignity too much. I’ll just leave.” Could I have left, and would that have been the end of it? One might think so. The Supreme Court, however, has not yet ruled, and the lower courts (especially the Ninth Circuit of all places) seem to hold that leaving is not an option.

A good testing case is *Torbet v. United Airlines*,²⁶ which straddled 9/11. The facts occurred pre-9/11, but the case itself was decided in 2002. The facts were these: Hugo Torbet, an attorney, attempted to catch a commuter flight from LAX to San Francisco. He willingly allowed his carry-on bag to be x-rayed. The x-rayed disclosed nothing suspicious. Nevertheless, Torbet’s carry-on bag was chosen for a random search. When Torbet refused to consent, policeman Mike Edwards was called, who informed Torbet that his bag was to be searched. Torbet responded that he’d rather leave the airport. Edwards informed

²⁴ Actually, I was first told that on a flight from Melbourne to Brisbane, Australia, but I assumed that the rules were the same in the United States.

²⁵ Thankfully, the frisk was conducted in a less intrusive way than that described in *Terry v. Ohio*, 392 U.S. 1, 16-17 n.13 (1968).

²⁶ *Torbet v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002).

him that leaving was not an option, whereupon Edwards instructed security personnel to search the bag. Finding nothing of interest, Torbet's bag was returned and he was permitted to catch his plane, which he did.

Subsequently, Torbet sued United Airlines, the Board of Airport Commissioners, the City of Los Angeles, Officer Edwards, and fifty unnamed defendants for \$1,000,000 as compensatory and punitive damages for the violation of his Fourth Amendment rights. Apart from whether the damages sought for Torbet's inconvenience and offense may have been a tad pricey, the Court had to ascertain whether Torbet's Fourth Amendment rights had been violated at all. The Court's answer was "no."

The Ninth Circuit agreed that Torbet, and everyone else, had a right to avoid being searched by simply choosing not to fly. The Court held, however, that once Torbet put his bag on the x-ray machine conveyor belt, the functional equivalent of consent to x-ray, he was not free to withdraw his consent. Consequently, the search of his bag was not unreasonable.

But, why couldn't he withdraw his consent? After all, the special need justifying the search is his flying on the plane. If he is willing to give up that opportunity, is there any need to search his bag anyway? The Ninth Circuit said "yes." Its apparent concern was giving potential terrorists safe exit. That is, it did not want to say to the terrorists, "Try sneaking something through the x-ray machine and if you get away with it, blow up the plane, but if they ask to do a hand search of your bag, just leave." So, the potential *in terrorem* effect of a secondary random search may reduce the number of potential hijackers who try it in the first place.

I find myself unpersuaded. Explosives or firearms are highly likely to show up on either an x-ray or a magnetometer. If an explosive can elude both of those, is it likely to be found by a secondary search? Possible, sure. But likely, no. Still, the government can argue that possible is good enough. But to win *Torbet*, it should have to go further. Not only should the government have to establish that possible is good enough to justify a random secondary search, it should establish that the fear of a possible secondary search that cannot be avoided once

the primary search has been conducted has enough of a deterrent effect on terrorists that it is worth the added anguish to travelers who would prefer forgoing travel to being subjected to such a search.

Of course, if *Torbet* had arisen post-9/11, I suppose that it would be clear that all bags are subject to being searched once they have been put on the x-ray machine and that x-rays and hand searches are just alternate ways of accomplishing the same thing. However, a secondary random frisk may present the same issue today.

Let us hypothesize that a fairly sophisticated traveler knows that one out of every ten airline travelers is randomly frisked even though there is nothing suspicious about him.²⁷ Further, let us assume that this particular traveler is quite averse to strangers feeling his body and, like the Supreme Court in *Terry*, does not consider it a “petty indignity.”²⁸ Further, assume that this traveler has purchased a ticket, like *Torbet*, for a commuter flight from Los Angeles to San Francisco. Finally, assume that his purchase is for a flight that will get him to San Francisco several hours before his first business meeting.

Our hypothetical traveler hopes that he will not be the one in ten selected for what he considers a demeaning frisk. But, if he is, he would simply opt to leave the boarding area, lose the value of his ticket, and purchase another ticket for a later plane ride, thus getting to San Francisco and avoiding the frisk. Put differently, he’d rather pay the \$100 extra for the flight than subject himself to the indignity of the frisk.

Should he be allowed that choice? It is worth repeating that there was nothing suspicious about his behavior. He was simply randomly selected for a frisk.²⁹ But, some would say,

²⁷ I’m not sure if that it is an accurate number, but I suspect that it is close.

