THE CURRENT STATE OF AMERICAN AIR TRAVEL: CHECKING YOUR BAGGAGE AND DIGNITY AT THE GATES

INTRODUCTION

As I walked into Terminal Three at Chicago O'Hare International Airport, a sea of anxious passengers paced slowly through the checkpoint ranks. When I joined the despondent mob, I noticed that the line was actually moving pretty quickly. In the distance, a large gyrating tube marked ProVision oscillated around the potential passengers. One by one they raised their hands like they were on the first big descent of the Navy Pier Ferris Wheel. Then it hit me, this was the x-ray body scanner I had heard my dad and all his Tea Party buddies argue and grumble about for so long. As I awaited my turn on the great steel trap, I remembered that someone, somewhere was about to see me just as I came in this old world, stark naked and weaponless. I stepped in and raised my arms, and noticed a burly TSA agent belaboring his investigations on a small screen in front of where he was seated. Mistakenly, I thought he was the one enjoying the view. I looked straight at him with a slight smirk and raised my eyebrows a couple of times as if to say "hubba hubba big boy." Needless to say, he was unimpressed by my come hither advances and immediately abandoned his post to speak to me directly.

The TSA agent barked, "This is a serious procedure sir . . . I ought to make you go to the back of the line and do it again!"

Attempting to reconcile the situation I uttered meekly, "I realize that officer, and, um, uh . . . I'm very sorry if I've made you mad."

"These machines save lives . . . they might just save yours someday." He continued, jabbing his index finger and tightly curled fist directly in my face.

"I know, I know," I apologized repeatedly.

"Go on," he said begrudgingly.

Thankfully, without further recourse, I went on my way. Although I hadn't been put into custody or given some ticket or fine, I left embarrassed, spurned and ashamed like the child I had obviously become.

This Comment will largely focus to encourage a stronger transparency from the Transportation Security Administration (TSA) in its operating procedure surrounding the Advanced Imaging Technology (AIT) protocol and act as a sort of call to arms regarding a number of cases that have not been widely publicized,

that will in turn illustrate the almost police state currently nurtured by the TSA in America's public airports and ever-increasingly in other public transportation hubs. Part I of this Comment will provide a detailed background of how the current American airport became so securitized. Firstly, it will provide a brief survey of what Fourth Amendment rights should really be expected when traveling in American airports. Secondly, it will outline a brief history of what airport security measures have been taken in the past and how they led to the technologies being employed currently. Part II will focus almost exclusively on Fourth Amendment violations that have occurred under the careful watch of the TSA and describe exactly how courts responded to such violations. In addition, Part II will explore a new tier of violations that should be expected to occur in the future as the TSA incessantly expands outside of the American airport. It will also provide some further background on exactly how little information the TSA has been willing to make public in the past and their justifications for doing so. Lastly, it will illustrate just how far the current culture of TSA protocol has tipped the scales of reasonableness that every American should be afforded. Part III will propose some solutions to restore dignity to the TSA's current operating procedures and thereby restore the general public's faith in their ability to ensure the safety of the American public, while not trouncing on their Fourth Amendment rights.

The Comment also intends to expose the potential future implications of AIT scanners and the almost certain disintegration of what few shrouds remain of Fourth Amendment rights in American airports, as well as what those implications might mean beyond the airport's gates. There have been a number of "whistleblower" papers written on the topic, but none that really delve in the exact implications these Fourth Amendment violations are most certainly going to create and the culture of secrecy within the TSA, as well as the discretionary abuse it most certainly incubates. The counter argument concerning "counter-terrorism" measures will be explored by an attempt to establish exactly what entails a "terrorist" these days and whether the alleged threat of such terrorism is worth essentially forfeiting all Fourth Amendment jurisprudence when people enter the gates of

American airports. There are also a number of other topics, namely health and safety standards, conflicts of law, etc., that will not be addressed in this Comment, but could be addressed in subsequent papers.

On September 11, 2001, a long history of American air travel safety protocol was turned upside down by an unthinkable act of terrorist violence.[1] Beginning with the creation of the Transportation Security Administration and more recently the Department of Homeland Security, the modern American airport has been transformed into the most sophisticated and thorough turnstile in the world of international air travel.[2] With this reformation, however, a very tangible blow has been dealt to the Fourth Amendment right to reasonable search and seizure promised to all U.S. citizens. An emerging jurisprudence, finding traction in decisions like *United States v. Fofana*[3] and *Rendon v. Transportation Security Administration*,[4] is quickly eroding the foundation on which these Fourth Amendment rights were built.

In consistently condoning transgressions against traveler's Fourth Amendment rights inside American airports, a virtual police state has been established and is being continuously cultivated. In an effort to counteract domestic and international terrorism, judges routinely evaluate violations of these rights, hinging their decisions on what was "reasonable" for the airline worker to do at the time of conflict. This standard of reasonableness however, is almost always evaluated in the shadow of an ever-present, post-9/11 threat of terrorism. When

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[1] *See* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1261 (2004).

[2] *See* 1 GUIDE TO HOMELAND SECURITY § 6:88 (2013 ed.).

[3] United States v. Fofana, 620 F. Supp. 2d 857, 861 (S.D. Ohio 2009) (reaffirming that "[w]arrantless and suspicionless airport screening searches are administrative searches and, therefore, exempt from the warrant requirement and constitutionally permissible if they are reasonable"), *rev'd*, 666 F.3d 985 (6th Cir. 2012).

