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I. INTRODUCTION

> *History reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an "emergency" or threat to the public. But the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike.*[1]
>
> —Judge Walter R. Mansfield

The Transportation Security Administration (TSA) has come under increasing scrutiny since its creation in 2001. In the 112th Congress alone, TSA-related witnesses testified at thirty-eight congressional hearings and provided 425 briefings for members of Congress.[2] As aptly summarized by Charlie Leocha, director of the Consumer Travel Alliance, "[t]o much of the flying public, the TSA is a boogeyman . . . . TSA has become the butt of countless jokes."[3] And by most accounts, Leocha is right. Criticisms of the TSA and airport security measures have been lobbed from almost every corner imaginable. The attacks have been full-throated, nonpartisan, and increasingly vitriolic. In fact, it has become commonplace to turn on the television or open the newspaper and see the TSA being lambasted in some way, shape, or form.

1. United States v. Bell, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring).

2. Joe Sharkey, *T.S.A. Skips a Hearing on Terminating the T.S.A.*, N.Y. TIMES (Dec. 3, 2012), http://www.nytimes.com/2012/12/04/business/tsa-skips-house-panel-hearing-on-privatizing-airport-checkpoint-security.html.

3. Ashley Halsey III, *House Members Criticize TSA*, WASH. POST (Nov. 29, 2012), http://articles.washingtonpost.com/2012-11-29/local/35584716_1_tsa-administrator-john-pistole-airport-security-federal-aviation-security-agency.

The stories concerning TSA misconduct have been as shocking as they have numerous. Many of the stories would be comical if they were not true. Here are some highlights. In 2008, in Lubbock, Texas, a woman was forced to remove her nipple piercings in the middle of the airport at the insistence of TSA agents.[4] Again in 2008, a woman's brassiere underwire set off airport metal detectors, and she was forced to remove her bra for closer inspection.[5] New mother Elizabeth McGarry was forced to taste her own breast milk at JFK Airport to assure TSA agents that the bottles did not contain poisonous liquids.[6] In Lansing, Michigan, TSA agents burst a bladder cancer patient's urostomy bag during the course of a pat-down, such that the man had to board his flight covered in his own urine.[7]

TSA agents have been criticized for victimizing America's most vulnerable populations, including the sick, the elderly, the handicapped, and children.[8] Arab- and Muslim-Americans have been routine targets of new TSA screening measures.[9] It seems that no one is safe from the pervasive

4. *TSA Forces Woman to Remove Nipple Rings*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-501843_162-3976376.html.

5. Anna Brones, *Underwire Bra Dispute Causes Woman to Miss Her Flight*, GADLING.COM (Aug. 26, 2008), http://www.gadling.com/2008/08/26/underwire-bra-dispute-causes-woman-to-miss-her-flight/.

6. *JFK Airport Security Forces Woman to Drink Own Breast Milk*, USA TODAY (Aug. 12, 2002), http://usatoday.com/travel/news/2002/2002-08-09-jfk-security.htm.

7. Harriet Baskas, *TSA Pat-Down Leaves Traveler Covered in Urine*, NBC NEWS (Mar. 25, 2011), http://www.msnbc.msn.com/id/40291856/ns/travel-news/t/tsa-pat-down-leaves-traveler-covered-urine.

8. Unfortunately, these stories are not isolated incidents. *See generally TSA Pat-Down Horror Stories*, ABC NEWS, http://abcnews.go.com/Travel/slideshow/photos-tsa-horror-stories-12186319 (last visited Jan. 5, 2013). A number of women have complained that they are being selectively targeted for enhanced screening in order for TSA agents to get a perverted sneak-peek at their naked bodies. *See* Olivia Katrandjian, *Strip-Searched Grandma Says TSA Removed Her Underwear*, ABC NEWS (Dec. 3, 2011), http://abcnews.go.com/blogs/headlines/2011/12/strip-searched-grandma-says-tsa-removed-her-underwear/. Little girls have complained of being victimized. *See* Hugo Gye, *Weeping Four-year-old Girl Accused of Carrying a Gun by TSA Officers After She Hugged her Grandmother While Passing Through Security*, DAILY MAIL (Apr. 24, 2012), http://www.dailymail.co.uk/news/article-2134280/Weeping-year-old-girl-accused-carrying-GUN-TSA-officers-hugged-grandmother-passing-security.html. And there have been complaints about the way in which the TSA treats disabled passengers. *See* Todd Starnes, *TSA Searches 3-year-old in Wheelchair, Video Shot in 2010*, FOX NEWS (Mar. 19, 2012), http://radio.foxnews.com/toddstarnes/top-stories/tsa-searches-3-year-old-in-wheelchair.html. Even celebrities have complained about being improperly groped by TSA agents. *See Nicki Minaj 'Fondled' By Airport Security*, HUFFINGTON POST (July 13, 2012), http://www.huffingtonpost.com/2012/07/10/nicki-minaj-fondled-by-airport-security_n_1662599.html.

9. *Muslim-American Group Criticizes TSA Plan as Profiling*, CNN JUSTICE (Jan. 4, 2010), http://www.cnn.com/2010/CRIME/01/04/tsa.measures.muslims/index.html.

abuse of authority occurring at the hands of the TSA and its agents. In fact, on June 1, 2012, CNN posted an article asking a question reverberating in the collective American consciousness: "How much do we really hate the TSA?"[10] The ACLU reported receiving over 900 complaints about TSA pat-downs in a single month.[11] Between October 2009 and June 2012, the TSA contact center received 39,000 complaints—averaging close to forty complaints every single day of the year.[12] America's faith in the TSA is swiftly eroding. As Charlie Leocha explained,[13] the TSA is truly becoming a joke—or worse, an abusive show of authority to which everyone who wishes to board an airplane must submit.

People are fighting back against the TSA, however, and the fight has been taken to the courts. Numerous lawsuits have been filed alleging a number of legal violations. From battery charges to constitutional challenges, the TSA is under siege. These challenges have come from many quarters: racial-justice advocates who believe that the TSA engages in unconstitutional profiling;[14] women's-rights advocates who believe that TSA screening often amounts to nothing more than sexual harassment;[15] and civil-liberties advocates who believe that the TSA infringes on basic constitutional rights.[16] The number of legal issues embroiled in TSA screening is growing so rapidly that the TSA's Office of the General Counsel released an article detailing the legality of TSA security measures.[17] The TSA even maintains a blog for the purpose of emphasizing the

10. Jamie Gumbrecht, *How Much Do We Really Hate the TSA?*, CNN TRAVEL (June 2, 2012), http://articles.cnn.com/2012-06-01/travel/travel_tsa-complaints_1_pat-downs-tsa-agents-national-opt-out-day?_s=PM:TRAVEL.

11. *Over 900 TSA Complaints in Nov., ACLU Says*, THE RAW STORY (Nov. 26, 2010), http://www.rawstory.com/rs/2010/11/26/aclu-recieves-900-complaints-tsa-screenings/; *Passengers' Stories of Recent Travel*, ACLU.ORG, http://www.aclu.org/passenger-stories-recent-travel/ (last visited Oct. 2, 2013).

12. Halsey, *supra* note 3.

13. *See supra* note 3 and accompanying text.

14. Amardeep Singh, *TSA Can and Should Take Action to Address Concerns of Racial Profiling*, AM. CONST. SOC'Y FOR LAW & POL'Y (Feb 15, 2012), http://www.acslaw.org/acsblog/tsa-can-and-should-take-action-to-address-concerns-of-racial-profiling.

15. *Female Passengers Say They're Targeted by TSA*, CBS NEWS (Feb. 3, 2012), http://dfw.cbslocal.com/2012/02/03/female-passengers-say-theyre-targeted-by-tsa/.

16. *ACLU Sues DHS over Unlawful TSA Searches and Detention*, ACLU.ORG (June 18, 2009), http://www.aclu.org/national-security/aclu-sues-dhs-over-unlawful-tsa-searches-and-detention.

17. Jennifer S. Ellison & Marc Pilcher, *Advanced Imaging Technology (AIT) Deployment: Legal Challenges and Responses*, 24 THE AIR & SPACE LAW. 4 (2012).

legitimacy of its security program.[18]

To be fair, the TSA was created during a politically charged time as a forceful reaction to a renewed fear of air terrorism. Although airport security has been commonplace since the 1970s, the TSA was created in response to the failure of such security measures—a failure that resulted in the deaths of over 3000 people in the September 11th terrorist attacks. As such, the TSA was given the heavy responsibility of protecting the skies and assuaging American fear, with no clear parameters on how best to achieve this goal.[19] The TSA, therefore, had to essentially improvise, protecting the airways as best seen fit. The Executive and Congress gave the TSA carte blanche to protect safety.[20] Unfortunately, many feel that the TSA has gone too far—that current security measures are no longer just an inconvenient incident of modern air travel, but have infringed on travelers' most personal rights of privacy. The issues implicated by TSA screening measures are larger than convenience or complaints of harassment. The constitutional issues at stake here are of utmost importance—the TSA's security measures may seriously infringe upon passengers' most basic privacy rights. And privacy is central to the Constitution—three out of the ten amendments in the Bill of Rights protect a citizen's privacy interests from government intrusion;[21] "the writing and ratification of the Bill of Rights manifested a hatred and fear of the federal government."[22] As one of the greatest champions of the Bill of Rights, Justice Louis Brandeis, put it, the Bill of Rights most importantly conferred the right, "as against the government . . . to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the [Constitution]."[23] The "right to be let alone" described by Justice Brandeis is not just central to the Constitution but central to *civility*. And while this right must of course give way in some circumstances, supporters of the Bill of Rights would argue that

18. *See generally* THE TSA BLOG, http://blog.tsa.gov/ (last visited Oct. 2, 2013).

19. 49 U.S.C. §§ 114(e), 44901(a), 44902(a), 44904(a) (2012).

20. 49 U.S.C. § 44902 (2012).

21. The First Amendment protects privacy of belief, U.S. CONST. amend. I; the Third Amendment protects the privacy of the home, U.S. CONST. amend. III; and the Fourth Amendment protects the privacy of the person and the home, U.S. CONST. amend. IV.

22. George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 179 (2001).

23. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

this right should not be cast aside lightly, and when it is cast aside, it should be done with exacting scrutiny.

If privacy is central to the Constitution and the Bill of Rights, the airport is quickly becoming a place of constitutional exceptionalism.[24] It has become clear in the government's approach to airport security screening that air safety trumps all; the unparalleled danger posed by air terrorism supersedes fundamental constitutional rights. In responding to emergencies during three different presidencies, the Executive Branch has essentially said that the Constitution, as developed and applied in other settings, has a different, less prominent role in the airport.[25] The increasing and ever-morphing threat posed by air terrorism justifies the increasing intrusions on travelers' personal liberties. And given the magnitude of the threat posed by skyjacking and air terrorism, air travelers are supposed to passively submit, mollified by the fact that the intrusion on their liberty is for their protection.

The tension between national security and individual privacy has been well documented in the legal community. For example, after the passage of the Patriot Act, much attention was given to the surveillance methods now allowed by the government and the resultant intrusion on individual privacy.[26] In fact, scholars have lamented the increasing lack of privacy in a post-9/11 world.[27] Yet despite the broader exploration of the national security versus civil liberties debate by the academy, legal scholarly discourse has largely foregone the exploration of constitutional rights in the

24. *See* Erik Luna, *The Bin Laden Exception*, 106 NW. U. L. REV. COLLOQUY 230 (2012). The concept of exceptionalism was first fully explored by John Locke, the father of classical liberalism; Locke grappled with the idea that some residual power needs to reside with the Executive in order for it to effectively deal with emergency situations not fully accounted for by present day laws. As Locke explained, "[m]any things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands." Thomas Poole, *Constitutional Exceptionalism and the Common Law* 3 (London Sch. of Econ. & Political Sci., Legal Studies Working Paper No. 14/2008, 2008), *available at* http://eprints.lse.ac.uk/24596/1/WPS2008-14_Poole.pdf. As further explained by Locke, it is impossible "to foresee, and so by laws provide for, all accidents and necessities that may concern the public . . . therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe." *Id*. Thus, in times of peril, the Executive needs leeway to respond accordingly.

25. Luna, *supra* note 24, at 241–44.

26. *See, e.g.*, Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 DENV. U. L. REV. 375, 392 (2002); Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists As Terrorists*, 22 PACE ENVTL. L. REV. 261 (2005).

27. *See, e.g.*, Derek M. Alphran, *Changing Tides: A Lesser Expectation of Privacy in a Post 9/11 World*, 13 RICH. J.L. & PUB. INT. 89, 145 (2009).

airport, seemingly accepting the ascendancy of national security in this particular theater.[28] Despite the centrality of air travel to everyday existence—in 2011 U.S. residents logged 1.5 billion personal trips via air[29]—scholarship regarding the TSA, airport security measures, and the resultant constitutional implications is scarily scant. Moreover, the Supreme Court has still not fully defined what the Constitution looks like in the airport, despite the constant complaints against the TSA.[30] This article hopes to shed some light on a shadowed area of vital importance.

By exploring the Constitution in a post-TSA airport, this article explores what constitutional rights look like for the average American who travels by air. Part I of the article details airport security, exploring the origins of modern-day security measures, looking at the creation of the Transportation Security Administration, and outlining what security measures are currently in force at the airport. Part II of the article looks at the Fourth Amendment in the airport, asking how much one's right to be free from unreasonable searches and seizures yields to national security. And Part III of the article looks at the First Amendment and how much leeway one has in protesting the airport security measures currently in place. Throughout the article, one overarching theme should become apparent: in the search for security in the air, constitutional rights in the airport have been effectively eviscerated.

II. AIRPORT SECURITY MEASURES

A. The Origin of Airport Security[31]

Piracy is not a new challenge for the community of nations. Most

28. This article builds on the work of the companion pieces authored by Professors Erik Luna, *supra* note 24, and Alexander A. Reinert, *Revisiting "Special Needs" Theory Via Airport Searches*, 106 NW. U. L. REV. 1513 (2012). It also draws upon the notes and comments authored by Jennifer LeVine, *Over-Exposed? TSA Scanners and the Fourth Amendment Right to Privacy*, 16 J. TECH. L. & POL'Y 175 (2011); Tobias W. Mock, *The TSA's New X-Ray Vision: The Fourth Amendment Implications of "Body-Scan" Searches at Domestic Airport Security Checkpoints*, 49 SANTA CLARA L. REV. 213 (2009); and Rebekka Murphy, *Routine Body Scanning in Airports: A Fourth Amendment Analysis Focused on Health Effects*, 39 HASTINGS CONST. L.Q. 915 (2012).

29. U.S. Travel Ass'n, *U.S. Travel Answer Sheet*, POWEROFTRAVEL.ORG (June 2012), http://www.ustravel.org/sites/default/files/page/2009/09/USTravelAnswerSheet_June2012.pdf.

30. Luna, *supra* note 24, at 245.

31. Much of the history recited in this section is taken from the Ninth Circuit's decision in *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). All information has been independently verified, and citations of the original sources are therefore provided herein.

> *countries, including the United States, found effective means of dealing with piracy on the high seas a century and a half ago. We can—and we will—deal effectively with piracy in the skies today.*[32]
>
> —Richard Nixon

Newton's third law of motion can be boiled down to this basic principle—every action has a reaction. Modern airport security measures are perfect evidence of Newton's theory. Although the TSA has long dominated the conversation about airport security, modern airport security was in place long before the TSA was even conceptualized. Therefore, to fully understand current airport security measures and their implications for constitutional rights, it is important to retrace the history of airport security measures. Contrary to popular belief, the security measures and policies adopted by the TSA already had a solid foundation in the form of decades-old policy. And much like current TSA security measures, modern airport security was born of a reaction to criminal behavior.