²⁸ *Terry*, 392 U.S. at 16-17.

²⁹ Candidly, I am not sure how random these frisks are. I recall that awhile back, when I went through security in Houston, a TSA agent told me that she was suspicious of what I correctly told her were wallets in my front pants pockets. Because of her suspicions, she directed me to secondary screening where her colleague told me that I had been “randomly” selected for a secondary screening. Nevertheless, for the remainder of this paper, I shall assume that secondary screenings are, or at least can be, random.

that the mere act of choosing to miss an already-paid-for ticket rather than undergo a routine frisk is itself suspicious. I now turn to that argument.

It certainly is unusual for a person to forego the value of a plane ticket rather than submit to what frankly is usually a rather cursory frisk. Indeed, it may be fair to say that for every ten people willing to forego a plane ticket to avoid a frisk, nine are guilty of concealing something unlawful,³⁰ while the other one, like Torbet, simply values his Fourth Amendment privacy more than his plane ticket.

Well, if the odds are nine to one, isn't that more than enough for reasonable suspicion or probable cause? My answer is "no," for two reasons. First, historically, refusal to consent has not constituted reasonable suspicion or probable cause, although surprisingly, no Supreme Court decision has directly so held. And second, probabilities simpliciter are insufficient to create probable cause or reasonable suspicion.

The principal reason refusal to consent cannot constitute reasonable suspicion is a policy one. If refusal to consent constituted reasonable suspicion, the right to refuse would be rendered nugatory. Statistics seem to indicate that most people who are asked by police to consent in fact accede to that request.³¹ Undoubtedly many, perhaps most, of those who refuse to consent have something to hide. But that fact alone cannot make refusal constitute reasonable suspicion.

This is not to say that there may not be cases in which a person's refusal to consent, coupled with other facts and circumstances, might not constitute reasonable suspicion. For example, in *United States v. Homburg*,³² a bomb threat had been phoned into the airport. Immediately thereafter, Homburg attempted to board a plane, awkwardly attempting to

³⁰ Although not necessarily a dangerous weapon, some might be concealing other evidence of a crime, such as drugs. *See United States v. Homburg*, 546 F.2d 1350, 1351 (9th Cir. 1976).

³¹ *See Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting), where a deputy testified in Robinette's case that he routinely requested permission to search automobiles he stopped for traffic violations. According to the deputy's testimony, he obtained consent to search in roughly 786 traffic stops in 1992, a year before Robinette's arrest.

³² *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976).

conceal a rectangular-shaped package in his pants pocket. He then asked for directions to the men's room. A security guard followed him into the men's room. Homburg entered a stall from which the officer could hear rustling sounds. Fifteen minutes later, Homburg emerged from the restroom carrying his suitcase and without the bulge in his pocket. Believing that he had transferred the item in his pocket (which could have been a bomb), security sought to search his suitcase. Homburg indicated that he'd rather leave, but the suitcase was searched anyway, and drugs were found.

The court held (1) Homburg had a right to leave and that any original consent he may have given dissipated upon his decision to leave the airport,³³ and (2) there was reasonable suspicion, and in the context of this case, that was enough to search his suitcase.³⁴ In my view, the *Homburg* Court was right on all counts. Consent should be withdrawable. But in the context of this case, reasonable suspicion justified the search.

Well, how is this different from a person simply walking away from a frisk? Aren't the odds just as great that a person who refuses a frisk on pain of losing his spot on the airplane is as suspicious as the events in *Homburg*? My answer is to revert to a hypothetical I use when teaching my class about probable cause. Suppose that in a particular city block of Main Street, between Fourth and Main and Fifth and Main, it could be established demographically that nine out of every ten men on the street between 6 p.m. and 10 p.m. are carrying drugs. Would that create probable cause (or reasonable suspicion) to arrest any man found on that block of Main Street at the requisite hours?

The answer, I believe, is "no." Probable cause and reasonable suspicion require more than demographic probabilities. There must be something specific to the defendant to create the probability as to him (perhaps a furtive gesture, an informant's tip, excessive nervousness, etc.). So, our question is whether the person who chooses to leave the airport rather than be frisked is more like the hypothetical resident of

³³ *Id.* at 1352, *overruled on this point by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

³⁴ *Id.* at 1354.

Main Street or more like Charles Homburg in the *Homburg* case.

I contend that he is more like the resident of Main Street. Both the resident of Main Street and the guy who says “no” to a frisk are probably guilty. But neither has done anything other than what he has the perfect right to do (live on the 400 block of Main Street, or avoid unwanted fingers probing his body). Homburg, on the other hand, engaged in a series of unusual acts that clearly pointed towards guilt.