[4] Rendon v. Transp. Sec. Admin., 424 F.3d 475 (6th Cir. 2005) (upholding the civil sanctions issued for profanities used by Rendon in suggesting that the TSA's security measures were "bullshit"). Moreover, such profanities were in fact in violation of 49 C.F.R. § 1540.109 as conduct "that *interferes* with screeners in the performance of their duties. That is, by using the term interfere, [the regulation] prohibits only that conduct which poses 'an actual hindrance to the accomplishment of a specified task.'" *Id.* at 480 (quoting Fair v. Galveston, 915 F. Supp. 873, 879 (S.D. Tex. 1996)).

asked about justifications for such intensely invasive and intrusive practices, agencies like the TSA, operating under a veil of secrecy, routinely rebut simply with "counter-terrorism." This almost irrebuttable argument has been sold to the American public as the new standard, to which we all should succumb. Without explaining any measure of their operating procedures, the TSA maneuvers with unchecked ambition, abusing discretionary protocol, the measure of which it never reveals to the American public.

Although counter-terrorism measures will always reside at the forefront of America's priority, the overreach of agencies like the TSA has dealt a kick in the teeth to the Constitutional rights promised to all Americans. The few inklings of Fourth Amendment jurisprudence left in the American traveler's psyche have to be re-affirmed and re-established by increased transparency from the security enforcement agencies representing the private industry interests of all airlines. Even though the safety interests of every traveler stopping over on American soil are of the highest order, one must always be concerned with the cost. Considering the current state of American air travel, have these costs finally outweighed the reward?

I. BACKGROUND

A. Fourth Amendment Doctrine

Every American is afforded the unwavering protection of the Fourth Amendment by the United States Constitution.[5] The Fourth Amendment, read quite plainly, bestows upon every American the right against "unreasonable searches and seizures."[6] This right, however, has been interpreted in a number of ways throughout the course of American case law. A brief overview of such interpretation will lend to better understanding of exactly what Fourth Amendment protections might be expected and what violations might be occurring presently.

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[5] U.S. CONST. amend. IV.

[6] *Id.*

1. Probable Cause

Perhaps the most fundamental keystone of American Fourth Amendment jurisprudence comes from its courts' continually evolving definition of probable cause. This continuous evolution is absolutely necessary, however, because no matter what definition of probable cause one chooses, it will necessarily have to be reformulated and applied to the relevant circumstance or scenario.[7] Under Fourth Amendment scrutiny, probable cause has been construed as depending on the time and place at which the alleged crime was committed, as well as a host of other factors.[8] For the purposes of this Comment, however, it will be assumed that if probable cause truly existed at the time the investigation was prompted, then no Fourth Amendment violations occurred during such an investigation.

2. Stop-and-Frisk

American Fourth Amendment rights were significantly interpreted and changed forever in the Court's pivotal decision *Terry v. Ohio*.[9] For the first time, the Supreme Court projected a hardline balancing test of what reasonable search and seizure would be deemed appropriate and within the scope of Fourth Amendment protection.[10] The Court announced, when determining what is reasonable, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'"[11] This interest is necessitated simply because the "scheme is justified in part upon the notion that a 'stop' and a

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[7] Many states have their own statutory definition for probable cause as well as different definitions for the requisite burden of proof for probable cause as applied to a host of different crimes (i.e. malicious prosecution vs. innocent mistake) across different types of law (i.e. criminal vs. civil). This obviously makes any attempt at defining probable cause almost futile; however, that being said, Black's Law Dictionary defines criminal probable cause under the Fourth Amendment as that information that "amounts to more than a bare suspicion but less than evidence that would justify a conviction." BLACK'S LAW DICTIONARY 1321 (9th ed. 2009).

[8] *See infra* notes 129-32.

[9] 392 U.S. 1 (1968).

[10] *See generally id.*

[11] *Id.* at 20-21 (quoting Camara v. Mun. Court, 387 U.S. 523, 534-35 (1967)).

'frisk' amount to a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement."[12] In essence, the reasonableness will always be viewed in the totality of the specific circumstances, that is to say "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" will be considered when construing the validity of an "inquiry under the Fourth Amendment."[13] *Terry* was just the beginning however, and would eventually become a high water mark for what reasonableness could be expected in searches and seizures throughout the country.

3. Administrative Searches

Although the modern implications of administrative searches are slight, the jurisprudence surrounding their implementation is crucial, as it almost single-handedly provided the cornerstones on which the modern interpretations of the "special needs" doctrine are founded. The first major ruling that defines the parameters and applicability of administrative searches came in *Camara v. Municipal Court*.[14] For the first time the Court departed from the normal reasonable suspicion requirements of a warrant supported by probable cause and instead looked to "balancing the need to search against the invasion which the search entails."[15] Although this ruling only applied to the inspections of private residences by municipal health and safety inspectors, such a narrow interpretation of its applicability quickly expanded.[16]

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[12] *Id.* at 10-11 (footnote omitted).

[13] *Id.* at 19.

[14] 387 U.S. 523 (1967).

[15] *Id.* at 537.

[16] *See* See v. City of Seattle, 387 U.S. 541 (1967) (holding warrantless search of commercial buildings by municipal health and safety inspectors as constitutional); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (holding the warrantless search of liquor store as prohibited; conversely, upholding the statute levying a fine on a licensee who refuses inspection because such businesses have a long history of regulation); United States v. Biswell, 406 U.S. 311 (1972) (upholding warrantless search of gun store because such businesses have a long history of regulation); Donovan v. Dewey, 452 U.S. 594 (1981) (upholding warrantless search of a mine because such businesses have a long history of regulation); New York v. Burger,

4. Special Needs Doctrine

The most relevant modern approach to searching and seizing individuals, especially when a strong governmental interest is involved, has been the development of the "special needs" doctrine.[17] Such intrusions are interpreted under the "special needs" doctrine and are subjected to a three-prong test as to determine whether or not the intrusion was in violation of the individual's Fourth Amendment rights. This test considers: (1) the interest of the State in protecting an individual from a risk, (2) that interest is then balanced with the effectiveness of the program in reducing such a risk, and (3) the level of intrusion upon an individual's privacy caused by the program.[18] Although not exclusively, the applicability of such a test as applied to the modern airport has largely hinged on these factors as well.