On May 1, 1961, Antulio Ramirez Ortiz committed America's first skyjacking.[33] Ortiz, a Korean War veteran, boarded National Airline Convair 440 going from Marathon to Key West, Florida with a knife and gun, and demanded the plane be diverted to Cuba.[34] As a result, on September 5, 1961, Congress amended the Federal Aviation Act of 1958 to make aircraft piracy a federal offense.[35] Despite the federal criminalization of hijacking commercial aircraft, between 1961 and 1968, on average, one American airplane was hijacked a year.[36] In 1968, the number of skyjackings increased dramatically—there were eighteen attempted aircraft hijackings.[37] The trend continued in 1969, which saw forty attempted hijackings, during thirty-three of which the skyjacker was successful in taking over the plane.[38]

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32. Statement Announcing a Program to Deal With Airport Hijacking, 1 PUB. PAPERS 742 (Sept. 11, 1970), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2659.

33. Jane Engle, *Aviation Security: Flight Attendant Aboard Aircraft Hijacked in 1961 Kept Her Career on Course*, L.A. Times (June 11, 2011), http://articles.latimes.com/2011/jun/11/news/la-trb-hijacking-flight-attendant-20110611.

34. *See Davis*, 482 F.2d at 897; Patrick Weidinger, *Top 10 US Airline Hijacking of the Sixties*, LISTVERSE.COM (Oct. 27, 2012), http://listverse.com/2012/10/27/top-10-us-airline-hijackings-of-the-sixties.

35. Act of Jan. 3, 1961, Pub. L. No. 87-197, 75 Stat. 466–68.

36. *See Davis*, 482 F.2d at 898; Weidinger, *supra* note 34.

37. *Id.* at 898.

38. *Davis*, 482 F.2d at 898.

This explosion of airway piracy prompted the United States government to act. On September 11 (what has now become an ominous date in American aviation history), 1970, President Nixon introduced to the public "A Program to Deal with Airplane Hijacking."[39] In creating the program, President Nixon heroically declared: "The menace of air piracy must be met—immediately and effectively."[40] Accordingly, in an effort to show that the government still had control over the air, President Nixon ordered a number of measures to ensure airport safety, including: (1) placing federal law enforcement officials on American airplanes; (2) using "electronic surveillance equipment and other surveillance techniques" in American airports; and (3) requiring the Departments of Transportation, Treasury, and Defense, the Central Intelligence Agency, the Federal Bureau of Investigation, the Office of Science and Technology, and other agencies to accelerate their efforts to develop security measures.[41] President Nixon also ordered federal agencies to determine whether using military-grade metal detectors in airports could help ensure safety.[42]

In line with the President's marching orders, by September 1971, the FAA proposed a rule requiring all air carriers to submit a screening program to the agency for its approval.[43] On February 1, 1972, the FAA required air carriers to adopt and implement an acceptable screening system "to prevent or deter the carriage abroad [sic] its aircraft of sabotage devices or weapons in carry-on baggage or on or about the persons of passengers."[44] Under this new rule, all airline passengers had to submit to FAA approved screening measures, which included: "behavioral profil[ing], magnometer [checks], identification check[s], [and] physical search[es]."[45]

In July 1972, President Nixon announced another rule to keep the airways safe: the screening of all airline passengers and inspection of all

39. *See supra* note 32.

40. *Id*.

41. *Id*.

42. *Id*.

43. *See* Aviation Security: Airports, 36 Fed. Reg. 19173 (Sept. 30, 1971) (to be codified at 14 C.F.R. pt. 121); *see also* Aviation Security: Certain Air Carriers and Commercial Operators, 36 Fed. Reg. 19172 (Sept. 30 1971) (to be codified at 14 C.F.R. pt. 107) (directed at airport operators).

44. Aircraft Security; Screening Systems, 37 Fed. Reg. 2500, 2500 (Feb. 2, 1972) (to be codified at 14 C.F.R. pt. 121).

45. *See* United States v. Davis, 482 F.2d 893, 900 (9th Cir. 1973) (quoting Press Release No. 72-26, Fed. Aviation Admin. (Feb. 6, 1972)).

carry-on bags on "shuttle-type" flights.[46] And again, following the President's lead, the FAA issued a directive on August 1, 1972, that "no airline 'shall permit any person' meeting [a specific] profile to board a plane unless his carry-on baggage had been searched and he had been cleared through a metal detector or had submitted to a 'consent search' prior to boarding."[47] The FAA had by then developed a skyjacker profile to help security personnel identify passengers who should be required to undergo targeted screening.[48] Although the details of the skyjacker profile were kept secret,[49] it has been said that the profile had an "ethnic component" and it focused on "unsuccessful" members of society, who appeared to be "lacking in resourcefulness, . . . ha[d] substantial feelings of helplessness or hopelessness, and perhaps w[ere] suicidal."[50]

But the FAA soon abandoned the selective profiling approach to securing air safety and decided to cast an all-encompassing net. On December 5, 1972, it announced a rule requiring airports to implement searches of *all* carry-on items and magnometer screening of *all* airline passengers by January 5, 1973.[51] These new "routine" screening measures were to be conducted by airline personnel, but in the presence of armed law enforcement officers who were "[a]uthorized to carry and use firearms," and "[v]ested with a police power of arrest under Federal, State, or other political subdivision authority."[52]

In sum, President Nixon responded to an increasingly serious concern with what some would call proportionately heavy-handed security measures. The potential carnage that can arise from a skyjacking is unparalleled. The number of people both in the air and on the ground that are put at risk by skyjacking is uniquely perilous. Therefore, when skyjacking became an all too common phenomenon, President Nixon acted swiftly in order to curb a

46. *See id*. at 901 n.23 (quoting *The Administration's Emergency Anti-hijacking Regulations: Hearing Before Subcomm. on Aviation of the Comm. on Commerce*, 93rd Cong. 68 (1973) (statement of John A. Volpe, Secretary, U.S. Department of Transportation)).

47. *See id*. at 901 (citing Press Release No. 72-72, U.S. Dep't of Transp. (Aug. 1972)).

48. *See* United States v. Lopez, 328 F. Supp. 1077, 1082–85 (E.D.N.Y. 1971).

49. Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1010 n. 25 (1993) (citing *Lopez*, 328 F. Supp. at 1080, 1083).

50. Curt R. Bartol & Anne R. Bartol, INTRODUCTION TO FORENSIC PSYCHOLOGY 90 (3d ed. 2012).

51. *See Davis*, 482 F.2d at 901–02 n.25 (citing Press Release No. 103-72, U.S. Dep't of Transp., (Dec. 5, 1972)).

52. Law Enforcement Officers, 37 Fed. Reg. 25,934, 24,934 (proposed Dec. 6, 1972) (to be codified at 14 C.F.R. pt. 107).

new crime wave that had potentially catastrophic consequences. It was at this point, in the early 1970s, that American air travel first required submission to government-mandated searches. And with that, modern airport security as we know it was born.

B. Creation of the TSA

> *On September the 11th, 2001, America felt its vulnerability—even to threats that gather on the other side of the Earth. We resolved then, and we are resolved today, to confront every threat from any source, that could bring sudden terror and suffering to America.*[53]
>
> —George W. Bush

There were relatively few developments in airport security measures between the 1970s and the 2000s. During that time period, airport security became embedded in both local and international air travel. However, thirty years after airport security screening was introduced into American airports and accepted by American air travelers, America's airways were under siege once again. This time, however, it was on a larger scale than anyone could have ever imagined.

On the morning of September 11, 2001, Islamist extremist organization Al-Qaeda coordinated the skyjacking of four American planes leaving from New York City and Washington, D.C. airports.[54] At approximately 9:00 a.m., the skyjackers flew two planes, American Airlines Flight 11 and United Airlines Flight 175, into the Twin Towers of the World Trade Center, eventually causing both towers to collapse two hours later.[55] Thirty minutes later, the skyjackers flew American Airlines Flight 77 into the Pentagon, the hub of America's defense.[56] The results were devastating—close to 3,000 people died in the attacks.[57] And in an instant, the collective safety felt by

53. Press Release, Office of the Press Secretary, President Bush Outlines Iraqi Threat (Oct. 7, 2002).

54. *See, e.g.*, *Look Back at How September 11 Unfolded*, CNN (Sept. 7, 2011), http://www.cnn.com/video/data/2.0/video/us/2011/09/07/natpkg-911-aircheck-timeline.cnn.html.

55. *Id.*

56. *Id.* The last plane crashed in rural Pennsylvania, as the skyjacker had purportedly been overcome by the passengers on the plane. *Id.*

57. *9/11 Commemorations and Memorials*, USA.GOV (last updated Sept. 6, 2013), http://www.usa.gov/Citizen/Topics/History-American/September11.shtml.

American air travelers evaporated.

Much like Nixon in the 1970s, President George W. Bush responded strongly and immediately. Less than a month later, on October 8, 2001, President Bush signed Executive Order 13,228.[58] The order established the Office of Homeland Security and the Homeland Security Council; the mission of the agencies was clear: "to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks."[59] The Office of Homeland Security was designed to detect, prevent, and protect the country from future terrorist attacks.[60]

In another response reminiscent of President Nixon in the 1970s, President Bush explicitly promised the American public the safety of air travel. On November 19, 2001, he signed into law the Aviation and Transportation Security Act (ATSA).[61] The ATSA, in important part, created the Transportation Security Administration within the U.S. Department of Transportation.[62] When signing the ATSA into law, President Bush unapologetically trumpeted new airport security measures as "permanent and aggressive steps to improve the security of our airways."[63] He made it clear that the September 11th terrorist attacks were a catalyst for federal action, and now that the federal government was firmly in control of air safety "[s]ecurity comes first."[64] President Bush promised that, in this time of crisis, "[a]dditional funds will be provided for federal air marshals, and a new team of federal security managers, supervisors, law enforcement officers, and screeners will ensure all passengers and carry-on bags are inspected thoroughly and effectively."[65] Finally, with the signing of the ATSA and the subsequent creation of the TSA, President Bush declared that this new security regime "should give all Americans greater confidence

58. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

59. *Id*.

60. *Id*.

61. Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 114 (2012)).

62. Aviation and Transportation Security Act § 115. The TSA was later transferred to fall under the authority of the Department of Homeland Security in March 2003. *See What is TSA?*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/about-tsa/what-tsa (last visited Oct. 2, 2013).

63. George W. Bush, President Bush Signs Aviation Security Bill (Nov. 19, 2001) (transcript available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_-111901.html).

64. *Id*.

65. *Id*.

when they fly."[66]

The tone of President Bush's statement was clear—the safety of American airways was paramount. The security measures in place before September 11th were insufficient, and the federal government was going to exercise the full extent of its powers to ensure that the events of that tragic day never happened again. President Bush reassured the American public in strong and unequivocal terms.[67] Thus, when President Bush signed into law the bi-partisan ATSA, the federal government effectively seized control of airport security by creating the Transportation Security Administration.[68] The TSA's mission was extremely broad and tellingly ambiguous: to "[p]rotect the Nation's transportation systems to ensure freedom of movement for people and commerce."[69] John Magaw was appointed by President Bush as the first Administrator of the TSA while the Senate was in recess,[70] and with that, the TSA was operational.

The goal of the TSA was clear: ensure the safety of American air travel.[71] Exactly how the TSA was going to achieve this goal went decidedly unspoken.

C. Current Screening Policies and Measures

> *I understand people's frustrations with [the TSA]. But I also know that if there was an explosion in the air that killed a couple of hundred people . . . and it turned out that we could have prevented it possibly . . . that would be something that would be pretty*

66. *Id.* It is important to note the effect that September 11th had on the airline industry in general. It is estimated that the airline industry lost approximately $1.1 billion, a tenth of projected revenue, because of September 11th. *See* Garrick Blalock et al., *The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel*, 50 J.L. & ECON. 731, 735 (2007). Therefore, from a financial standpoint, drastic measures needed to be taken to revitalize the airline industry.

67. Bush, *supra* note 63.

68. *See, e.g.*, Molly Selzer, *Federalization of Airport Security Workers: A Study of the Practical Impact of the Aviation and Transportation Security Act from a Labor Law Perspective*, 5 U. PA. J. LAB. & EMP. L. 363 (2003).

69. *Mission, Vision and Core Values*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/about-tsa/mission-vision-and-core-values (last visited Oct. 2, 2013).

70. Nick Anderson, *Bush Fills Security Job, Skirts Senate*, L.A. TIMES (Jan. 8, 2002), http://articles.latimes.com/2002/jan/08/news/mn-21161.

71. *See supra* note 69 and accompanying text.

upsetting to most of us—including me.[72]

—Barack Obama

In order to carry out its goal of protecting American air safety, the TSA issues and administers Transportation Security Regulations,[73] which the TSA Administrator is then charged with implementing.[74] Congress, through the ATSA, gave the TSA wide latitude in implementing security measures, declaring generally that the TSA "shall provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft."[75] Congress also directed the TSA to give "high priority to developing, testing, improving, and deploying [technology] at airport screening checkpoints" that will detect weapons and explosives "in all forms, on individuals and in their personal property."[76] And on the basis of these broad directives, the TSA implements its regulations.[77] Furthermore, Congress left to the TSA the power to prescribe its own Standard Operating Procedures, which are not made available to the public.[78]

With sweeping goals and little direction, it is unsurprising that the TSA has come under fire for the security programs it has administered.[79] The following section looks at the TSA regulations presently in force, particularly those relating to searches and seizures at airport security checkpoints. It also looks at the current screening measures, detailing what exactly a passenger must submit to in the airport screening area.

1. Regulations

The section of the TSA regulations entitled "Responsibilities of Passengers and Other Individuals and Persons," contains the TSA's rules

72. Thomas M. DeFrank, *President Barack Obama on TSA Airport Patdowns: Better Safe than Sorry, but Policy Will Evolve,* N.Y. DAILY NEWS (Nov. 26, 2010), http://www.nydailynews.com/news/politics/president-barack-obama-tsa-airport-patdowns-better-safe-policy-evolve-article-1.456933.

73. *Security Regulations*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/stakeholders/security-regulations (last visited Oct. 2, 2013).

74. 49 C.F.R. § 1502.1(a) (2012).

75. 49 U.S.C. § 44901(a) (2012).

76. *See id*. § 44925(a).

77. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011).

78. *Id*.

79. *See, e.g.*, Murphy, *supra* note 28.

regarding what air travelers must do to comply with TSA regulations.[80] The regulations, in pertinent part, make it unlawful for a passenger to present any fraudulent or falsified records at a security checkpoint[81] or to tamper with or circumvent airport security.[82] The section also importantly provides that passengers are prohibited from carrying weapons, explosives, and incendiaries,[83] and cannot, in any manner, interfere with airport security personnel.[84] Finally, relevant in this particular section of the regulations, any person wishing to enter a "sterile area" or board an aircraft *must* submit to screening and inspection of his or her person and property, and *must* provide identification detailing his or her full name, date of birth, and gender.[85] Without submitting to this process, per TSA regulations, a person is not permitted to board an aircraft.[86]

In regards to airport security, TSA regulations state that an airport operator must "provide[] for the safety and security of persons and property on an aircraft operating in air transportation or intrastate air transportation against an act of criminal violence, aircraft piracy, and the introduction of an unauthorized weapon, explosive, or incendiary onto an aircraft."[87] The regulations go on to detail the security measures required to be implemented by airport operators in order to gain the TSA's mandatory approval.[88] Under the TSA regulations, each airport operator is required to have a secured area which "[p]rovide[s] for detection of, and response to, each unauthorized presence or movement in, or attempted entry to, the secured area."[89] This section also gives extensive direction as to the background checks required of airport and aircraft personnel,[90] and further requires all airport security operators to have adequate support from official law enforcement personnel.[91]

The section of the regulations entitled "Aircraft Operator Security: Air

80. 49 C.F.R. §§ 1540.101–.117 (2012).
81. *See id*. § 1540.103.
82. *See id*. § 1540.105(a)(1).
83. *See id*. § 1540.111(a).
84. *See id*. § 1540.109.
85. *See id*. § 1540.107.
86. *See id*.
87. *See id*. § 1542.101(a)(1).
88. *See id*.
89. *See id*. § 1542.201(b)(2).
90. *See id*. § 1542.209.
91. *See id*. § 1542.219.