Some might argue that one who goes through all of the trouble appurtenant to flying and then, after all that, would give up his place on the plane as well as his cost of the ticket just to avoid a silly little frisk is very suspicious indeed. I guess I do agree that it is odd, especially since the frisks are not typically as extreme as a *Terry* frisk.³⁵ Still, I see a vast difference between refusing a frisk simpliciter and the circumstances in the *Homburg* case.

If the person who refuses to be frisked were treated like Homburg, it would be hard to distinguish the Main Street case. Moreover, a person with an extreme adversity to being probed by strange fingers would never be permitted to fly even if he were willing to eat the cost of a ticket whenever he was randomly chosen for a frisk. I find that scenario unacceptable. It is, at best, marginally protective of safety and extraordinarily unreasonable for the person who takes his bodily autonomy seriously.³⁶

Well, suppose we changed the rules and announced in advance that every person boarding a plane will be subject to a frisk. Were that the rule, every person would know that before boarding a plane he or she would be frisked. Would that make it better under the “misery loves company” rule?³⁷ It would certainly eliminate the complaint by the traveler that “I didn’t know I would be frisked.” It would also require an even more

³⁵ Query whether the particular traveler knows how relatively unintrusive the frisk is likely to be.

³⁶ Perhaps he could be required to submit to a full body x-ray in lieu of a frisk, although full body x-rays are even more intrusive to some than a frisk (though presumably not to a frisk-averse person).

³⁷ A concept derisively introduced by Justice Rehnquist in his dissent in *Delaware v. Prouse*, 440 U.S. 648, 664-65 (1979) (Rehnquist, J., dissenting).

wholesale invasion of our freedom from suspicionless searches. It probably would only marginally delay the already delayed airline boarding system, assuming that the average frisk took only about thirty seconds.

To some extent, these questions are similar to the one with which I begin my criminal procedure class: “How big a deal is it to be searched anyway?”³⁸ If the answer is that it is not very important, then the airport answers become obvious—the government can do what it wishes. But, of course that is not the theory of our Fourth Amendment. As Justice Jackson reminded us, shortly after his return from Nuremberg, “[u]ncontrolled searches and seizures is one of the first and most effective weapons in the arsenal of every arbitrary government.”³⁹

The heightened level of TSA searches does not make the United States an arbitrary government, but the magnitude of these searches is greater than it needs to be and a step in the wrong direction. While I am not at all sure that the courts will help reign in the TSA, it is my fondest hope that someone in the government will get the message that those airport procedures that are not really necessary for our security tread dangerously close to measures of dictatorial tyrants, from whom we are supposedly protecting ourselves.

EPILOGUE

Subsequent to writing this essay, TSA has upped the ante. Now at many airports, pockets have to be completely emptied (even of nonmetallic items) and all travelers need to raise their arms and go through an x-ray type scanner in full public view. The only alternative is a full frisk, which can be done in private.

I have heard considerable unhappiness expressed about this additional intrusion. Unquestionably, it has adversely affected our comfort level in flying. Hopefully, the additional x-

³⁸ See ARNOLD H. LOEWY, *CRIMINAL PROCEDURE: CASES, MATERIALS AND QUESTIONS* 1 (3d ed. 2010).

³⁹ *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

ray level to which frequent fliers will be subjected will not adversely affect their health, but who really knows?⁴⁰

Has it made us safer? I am unaware of a single terrorist who escaped normal screening, but was caught by enhanced detection. Of course, that is not the whole question. The question is whether there are would-be terrorists who have abstained because of the increased security. Given that the old security seemed to be working just fine,⁴¹ I would submit that the impact of the new and improved security is marginal indeed.

Perhaps our mistake was not to complain earlier. Now that TSA has a foot in the door, it is unlikely to back off its enhanced sense of entitlement. Perhaps the populace rising up in righteous indignation would make a difference. But it is not likely to happen. Just as we became used to removing our shoes, we will (or have) become used to emptying our pockets and displaying ourselves in the x-ray machine.

So, I reluctantly conclude that we are coming even closer to the dictatorial tyrants that I feared in the last paragraph of the non-epilogue portion of this essay. If any Congresspeople are reading this essay, it is my fondest hope that you are persuaded of the need to restore a reasonable police/citizen balance at our nation's airports.

⁴⁰ See *United States v. Montoya de Hernandez*, 473 U.S. 531, 561 (1985) (Brennan, J., dissenting).

⁴¹ I am unaware of a successful airplane highjacking since 9/11.