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482 U.S. 691 (1987) (upholding warrantless search of junkyard because such businesses have a long history of regulation).

[17] The phrase "special needs" came initially from Justice Blackmun's concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

[18] *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (holding the requirement that any public high school student who wanted to participate in extracurricular activities submit to drug testing constitutional because the school had a strong interest in preventing and deterring drug use amongst its students and that those students voluntarily forfeited their privacy rights in order to participate in extracurricular activities); City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (upholding sobriety checkpoints authorized under *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), and further expanding the constitutionality of utilizing drug-sniffing dogs during the stop for the purpose of interdicting narcotics because the utilization of such dogs does not make the search any more intrusive, but holding the search in the case unconstitutional because the primary purpose of the checkpoints was ordinary criminal investigation); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding the constitutionality of sobriety checkpoints by utilizing the "special needs" balancing test and finding that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment."); Griffin v. Wisconsin, 483 U.S. 868 (1987) (upholding the warrantless search of a probationer's home by balancing the government's strong interest in supervising probationers to insure the safety of the public versus the reduced expectation of privacy from such probationers in their homes).

Reasonableness, especially under "special needs" analysis, always has to be considered in the context of the physical location in which the violation occurred. There is no denying that, generally speaking, any American citizen should expect to have a somewhat lower expectation of privacy when in an airport.[19] This lowered level of expectation comes "due in part to extensive antihijacking surveillance and equipment"[20] utilized throughout the airport. The biggest contributing factor to this lowered expectation of privacy seems to be a sort of logical inference established by Justice White in *Florida v. Royer*.[21] Speaking for the Court, Justice White reasoned that "Royer was not taken from a private residence, where reasonable expectations of privacy perhaps are at their greatest."[22] More to the point, "he was approached in a major international airport where . . . reasonable privacy expectations are of significantly lesser magnitude" and "certainly no greater than the reasonable privacy expectations of travelers in automobiles."[23] With this case, Justice White subsumed all the vehicular privacy expectations established through decades of Supreme Court cases into what passengers could assume for air travel privacy, or more accurately, probably even a little less.[24]

In 2000, Justice Ginsberg, speaking for the Court in *Florida v. J.L.*, made this point exceedingly clear again, stating that one place "where the reasonable expectation of Fourth Amendment privacy is diminished" would be "airports."[25] Although this mentioning of airports being a place with diminished expectations of privacy was almost a footnote in the grand scheme of the decision reached in *J.L.*, the jurisprudence surrounding these diminished expectations of privacy has resurged stronger than ever due to this opinion. Accordingly, it has been asserted by many that "a citizen's Fourth Amendment rights in light of the tragic events of September 11 may soon fall to near the bottom of

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[19] *See* Florida v. Rodriguez, 469 U.S. 1 (1984).

[20] *Id.* at 6 (quoting Florida v. Royer, 460 U.S. 491, 515 (1983)).

[21] *See* Florida v. Royer, 460 U.S. 491 (1983).

[22] *Id.* at 515.

[23] *Id.*

[24] *Id.*

[25] Florida v. J.L., 529 U.S. 266, 274 (2000).

the list."[26] Even though these rights might indeed be diminished, they are not, however, completely destroyed.

Currently, Fourth Amendment jurisprudence throughout American airports is becoming an ever nullified view of the past. With the decision reached in *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, an emerging jurisprudence of complete Fourth Amendment desertion is quickly gaining momentum.[27] In reiterating the Supreme Court's "repeated[] refus[al] to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment," the Court effectuated that there is a new standard to which all air travelers will have to adhere.[28] That new standard of intrusion is the Advanced Imaging Technology (AIT) scanner used in the vast majority of airports today. There is no denying that the scanner produces a stark naked image of whatever body enters its capacity, but because, however, the TSA has taken some "measures . . . to safeguard personal privacy," the Court held the "AIT screening does not violate the Fourth Amendment."[29] Although this rationale might seem a little suspect, to really understand how the TSA can attempt to justify the effectiveness of the AIT scanners, it helps to look at the timeline that surrounded their initial implementation.

B. Transportation Security Administration Standard Operating Procedures

1. Security Checkpoint Procedure

Although the first bombing of a commercial airplane was documented in 1949, the late 1960s were the first real proliferation of terrorist hijacking in American history to date.[30] A

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[26] Robert J. Pures II, *The Fourth Amendment Warrantless Search and Seizure of the Home Since September 11, 2001*, 27 RUTGERS L. REC. 5, 14 (2003).

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

[28] *Id.* at 10 (quoting City of Ontario v. Quon, 130 S. Ct. 2619, 2632 (2010)) (internal quotation marks omitted).

[29] *Id.*

[30] Jack H. Daniel III, Comment, *Reform in Airport Security: Panic or Precaution?*, 53 MERCER L. REV. 1623, 1625 (2002).

total of sixty-two hijackings occurred in 1968 and 1969 alone.[31] In response, in December of 1972, the Federal Aviation Administration, under the order of President Nixon, required the "magnetometer screening of *all* passengers" be mandatory by January of 1973.[32] Up until this point, passengers only had to go through a screening pat-down and magnetometer search if they aroused suspicion in the eyes of an airline employee.[33] Passengers were very rarely bothered with these "profiling"[34] efforts from airline employees and weren't usually required to show photo identification at all before boarding the plane.[35] This treatment of potential airline passengers changed overnight with the FAA's reactions to the hijackings of the late 1960s. The overreaction of the FAA in the 1960s provides some insight into the present-day treatment of potential airline passengers.[36]

The TSA has traditionally used magnetometers as a primary screening mechanism for passengers seeking to gain entrance to the "sterile area" of an airport.[37] In 2004, in response to Congressional directions, the TSA began "developing, testing, improving, and deploying" a new screening technology that would detect "nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms."[38] Of course, this technology eventually materialized itself into the AIT scanners we know today. These scanners were initially implemented into American airports as early as 2007 and were used exclusively as a secondary screening mechanism for selected passengers that had already

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[31] *Id.*

[32] United States v. Davis, 482 F.2d 893, 901-02 (9th Cir. 1973).