Carriers and Commercial Operators," provides further detail on the security measures necessary at commercial airports.[92] Per TSA regulations, airports must have in place TSA approved security measures that prevent and deter carrying explosives, weapons, or incendiaries by individuals and property within their control and any baggage submitted for transport.[93] An airport operator cannot allow a person into a sterile area and must refuse to transport any person who does not submit to the TSA approved screening process.[94] This section of the regulations allows for the use of metal detection devices, x-ray systems, and explosive-detection systems, but only when approved by the TSA.[95] The regulations do not provide specific detail as to what security screening systems are required to be used where—nor do they provide significant detail as to what is necessary for the obligatory TSA approval.

The "Secure Flight Program" was also created by the Transportation Security Regulations.[96] Secure Flight is a "behind-the-scenes program that enhances the security . . . of air travel" by crosschecking passengers' names against government watch lists.[97] Under the program, before a person can travel, the airline must submit the person's name, date of birth, and gender to the TSA.[98] If a person is on a "No Fly List," airlines are prohibited from issuing the person a boarding pass and he or she is not allowed to enter the sterile area of the airport or to travel by plane.[99] The regulations do not provide any information on how one comes to arrive on a "No Fly List," but does detail a redress process whereby persons can contest their inability to travel under the program.[100]

Finally, it is important to note that these regulations are not toothless mandates or advisory rules. The TSA was given broad enforcement powers with steep penalties to assist in enforcing its regulations.[101] The TSA not

92. *See id*. pt. 1544.
93. *See id*. §§ 1544.201, 1544.203, 1544.207.
94. *Id*.
95. *See id*. §§ 1544.211, 1544.213.
96. *See id*. pt. 1560; John S. Pistole, *Secure Flight: November 1st Marks End of Grace Period for Airlines*, THE TSA BLOG (Oct. 26, 2010), http://blog.tsa.gov/2010/10/talk-to-tsa-secure-flight-november-1st.html.
97. *Secure Flight Program*, TRANSP. SECURITY ADMIN. (last updated May 3, 2013), http://www.tsa.gov/stakeholders/secure-flight-program.
98. *Id*.
99. *See* 49 C.F.R. § 1560.105 (2012).
100. *See id*. §§ 1560.201–.207.
101. *See id*. § 1503.

only has the power to issue administrative orders such as warning notices and letters of correction, but also has the ability to assess civil penalties in amounts ranging from $10,000 to $400,000.[102] Moreover—although the TSA does not have the power to arrest individuals—because airport-screening personnel must work in tandem with law enforcement as required by TSA regulations, arrest is always a viable option.[103]

Even after reading the TSA's implementation regulations, however, it is still not precisely clear how the TSA is going above and beyond to ensure the safety of American travel. The TSA announced broad rules, making it unlawful to interfere with security personnel or circumvent security procedures and commanding that security operators must screen passengers and their belongings—but what these rules actually require is not specified.[104] The TSA security measures are further obfuscated by the fact that TSA Standard Operating Procedures are not available to the public at large, such that the general public has no idea what TSA personnel can or cannot do pursuant to official agency policies and regulations.[105] This lack of transparency presents two major problems: (1) passengers are left unaware of their rights in relation to TSA officials; and (2) TSA personnel could be acting pursuant to unlawful operating procedures, exposing themselves to potential liability.

Because information about the security measures followed by TSA agents is largely unavailable to the public, the next section attempts to piece together the security measures currently in place at airport security checkpoints.

2. Screening Procedures

Of all the screening measures currently in place,[106] the most

102. *See id.* § 1503.401.

103. *See, e.g.*, John Marzulli & Corky Siemaszko, *Peanut Butter-loving Flier Seeks $5 Million from TSA Worker and Port Authority Cop for Putting Him in Sticky Situation,* N.Y. DAILY NEWS (Feb. 8, 2013), http://www.nydailynews.com/new-york/peanut-butter-lover-seeks-5m-airport-jam-article-1.1258474.

104. *See* 49 C.F.R. §§ 1540.105(a)(1), 1540.109, 1544.201, 1544.203, 1544.206 (2012).

105. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011).

106. The TSA has adopted a security program which has been dubbed the "21 Layers of Security." Mark G. Stewart & John Mueller, *Cost-Benefit Analysis of Advanced Imaging Technology Full Body Scanners for Airline Passenger Security Screening*, 8 J. HOMELAND SECURITY & EMERGENCY MGMT., no. 1, art. 30, 2011 at 8. Fifteen of the twenty-one layers are pre-boarding aircraft security, which includes: intelligence, international partnerships, customs and

controversial is undoubtedly Advanced Imaging Technology (AIT) scanning. In 2007, AIT units were slowly introduced into airports.[107] AIT units provide "full-body imaging," which, according to the TSA, can "detect a wide range of threats to transportation security in a matter of seconds to protect passengers and crews."[108] The way the technology works is that millimeter wave or backscatter technology bounces electronic waves off the body to produce negative-like, black and white, three-dimensional images[109] showing the folds and contours of the person's body, including genitalia.[110] "AIT scanners are able to screen beneath passengers' clothing to produce an image of their bodies, revealing both metallic and nonmetallic items."[111]

At first, AIT units were employed solely as enhanced secondary screening apparatuses.[112] A person would only have to submit to AIT scanning after they passed through and triggered the standard magnetometer (metal detector).[113] However, pursuant to no codified regulation or formal rule,[114] in early 2010 the TSA decided to abandon metal detectors and use AIT scanners as the primary screening measure, unilaterally concluding that AIT scanners would be more successful in detecting potential threats than previously existing screening measures.[115] This change was also in large part a reaction to a criminal threat.[116]

On Christmas Day in 2009, "Underwear Bomber" Umar Farouk Abdulmutallab was able to board a Northwest Airlines flight with plastic

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border protection, joint terrorism task force, no-fly list and passenger pre-screening, crew vetting, Visible Intermodal Protection Response Teams, canines, behavioral detection officers, travel document checker, checkpoint/transportation security officers, checked baggage, transportation security inspectors, random employee screening, and bomb appraisal officers. *Id*. The other six layers are in-flight security, which includes: Federal Air Marshal Service, federal flight deck officers, trained flight crew, law enforcement officers, hardened cockpit doors, and passengers. *Id*.

107. *Elec. Privacy Info. Ctr.*, 653 F.3d at 3.

108. *Advanced Imaging Technology (AIT) Traveler's Guide*, TRANSP. SECURITY ADMIN. (Dec. 18, 2012), http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait.

109. *Id*.; *see* Sarah Gonzalez, *New Airport Security Rules Cause Traveler Discomfort*, NPR (Nov. 15, 2010), http://www.npr.org/2010/11/15/131328327/new-airport-security-rules-cause-traveler-discomfort; LeVine, *supra* note 28, at 187–88.

110. Gonzalez, *supra* note 109.

111. LeVine, *supra* note 28, at 177.

112. *Elec. Privacy Info. Ctr.*, 653 F.3d at 3.

113. *Id*.

114. *See id*. at 4.

115. *Id*. at 3.

116. *See* Indictment, United States v. Abdulmutallab, No. 2:10-cr-20005 (E.D. Mich. filed Jan 6, 2010), *available at* http://www.cbsnews.com/htdocs/pdf/Abdulmutallab_Indictment.pdf.

explosives hidden in his underwear.[117] No damage was done to anything but the would-be bomber's private parts, but the fact that a person was still able to board a plane post-September 11th with explosives rocked the American public.[118] As a result, President Barack Obama issued a "Presidential Memorandum Regarding 12/25/2009 Attempted Terrorist Attack;" a response much similar to his predecessors', that required the Department of Homeland Security "to aggressively pursue enhanced screening technology consistent with privacy rights and civil liberties."[119] It is important to recognize that, unlike his predecessors, President Obama directed the Department of Homeland Security and the TSA to ensure all pursued security measures were consistent with the privacy rights guaranteed by the Constitution.[120]

Supposedly consistent with this presidential mandate, the TSA decided to implement AIT scanning units as the primary screening mechanism in American airports.[121] Thus, the way airport screening procedures work now, a passenger has to remove any outer layer of clothing, belt, shoes, and jewelry, empty his or her pockets, and place all of the items on a conveyor belt for x-ray scanning.[122] He or she then has to undergo AIT scanning such that a full-body image can be taken.[123] To address the privacy concerns of passengers who do not wish to undergo full-body imaging, TSA policy allows passengers to opt out in favor of a full-body pat-down.[124] A pat-down is an open-handed "thorough" examination performed by a TSA agent of the same gender—if privacy is a concern this pat-down can take place in a private screening area.[125] No further information is provided about the logistics of this "thorough" pat-down investigation,[126] which perhaps

117. *Id*.
118. *Id*.
119. Ellison & Pilcher, *supra* note 17, at 4.
120. *Id*.
121. *Id*.
122. *See How to Get Through the Line Faster*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/traveler-information/how-to-get-through-line-faster (last updated July 30, 2013).
123. *See supra* note 110.
124. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011).
125. Transportation Security Administration, *Pat-Downs, What to Know Before You Go*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/traveler-information/pat-downs (last visited Oct. 2, 2013).
126. Brief of Amicus Curiae Freedom to Travel USA in Support of Plaintiffs-Appellants' on the Merits, Redfern v. Napolitano, No. 11-1805 (argued April 4, 2013), 2012 WL 6057509, at *20 (filed Nov. 30, 2012) (citing *A Primer on the New Airport Security Procedures*, CNN TRAVEL (Nov. 23, 2010, 12:58 PM), http://www.cnn.com/2010/TRAVEL/11/23/tsa.procedures.primer/index.html).

explains why, according to the TSA, 99% of passengers prefer the AIT scanning versus the invasive pat-down.[127]

The TSA has security measures in place beyond those which passengers are required to physically submit to at the screening station. In addition to the Secure Flight program discussed earlier,[128] the TSA Visible Intermodal Prevention and Response teams "are broadly deployed to increase the visible presence of security personnel."[129] These teams are used to heighten perceived police presence in an airport in an effort to deter any would be criminals.[130] Another program the TSA has in place is the Screening Passengers and Observational Techniques (SPOT) program, whereby "[t]rained officers observe passengers and look for both obvious and subtle suspicious behavioral indicators, like a particular vocal timbre, gestures, and facial movements."[131] This program is used as a profiling device to target passengers who exhibit seemingly suspicious characteristics.[132]

All of these security measures work in tandem to ensure the safety of American air travel; not without backlash from the traveling public, however.[133] When TSA announced the implementation of AIT scanning units as the new primary screening mechanism the protest was vociferous.[134] News networks across the country were reporting Americans' outrage with intrusive full-body imaging and the new invasive pat-downs.[135] Grassroots

127. *See supra* note 108. In addition, an article was recently published suggesting that the TSA punishes passengers who opt out through intimidation, harassment, and exacting a retaliatory wait time. *See* Christopher Elliot, *3 Troubling Ways the TSA Punishes Passengers Who Opt Out*, HUFFINGTON POST (Jan. 9, 2013, 7:45 AM), http://www.huffingtonpost.com/christopher-elliott/3-troubling-ways-the-tsa-_b_2435503.html.

128. 49 C.F.R. pt. 1560; *see supra* Part I.C.1.

129. Mock, *supra* note 28, at 218.

130. *Visible Intermodal Prevention and Response (VIPR)*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/about-tsa/visible-intermodal-prevention-and-response-vipr (last updated Aug. 23, 2013).

131. Mock, *supra* note 28, at 218.

132. *Id*. at 218–19.

133. Stephen Clark, *'Invasive' Airport Screening Stirs Backlash Among Airline Passengers*, FOX NEWS (Nov. 12, 2010), http://www.foxnews.com/politics/2010/11/12/invasive-airport-screening-stirs-backlash-airline-passengers.

134. *Id*.

135. *See, e.g*., Phil Gast, *Growing Backlash Against TSA Body Scanners, Pat-Downs,* CNN TRAVEL (Nov. 13, 2010), http://www.cnn.com/2010/TRAVEL/11/12/travel.screening/index.html; Editorial, *The Uproar over Pat-Downs*, N.Y. TIMES (Nov. 19, 2010), http://www.nytimes.com/2010/11/20/opinion/20sat3.html?ref=transportationsecurityadministration&_r=0&gwh=3375F5A90024564A54440BDD5048BE70.

organizations called for a "National Opt Out Day," suggesting widespread protest against AIT scanning at airports during the Thanksgiving season—the busiest travel time of the year.[136] Full-body imaging, full-body pat-downs, and selective screening processes have been attacked by individuals and organizations across the country.[137] While pre-TSA screening measures were eventually accepted by the American public as a permissible exception to constitutional privacy rights, current enhancements to airport security screening begs the question: are TSA screening measures constitutional? Or more simply, what are passengers' constitutional rights in the airport?

III. THE AIRPORT AND THE FOURTH AMENDMENT

> *The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*[138]

Fourth Amendment rights are not inviolate. Per the text of the Amendment, a particularized warrant supported by probable cause grants an exception to the government's inability to invade one's privacy.[139] There are also limited circumstances in which the Supreme Court has carved out exceptions to the seemingly clear pronouncements of the Amendment, and found that certain circumstances justify government intrusion on one's person and property without a warrant.[140] Whenever passengers submit bags to x-ray screening or present themselves for full-body imaging, the government is undoubtedly performing a "search" as defined by the Fourth Amendment.[141] And it is beyond dispute that the TSA does not have a warrant to search every person that travels by air. The question is, therefore,

136. Gast, *supra* note 135.

137. Clark, *supra* note 133.

138. U.S. CONST. amend. IV.

139. *Id*.

140. *See, e.g.*, Horton v. California, 496 U.S. 128 (1990) (recognizing an exception for contraband in plain view); Chimel v. California, 395 U.S. 752 (1969) (recognizing an exception for a search incident to lawful arrest).

141. Courts have held, however, that this does not constitute a *seizure* for Fourth Amendment purposes. *See, e.g.*, United States v. Black, 675 F.2d 129 (7th Cir. 1982); United States v. Viegas, 639 F.2d 42 (1st Cir. 1981); United States v. Jefferson, 650 F.2d 854 (6th Cir. 1981); United States v. Allen, 644 F.2d 749 (9th Cir. 1980); United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979).

under which exception, if any, to Fourth Amendment protections do the current TSA screening procedures fall?

