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Case Brief: United States v. Aukai (440 F.3d 1168)

Daniel Kuualoha Aukai arrived at the Honolulu International Airport on February 1, 2003, intending to take a Hawaiian Airlines flight from Honolulu to Kona. Mr. Aukai checked in at the ticket counter, but did not show a government-issued ID; the ticket agent noted this on his boarding pass. Mr. Aukai proceeded to the security checkpoint, where signs were posted advising travelers that they and their carry-on bags were subject to search. He placed some items in a plastic container, and walked through the metal detector without triggering it. The items Mr. Aukai placed in the container were x-rayed and nothing suspicious was found.

Mr. Aukai then presented his boarding pass to a TSA agent. Since the boarding pass contained a "No ID" notation, Mr. Aukai was taken aside for secondary screening. After being taken aside for the screening, Mr. Aukai attempted to collect the items he had placed in the bin and leave the area. The TSA agent instructed him to stay in the secondary screening area. A second TSA agent then searched Mr. Aukai using a portable magnetometer (also called a "wand"). The wand indicated the presence of metal in Mr. Aukai's pocket. The agent asked Mr. Aukai if he had anything in his pocket; Mr. Aukai stated he did not. The agent then made a second sweep with the wand, which again indicated metal in Mr. Aukai's pocket. Mr. Aukai continued to deny having anything in his pocket; the TSA agent touched the pocket and felt something in it. Mr. Aukai indicated at this point that he wished to leave the airport, but was detained. A second TSA agent came over and Mr. Aukai was wanded again, with a positive result. The agents again felt Mr. Aukai's pocket and detected something within in. Mr. Aukai eventually emptied his pocket in the presence of the TSA agents, revealing that he had a methamphetamine pipe in his possession. He was then arrested; during a search incident to the arrest, methamphetamine was also discovered on Mr. Aukai's person. Mr. Aukai eventually made a statement admitting to methamphetamine possession.

At trial, Mr. Aukai moved to suppress the evidence collected incident to the arrest. This motion was denied: he then entered a guilty plea to possession of methamphetamine with intent to distribute, but his plea stipulated that he had the right to appeal the denial of the suppression motion. Mr. Aukai appealed his conviction to the Ninth Circuit Court of Appeals, which heard his appeal in an "en banc" hearing (one including all of the judges on the court).

The question before the Court was whether the search of Mr. Aukai by TSA agents was reasonable, even though Mr. Aukai objected to the search, withdrew his consent, and attempted to leave the area before being searched. The Ninth Circuit held, in a 15-0 decision, that the search of Mr. Aukai was a constitutionally reasonable administrative search, and the reasonableness of the search did not depend on Mr. Aukai's consent or lack thereof.

In the majority decision, written by Judge Bea (with Judges Schroeder, Kozinski, Kleinfeld, Hawkins, Silverman, Graber, McKeown, Wardlaw, Fletcher, Gould, Rawlinson, Bybee, Callahan, and Ikuta concurring), the Court summarizes the circumstances of Mr. Aukai's arrest and conviction, and of the appeal, in parts one and two of the opinion. Part three of the opinion discusses the constitutional background that determines what kind of searches are reasonable, specifically focusing on "public safety" searches along the lines of *National Treasury Employees Union v. Von Raab (1989)* and "administrative searches" along the lines of *New York v. Burger (1987)*. The court goes on to cite the decisions in *Michigan Department of State Police v. Sitz*

(1990) which upheld sobriety checkpoints, and *United States v. Biswell (1972),* which established that warrantless searches based on the authority of a valid statue were constitutional.

The Court goes on to observe that previous case laws established the validity of airport screening searches as "constitutionally reasonable administrative searches" because they are intended to protect public safety (by preventing someone from carrying weapons or explosives on an aircraft) and because they are part of a "general regulatory scheme in furtherance of an administrative purpose". The Court notes, however, that the established case law has left a mistaken impression that the reasonableness of such searches is dependent on consent. This is not the case, states the Court. Allowing passengers to revoke consent would basically allow someone who is planning a crime to keep probing airport security until they found a weak sport. The Court finds this unacceptable, and holds that "where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger's election to attempt entry into the secured area of an airport". Further, "that election occurs when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine". When Mr. Aukai put items on the conveyor belt of the X-ray machine, he had already elected to allow his person and items under his control to be searched, and could not revoke that election.

The Court goes on to note that the boundaries of airport searches are not without limits, but must be "no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [][and] that it is confined in good faith to that purpose." The Court holds that the search of Mr. Aukai met this condition: Mr. Aukai went through the metal detector, was selected for a secondary search because he presented no identification at the ticket counter, was searched several times with a portable magnetometer (which alerted on Mr. Aukai's person each time) before his pocket was searched by hand, and was finally made to empty his pocket (due to the officers feeling something inside of it, and the presence of an obvious external bulge in the pocket) whereupon the drug paraphernalia was discovered. The Court holds that this was a minimally invasive search. Further, Mr. Aukai was not detained for an unreasonable amount of time; from when he entered the secured area until the drug paraphernalia was discovered was less than 18 minutes. Accordingly, the majority held that the search was a constitutionally valid administrative search, and affirmed Mr. Aukai's conviction.

Judge Graber wrote a separate opinion concurring with the majority. The main focus of his opinion is a belief that the majority's references to terrorism and "9/11" have nothing to do with the case in question. He sees these references are irrelevant and distracting: "Nor is there any legal significance to whether or not an individual is a terrorist." For Judge Graber, the entire issue at hand is whether airport searches are reasonable administrative searches, and whether consent is required for a screening search once a passenger enters the secured area of an airport. Judge Graber feels the precedent is clear on this, and that references to terrorism and September 11th make the majority's "solid holding dependent on the existence of the current terrorist threat, inviting future litigants to retest the viability of that holding".

As I have said before, the fact that a majority of the court holds one way – even if that majority is unanimous, as it is in this case – does not automatically make the decision of the court correct. In this case, however, I agree with the majority decision. Given that Mr. Aukai was on notice before entering the security checkpoint that he and his belongings would be subject to search, I think that the initial search (including the secondary screening) constitute a reasonable administrative search. Mr. Aukai had the choice of not going through the checkpoint. Once he

placed items on the conveyor belt, though, I agree that he had agreed to whatever might follow. Given Mr. Aukai's suspicious behavior once he was selected for secondary screening, and given his even more suspicious behavior after the portable magnetometer alerted on his person, I have no choice but to consider the physical search of Mr. Aukai (which discovered drug paraphernalia) a reasonable search; if not as an administrative search, as a Terry search (given that the officers noted a bulge in Mr. Aukai's pocket, which could have been a weapon). I believe the court's decision is supported by both the facts in this case and previous precedent, and I concur with the Ninth Circuit.