[33] *Id.* at 898.

[34] *Id.*

[35] *Id.* at 900.

[36] *See supra* note 30; *infra* notes 100-01. The use of the word "overreaction" here is to illustrate the tendency of American aviation security tactics to be typically reactive after a domestic terrorist attack, as opposed to proactive in designing security measures prior to domestic aviation attacks; moreover, these reactive vs. proactive security design measures tend to push security measures to be far more intrusive than they have to be in order to remain effective.

[37] Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 2-3 (D.C. Cir. 2011). "Sterile area" entails any part of the airport where a passenger might be able to board a plane: typically, the boarding gate areas.

[38] *Id.* at 3.

passed through the magnetometer.[39] Effectively, the AIT technology would only be utilized on a randomly selected group of potential passengers that the TSA chose to undergo a heightened screening mechanism, just like those randomly selected for a physical pat-down.[40] By 2009, the TSA had implemented the AIT scanner as a primary screening mechanism in a "limited number of airports."[41] By 2010, the TSA had made the command decision to "use the [AIT] scanners everywhere for primary screening."[42] In the course of three short years, the TSA completely decimated the long-standing Fourth Amendment landscape of the American airport, and the privacy it continues to herald as a "cornerstone" of their security protocol and policy.[43] Worse yet, they did so with no apparent notice, justification, or explanation to the American public.[44]

2. Sensitive Security Information

This lack of notice, justification, or explanation came on the back of the concept of Sensitive Security Information (SSI). SSI had its founding in the Air Transportation Security Act of 1974.[45] Under this congressional act, for the first time, the FAA was authorized to "prohibit disclosure of any information" that "would be detrimental to the safety of persons traveling in air transportation."[46] To provide further clarification and depth to the body of what information could be classified as SSI, the FAA established Title 14 Code of Federal Regulations (CFR) Part 191.[47] Under this section of the code, the FAA had the authority to classify any information surrounding screenings and all other

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Frequently Asked Questions — Secure Flight*, TSA, http://www.tsa.gov/content/frequently-asked-questions-secure-flight#Protecting Your Privacy (last visited Aug. 27, 2014).

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

[45] Air Transportation Security Act of 1974, Pub. L. No. 93-366, 88 Stat. 415.

[46] *Id.* at 417.

[47] 14 C.F.R. § 191 (1999).

investigation tactics they planned to utilize in their security programs.[48] After the events of September 11, 2001, Congress passed a new scheme to combat aviation terrorism in the Aviation and Transportation Security Act (ATSA).[49] This Act functioned to serve many purposes, but amongst the most substantial was the establishment of the Transportation Security Administration (TSA) that would be an administration of the Department of Transportation.[50] Under the ATSA, the TSA would basically assume all the aviation security duties previously controlled by the FAA.[51] In February of 2002, the TSA and FAA announced the implementation of 49 CFR Part 1520.1, which, in all practicality, handed down the full scope of SSI, which would be handled by TSA exclusively.[52] At the same time 49 CFR Part 1520.5 was also handed down to illustrate the new expanded definition of what could be classified as SSI as being anything that would be "detrimental to the security of transportation."[53]

Although this seems like a subtle change from the "safety of persons traveling in air transportation" language of the Air Transportation Security Act of 1974,[54] the breadth of information covered by 49 CFR 1520.5 is most certainly wider because (1) it encompasses all forms of transportation governed by the TSA, and (2) it shifts the focus away from the "safety of persons traveling"[55] to the more auspicious "security of transportation."[56] The implementation of 49 CFR 1520.5 also specified, for the first time, a direct list of categories of information that would "constitute SSI."[57] These SSI bodies of information include: security directives;[58] security inspection or investigative information;[59]

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[48] *Id.*

[49] Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

[50] *Id.*

[51] *Id.*

[52] 49 C.F.R. § 1520.1 (2013).

[53] *Id.* § 1520.5(a)(3).

[54] Air Transportation Security Act of 1974, Pub. L. No. 93-366, 88 Stat. 415, 417.

[55] *Id.*

[56] 49 C.F.R. § 1520.5(a)(3) (2013).

[57] *Id.* § 1520.5(b).

[58] *Id.* § 1520.5(b)(2).

[59] *Id.* § 1520.5(b)(6).

security measures;[60] security screening information;[61] security training materials;[62] systems security information;[63] research and development;[64] and the ominous "Other information" section.[65] The TSA has repeatedly classified the release of SSI information strictly on a "need to know" basis.[66] This "need to know" has fallen almost exclusively to those persons who work for the TSA and need the specific information to aid in the completion of their day-to-day employment duties.[67]

II. THE TRANSPORTATION SECURITY ADMINISTRATION'S CULTURE OF ABUSE

The TSA, just as the FAA before it, has a longstanding rapport with federal and state courts around the country. This relationship comes in large part from its constant struggle to adequately respond to the criminal defendants it aids in creating every year. If the TSA employed a highly-trained and legally sophisticated group of investigatory officers, then there would probably never be a need for such a discussion as the one addressed by this Comment. However, this does not seem to be the reality of the TSA's current prerogative, and as such, an in-depth analysis of the culture that is currently incubating within the TSA should be explored.

A. Fourth Amendment Doctrine Inside American Airports

Although this section is by no means an exhaustive survey of every case that has interpreted Fourth Amendment jurisprudence inside American airports, perhaps it will give a general overview

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[60] *Id.* § 1520.5(b)(8).

[61] *Id.* § 1520.5(b)(9).

[62] *Id.* § 1520.5(b)(10).

[63] *Id.* § 1520.5(b)(13).