A. Pre-TSA Fourth Amendment Litigation

Fourth Amendment litigation challenging airport security measures is nothing new. Since FAA search programs were introduced in the 1960s they have been challenged as unconstitutional. No federal court of appeals has wholesale found airport screening measures unconstitutional.[142] During these initial challenges to new airport security measures, it became clear that the airport was becoming another exception to the rule.[143] Early litigation concerning the constitutionality of airport security measures seemed to suggest that the Constitution, especially the Fourth Amendment, did not apply in equal force at airport screening stations. This point is accentuated by the federal appellate courts' inability to come to a single principled consensus to justify the constitutionality of airport security searches—in the infancy of airport litigation, courts used four primary rationales to uphold airport security screening: *Terry* reasonableness, passenger consent, the border search exception, and the administrative-search exception. Despite the differences in rationale, however, the undergirding theme of all the early appellate decisions was clear: the necessity of air-travel safety justified any constitutional intrusion. The following, therefore, highlights how the federal courts of appeals stretched to find the means to justify the end.

1. *Terry* Reasonableness

The Fourth Circuit was one of the first courts of appeals to deal with the constitutionality of airport security in *United States v. Epperson*.[144] In *Epperson*, the defendant was arrested at Washington National Airport for attempting to board an aircraft carrying a concealed dangerous weapon, in violation of 49 U.S.C. § 1472(l).[145] Epperson triggered the screening

142. But there have been occasions where the facts surrounding a particular search rendered that search unconstitutional. *See, e.g.*, United States v. $124,570 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989).

143. Fourth Amendment rights have been limited in other contexts too. S*ee* New Jersey v. T.L.O., 469 U.S. 325 (1985) (limiting Fourth Amendment rights in public schools); Hudson v. Palmer, 468 U.S. 517 (1984) (limiting Fourth Amendment rights in prisons).

144. 454 F.2d 769 (4th Cir. 1972).

145. *Id.* at 770.

magnetometer, and as a result, was subjected to a frisk of his person by a United States Marshal.[146] Upon frisking him, the marshal discovered a loaded .22 pistol in Epperson's jacket pocket, resulting in Epperson's arrest.[147] Epperson moved to suppress the evidence of the gun, arguing that the use of the magnetometer was a search within the meaning of the Fourth Amendment, violating the warrant requirement.[148]

The Fourth Circuit agreed that passing through a metal detector was a "search" in Fourth Amendment terms, and interestingly found that the search by magnetometer did not fall under any of the established exceptions to the Fourth Amendment's warrant requirement.[149] Instead, the Fourth Circuit found that the search was justified by the then recently handed down Supreme Court decision *Terry v. Ohio*.[150] Extrapolating from *Terry*, the Fourth Circuit reasoned that the danger of skyjacking "is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances."[151] The Fourth Circuit went on to state that passing through a metal detector, "unlike frisking, cannot possibly be 'an annoying, frightening, and perhaps humiliating experience,' because the person scrutinized is not even aware of the examination."[152] Thus, resting on the use of the modifier "unreasonable" in the text of the Fourth Amendment, the court found that a magnetometer was a limited search of minimal intrusion, and was therefore "reasonable" in the face of pressing national security interests. The court viewed airport screening as the logical extension of a *Terry* stop and frisk.[153]

Just a few months after *Epperson* was handed down, the Second Circuit was called to grapple with the constitutionality of airport security in *United States v. Bell*.[154] In *Bell*, the defendant was stopped and frisked after he activated the magnetometer, which he argued was an unreasonable search under the Fourth Amendment.[155] The court heartily disagreed and, citing

146. *Id*.
147. *Id*.
148. *Id*.
149. *Id*.
150. 392 U.S. 1 (1968).
151. *Epperson*, 454 F.2d at 771.
152. *Id*. (quoting *Terry*, 392 U.S. at 25 (1968)).
153. *Id*. at 772; *accord* United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972).
154. 464 F.2d 667 (2d Cir. 1972).
155. *Id*. at 673.

Epperson, argued: "None of the personal indignities of the frisk discussed [] in *Terry* are here present. In view of the magnitude of the crime sought to be prevented, the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer is in our view a reasonable caution."[156] Going one step further than the majority opinion, however, Judge Henry Friendly in a concurrence hammered home the fact that grave national security interests temper any Fourth Amendment protections.[157] He proclaimed "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness."[158] Thus, in Judge Friendly's opinion, again resting on the use of the word "unreasonable" in the Fourth Amendment, national security effectively renders all "good faith" searches "for the purpose of preventing hijacking" reasonable, and therefore constitutional—and in his view, if a passenger does not like it "he can avoid it by choosing not to travel by air."[159]

In an attempt to rein in his colleague, Judge Walter Mansfield also wrote a separate concurring opinion, attempting to ground the Fourth Amendment conversation in a discussion about individual rights.[160] He cautioned against the approach taken by Judge Friendly, arguing that although skyjacking does pose a grave risk to national security, vague principles of security and good faith cannot be used "to abandon standards that have been carefully constructed over the years as a means of protecting individual rights guaranteed by the Fourth Amendment."[161] He went on to say "[n]o necessity exists for punching a hole in the Fourth Amendment in order to enable the FAA and airline authorities to deal effectively with the air piracy problems."[162] Judge Mansfield presciently concluded:

> [S]hould there be any increase in the threat of hijackings, airline authorities, in addition to their use of existing methods described in the majority opinion (which are undoubtedly undergoing improvement and refinement on the basis of experience) may

156. *Id*. (citing *Terry*, 392 U.S. at 16–17).
157. *Id*. at 674–75 (Friendly, J., concurring).
158. *Id*. at 675 (emphasis in the original).
159. *Id*.
160. *Id*. 675–76 (Mansfield, J., concurring).
161. *Id*. at 675.
162. *Id*. at 676.

> protect themselves and the public by refusing passage to a suspected hijacker rather than by subjecting all passengers to the wholesale indignities that would be permitted in the exercise of broad powers of the type urged.[163]

Judge Mansfield warned of what he foresaw as becoming a popular trend: courts exaggerating the security interests involved in preventing air piracy to allow the government to trample on an individual's civil liberties.[164]

2. Border Search Exception

Just one year after *Epperson* and *Bell*, the Fifth Circuit in *United States v. Skipwith* rejected *Terry* as the basis for justifying airport security.[165] The court instead turned to the Supreme Court's border search precedent as condoning the Fourth Amendment intrusions occasioned by airport security screening.[166] Rehashing Judge Friendly's concurrence in *Bell*, the court made sure to emphasize the pressing national security concerns that are at play in an airport.[167] The court then looked to border search jurisprudence to justify its holding, finding that "those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or *unsupported* suspicion."[168] In holding airport searches to be constitutional border-like searches, the Fifth Circuit performed a three-part balancing test, weighing "public necessity, efficacy of the search, and degree of intrusion."[169] In conducting the test, often seen in the administrative-search context, the court expressed judicial concern with the crime of air piracy, noting "there is a judicially-recognized necessity to insure [sic] that the potential harms of air piracy are foiled."[170] And because metal detectors, visual inspections, and physical searches appeared to be both efficacious and efficient, the then-current airport

163. *Id*.
164. *Id*.
165. 482 F.2d 1272 (5th Cir. 1973). The Fifth Circuit had previously upheld case-by-case searches in airports. *See* United States v. Moreno, 475 F.2d 44 (5th Cir. 1973).
166. *Skipwith*, 482 F.2d at 1276.
167. *Id*.
168. *Id*. (emphasis added).
169. *Id*. at 1275.
170. *Id*.

screening protocol passed constitutional muster.[171]

3. Administrative Search Exception

Two weeks after *Skipwith*, the Ninth Circuit also rejected the notion that *Terry* justifies airport security measures in *United States v. Davis*.[172] In that case, the defendant's briefcase was opened and searched as part of a routine check, during the course of which a handgun was found.[173] The defendant challenged the search as a violation of his Fourth Amendment rights.[174] After a lengthy recount of the then-recent phenomenon of skyjacking, the Ninth Circuit found that airport security screening is not per se unconstitutional.[175] The court, however, rejected that *Terry* could justify general airport screening given that there was no particularized suspicion for all travelers subjected to the screening process and that the scope of airport screening extends beyond the measures necessary to assure a passenger does not have a weapon immediately available for use against the screening agents.[176] The court reasoned that if *Terry* was extended "to authorize airport screening searches" the result would be "intrusions upon privacy unwarranted by the need."[177] Thus, the Ninth Circuit had to look elsewhere to justify airport screening in the face of pressing national security interests.

Breaking new ground in airport security jurisprudence, the Ninth Circuit held that screening measures were justified under the administrative search exception to the Fourth Amendment.[178] At the time, the only way to examine whether a search was permissible under the administrative exception to the Fourth Amendment was to balance the "need to search against the invasion which the search entails."[179] With this standard in mind, the Ninth Circuit found that in light of the "grave and urgent" need to prevent skyjacking, airport searches could occur under the administrative search doctrine so long as the search is "indiscriminate" and "limited in its intrusiveness as is consistent with satisfaction of the administrative need that

171. *Id*.
172. 482 F.2d 893 (9th Cir. 1973).
173. *Id*. at 896.
174. *Id*.
175. *Id*. at 897–904.
176. *Id*. at 907.
177. *Id*.
178. *Id*. at 908–09.
179. *Id*. at 910 (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)).

justifies it."[180] Moreover, the Ninth Circuit held that a potential passenger should retain the right to leave rather than being forced to submit to the search.[181]

4. Consent

Finally, some courts found that airport security screening did not raise any constitutional issues given that passengers consent to airport screening measures. For example, in *United States v. Freeland*, the Sixth Circuit found that the search of a passenger's bags during an airport screening routine could be justified under the doctrine of consent.[182] Noting that there was a sign posted at the ticket counter that baggage would be examined, the court stated that once the defendant read the sign and proceeded to commence the screening process, he essentially consented to the search.[183] Drawing on the Supreme Court's *Bustamonte* decision,[184] the Sixth Circuit looked at the two concerns circling the question of voluntary consent: (1) the legitimate need for searches; and (2) the absence of coercion.[185] Analyzing these two concerns, the Sixth Circuit found that the acute need for air security and the ability for a passenger to withdraw his bag from the search at any time satisfied the *Bustamonte* voluntariness requirements.[186] As such, given a passenger's tacit consent to airport searches, the airport security screening program in question did not implicate any Fourth Amendment rights.[187]

The cases above emphasize two important points. One, that an undergirding concern for national security drove the courts to find airport security screening measures constitutional. All of the circuits discussed above went to painstaking lengths to detail the threat posed by skyjacking and the current danger facing the country as a precursor to their constitutional analysis. Second, four distinct rationales emerged from the

180. *Id.*; *accord* United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

181. *Davis*, 482 F.2d at 912. The court later held that a person does not always have the right to leave. *See* United States v. Aukai, 497 F.3d 955, 960–61 (9th Cir. 2007) (en banc).

182. 562 F.2d 383, 385–86 (6th Cir. 1977).

183. *Id.*

184. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

185. *Freeland*, 526 F.2d at 386.

186. *Id.*

187. *Id.* Similar conclusions were also reached by other courts. *See, e.g.*, United States v. DeAngelo, 584 F.2d 46 (4th Cir. 1978).

courts as justification for airport security screening measures: consent, the border search exception, general reasonableness under *Terry*, and the administrative search doctrine. Although the Supreme Court has never explicitly stepped in to explain how, if at all, airport security measures are justifiable under the Constitution, it is important to explore these four views in order to assess the constitutionality of current TSA airport screening measures.

B. Ends Justify the Means—Constitutionality of Airport Security

If airport screening measures are in fact constitutional, then they have to be justified by an exception to the Fourth Amendment warrant requirement. The Supreme Court has delineated limited situations in which a government official is not required to get a warrant to effectuate a Fourth Amendment search or seizure.[188] Because the Supreme Court has never officially decided what exception to the Fourth Amendment justifies airport searches, it is important to examine the four competing rationales used by the courts in early airport security litigation to determine which exception, if any, is true to precedent and passes constitutional muster.

1. Consent

Despite the fact that it was cited by at least three circuits as justifying airport security searches, the consent exception is perhaps the easiest rationale to dispatch.[189] Most would now recognize that requiring persons to choose between their constitutional right to travel[190] and their Fourth Amendment right to be free from unreasonable searches would be coercion, and therefore render consent meaningless.[191] Indeed, the Supreme Court said

188. *See* Arizona v. Gant, 556 U.S. 332 (2009) (recognizing motor vehicle exception); Arizona v. Hicks, 480 U.S. 321 (1987) (recognizing plain view exception); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (recognizing consent exception); Chimel v. California, 395 U.S. 752 (1969) (recognizing exception for searches incident to arrest); Hester v. United States, 265 U.S. 57 (1924) (recognizing open fields exception).

189. *See DeAngelo*, 584 F.2d at 47 (4th Cir. 1978); *Freeland*, 562 F.2d at 384 (6th Cir. 1977).

190. The constitutional right to travel includes the right to travel from one state to another and the free use of instrumentalities of interstate commerce to do so. United States v. Guest, 383 U.S. 745, 757 (1966).

191. *See* United States v. Albarado, 495 F.2d 799, 806–07 (2d Cir. 1974) (holding that government cannot force passengers to choose between Fourth Amendment rights and right to travel); United States v. Kroll, 481 F.2d 884 (8th Cir. 1973) (same). These cases indicate that the

that it is "intolerable that one constitutional right should have to be surrendered in order to assert another."[192] This is reinforced by the fact that under current airport security policies, if a person withdraws consent and attempts to leave a screening area, he or she can be subject to civil liability.[193] Thus, this rationale seems to be squarely foreclosed by Supreme Court precedent. For the purposes of this discussion, therefore, we can turn to the other constitutional doctrines used to justify airport screening's infringement on Fourth Amendment rights.

2. Border Search Exception

The Fifth Circuit turned to the Supreme Court's case law regarding border search to determine that airport security screenings were excepted from Fourth Amendment protections.[194] While from a bird's-eye perspective the analogy makes sense, a closer look at the border exception doctrine shows that it may not be constitutionally analogous and therefore is a weak justification for airport security measures.

At the time airport security was federally implemented in airports, the border searches exception to Fourth Amendment protections was well established. As detailed by Chief Justice Rehnquist in *United States v. Ramsey*, the Supreme Court first announced the government's authority to perform border searches notwithstanding the Fourth Amendment in 1886.[195] Then in 1925 the Court laid out the constitutional difference between border searches and searches of persons lawfully within the country.[196] The Court re-announced the border exception to the Fourth Amendment in light of recently enacted airport security measures in 1971, explaining that

> a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of . . . illegal [] materials . . . . [I]t is an old practice and is intimately

courts were wrong at the time they reached their conclusion.

192. *See* Simmons v. United States, 390 U.S. 377, 394 (1968).

193. *See* Susanna Kim, *Airport Pat-Downs: TSA Says It Can Fine You for Backing Out*, ABC NEWS (Nov. 23, 2010), http://abcnews.go.com/Business/walking=airport-security-lead-11000-fine/story?id=12215171; *see also* 49 C.F.R. § 1503.401(a), (b)(1) (2012) (TSA civil penalties provisions).

194. United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973).

195. 431 U.S. 606, 617 (1977) (citing Boyd v. United States, 116 U.S. 616, 623 (1886)).

196. *Id.* at 618 (citing Carroll v. United States, 267 U.S. 132, 153–54 (1925)).

associated with excluding illegal articles from the country.[197]

Thus, again building from the Fourth Amendment principle of reasonableness, border searches have been considered a reasonable exception to the Fourth Amendment since its inception and therefore evade the warrant requirement.[198]

The border search precedent, primarily relied on by the Fifth Circuit in *Skipwith*, does not fit precisely with air port screening given that most passengers screened in airports are traveling domestically or out of the United States. In creating the border exception caveat, the Supreme Court noted the "distinction between searches within this country, requiring probable cause, and border searches."[199] The border search exception was in large part justified by the Executive's power to deal in foreign commerce and to secure the borders.[200] The executive powers at play at the border are not implicated in domestic travel. Thus, given the ill fit of the analogy, this exception too can be dispatched when assessing the constitutionality of airport security screening.

