

The Washington Post

The Fourth Amendment and Airport Security, cont'd

By David Post

April 10, 2014

VC co-blogger Orin Kerr, responding here to my initial posting cum rant about airport security and the 4th Amendment's prohibition against unreasonable seizures (in which I suggested that the TSA policy of putting you "in custody" once you enter the screening area is unconstitutional), shows that the caselaw is generally against my position.

Orin knows this body of law much, much better than I do, and I take his word for it. It encapsulates, I think, much of what irks me about 4th Amendment law. The quotations Orin includes from the cases upholding this practice against 4th Amendment challenges say what much 4th Amendment jurisprudence says: the government cannot "seize" me unless it has a good reason (or maybe even a damned good reason) for doing so. Not comforting. I recognize that the source of the problem is in the Constitutional language itself – which declares, of course, that we don't have a right to be free from searches and seizures, we have a right to be free only from "unreasonable" searches and seizures, and a reasonableness test will, inevitably, become an open door; if the First Amendment protected only against "unreasonable" abridgements of the freedom of speech, we would've gone to hell in a handbasket on that front a long time ago. Orin did acknowledge that "some readers will contend that the cases are irrelevant to what the law truly is. If the cases say that, they will reason, then it just shows how the judges don't understand what the Constitution truly means." Count me among them.

David Post David Post is currently Professor of Law at the Beasley School of Law at Temple University, where he teaches intellectual property law and the law of cyberspace. He is also a Fellow at the Center for Democracy and Technology, an Adjunct Scholar at the Cato Institute, and a member of the Board of Trustees of the Nexa Center for Internet and Society. Professor Post is the author of *In Search of Jefferson's Moose: Notes on the State of Cyberspace* (Oxford, 2009) (see <http://jeffersonsmoose.org>), a Jeffersonian view of Internet law and policy described as "astonishing" (Lawrence Lessig), "brilliant, and a joy to read" (Jonathan Zittrain), and "an authentic work of genius, conceived and written in the finest Jeffersonian spirit" (Sean Wilentz). He is also co-author of *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age* (West, 2007) (with Paul Schiff Berman and Patricia Bellia), and numerous scholarly articles on intellectual property, the law of cyberspace, and complexity theory. He has been a regular columnist for the *American Lawyer* and *InformationWeek*, a commentator on the *Lehrer News Hour*, *Court TV's Supreme Court Preview*, *NPR's All Things Considered*, *BBC's World*, and

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