[64] *Id.* § 1520.5(b)(15).

[65] *Id.* § 1520.5(b)(16). To qualify for this section, the information would have to be determined as SSI by the TSA or the Secretary of the DOT and would have to be requested as SSI in writing.

[66] *Id.* § 1520.11.

[67] *Id.* § 1520.11(a).

and feel of the climate of such judicial interpretation in the past as well as currently.

1. Probable Cause

The safety of air-travelers throughout American airports has and always will be at the forefront of the American psyche. Therefore, there should never be any greater degree of deference given to a court interpreting criminal activity inside of an American airport as opposed to any other venue inside American borders. If probable cause surrounding a potential perpetrator does in fact exist, then traditional values of Fourth Amendment jurisprudence should apply inside American airports with equal fervor as well.[68]

2. Stop-and-Frisk

The applicability of *Terry* "stop-and-frisk" searches has been interpreted and applied to a number of airport cases throughout the country.[69] However, it is important to realize two points here. Firstly, the cases that interpret airport security under the *Terry* "stop-and-frisk" analysis were decided almost exclusively before the advent of administrative searches and the "special needs" doctrine.[70] Secondly, although *Terry* is not utilized profusely in more modern airport security Fourth Amendment cases, its

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[68] *See, e.g.*, United States v. Herzbrun, 723 F.2d 773, 778 (11th Cir. 1984) ("Viewing the entire occurrence in a common-sense, pragmatic manner, the arresting police officers in the instant case had probable cause to believe that the substance the two checkpoint inspectors had observed was either narcotics or explosives—it could have been little else.").

[69] *See, e.g.*, United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (holding brief stop-and-frisks constitutional when suspects activate the magnetometer and fit the profile of a potential hijacker; however, determining the search in this case was unconstitutional because of improper tampering with the profile by airline employees); United States v. Dalpiaz, 494 F.2d 374 (6th Cir. 1974) (holding that a person may be searched, even after successfully passing through the airport screening process, if the officers justifiably believe that the person whom they are investigating at close range is armed and dangerous); *cf.* United States v. Place, 462 U.S. 696 (1983) (extending the brief detention of someone's luggage in order to quickly dispel a suspicion of illegal activity as justified under *Terry*).

[70] *See supra* notes 14-16.

modern applicability should not be interpreted as archaic or unnecessary.[71]

3. Administrative Searches

In the wake of the increased hijacking of the 1960s,[72] two distinct progenies of cases justifying increased airport security searches began to surface. The minority progeny was one that justified a warrantless search and seizure of passengers based on a theory of "express or implied consent" from the passenger in giving up materials or information inside the airport that would eventually lead to their implication in criminal activity.[73] The majority progeny, however, was one that grew out of the Court's decision in *Camara v. Municipal Court*,[74] and treated the airport's ability to perform security inspections pursuant to the expectations and guidelines of administrative searches. Because it is not hard to fathom the direct interest a state might have in protecting American air-travelers, if it can be shown that the security program is directed only at fulfilling an administrative purpose, ensuring the safety of its passengers, and only involves an intrusion of privacy required to facilitate such a program, then

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[71] *See* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998). *Terry* is, in effect, as good today as the day it was written; however, most modern courts don't have to address *Terry* concerns because such concerns are typically outweighed by those involved with administrative searches and seizures pursuant to the "special needs" doctrine.

[72] *See* Daniel, *supra* note 30, at 1625.

[73] *See* United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (holding that preflight passenger screenings were not unconstitutional because passengers voluntarily proceeded, thereby impliedly consenting, to the screening checkpoint pursuant to their being able to board the plane); United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir. 1986) (holding that a passenger that places his baggage on a conveyor belt that passes through an x-ray screening device gives implied consent to subsequent inspections of the bag by airport screening agents); United States v. Tolbert, 692 F.2d 1041 (6th Cir. 1982) (holding that denying ownership of a piece of luggage was equivalent to abandoning it, thereby giving officers the ability to search the luggage without any suspicion and subsequently barring the defendant from raising any Fourth Amendment privacy claim at trial because she had voluntarily forfeited any such right in denying ownership), *cert. denied*, 464 U.S. 933 (1983).

[74] 387 U.S. 523 (1967).

courts have routinely upheld the constitutionality of the search.[75] If this regulatory administrative search scheme is ever exposed as having any purpose outside of the specific regulatory purpose for which they were created, however, then they will be held as unconstitutional.[76]

4. Special Needs Doctrine

Although there are very few cases that have ever addressed the "special needs" doctrine as applied to the American airport security checkpoints,[77] a new wave of very recent cases have applied the "special needs" doctrine to passenger searches regarding other forms of travel.[78] Differentiating between administrative searches and those authorized under the "special needs" exceptions to normal Fourth Amendment search

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[75] *See Davis*, 482 F.2d at 910 (holding that the search "must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it"), *overruled by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (holding that the reasonableness of a preflight screening does not depend, in whole or in part, on implied or express consent); United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1244 (9th Cir. 1989) (upholding *Davis*, but emphasizing "the importance of keeping criminal investigatory motives from coloring administrative searches"); United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974) (holding the use of magnetometers constitutional as part of an administrative search regimen).

[76] *See, e.g.*, *Davis*, 482 F.2d at 909 (holding that if such searches were used for the "general search for evidence of crime," then such a search would be held as non-administrative and therefore unconstitutional).

[77] *Cf.* MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006). Although this opinion justified the "special needs" doctrine's applicability to subway searches, the court in *MacWade* reiterated that while its earlier decision in *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974), was decided under the guise of administrative searches, its decision actually hinged on what would later become known as the "special needs" doctrine. "Although at the time we lodged our decision within the broad rubric of reasonableness, our reasoning came to be known as the 'special needs exception' roughly one decade later." *MacWade*, 460 F.3d at 268 (citation omitted). Although the court in *Wehrli* utilized the conventional administrative search analysis of the time, it also found that the reasonableness of the search was justifiably enhanced because it "did not range beyond an area reasonably calculated to discover dangers to air safety" and would only lend itself to making the program more effective. United States v. Wehrli, 637 F.2d 408, 410 (5th Cir. 1981).