3. General Reasonableness—the *Terry* Stop and Frisk

Both the Second and Fourth Circuits found airport security screening constitutional on the basis of the Supreme Court's decision in *Terry v. Ohio*, in which Chief Justice Earl Warren grappled with the "practical and constitutional arguments" concerning on-the-street police–citizen encounters.[201] Weighing constitutional freedoms against the "rapidly unfolding and often dangerous situations on city streets" and the police's need for "an escalating set of flexible responses," the Supreme Court reminded us that the police "*must*, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[202] The Court went on, however, to carve out a new exception to Fourth Amendment protections—when police action is "predicated upon the on-the-spot observations of the officer."[203] In these situations, the Court

197. *Id.* (citing United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 376 (1971)).
198. *Id.* at 619.
199. *Id.* at 618.
200. *Id.*
201. 392 U.S. 1, 10 (1968).
202. *Id.* (emphasis added).
203. *Id.* at 20.

commanded lower courts to look past the warrant requirement and test such stops, searches, and seizures against the Fourth Amendment's "general proscription against unreasonable searches."[204] In a capitulation to modern realities, Chief Justice Warren went on to announce that police may, "in appropriate circumstances and in an appropriate manner[,] approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."[205] And while Chief Justice Warren, perhaps in vain, tried to warn against infringement on individual rights, an officer's ability to conduct what is now known as an investigative *Terry* stop and frisk was premised upon two principles: one, a *Terry* stop must be based on a reasonable and particularized suspicion of criminal activity; and two, a *Terry* frisk must be tailored to a search for weapons to ensure officer safety.[206]

In basing their holding on *Terry*, it appears that the Second and Fourth Circuits forgot to the read the entire opinion. While the *Terry* decision does use broad language concerning on-the-spot decision-making by law enforcement and the need to afford police discretion in performing their duties, the *Terry* opinion is not untethered to articulable principles. While *Terry* found its genesis in the use of the word "unreasonable" in the text of the Fourth Amendment—for the Second and Fourth Circuits to latch onto *Terry*'s underpinnings and find that airport security satisfies a general standard of "reasonableness" and thus satisfies the Fourth Amendment runs contrary to the rest of the *Terry* decision. *Terry* gives two clear commandments for justifying *Terry* stops and frisks—an articulable and particularized suspicion for performing a stop, and a search both limited and justified by the immediacy of officer safety.[207] These two rationales are not present in a generalized airport security screening program. While there may be certain instances where some criminal activity is afoot, this does not translate to the particularized suspicion necessary to search every air passenger under *Terry*. Moreover, airport screening was not implemented for the safety of the officer conducting the search but for protecting the safety of the aircraft and the passengers onboard.[208] Thus, the *Terry*

204. *Id*.
205. *Id*. at 22.
206. *Id*. at 27.
207. *Id*. at 33.
208. *See* 49 C.F.R. § 1542.101(a)(1) (requiring airport security programs that "[p]rovide[] for the safety and security of persons and property on an aircraft operating in air transportation").

justification of a search for weapons to protect the immediate safety of the officer performing the search does not always apply in an airport setting. While protecting the airplane and the passengers on board is a laudable goal in itself, it does not fit squarely within *Terry's* justifying principles. It seems clear, therefore, that airport screening measures do not satisfy the basic requirements outlined in *Terry*, allowing the government to conduct wholesale warrantless searches.

More importantly, to adopt the Second and Fourth Circuits' approach and justify airport security screening measures using a general standard of reasonableness would create an extremely slippery slope. If an unauthorized government search only had to be "reasonable," a nebulous word in and of itself, Fourth Amendment protections far beyond the airport would be at risk. Reasonableness is subjective to the point where almost anything can be justified.[209] Fourth Amendment safeguards would therefore hinge upon the discretion of the acting government official or presiding judge. A constitutionally guarded reading of the Fourth Amendment therefore requires any warrantless search or seizure be deemed per se unreasonable unless it fits into one of the narrow, judge-made exceptions.[210] Thus it is safe to dismiss *Terry* (or an unsupported extrapolation therefrom) as the basis for the constitutionality of airport screening programs.

With three of the four rationales used to justify the constitutionality of airport security screening by early appellate courts now dismissed, the question becomes whether airport-screening measures can be justified under the only rationale left—the administrative search exception.

4. Administrative Search Exception

The Supreme Court has repeatedly upheld warrantless government searches pursuant to an administrative scheme.[211] Around the time airport security screening was first implemented, the Supreme Court in *United States v. Biswell* upheld the warrantless search of a federally licensed gun

209. *See* Bell v. Wolfish, 441 U.S. 520, 559 (1979) ("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.").

210. *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

211. *See* Camara v. Mun. Court of S.F., 387 U.S. 523 (1967); Frank v. Maryland, 359 U.S. 360 (1959).

dealership because the licensing statute authorized such searches.[212] The Court noted the importance of federal efforts to regulate crime and the crucial interests at stake in this instance, "since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms."[213] Again basing its conclusion on the use of the word "unreasonable" in the Fourth Amendment, the Court held that it has "little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."[214]

Based on the Supreme Court's administrative search jurisprudence, it is logical to conclude, as the Ninth Circuit did in *Davis*,[215] that airport security screenings fall under this exception to the Fourth Amendment. The urgent need for securing American airways justifies the government's implementing a warrantless search program, especially as a warrant requirement would "easily frustrate inspection."[216] Thus, just as the Ninth Circuit reasoned, it appears that the administrative search doctrine provides a sound and principled rationale for upholding airport security searches conducted pursuant to a statutory scheme and codified regulations.

More recent Supreme Court precedent expounding on the administrative search exception to the Fourth Amendment bolsters the conclusion that airport security screenings fall under this exception. In the 1990 decision of *Michigan Department of State Police v. Sitz*, the Supreme Court was called upon to determine the constitutionality of sobriety checkpoint programs.[217] The *Sitz* Court applied the three-part balancing test announced in *Brown v. Texas*[218] for determining the constitutionality of administrative search programs, weighing the state's interest, the effectiveness of the search measure, and the level of intrusion on the individual's privacy.[219]

In performing the analysis, the Supreme Court looked at the state's

212. 406 U.S. 311 (1972).
213. *Id.* at 315–16.
214. *Id.* at 317.
215. 482 F.2d 893 (1973).
216. *Biswell*, 406 U.S. at 316.
217. 496 U.S. 444 (1990); *see also* Illinois v. Lidster, 540 U.S. 419, 427 (2004).
218. 443 U.S. 47, 51 (1979).
219. *Sitz*, 496 U.S. at 448–49.

interest by emphasizing the magnitude of the drunk driving problem in Michigan, evidenced by statistics.[220] The Court then compared this to the slight intrusion on motorists' privacy caused by a brief checkpoint stop, where fear and annoyance is minimized by the fact that everyone is subject to the same search measures—there was no discretion in the program.[221] Finally, the Court looked at the effectiveness of the administrative search program in question, and found that empirical data resulted in the arrest of around 1.6% of all motorists stopped, which was statistically significant according to the Court's precedent.[222] In sum, the Supreme Court upheld blanket sobriety checkpoints under the administrative search exception to the Fourth Amendment so long as the checkpoint was justified by a pressing government interest, effectively implemented, and minimally intrusive on travelers' privacy.[223] In explaining what is allowable under the administrative search exception, the Court emphasized the minimal invasion on a person's privacy interest, the fact that administrative searches are not susceptible to individual abuse, and that the administrative search program in question had proven statistically effective.[224]

As further evidence that airport security screenings fall under the administrative search exception, all of the federal appellate cases that have examined the constitutionality of airport screening measures after the advent of the TSA have followed the Ninth Circuit's lead in *United States v. Davis*[225] and analyzed the airport security programs using the administrative search exception.[226] In fact, the Supreme Court on three separate occasions has hinted that airport security checkpoints are justifiable under the administrative search exception to the Fourth Amendment.[227] Despite this, it

220. *Id*. at 453–55.

221. *Id*. at 452–53.

222. *Id*. at 454. In assessing effectiveness, the Michigan Court of Appeals applied tests espoused by the U.S. Supreme Court in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *Delaware v. Prouse*, 440 U.S. 648 (1979). Sitz v. Dep't of State Police, 429 N.W.2d 180, 183–84 (1988), *rev'd*, 496 U.S. 444 (1990).

223. *Sitz*, 496 U.S. at 455.

224. *Id*.

225. 482 F.2d 893 (9th Cir. 1973).

226. *See* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc); United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006).

227. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 47–48 (2000) ("Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."); Chandler v. Miller, 520 U.S. 305, 323 (1997); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 675 n.3

is important to highlight that all federal appellate courts that have upheld airport security screening using the administrative search doctrine, both before and after the introduction of the TSA, were primarily analyzing the use of standard metal detectors (magnetometers) and x-ray baggage scanners.[228] Therefore, even assuming the administrative search doctrine justifies airport security screening programs generally, current TSA screening measures differ greatly from the then-current security measures held to be constitutional by the courts.[229] Courts must, therefore, perform the administrative-search balancing test using current security screening measures to scrutinize whether American air travelers now routinely subject to enhanced screening measures are being required to submit to unconstitutional searches.

C. Do Current Screening Measures Violate the Fourth Amendment?

Even conceding that the appellate courts got it right in the 1970s, that airport screening programs as originally enacted were justifiably excepted from Fourth Amendment protections, it does not follow that the current enhanced screening measures are also constitutional. There is a strong argument to be made that current screening measures do not satisfy the requirements of the administrative search exception to the Fourth Amendment; AIT scanning and the new, more invasive pat-downs are quite different from the previously employed standard metal detectors and x-ray baggage scanners.[230]

Earlier this year, the TSA announced that it is removing at least 174 full-body scanners that use backscatter technology from airport security checkpoints.[231] This decision was made after the TSA concluded that software could not be developed to limit the intrusiveness of the machines as required by Congress.[232] As put by Representative John L. Mica (R-Fla.), it was an example of "another very bad decision by TSA coming home to

(1989).

228. *See supra* note 226.

229. Ellison & Pilcher, *supra* note 17, at 4.

230. Ellison & Pilcher, *supra* note 17, at 5.

231. Ashley Halsey III, *TSA to Pull Revealing Scanners from Airports*, WASH. POST (Jan. 18, 2013), http://articles.washingtonpost.com/2013-01-18/local/36409626_1_millimeter-wave-scanners-administrator-john-s-pistole-full-body-scanners.

232. *Id*.

roost."[233] Yet despite some AIT scanners being removed from airports, the scanners that use millimeter wave technology will still be in place, and the backscatter machines that are being removed will be placed in federal buildings.[234] The Congressional worry surrounding AIT scanning further emphasizes the need for a renewed constitutional analysis of current airport screening measures.[235] Even TSA's general counsel's office admitted that "[t]he additional capability of AIT [scanning] . . . raises novel legal and policy issues, particularly those related to privacy."[236]

As Chief Justice Earl Warren warned in *Terry*, "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."[237] The following section analyzes current airport security measures using the administrative search doctrine test in an effort to examine the constitutionality of AIT scanning and the invasive pat-downs.

1. *Electronic Privacy Information Center (EPIC) v. Department of Homeland Security*

As of now, the D.C. Circuit is the only federal court of appeals that has examined the constitutionality of AIT scanning, which was at issue in *Electronic Privacy Information Center (EPIC) v. United States Department of Homeland Security*.[238] Outlining the history of courts upholding airport security screening under the administrative search doctrine, the D.C. Circuit proceeded to perform its own limited administrative balancing test regarding the use of AIT scanners and full-body imaging.[239] The court found that the

233. *Id*.

234. The TSA announced that it will discontinue backscatter scanners as of May 31, 2013. *Id*.; *see also* Supplemental Brief on Mootness for Plaintiff-Appellants, Redfern v. Napolitano, No. 11-1805, 2013 WL 3470495 (1st Cir. Apr. 1, 2013), 2013 WL 1370111 at *4.

235. *See* Supplemental Brief on Mootness, *supra* note 234, at *2.

236. Ellison & Pilcher, *supra* note 17, at 5.

237. Terry v. Ohio, 392 U.S. 1, 18 (1968).

238. 653 F.3d 1 (D.C. Cir. 2011). In 2010, Jeffrey Redfern and Anant N. Pradhan brought an action in the United States District Court for the District of Massachusetts challenging the constitutionality of the TSA's screening procedures. *See* Redfern v. Napolitano, No. 10-12048, 2011 WL 1750445 (Mass. Dist. Ct. May 9, 2011). The district court did not reach the merits, however, dismissing the case for lack of subject matter jurisdiction. *Id*. at *8. Redfern and Pradhan appealed. *See* Redfern v. Napolitano, No. 11-1805, 2013 WL 3470495 (1st Cir. July 11, 2013) (holding that the claims have become moot as the AIT scanners were removed).

239. *Elec. Privacy Info. Ctr.*, 653 F.3d at 10–11.

scales tipped in favor of the government, given that the need "to ensure public safety can be particularly acute."[240] The court then noted the increased effectiveness of AIT scanning, because unlike a metal detector, it can detect any liquids or powders carried on a person.[241] The court emphasized that the TSA has taken measures to protect people's privacy when using the AIT scanner, including distorting images and deleting them, but even "more telling," allowing people to opt out in favor of a pat-down.[242] This one-paragraph analysis rendered it obvious to the court that AIT scanning does not violate the Fourth Amendment, especially, according to the court, given the fact that the Fourth Amendment administrative search exception does not require the least intrusive means of effecting a search in order for an administrative search program to be constitutional.[243]

The D.C. Circuit's perfunctory analysis finding AIT scanning constitutional is intellectually callous for a number of reasons. First, the court makes no mention of the increasing intrusiveness of AIT scanning in that it produces nude full-body images. Most would agree that a government official viewing one's naked body is a much greater privacy intrusion than walking through a standard metal detector fully clothed. Moreover, the court does not demonstrate how this increased intrusion is justified by any proportionate increase in the government's interest. Assuming that the government's interest at stake here has been heightened by September 11th and subsequent terrorist attacks, the court does not even engage in analysis to explain the magnitude of the government's interests. And finally, the court cites no evidence whatsoever that AIT scanning has proven effective.[244]

In rejecting the plaintiff's constitutional challenges to AIT scanning, the court inadequately considered the constitutional implications, shrugging aside the serious privacy interests implicated. "The opinion's terse analysis of a highly contentious issue in a high-profile case speaks volumes about the level of deference that the TSA will receive from the courts."[245] Given that the D.C. Circuit did not treat the issue with the intellectual rigor it deserves, the following section provides an analysis of the constitutionality of AIT

240. *Id*. at 10 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 33 (2000)).
241. *Id*.
242. *Id*.
243. *Id*. at 10–11.
244. *See id*.
245. Luna, *supra* note 24, at 245.

screening measures under the administrative search exception three-part balancing test.

