

Peter Moskos

Balancing Security and Liberty

When you board a plane, both you and your carry-on bags are searched. A civilian employee of the Transportation Security Administration may open and search your checked luggage as well. Although primarily looking for security threats, workers report any illegal or suspicious objects to a supervisor or law enforcement agent, even if the object represents no danger to the flight.

Two legal concepts allow both you and your bags to be searched despite the Constitution's protection against unreasonable search and seizure. By being in an airport and trying to board a plane, the Supreme Court says, you have given "implied consent" to being searched. The "plain view" principle, according to the court, states that whatever law enforcement legally finds, feels or sees—even if unrelated to the original investigation or search—is fair game for arrest and prosecution.

Using security and terrorism as justification, the government is beginning to extend airport-like implied consent zones to more and more of the public sphere, including the entire Boston subway system. Before the Democratic convention, daily commuters, anybody approaching a national political convention, and drivers on vital bridges and tunnels were told to expect random searches without a warrant. Fourth Amendment protection against unreasonable search and seizure does not apply.

When police are granted greater rights to search without probable cause, they will use these rights. Therefore it's essential to consider the implications of implied consent and plain view searches in the public sphere. Fear of increased government repression is shared by both ends of the political spectrum. But many others understand that a necessary element of freedom is security. Airline passengers should be screened. The Democratic and Republican national conventions need to be bomb-free.

Few people object to bomb searches on airplanes. And many would be willing to waive their constitutional rights (if such rights were negotiable) to guarantee their security. But what starts as a necessary security measure will quickly become standard law enforcement procedure even for crimes that are nonviolent and not related to terror. These expanding implied consent zones have staggering implications for American life and freedom far beyond al Qaeda.

Police officers are experts at bending rules, particularly in the "war on drugs." As a police officer, I was taught to push the rules of the "Terry search," which meant that if I articulated fear that a suspect might harm me, I could legally frisk suspects for weapons without probable

cause. I know officers who towed cars, again legally, simply so they could "inventory" the contents (technically for safekeeping). In both cases, the real goal was to find illegal drugs and make an arrest.

One must expect law enforcement to use all its available tools. As a law enforcement officer, why deal with the tedious process of probable cause, judicial approval and paperwork?

In order to stop and search any suspect, not just a terrorism suspect, law enforcement need only wait for a person to enter an implied consent area such as a subway or a shopping mall. Their action justified by the "war on terror," police may then conduct a full search. The true object of the search—most likely drug possession, but any contraband will do—is unrelated to terrorism.

Of course people shouldn't break the law or carry illegal objects. But the difference between civilian employees searching for bombs in airports and government agents conducting random searches for suspicious objects is the difference between preserving a free society and creating a police state.

In airport security today, items deemed suspicious are not necessarily dangerous: Large amounts of cash, pirated CDs, pornography and, of course, drugs—not just illegal drugs but even prescription drugs in certain circumstances. In fact, controversial books can be grounds for further investigation and arrest. Such a standard, even if established in airports, is unacceptable and must not be allowed to spread to our streets and subways.

The solution—the balancing of public safety with constitutional liberties—is surprisingly simple. The only way to prevent creeping use of implied consent is to limit the doctrine of plain view. Before searching a person, the government must choose either plain view or implied consent. If the government must search without probable cause, let it search, but only for illegal weapons or bombs. If security outweighs the Fourth Amendment, the scope of such searches must be limited to objects representing a clear and present danger to public safety. Any unrelated suspicious or illegal objects found must be ignored.

It is the job of our courts and legislature to strike the balance between security and liberty. By limiting the plain view doctrine, lawmakers or Supreme Court justices have the rare opportunity to be tough on terrorism while guaranteeing the rights and freedom of citizens.

The writer, a former Baltimore police officer, is professor of law and police science at John Jay College of Criminal Justice in New York.



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