[78] *See* MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006) (applying the "special needs" doctrine to warrantless searches performed on subway passengers); Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006) (applying the "special needs" doctrine to warrantless searches performed on ferry commuters and their cars).

requirements is not an easy task. Perhaps the most critical difference that should be recognized for the purposes of this Comment is that there are far fewer judicial avenues to limit and overturn "special needs" searches than there have been historically allotted for administrative searches.[79] This lack of judicial safeguard will ultimately make any effort to reign in such a program, should the need ever arise, virtually impossible.[80]

B. TSA Secrecy

When Sensitive Security Information requests have been made in the course of litigation surrounding civilian privacy violations pursuant to TSA security measures, such requests are almost always denied.[81] The overwhelming majority of cases, however, are thrown out at first glance by district courts because they lack jurisdiction in requesting the SSI to begin with.[82] Such courts will typically argue the merits of the case, then routinely throw the claim out because the court lacks the requisite authority under 49 U.S.C. § 46110.[83] This authority has been bestowed exclusively on the Courts of Appeals.[84] By putting the authority to challenge a TSA denial for release of SSI information on such a high judicial pedestal, the ability to gain access to such information in order to pursue TSA violation litigation becomes far removed for the vast majority of potential litigants.[85] With this

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[79] The prime differentiating mechanism here being the ability to overturn an administrative search as unconstitutional if it is found to have any purpose outside of the regulatory purpose for which it was created.

[80] *See* Alexander A. Reinert, *Revisiting "Special Needs" Theory via Airport Searches*, 106 NW. U. L. REV. 1513 (2012).

[81] *See, e.g.*, Robinson v. Napolitano, 689 F.3d 888, 893 (8th Cir. 2012) (holding that SSI information that was withheld from litigation was not done so to "gain a tactical advantage" or arbitrarily or capriciously, therefore access to the SSI was not granted).

[82] *See* 49 U.S.C. § 46110 (2012).

[83] *See* Chowdhury v. Nw. Airlines Corp., 226 F.R.D. 608, 614 (N.D. Cal. 2004) ("Congress has expressly provided that an appeal from an order of the TSA . . . lies exclusively with the Court of Appeals."); Durso v. Napolitano, 795 F. Supp. 2d 63 (D.D.C. 2011) (again denying a request to sequester SSI records from the TSA on grounds of a lack of authority).

[84] 49 U.S.C. § 46110 (2012).

[85] *See supra* notes 83-84. The practical realization here has to be that the vast majority of potential litigants do not have the financial means to pursue litigation up to the appellate level; moreover, this impracticality of litigation will lend itself ultimately

judicial gap effectuated, the TSA is able to operate under a veil of secrecy and the release from liability to answer for its decisions and methods in security enforcement throughout American airports.

C. Tipping the Scales of Reasonableness

Need, depth, and justifiability must always be at the forefront of consideration for any governmental intrusion, "special needs," administrative, or otherwise. Quite literally, one must always ask, "Is this intrusion reasonable in light of the supposed societal gain from such an intrusion?" These "scales of reasonableness" have to be constantly reevaluated; and if ever found to be out-of-balance, then alternative courses must be considered and possibly pursued.

If the veil of secrecy maintained by the TSA in not releasing justification or explanation of information deemed as SSI seems to tip these scales, then the implications that are fleshed out in effects on the American public are equally, if not more, unsettling. In *Durso v. Napolitano*, a trio of violated plaintiffs spelled out their respective violations to the court to no avail.[86] Adrienne Durso, "who had undergone a mastectomy as part of breast cancer treatment," was subjected to a "humiliating and painful patdown in which a TSA agent 'repeatedly and forcefully . . . prodded' at her chest."[87] Chris Daniels "experienced 'an aggressive and invasive pat-down of his genitals,' an experience exacerbated by a childhood injury."[88] Worst of all, C.N., a twelve-year-old girl, "was pulled out of the security screening line and forced to undergo an AIT scan without the knowledge or consent of her parents and without being given an opportunity to refuse."[89] Attempting to establish a claim challenging the Screening Checkpoint Standard Operating Procedure order, the plaintiffs filed the claim in the district court of the District of Columbia, a court with which they

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to a "chilling effect" to which potentially successful plaintiffs should never have to be subjected.

[86] *Durso*, 795 F. Supp. 2d at 65-67.

[87] *Id.* at 65.

[88] *Id.*

[89] *Id.* at 65-66.

assumed jurisdiction to lie because of their constitutional challenges.[90] The court flat out punted the issue and deemed that even though "[49 U.S.C.] § 46110 does not define the term 'order,' . . . [the] TSA's Screening Checkpoint SOP is an 'order' in the meaning of 49 U.S.C. § 46110" because of its effect on all of TSA's SOPs.[91] Perhaps the most surprising ruling by the court came in the assertion that "[b]ecause plaintiffs' Fourth Amendment claim is inescapably intertwined with a review of that order . . . defendants' motion to dismiss must be granted."[92] The court simply walked away from an issue over which they had jurisdiction in order to not step on the TSA's statutory toes. The effects of judicial bureaucracy here are chilling. Currently, none of the claims have been reheard under the proper judicial review.