2. Administrative Search Analysis

A *true* examination of the constitutionality of the administrative search program requires one to look at: (a) the government interest in question; (b) the effectiveness of the search measure implemented; (c) and the nature of the intrusion on one's privacy.[246] As reflected below, the constitutionality of airport security measures proves to be a much closer question than the D.C. Circuit would have one imagine.

a. Government Interest

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation,"[247] the government interest at stake when airport security measures were first implemented. In the 1970s, when President Nixon first announced the necessity for federally mandated airport security programs, the number of skyjackings in the United States was on the rise.[248] And the stakes at the time were clear—not only does skyjacking endanger the lives of the people on the airplane, it also has the possibility of impacting hundreds, if not thousands more people on the ground should the plane crash.[249] The worst of these risks was realized in the September 11th terrorist attacks.[250] The American public saw firsthand the widespread destruction that can result from skyjackings, resulting in the loss of close to 3000 people.[251] And given the difficulty or near impossibility of finding weapons or explosives absent an all-inclusive administrative search program, the government's need to conduct such routine searches before a passenger boards a plane is now painfully acute. The question remains, however, how to assess the government interests at stake in the face of an ever-changing terrorist threat. While September 11th resulted in more deaths than any other skyjacking in history, did this terrorist

246. *See* Illinois v. Lidster, 540 U.S. 419 (2004); Brown v. Texas, 443 U.S. 47 (1979).
247. Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting United States v. Guest, 383 U.S. 745, 757–58 (1966)).
248. *See supra* notes 32–42 and accompanying text.
249. *See supra* notes 54–57 and accompanying text.
250. *See supra* notes 54–57 and accompanying text.
251. *See supra* note 57 and accompanying text.

event heighten the government interests presently at stake?

Terrorism is by no means a recent phenomenon.[252] However, since the 1970s, terrorist organizations have become more complex and the technology with which to perpetrate attacks more advanced. The world's most infamous terrorist group, Al-Qaeda, came into existence in the late 1980s.[253] Today, a bomb can be created using chemical concoctions unheard of in the 1970s.[254] An even more frightening aspect of terrorism today as compared to the 1970s is that a bomb can be made from a wide range of materials and detonated using a seemingly innocent device, such as a cellphone.[255] Although the September 11th skyjackers overcame the planes using rudimentary weapons, and attempting to carry bombs on a plane has occurred since the 1970s,[256] one could persuasively argue that the sophistication of terrorism today has more seriously imperiled the interests the government is trying to protect and defend.

But in weighing the government's interests, it is important to not overstate it. In 1970, when airport security measures were beginning to be introduced, there were approximately sixty terrorist attacks against U.S. interests.[257] In 2001, when the United States faced its most deadly terrorist incident, there were roughly thirty terrorist attacks against U.S. interests.[258] In 2010, when AIT scanners were introduced into American airports, the number of incidents of terrorism worldwide was on a decline since September 11th.[259] In 2011, the year after the introduction of AIT scanning into airports, the National Counterterrorism Center reported that the number of terrorism-related deaths was the lowest it had been since the agency

252. *See* Beverly Gage, *Terrorism and the American Experience: A State of the Field*, 98 J. AM. HIST. 73 (2011); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 554–69 (2004) (Scalia, J., dissenting) (explaining the history of the treatment of enemy combatants).

253. PETER L. BERGEN, THE OSAMA BIN LADEN I KNOW: AN ORAL HISTORY OF AL-QAEDA'S LEADER (Free Press, 2006).

254. *Cf.* Romesh Ratnesar, *Why Homegrown Terrorism Is Hard to Stop*, BLOOMBERG BUSINESSWEEK (Apr. 15, 2013), http://www.businessweek.com/articles/2013-04-15/why-home grown-terrorism-is-hard-to-stop.

255. *What We Know About the Boston Marathon Bombing and Its Aftermath*, CNN (Apr. 16, 2013), http://www.cnn.com/2013/04/15/us/boston-marathon-things-we-know.

256. *See* United States v. Busic, 592 F.2d 13 (2d Cir. 1978).

257. DAVID B. MUHLHAUSEN & JENA BAKER MCNEILL, TERROR TRENDS: 40 YEARS' DATA ON INTERNATIONAL AND DOMESTIC TERRORISM 5, (Heritage Found. 2011), *available at* http://thf_ media.s3.amazonaws.com/2011/pdf/sr0093.pdf.

258. *Id.*

259. BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2011 (2012), *available at* http://www.state.gov/documents/organization/195768.pdf.

began collecting comprehensive terrorism data in 2007.[260] When looking at how Americans were impacted by terrorism in 2011, seventeen Americans were killed by incidents of terrorism, fourteen were injured, and three were kidnapped.[261] Importantly, however, none of the incidents of terrorism that affected American citizens occurred in the United States, or the western hemisphere for that matter[262]—all of these incidents occurred in Afghanistan, Israel, or Iraq.[263] The number of Americans affected by terrorism becomes even smaller when looking specifically at American deaths caused by Al-Qaeda. In the ten-year period after September 11th, fourteen United States citizens were killed by Al-Qaeda related or inspired terrorists.[264] The likelihood of a private U.S. citizen dying as a result of a terrorist incident is equivalent to the likelihood of that same citizen being crushed to death by his or her television or furniture.[265]

Although the government's need to fight and prevent terrorist attacks in the United States is certainly more pressing today than perhaps it ever has been, it is not clear that the threat of terrorism in America is any graver than it was in the 1970s. Therefore, it is not enough for the government to rely on the events of September 11th as being indicative of a substantially more pressing governmental interest justifying an increasing intrusion on individual privacy. Although perhaps not fully conceptualized, the very results of September 11th were contemplated by the Executive and Congress when airport security was first introduced in the 1970s.[266] It is up to the TSA, therefore, to show how the government interests at stake in airport security screening have intensified since September 11th and the attempted Christmas Day underwear bombing, doing more than just citing the incidents themselves. Or else, as the concurrence in the en banc Ninth Circuit decision *United States v. Aukai* opined, if a search is to be found constitutional after September 11th, it should have also been constitutional

260. *Id.* at 3.
261. *Id.* at 7.
262. *Id.* at 7–8.
263. *Id.*
264. Michael Leiter et al., *Ten Years After 9/11: The Changing Terrorist Threat*, 2 AM. U. NAT'L SECURITY L. BRIEF 113, 116 (2012).
265. Micah Zenko, *How Many Americans Are Killed by Terrorism?*, COUNCIL ON FOREIGN REL. (June 5, 2012), http://blogs.cfr.org/zenko/2012/06/05/how-many-americans-are-killed-by-terrorism/?cid=oth_partner_site-atlantic.
266. *See supra* note 32.

before September 11th.[267] A single terrorist event does not *necessarily* change the underlying evil the government is trying to prevent. What the D.C. Circuit did, allowing the government to rely on a lone terrorist event to justify increasing constitutional intrusion is tantamount to hanging constitutional freedoms on momentary apprehension. The D.C. Circuit applied the Fourth Amendment with a heightened deference in the wake of September 11th without providing any doctrinal justification for this shift.[268] This is not and cannot be the standard used to measure the government's interest when performing an administrative-search balancing test. It is up to the government, therefore, to explain how the changing times have intensified its interests.

b. Effectiveness of the Search Measure Implemented

The TSA has provided little in the way of evidence indicating how, if at all, AIT screening is more effective in preventing skyjacking than the standard metal detectors and previous search regimes used in airports. In fact, in implementing the enhanced screening measures, the TSA justified its actions to no one—the new procedures were not established pursuant to formal rulemaking.[269] There is no concrete record indicating that AIT screening measures are more effective at preventing skyjacking or detecting weapons. In fact, citing national security concerns, the TSA has refused to make public statistical data detailing the effectiveness of its screening measures.[270] In sum, "[t]he TSA declined to state whether the new screening measures (or even behavioral detection) ha[ve] identified any terrorists . . . . Moreover, the Governmental Accountability Office has cast doubt on whether the AIT would have detected the incident involving [the Underwear Bomber]," which prompted the widespread use of AIT scanning in the first place.[271] Not only has there been government skepticism regarding the

267. 497 F.3d 955, 963–64 (9th Cir. 2007) (en banc) (Graber, J., concurring).

268. *See generally* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

269. *See generally id.* at 11 (remanding in order for the TSA to conduct formal rulemaking procedures including holding a notice and comment period).

270. Reinert, *supra* note 28, at 1519–20.

271. *Id.* (citing Spencer S. Hsu, *GAO Says Airport Body Scanners May Not Have Thwarted Christmas Day Bombing*, WASH. POST (Mar. 18, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031700649.html); *see also* David Kravets, *Airport 'Nude' Body Scanners: Are They Effective?*, WIRED (Mar. 8, 2011, 1:00 PM), http://www.wired.com/

efficacy of the machines, with the chairman of the House transportation committee stating "[u]nfortunately, the performance hasn't improved . . . . It's at such a poor level we need dramatic changes in the whole program," the costliness of AIT scanning seems to be placing a hefty and unwarranted burden on the American taxpayers.[272]

With no established record of success, this factor cannot weigh in favor of the constitutionality of the current search regime. When approving administrative searches, concrete evidence of effectiveness has played a pivotal role in the Supreme Court's decision-making.[273] And given that it is the TSA that is infringing on passengers' constitutional rights, it is the TSA's burden to prove that the search program currently employed is effective. The fact that the TSA can see more of a passenger's body by using AIT scanning does not automatically equate to greater effectiveness in detecting relevant contraband, despite the D.C. Circuit's equivocation.[274] Thus, given there is nothing to indicate that AIT scanning is any more effective at detecting weapons and preventing skyjacking than the measures previously in place, this factor surely weighs against a finding of constitutionality.

c. Intrusion on Privacy

In comparison to the government's need to ensure security, the privacy interests at risk here are just as grave, if not more so. AIT scanning shows images of a traveler's unclothed body.[275] The ACLU aptly refers to AIT scanning as a "virtual strip search."[276] And strip searches are patently different from other search methods. The Supreme Court acknowledged the unique severity of strip searches in *Safford Unified School District No. 1 v. Redding*, finding that the "subjective and reasonable societal expectations of

threatlevel/2011/03/scanners-part3/.

272. Susan Stellin, *Bomb Plot Raises Questions About Airport Security*, N.Y. TIMES (May 14, 2012), http://www.nytimes.com/2012/05/15/business/plot-raises-questions-about-airport-security.html.

273. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (highlighting the import of statistical effectiveness when upholding an administrative search program).

274. *See Elec. Privacy Info. Ctr.*, 654 F.3d at 10.

275. *See id.*

276. *ACLU Backgrounder on Body Scanners and "Virtual Strip Searches"*, ACLU (Jan. 8, 2010), http://www.aclu.org/technology-and-liberty/aclu-backgrounder-body-scanners-and-virtual-strip-searches.

personal privacy support the treatment of [strip] search[es] as *categorically distinct*."[277] For the D.C. Circuit to give no credence to the much greater level of intrusion encompassed in AIT scanning and full-body imaging undermines its entire analysis. Subjecting passengers of all ages, from infants to the elderly, to naked imaging increases the level of intrusiveness of TSA screening measures ten-fold, particularly given that the government interest has not demonstrably changed since the advent of airport security, and there is no evidence, empirical or otherwise, to support the use of such invasive measures. It appears, therefore, in a pure application of the *Brown* administrative search balancing test, given the information available to the public, when it comes to AIT scanning the privacy interests infringed far outweigh the valid governmental interest.[278]

The D.C. Circuit also justified current TSA security measures by noting that current security measures provide an alternative: people can opt out of AIT scanning in favor of a full-body pat-down, which allows a passenger to decide which method of government intrusion is "least invasive."[279] But as the TSA proudly boasts, 99% of airline passengers submit to AIT scanning as opposed to a full-body pat-down,[280] presumably because most people feel that the full-body pat-down is more invasive than AIT scanning. Indeed, sexual harassment complaints have been filed and criminal prosecution threatened as a result of TSA pat-downs.[281] Clearly, full-body pat-downs used by the TSA go beyond a limited *Terry* frisk and involve an intimate physical search of a person's body. What makes pat-downs even more worrying is that the TSA has not explained "what body parts may be

277. 557 U.S. 364, 374 (2009) (emphasis added).

278. Travelers and TSA agents alike have also raised concerns over the radiation caused by AIT scanning. *See* David Kravets, *TSA Wants to Know If Airport Body Scanners Are Nuking You*, WIRED (Dec. 19, 2012 2:49 PM), http://www.wired.com/threatlevel/2012/12/airport-scanners-nuking-you/. Thus, travelers' privacy interests implicated by AIT scanning may be even more acute than portrayed herein. The TSA has rejected the notion that AIT scanning can have detrimental health effects, stating that it "meets national health and safety standards." *See Advanced Imaging Technology (AIT) Traveler's Guide*, TRANSP. SECURITY ADMIN. (July 23, 2013), http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait.

279. *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

280. *See Advanced Imaging Technology (AIT) Traveler's Guide*, *supra* note 278.

281. The district attorney's office in San Mateo County, California, warned the TSA that any of its agents that inappropriately touch passengers during a pat-down will be prosecuted. *See,* Melanie Eversley, *California Official Warns Against Inappropriate Pat-Downs*, USA TODAY (Nov. 17, 2010), http://content.usatoday.com/communities/ondeadline/post/2010/11/official-in-calif-warns-against-inappropriate-pat-downs/1.

touched, with what intensity, and for what duration."[282] A search in which an agent gropes so hard that a urostomy bag bursts, however, is clearly an intrusive and extensive physical search. Moreover, this whole argument is a red herring. The constitutionality of one screening measure does not mandate the constitutionality of another. Thus, even if full-body pat-downs passed the constitutional muster of the administrative search exception, it does not follow that AIT scanning must also be excepted from Fourth Amendment protections.

The D.C. Circuit also dismissed outright the idea that a search must be "minimally intrusive" in order to fall within the administrative search exception.[283] Contrary to the D.C. Circuit's emphatic conclusion, the Ninth Circuit requires minimal intrusiveness, mandating that an administrative search be "no more extensive or intensive than necessary."[284] And even assuming that the D.C. Circuit may be right that minimal intrusiveness is not a mandatory prerequisite to finding an administrative search program constitutional, it has often been a key reason for upholding an administrative search program both inside and outside the airport.[285]

If a search is "minimally intrusive," then the scales tip in the government's favor when performing the balancing test, especially in the face of a pressing government need.[286] When a search is not minimally intrusive, however, courts have to be exacting in performing the administrative search exception balancing test, as the administrative search doctrine is an exception, not the rule.[287] Article III courts are tasked with

282. Brief of Amicus Curiae Freedom to Travel USA in Support of Plaintiffs-Appellants' on the Merits, Redfern v. Napolitano, No. 11-1805, 2013 WL 3470495 (1st Cir. July 11, 2013), 2012 WL 6057509 at *20 (citing *A Primer on the New Airport Security Procedures*, CNN (Nov. 23, 2010, 12:58 PM), http:// www.cnn.com/2010/TRAVEL/11/23/tsa.procedures.primer/index.html).

283. *Elec. Privacy Info. Ctr.*, 653 F.3d at 11.

284. United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005). Here, the court said that an airport security screening program is constitutional if: "(1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly." *Id.*

285. *See, e.g.*, United States v. Hartwell, 436 F.3d 174, 180 (3d Cir. 2006) (upholding AIT imaging *after* a person failed initial screening measures); United States v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007) (en banc) (same).

286. *See, e.g.*, Aukai, 497 F.3d at 962–63 (holding that a wand search was minimally intrusive and "no more extensive nor intensive than necessary . . . to detect the presence of weapons or explosives" and thus did not violate the Fourth Amendment).

287. *See, e.g.*, United States v. Washington, 387 F.3d 1060, 1070 (9th Cir. 2004) (holding that officers' search of a man was not minimally intrusive, was overly extensive, and was "beyond the scope of any permissible detention under the Fourth Amendment").

upholding the Constitution, an independent branch designed to protect citizen's constitutional rights from government infringement. For a court to hastily find an exception to the Constitution in the face of a search program that it admits is beyond minimally intrusive seems to be an abdication of the court's most basic duty.