Many citizens' religious convictions have been ignored in the wake of the implementation of new AIT scanner technologies as well.[93] Although many religious groups have come out to denounce the use of AIT technology, perhaps none have been so prominently heard lately than Southern Baptists, Orthodox Jews, and American Muslims.[94] Richard Land, acting as head of public policy for the Southern Baptist Convention, an organization with over sixteen million members, stated that "[t]he Bible's pretty clear about nakedness not being something which is supposed to be public. It's a disgrace."[95] Land also compared the AIT scanner boycott to the "Montgomery, Ala., bus boycott in the 1950s," calling for all Southern Baptists to "find alternatives to air travel and to call airlines to let them know why" in order ultimately to "go to the airlines and make it hurt."[96] Rabbi Abba Cohen, vice president for federal affairs and director of a national Orthodox Jewish organization that has worked extensively with the TSA,

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[90] *Id.* at 66.

[91] *Id.* at 67-73.

[92] *Id.* at 73.

[93] *See* Colleen Deal, Comment, *Faith or Flight?: A Religious Dilemma*, 76 J. AIR. L. & COM. 525 (2011).

[94] *See* Tara Bahrampour, *TSA Scanners, Pat-Downs Particularly Vexing for Muslims, Other Religious Groups*, WASH. POST (Dec. 23, 2010, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122202919_pf.html.

[95] *Id.*

[96] *Id.*

said that the AIT scanners present "clearly a picture that exposes private body parts, and I know in our community there would be a great discomfort in going through these machines."[97] The Fiqh Council of North America, a body of Muslim jurists whose purpose is to interpret Islamic law for Muslims in North America, issued a ruling that AIT scanner technologies were "a violation of clear Islamic teachings" about men and women not being seen naked and ordered that all North American Muslims undergo the alternative pat-down screening instead.[98] Although the pat-down also presents Muslims with some religious violation as well, it is supposedly the lesser of two evils.[99] Under the current administration, religious conviction will never overweigh the mandated AIT or pat-down protocol enforced throughout America's airports by the TSA, no matter the cost.[100]

The long list of Fourth Amendment violations does not stop there. Perhaps one more example might aid in illustrating exactly how removed the TSA's SOPs are from the norms of the American psyche and what most Americans view as reasonable under the Fourth Amendment. Elizabeth McGarry was recently forced by TSA agents at John F. Kennedy International Airport to publicly drink her own breast milk before being allowed to board her flight.[101] McGarry and her infant child were initially pulled aside for enhanced screening where agents "examined her shoes, searched her baby and went through her diaper bag."[102] McGarry acknowledged that "[n]one of that bothered her," it was rather "when she was ordered to drink the breast milk did she fail to see the connection to stopping terrorism."[103] Given no other choice, McGarry drank the contents of her infant's bottle, the milk of her

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *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/.

[101] *JFK Airport Security Forces Woman to Drink Own Breast Milk*, USA TODAY (Aug. 12, 2002, 11:12 AM), http://usatoday30.usatoday.com/travel/news/2002/2002-08-09-jfk-security.htm.

[102] *Id.*

[103] *Id.*

own breast.[104] McGarry summed up the entire experience and the anguish that it immediately caused her as "embarrassing and disgusting."[105] One would be hard pressed to find a new mother that felt otherwise.

D. Future Violations

With the TSA's operation of the AIT scanners at full steam ahead, it is not hard to imagine what the future holds for American air travelers' Fourth Amendment rights. In short, there probably will not be any left to speak of. There has been a long precedent in the American legal system to uphold contraband possession convictions that occur pursuant to "random" or procedurally justified secondary heightened security inspections in airports.[106] Without such a justification however, American courts have been quick to suppress any evidence found in violation of the passenger's Fourth Amendment protection.[107] With the implementation of AIT scanners as the primary screening method, this extremely important body of judicial discretion completely goes away. With the ability to examine every part of a passenger's person and their luggage, this last shred of Fourth Amendment protection will be destroyed, because there will not be any opportunity for an unscreened detail, illegal or otherwise. This

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[104] *Id.*

[105] *Id.*

[106] *See* United States v. Marquez, 410 F.3d 612 (9th Cir. 2005) (random search that revealed cocaine possession did not violate plaintiff's Fourth Amendment rights); Higerd v. State, 54 So. 3d 513 (Fla. Dist. Ct. App. 2010) (because the search of passenger's luggage that revealed a large amount of child pornography was at random, no Fourth Amendment violation occurred); United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (because TSA protocol allows for a secondary heightened security screening of any passenger who is unable to produce photo identification, any drugs discovered pursuant to such screening is not in violation of passenger's Fourth Amendment rights).

[107] *See* United States v. Place, 462 U.S. 696 (1983) (In determining whether or not an agent's investigation of a passenger's property is "reasonable," length, physical location, and details and arrangements of such investigation by agents is absolutely determinative of passenger's Fourth Amendment rights.); United States v. Fofana, 620 F. Supp. 2d 857, 863 (S.D. Ohio 2009) (contraband was suppressed because "the evidence in this case shows that the extent of the search went beyond the permissible purpose of detecting weapons and explosives and was instead motivated by a desire to uncover contraband evidencing ordinary criminal wrongdoing").

newly founded transparency may be viewed as productive to the safety interest of American air travelers, but the decimation of those same travelers' privacy rights is inescapable and unrivaled in any other aspect of the American constitutional spirit.

This decimation of travelers' privacy rights will be especially vexing looking forward as the TSA continues to expand its scope of domestic security into realms outside of the American airport.[108] In establishing the Visible Intermodal Prevention and Response (VIPR) squads, the TSA has created an ever expanding and increasingly penetrating domestic police force.[109] Operating annually with a budget in excess of $100 million and typically clothed in civilian attire, VIPR has historically been confined to move throughout American airports, in a concerted effort to supplement and increase the efficiency and effectiveness of TSA officers on duty within those airports.[110] This confinement to operate within the walls of American airports has all but disappeared as of recently, however, and the presence of VIPR has been increasingly seen elsewhere. Most recently, several domestic rail, subway, and bus line patrons have been subjected to pat-downs and warrantless searches of personal effects before being allowed to board their transportation.[111]

All privacy concerns from these travelers seeking justifications from the TSA have been met with the same rhetoric most airline passengers have come to expect. Firstly, passengers are routinely told that searches are not mandatory, because the traveler can opt out of the search and not be allowed to board the train, subway, bus, etc.[112] Secondly, when asked about the justifications surrounding a need for such increased security measures, patrons of these transportation companies are routinely

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[108] Ron Nixon, *T.S.A. Expands Duties Beyond Airport Security*, N.Y. TIMES (Aug. 5, 2013), http://www.nytimes.com/2013/08/06/us/tsa-expands-duties-beyond-airport-security.html.