Another wrinkle in the D.C. Circuit's assessment of the constitutionality of current airport screening measures is the fact that passengers are no longer able to withdraw from airport searches without, at a minimum, facing civil liability in the form of a hefty fine.[288] An important factor in the early appellate decisions finding airport security searches constitutional under the administrative search doctrine was the fact that a passenger could refuse to undergo the search if he or she chose to.[289] Under current TSA regulations, however, this is no longer the case—a fact that the D.C. Circuit overlooked.[290] And if further evidence is needed of the D.C. Circuit's inadequate analysis of the privacy issues at stake, the court did not even tangentially reference the potential health concerns raised by AIT scanning[291] or the possibility that current screening measures could run afoul of a passenger's religious beliefs.[292]

In short, there is a strong argument to be made that the use of AIT imaging and current airport security measures are not justifiable under the administrative search doctrine—the current search program is not "appropriately limited" given the nature of the intrusion.[293] Or even if the current search program is constitutional, it requires serious consideration from the courts—preferably the highest one—given the privacy implications involved. Everyone traveling by air in America is subject to a virtual strip-search or an intensive groping. These extremely invasive procedures cannot be assumed reasonable without thorough constitutional justification.

D. How Does Profiling Fit the Framework?

Another issue in regards to the constitutionality of airport screening

288. 49 C.F.R. § 1503.401(a), (b)(1).

289. *See, e.g.*, United States v. Davis, 482 F.2d 893, 912 (9th Cir. 1973).

290. *See* 49 U.S.C. § 44902(a)(1) (2012).

291. *See generally* Murphy, *supra* note 28 (analyzing Fourth Amendment privacy interests and AIT scanning in light of the health risks it poses).

292. *Religion Offers No Break on Airport Screening, TSA Says*, FOX NEWS (Nov. 16, 2010), http://www.foxnews.com/politics/2010/11/16/religion-offers-break-airport-screening-tsa-says/.

293. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

programs is the use of profiling.[294] The TSA openly admits that part of its current screening procedures includes the employ of "behavior detection officers."[295] These officers use specialized behavioral analysis techniques "to determine if a traveler should be referred for additional screening at the checkpoint."[296] TSA behavior detection officers engage in "chat downs" to determine if a person should be subject to enhanced screening.[297] However, a number of people, mostly racial and ethnic minorities, complain that they are being unfairly profiled by this security measure.[298] This profiling led TSA officials in Logan International Airport to file an official complaint about the behavior detection program, with one officer lamenting "[t]he behavior detection program is no longer a behavior-based program, but it is a racial profiling program."[299] As a result of the complaints, TSA agents were "retrained" in behavioral-detection analysis to alleviate any fears that racial profiling was occurring.[300] But with no actual information on what behavior-detection analysis entails, questions arise as to the constitutionality of such a security measure.

In *Reid v. Georgia*, the Supreme Court found unconstitutional a *Terry* stop in an airport by the Drug Enforcement Administration based solely on the fact that the defendant fit a "drug courier profile."[301] The Court held that "[a]lthough there could . . . be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot," this was not such a case because the defendant's simple matching of a drug courier profile did not amount to a particularized and articulable suspicion

294. *See* Timothy M. Ravich, *Is Airline Passenger Profiling Necessary?*, 62 U. MIAMI L. REV. 1 (2007).

295. *TSA Provides Updates to Travelers on Security Procedures for the Holiday Travel Season*, TRANSP. SECURITY ADMIN. (Nov. 16, 2011), http://www.tsa.gov/press/releases/2011/11/16/tsa-provides-updates-travelers-security-procedures-holiday-travel-season.

296. *Id.*

297. Jeff Plungis et al., *TSA's Chat-Downs Being Examined Amid Racial-Profiling Charges*, BLOOMBERG BUSINESSWEEK (Sept. 13, 2012), http://www.businessweek.com/news/2012-09-13/tsa-s-chat-downs-being-examined-amid-racial-profiling-charges.

298. *Terror Profile: TSA Agents Key on Minority Passengers Again*, PITTSBURGH POST GAZETTE (Aug. 16, 2012), http://www.post-gazette.com/stories/opinion/editorials/terror-profile-tsa-agents-key-on-minority-passengers-again-649112/.

299. Michael S. Schmidt & Eric Lichtblau, *Racial Profiling Rife at Airport, U.S. Officers Say*, N.Y. TIMES (Aug. 11, 2012), http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html.

300. *TSA Behavior Detection Officers Will Be Retrained After Profiling Complaints*, CNN TRAVEL (Aug. 23, 2012), http://www.cnn.com/2012/08/22/travel/tsa-officers/index.html.

301. Reid v. Georgia, 448 U.S. 438, 440–42 (1980) (per curiam).

necessary to conduct a *Terry* stop.[302] This type of profiling, without individualized suspicion, allows for the possibility of discretionary government harassment, in clear contravention of the Fourth Amendment.

The TSA's behavior detection program similarly risks violating the constitutional bounds of *Terry*. It is almost inevitable that a prolonged "chat-down," which has a singularly investigative purpose, classifies as a *Terry* stop under the Fourth Amendment. Therefore, each and every "chat-down" has to be justified by a particularized suspicion of criminal activity.[303] Chat-downs cannot fall under the broader administrative search exception to the Fourth Amendment because they involve the use of government discretion, and the use of discretion necessarily brings a search program outside the ambit of the administrative search exception. There could, therefore, be many instances in which these chat-downs are not supported by a particularized suspicion, thus violating the Fourth Amendment. This is especially the case given that the TSA has not, again in the name of national security, divulged what officers are actually looking for when performing behavior detection analyses. This lack of transparency is especially troubling when persons' constitutional liberties are at risk of being violated. Like AIT scanning, behavioral detection screening potentially violates targeted travelers' Fourth Amendment rights.[304]

E. Why Does it Even Matter?

The above Fourth Amendment arguments may seem largely academic. It could be that many believe the D.C. Circuit's approach—that the government can take the necessary steps to ensure September 11th never happens again—is the appropriate way to analyze airport security.[305] But it is important to look at the precedent this approach would set. Even if airport security is eventually found to be constitutional by the courts, without rigorously testing the constitutionality of the measures currently in place, the resultant implications could be far-reaching for other areas of everyday life.

For example, one major concern about blindly rubber-stamping airport

302. *Id.* at 440–41.

303. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that an officer may conduct a limited search when he concludes that criminal activity is transpiring).

304. *But see* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 10–11 (D.C. Cir. 2011) (holding that an AIT scan was not a Fourth Amendment violation).

305. *See id.* at 10.

security programs is the fact that it allows one event to justify constitutional intrusion. Such precedent encourages hysterical decision-making. The Legislative and Executive Branches are subject to political pressure; therefore, the decisions they make are often dictated by public sentiment. It is not surprising that both of these governmental bodies would react strongly and perhaps rashly to ensure public confidence in a time of crisis. Courts, on the other hand, are the constitutional constant of American democracy. It is the job of the courts to guarantee that the democratic system remains tethered to the principles of the Constitution and the compact that it represents between "We the People." For courts to reach a decision justifying the curtailment of constitutional rights solely based on sentiments about modern-day events, with no further justification, is tantamount to the courts abandoning their constitutional function.

Moreover, as technology advances so will the ability for the government to effectively search a person or their belongings, leading to the logical question of where one draws the line. Even though a search may be effective, it does not follow that it is constitutional. A plurality of the Supreme Court expressed this very sentiment, stating that in the face of evolving technology, "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"[306] Better technology alone cannot and should not justify suppressing constitutional rights—just because something may be more effective, does not always mean it should be widely implemented.

Another problem with blindly allowing the TSA to go forward with its security program is its use of profiling. Immediately following the September 11th terrorist events, public sentiment favored the profiling of people appearing to be Muslim or of Middle-Eastern descent.[307] According to a Gallop Poll taken less than two weeks after September 11th, 49% of Americans supported the practice of forcing Arabs or Arab-Americans to carry special identification and 58% supported requiring Arabs to undergo more security checks at airports.[308] In a *Los Angeles Times* poll, 68% of respondents said that law enforcement should be allowed to randomly stop

306. United States v. Jones, 132 S. Ct. 945, 950 (2012) (Alito, J., concurring) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).

307. Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1225 (2003).

308. *Id*.

people who fit the profile of suspected terrorists.[309] It seems public opinion was cemented in TSA policy, as just last year TSA agents complained they were being trained to target ethnic and religious minorities.[310] To allow this form of profiling, with no justification, legitimates profiling in other situations. It reinforces law enforcement officers targeting African-Americans or Latinos based on nothing more than race, socio-economic status, or location.[311] It even signals to policy-makers, e.g. those in Arizona that passed S.B. 1070,[312] that it is acceptable to pass laws permitting profiling if the profiling is employed to combat a "pressing" problem, such as illegal immigration. Profiling is repugnant to the ideal of Americans' constitutional entitlement to "equal protection of the laws."[313]

In short, exaggerating the government's interest to justify current airport security measures is an abuse of the early reasonableness standard used by courts to justify airport security measures—where the urgent needs of airport security justified just about any search mechanism in spite of the Fourth Amendment. These arguments, while tempting in certain instances, could lead to absurd results. In passing child pornography laws, the government noted its strong interest in curbing the distribution of child porn in a digital age[314]—could that justify the "administrative search" of every email sent in America? Why shouldn't airport screening regimes extend to subway systems, bus terminals, and train systems? Surely the need to ensure security is just as pressing in these contexts. Can the government monitor everyone's communications both sent and received to ensure someone is not a terrorist or involved in terrorist activities? The parade of horribles is potentially endless. This is not to say that current airport security measures, as a matter of certainty, violate the Fourth Amendment.[315] It is saying,

309. *Id*.

310. Schmidt & Lichtblau, *supra* note 299.

311. *See, e.g*., Angela Anita Allen-Bell, Comment, *The Birth of the Crime: Driving While Black (DWB)*, 25 S.U. L. REV. 195 (1997).

312. Section 2(B) of S.B. 1070 provides "that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government." Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (citing ARIZ. REV. STAT. ANN. § 11-1051 (2013)). Although the Court found parts of S.B. 1070 to be preempted, the Court specifically refrained from finding this portion of the Bill unconstitutional, although it did not foreclose future challenges depending on how it is employed in practice. *Id*. at 2507–10.

313. U.S. CONST. amend. XIV.

314. *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

315. *See generally* Sara Kornblatt, Note, *Are Emerging Technologies in Airport Passenger*

however, that if the airport security measures are challenged as unconstitutional, given that they infringe on basic Fourth Amendment rights, those challenges should be taken seriously. And until courts adequately assess the constitutionality of the intrusions occasioned by the TSA's AIT scanning, invasive pat-downs, and new behavioral detection measures, people have, will, and should continue to challenge the constitutionality of such measures.[316]

The prospect of challenging the constitutionality of airport screening measures necessarily bleeds into another question of constitutional rights: First Amendment protections in the airport.

IV. FIRST AMENDMENT AND THE AIRPORT

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*.[317]

As people challenge the constitutionality of TSA screening measures, First Amendment rights will inevitably be implicated. As soon as the TSA's new search measures were announced, organizations urged citizens to protest against them.[318] "Opting out" became a popular measure of protest, where travelers would forgo AIT scanning in favor of the pat-down, hoping to slow down the screening process.[319] Civil rights organizations like the ACLU were gathering complaints, contemplating what future action the organization could take against TSA screening measures.[320] And travelers have made fliers and placards, and have worn slogan-bearing T-shirts and Scottish kilts (sans underpants, of course), all in protest of TSA's new

Screening Reasonable under the Fourth Amendment? 41 LOY. L.A. L. REV. 385, 386 (2007).

316. Katie Johnston Chase, *Lawsuit Challenges Airport Full-body Scanners,* BOSTON GLOBE (Aug. 4, 2010), http://www.boston.com/business/articles/2010/08/04/lawsuit_challenges_airport_full_body_scanners/.

317. U.S. CONST. amend. I.

318. Richard Knox, *Protests Mount over Safety and Privacy of Airport Scanners*, NPR (Nov. 12, 2010), http://npr.org/blogs/health/2010/11/12/131275949/protests-mount-over-safety-and-privacy-of-airport-scanners/.

319. *Id*.

320. Sam Ritchie, *Homeland Security Wants to See You Naked*, ACLU (Nov. 16, 2010), http://www.aclu.org/blog/national-security/homeland-security-wants-see-you-naked.

screening measures.[321] There are even numerous blogs dedicated to stopping the use of full-body image scanning in airports.[322]

But perhaps the most (in)famous and shocking method of protest is people showing TSA agents the nude images they see using AIT scanners in the flesh—naked protests have become increasingly common in the airport.[323] In Portland, Oregon, John Brennan stripped down to his birthday suit before he walked through an AIT scanner in protest of what he called TSA's "harassment."[324] He was arrested for his protest.[325] Aaron Tobey, a twenty-one-year-old college student, stripped down to skimpy running shorts in a Richmond, Virginia airport, revealing the Fourth Amendment written on his chest to proclaim his protest of AIT scanning.[326] He too was arrested.[327] In Manchester, New Hampshire, a woman stripped to her lingerie and passed out fliers in protest of TSA screening measures.[328] And "Bikini Girl," Corinne Theile, has worn her swimsuit on at least seven flights in protest of the TSA.[329]

The First Amendment declares that the government cannot abridge a person's "freedom of speech," or infringe on his or her right to "petition the Government for a redress of grievances."[330] It appears, however, that John Brennan and Aaron Tobey were arrested for doing exactly what the First Amendment allows—protesting against government policies.[331] Therefore,

321. Michael Tarm, *Placards, Kilts Part of Plans for Scanner Protests*, SEATTLE TIMES (Nov. 23, 2010), http://seattletimes.com/html/businesstechnology/2013499299_apusairportsecurity.html.

322. *See, e.g.*, STOP TSA SCANNERS, http://stoptsascanners.blogspot.com/ (last visited Oct. 2, 2013).

323. *See* Kashmir Hill, *Getting Naked at the Airport to Protest the TSA is So 2010*, FORBES (Apr. 18, 2012), http://www.forbes.com/sites/kashmirhill/2012/04/18/getting-naked-at-the-airport-to-protest-the-tsa-is-so-2010/.

324. Erik Kain, *Man Strips Naked at Oregon Airport to Protest TSA*, FORBES (April 18, 2012), http://www.forbes.com/sites/erikkain/2012/04/18/man-strips-naked-at-oregon-airport-to-protest-tsa/.

325. *Id.*

326. Libby Zay, *Aaron B. Tobey, Airport Security Strip Protester, Sues TSA over Arrest,* AOL TRAVEL (Aug. 11, 2011), http://news.travel.aol.com/2011/08/11/aaron-b-tobey-airport-security-strip-protester-sues-tsa-over/.

327. *Id.*

328. *See* Christopher Elliott, *What Do TSA Underwear Protesters Reveal About You?*, HUFFINGTON POST (Feb. 13, 2012), http://www.huffingtonpost.com/christopher-elliott/what-do-tsa-underwear-pro_b_1272634.html.

329. Jessica Satherley, *'Bikini Girl' Corinne Theile Returns to LA a Year After Stripping Off in TSA Protest*, DAILY MAIL (Nov. 24, 2011), http://www.dailymail.co.uk/news/article-2065574/Bikini-Girl-Corinne-Theile-returns-LA-year-stripping-TSA-protest.html.

330. U.S. CONST. amend. I.

331. Interestingly, of the stories above, only the men were arrested for their acts of protest.

as people continue to push back against TSA screening measures and AIT scanning, it is important to explore what First Amendment protections exist in the airport.

A. First Amendment in the Airport

The Supreme Court has established that an airport is a nonpublic forum for First Amendment purposes.[332] The Court reasoned that neither history nor purpose indicates that an airport terminal should have all the protections flowing from the designation of a locale as a public forum.[333] Further, the Court did not find it persuasive that "transportation nodes," such as bus and train stations, often serve as centers for expressive activity.[334] Instead the Court found that airports are different.[335] Airports have security measures that do not have a parallel with other means of public transportation, airports restrict public access to certain areas, and importantly, "airports are commercial establishments" and thus must provide "services attractive to the marketplace."[336] The purpose of an airport, therefore, is not to promote the "free exchange of ideas,"[337] but instead, airport terminals are dedicated to ensuring safe and "efficient air travel."[338] As such, unlike a traditional public forum, such as a public sidewalk, where restriction on speech is subject to strict scrutiny, restrictions in an airport must only satisfy a general standard of "reasonableness."[339]

Although restrictions on speech in an airport only need to satisfy a general standard of reasonableness, restrictions cannot be all-encompassing. And even though the TSA has wide latitude to restrict speech in an airport, any restrictions implemented cannot be in "an effort to suppress expression merely because [the TSA] oppose[s] the speaker's view."[340] Thus, in an

332. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

333. *Id.* at 680–81.

334. *Id.* at 681. The Court found dispositive that such transportation nodes have often been subject to private ownership.

335. *Id.* at 682.

336. *Id.*

337. *Id.* (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

338. *Id.* at 683.

339. *Id.*; *see also* United States v. Kokinda, 497 U.S. 720, 728–29 (1998).

340. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987); *Kokinda*, 497 U.S. at 730 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

airport, the Supreme Court has specifically held that "nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be 'airport related,' but is still protected speech even in a nonpublic forum."[341] And because nondisruptive speech is protected in an airport, the TSA cannot retaliate against a traveler for engaging in this form of expression, as that would chill an individual's exercise of his or her First Amendment rights, in clear contravention of the Constitution.[342]

Underscoring the First Amendment's role in airport security protesting, an Oregon court recently held that a man stripping naked to protest AIT scanning was protected speech.[343] On April 7, 2012, at Portland International Airport, fifty-year-old John Brennan stripped naked in protest of AIT scanning.[344] As a result, Brennan was charged with violating a number of city ordinances all relating to indecent exposure.[345] Following a 1985 Oregon Court of Appeals decision, the Multnomah County Circuit Court dismissed the charges against Brennan, finding that in Oregon, nudity laws do not apply in moments of protest, and as a result, "it is the speech itself that the state is seeking to punish."[346] Under Oregon law, Brennan's nude protest, as a method of speech, was protected in the airport.[347] This is not to say, however, that in every airport a person can bare all in protest of the TSA. Brennan luckily happened to be in Portland, Oregon, a city that considers itself a bastion of free speech and is very familiar with nude protesting.[348] In other cities and states, however, law enforcement can lawfully arrest someone for baring all at the airport, and the Supreme Court has held that First Amendment retaliation does not lie where there is a lawful arrest.[349] Moreover, TSA regulations allow for a person to be fined should they disrupt or interfere with the screening process, as naked protest may.[350] Therefore, it is important to parse what methods of protest are allowed in

341. *Jews for Jesus*, 482 U.S. at 576.
342. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
343. Aimee Green, *Portland's Airport Stripper John Brennan Convinces Judge Nudity Was Protest Against TSA*, THE OREGONIAN (July 18, 2012), http://www.oregonlive.com/portland/index.ssf/2012/07/portlands_airport_stripper_joh.html.
344. *Id*.
345. *Id*.
346. *Id*.
347. *Id*.
348. *Id*.
349. Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012).
350. *Id*.

airport screening areas under TSA regulations; going "full-monty" will not be successful for everyone.

B. First Amendment and TSA Regulations

The TSA cannot wholesale ban political speech in an airport, suppress a traveler's views solely because it disagrees with them, or retaliate against a passenger for expressing her views, even though it is a nonpublic forum.[351] Reading the Supreme Court's pronouncements together, limited protest in an airport is protected so long as it is nondisruptive. As outlined earlier, the TSA has a number of regulations describing what is and is not allowed in an airport terminal.[352] In addition to expressly excluding weapons and contraband at any point beyond an airport screening area,[353] TSA regulations essentially prohibit any interference with TSA agents performing their security duties or delaying or generally disturbing a TSA screening process.[354] The breadth of these Regulations is astonishing. At first blush, there is nothing in TSA regulations outside the proscription on contraband that signals to a traveler what is and is not allowed in an airport screening area. It appears that under its regulations, TSA agents have broad discretion to determine when the regulations are being violated, as often times what is considered "disruptive" or what causes "delay" is a subjective and fact-intensive determination. These regulations do not bode well for people wishing to protest against the constitutionality of airport security screening measures in the actual airport, as it appears TSA agents can justify the suppression of protest under the sweeping TSA regulations currently in force.

As of this writing, the overall constitutionality of TSA regulations has only been tested once in the federal courts of appeals.[355] In *Rendon v. TSA*, the Sixth Circuit was called upon to assess the constitutionality of 49 C.F.R. § 1540.109, which "prohibits any person from interfering with, assaulting, threatening, or intimidating screening personnel in the performance of their screening duties."[356] Rendon, caught up in the frustration of running late for

351. Bd. of Airport Comm'rs of L.A. v. Jew for Jesus, Inc., 482 U.S. 569 (1983).
352. *See supra* Part II.C.1.
353. 49 C.F.R. § 1540.111 (2013).
354. 49 C.F.R. § 1540.109 (2013).
355. Rendon v. Transp. Sec. Admin., 424 F.3d 475 (6th Cir. 2005).
356. *Id*. at 477 (citing 49 C.F.R. § 1540.109 (2013)).

his flight, was delayed at the screening station after setting off the metal detector.[357] Unsurprisingly, Rendon progressed from anxious to angry to belligerent, spouting profanities at the TSA screening agents.[358] As a result, a TSA supervisor pulled Rendon aside and told him he was being "uncooperative, unruly, and using loud profanities."[359] Airport police subsequently removed him from the screening area, and the TSA eventually assessed a civil fine against him for violating the above regulation.[360]

Rendon attempted to challenge the regulation facially and as applied, arguing that it violates First Amendment free speech protections.[361] The Sixth Circuit disagreed, finding that the regulation here was a content-neutral regulation narrowly tailored to achieve the government's substantial interest of efficiently and effectively screening for weapons.[362] Moreover, because the regulation only prohibits conduct that poses "an actual hindrance to the accomplishment of a specified task,"[363] it is not constitutionally overbroad. Finally, in rejecting Rendon's vagueness challenge to the statute, the Sixth Circuit found that because the regulation does not reach a "substantial amount of constitutionally protected conduct" it "is not impermissibly vague in all its applications," thus failing a facial challenge.[364] In short, Rendon's civil penalty stood, and his constitutional challenge to the TSA regulation—both as applied and facially—failed.[365]

Given the fact that courts generally construe regulations and statutes against a finding of overbreadth, and will read constitutionally-saving restrictions into a statute when it is challenged on its face, it appears a successful challenge to TSA regulations will rest on an "as-applied" challenge. There may be instances, therefore, that persons who engage in protected behavior in a screening area, such as peaceful protest, are cited for violating TSA regulations. In these instances, the regulations could (perhaps) successfully be challenged as unconstitutional as applied. However, challenging the constitutionality of TSA regulations is not the

357. *Id*.
358. *Id*. at 477–78.
359. *Id*. at 478.
360. *Id*.
361. *Id*.
362. *Id*. at 479–80.
363. *Id*. at 480 (citing Fair v. City of Galveston, 915 F. Supp. 873, 879 (S.D. Tex. 1996)).
364. *Id*.
365. *Id*. at 481.

only way to test First Amendment protections in an airport screening area. There is also the potential for retaliation claims if passengers engaging in protest believe they are being targeted for the message they are trying to convey, as opposed to any regulations or law they are supposedly violating.

C. First Amendment Retaliation Claims

As noted by the TSA's Office of the General Counsel, retaliation claims may be the new legal frontier to combat overzealous TSA agents.[366] As of this writing, however, only one First Amendment retaliation claim against TSA screening agents has made it up to the federal courts of appeals.[367] In *Tobey v. Jones*, a twenty-one year-old college student was traveling from Virginia to Wisconsin to attend his grandfather's funeral.[368] Under the then-current TSA screening policies, passengers were screened using standard metal detectors, with certain passengers selected for enhanced screening using AIT scanners.[369] Tobey, in accordance with the national trend of the time, believed that AIT scanning was unconstitutional.[370] Just in case he was selected for enhanced screening, therefore, Tobey wrote an abridged version of the Fourth Amendment on his bare chest to reflect his sentiments on the constitutionality of AIT scanning.[371] His body art did not go to waste, as the TSA selected him for enhanced screening.[372] Before he entered the AIT scanner Tobey removed his pants and stripped off his shirt, leaving him in skimpy running shorts, revealing the Fourth Amendment on his chest.[373] The TSA inquired as to Tobey's "bizarre" behavior, to which Tobey responded that he was protesting.[374] As a result, the TSA agents radioed the local police to come and arrest Mr. Tobey.[375] Tobey sued the TSA agents under *Bivens*[376] for civil damages.[377]

366. *See* Ellison & Pilcher, *supra* note 17, at 8.
367. Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013).
368. *Id.* at 383.
369. *Id.* at 384.
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. Bivens v. Six Unknown Agents for the Fed. Bureau of Narcotics, 403 U.S. 388, 91 (1971).
377. *Tobey*, 706 F.3d at 384.

Although the Fourth Circuit reviewed the complaint to decide whether it stated a cognizable First Amendment claim and therefore did not reach the merits of the dispute, the court found that Tobey may have an actionable First Amendment claim should the facts as he alleged them prove true.[378] The court reasoned that nonviolent, silent, nondisruptive messages of protest are protected in the airport screening area, such that a person cannot be retaliated against for displaying such a message.[379] Perhaps more importantly for persons who wish to exercise their rights of protest going forward the court found that this principle was clearly established, such that if retaliation for protest is found the TSA agents can be held personally liable.[380] Out of the abundance of caution, however, the court emphasized that if Tobey was in fact being disruptive or causing an interruption, the TSA agents could be justified in their response given the nature of airport screening and the dangers faced.[381] Moreover, the court also required Tobey to prove going forward that his arrest was solely motivated by his protected expression.[382] Thus, the Fourth Circuit greatly restricted the scenarios in which an airport protester could hold TSA agents personally liable under a retaliation theory. And given the nature of qualified immunity and the protections it affords, in most situations it will be hard for a plaintiff to successfully hold the TSA agents liable for violating her First Amendment rights.

The limited case law accentuates one important point: As passengers continue to the test the constitutionality of airport screening measures, specifically AIT scanning and invasive pat-downs, their expression of dissent is not limited to filing a complaint after the search has ensued or blogging about it once the alleged constitutional violation has occurred.[383] Passengers are able to protest in real time, so long as TSA regulations and local laws are followed. And if passengers truly engage in nondisruptive, nonviolent protest and as a result are cited for violating TSA regulations, the regulations can be challenged as an unconstitutional infringement on the

378. *Id.* at 391.
379. *Id.*
380. *Id.* at 391–92.
381. *Id.* at 391.
382. *Id.* at 390–91.
383. The organization Young Americans for Liberty has an entire webpage dedicated to explaining how the average person can fight back against TSA's new intrusive screening measures. *See So the TSA Wants to See You Naked. What Can you Do?*, YOUNG AMERICANS FOR LIBERTY, http://www.yaliberty.org/activism/tsa/fall2010 (last visited Oct. 2, 2013).

passenger's First Amendment rights. Moreover, if the passenger is seized solely for his or her silent, nonviolent, nondisruptive message of protest, then a civil suit may survive qualified immunity such that TSA agents can be held personally liable if their actions were in retaliation for the protected expression.

V. CONCLUSION

> *While aviation security is undoubtedly important, we must be diligent in protecting the rights of all Americans, such as their freedom from being subjected to humiliating and intrusive searches by TSA agents, especially when there is no obvious cause . . . . It is important that the rules and boundaries of our airport screening process be transparent and easily available to travelers so that proper restraints are in place on screeners. Travelers should be empowered with the knowledge necessary to protect themselves from a violation of their rights and dignity*.[384]
>
> —Senator Rand Paul

The relationship between the airport and the Constitution is complicated. On one hand, there is a potential situation where thousands of people can be affected by a single lapse in security. On the other hand, constitutional rights are supposed to be at their strongest in times of peril. The Fourth and First Amendments have an especially important role in guaranteeing the citizenry's free movement in society. Allowing single instances of terror to shape constitutional rights, especially First and Fourth Amendment rights, holds constitutional freedoms hostage to anyone wishing to do harm. This also gives the government, in the name of safety, the permission to restrict constitutional freedoms, as persons subject to the restrictions stand idly by—pacified, or even worse paralyzed by fear. This cannot be how constitutional rights develop.

The Fourth Amendment's text is very clear, that we are to be free from unreasonable searches or seizures, and to effectuate a search or seizure the government has to obtain a warrant supported by probable cause. While courts have carved out exception after exception from Fourth Amendment

384. Burgess Everett, *Rand Paul Files Bills that Take Aim at TSA*, POLITICO (June 15, 2012), http://www.politico.com/news/stories/0612/77475.html.

freedoms, these exceptions may have been misappropriated in an effort to justify airport security. The First Amendment is equally clear; the government cannot suppress a citizen's expression of disdain for governmental policies solely because it disagrees with it. Yet overbroad regulations and little operational guidance have given the TSA wide latitude to potentially fine people or effectuate an arrest based on a passenger's dissent and nothing more.

Ultimately, given the importance of air travel to everyday American life, the Supreme Court should explain the contours of the Constitution in the airport, which it has thus far refused to do.[385] This would give both passengers and security personnel notice of what is or is not acceptable in the airport setting. As long as this area lies in constitutional limbo, however, or courts give the founding document mere lip service in its application, rights are left unsettled, which in turn leads to potential abuse. Furthermore, the potential for abuse and increasing infringement on air passengers' constitutional rights is heightened by ever-evolving technology. As it becomes easier to effect a search it is increasingly important to ensure that the search meets the strictures of the Constitution. Until courts take a more serious look into this issue however, one must assume the Constitution applies in equal force in the airport, just as it would anywhere else. Therefore, the power is in the hands of the people to push back against enhanced screening measures to ensure that seeming constitutional violations do not go unnoticed. If courts are just going to rubber-stamp the government's abrogation of travelers' constitutional rights, then they should just tell the TSA to hang a sign at every airport that reads: "The Constitution does not apply here."

385. *See, e.g.*, Corbett v. United States, 458 F. App'x 866 (11th Cir.), *cert. denied*, 133 S. Ct. 161 (2012) (upholding the district court decision to dismiss the challenge of TSA procedures for lack of subject matter jurisdiction); *see also* Jonathan Stempel, *Supreme Court Rejects Appeal on Airport Scanners*, NBC NEWS (Oct. 1, 2012), http://www.nbcnews.com/travel/supreme-court-rejects-appeal-airport-scanners-6206531; Michael Kirkland, *Showing the Naughty Bits at the Airport?*, UPI.COM (Jan. 24, 2010), http://www.upi.com/top_new/US/2010/01/24/US-supreme-court-showing-the-naughty-bits-at-the-airport/UPI-98371264321800/#IXZZ2GWZBBKE8.

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