[109] *Id.*

[110] *Id.*

[111] Thom Patterson, *TSA Rail, Subway Spot-Checks Raise Privacy Issues*, CNN (Jan. 28, 2012, 10:05 AM), http://www.cnn.com/2012/01/28/travel/tsa-vipr-passenger-train-searches.

[112] *Id.* This obviously creates an almost inescapable submission to searches against passengers that have no other means of transportation other than those they must be searched in order to board.

told that the scope of the TSA is not just confined to air travel. More blatantly, when asked about the need for an internal taskforce such as the TSA's VIPR program, John Pistole, then-administrator of the TSA, answered, "Our mandate is to provide security and counterterrorism operations for all high-risk transportation targets, not just airports and aviation . . . [t]he VIPR teams are a big part of that."[113] When asked if the TSA had ever actually "foiled a terrorist plot or thwarted any major threat to public safety," TSA officials were a little less candid, asserting simply that information surrounding the VIPR program and its effectiveness is "classified."[114] Instead, TSA officials relied on the same justifications as usual in that "the random searches and presence of armed officers [at train, subway, and bus terminals] serve as a deterrent that bolsters the public confidence."[115]

These justifications have not proven to be adequate in a number of cases domestically and public outcry for explanation and reform has become a real hot-button topic recently. One such incident came in Amtrak police chief John O'Connor's handling of VIPR's misconduct in Savannah, Georgia in February of 2011. O'Connor witnessed a squad of VIPR agents show up and literally take over the train station, with no prior notifications to or approval from Amtrak's police department.[116] Operating with absolutely no coordination or assistance from the Amtrak police, VIPR agents instituted a near blanket policy searching everyone in the vicinity of the station, with no regard to suspicion or cause. A recollection of that day's events tells a grim but increasingly common tale:

> Everyone who entered the station was thoroughly searched. It didn't seem to matter whether people were getting on trains or getting off trains, or just looking for a place to go to the

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[113] Nixon, *supra* note 108.

[114] *Id.*

[115] *Id.*

[116] Don Phillips, *Rail's Handling of TSA Should Be a Model*, CNN (Feb. 6, 2012, 8:44 AM), http://www.cnn.com/2012/02/06/opinion/don-phillips-tsa-vipr-teams/.

> bathroom. The "rules," if there were any, seemed to be that if you entered the station, you went through a full search.[117]

Observing this event as the obvious invasion of privacy that it was, O'Connor angrily kicked all the VIPR agents off of Amtrak's property "until they learned how not to make fools of themselves."[118] Even though there are numerous unreported events like those surrounding O'Connor's experience that occur every year, several senators and other lawmakers have also been very skeptical publicly of VIPR efficiency, or even necessity, in recent years.[119] This outcry for explanation and justification surrounding the necessity of such a highly funded, civilian clothed, police force will continue to be heralded and eventually heard and answered by the TSA in the future. Without such justification and explanation, the TSA will continue to endorse its current position as an agency that promotes a culture of discretionary abuse, all the while withholding any information that might console the masses that support its operation through their hard earned income and taxes.

III. EFFICIENCY, JUSTIFICATIONS, AND TRANSPARENCY: AN ATTEMPT TO SALVAGE THE TSA

The solution to the problems presented throughout this Comment will be exactly two-fold. (1) The TSA should revoke its haphazard implementation of both the AIT and pat-downs as primary screening methods and revert back to the use of magnetometers as primary screening tools, with the use of AIT and pat-downs as secondary heightened screening methods. This solution would be just as effective as the current screening

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[117] *Id.*

[118] *Id.*

[119] Nixon, *supra* note 108. One such skeptic has been Representative Bennie Thompson, Democrat of Mississippi and ranking member of the House Homeland Security Committee, which maintains "oversight of the TSA;" moreover, in Mr. Nixon's article, Mr. Thompson said he "generally supports the VIPR teams but remains concerned about the warrantless searches and the use of behavior detection officers to profile individuals in crowds. 'This is a gray area,' . . . . 'I haven't seen any good science that says that is what a terrorist looks like. Profiling can easily be abused.' . . . 'It's hard to quantify the usefulness of these teams based on what we have seen so far . . . .'" *Id.*

regimen, but with far less propensity for Fourth Amendment violation. (2) In the alternative, if the TSA is to continue to use the AIT in any form, primary, secondary, or otherwise, a greater transparency in its SSI and a set of SOPs have to be made available to the public. Although there are concerns with the terrorist forces "learning our secrets," the American psyche can no longer tolerate this type of tyrannical abuse.

A. Revert Back to Magnetometers as Primary Screening Procedure

Although it is extremely difficult to estimate the effectiveness of AIT implementation in thwarting air terrorism in America, best case scenario models put an anti-terrorism method effectiveness rating increase from 90.2 percent (pre-AIT implementation) to 100 percent with the assumption that every terrorist effort would be exposed and thwarted through the use of AIT technologies.[120] However, even in light of these optimistic increases in the effectiveness of security, more realistic estimates serve to increase the effectiveness of AIT implementation on terrorist activity reduction by about 5-7 percentage points overall, increasing the overall effectiveness to approximately 95-97 percent from the estimated 90.2 percent pre-AIT implementation effectiveness.[121] It should also be taken into consideration that, at minimum, purchasing, installing, operating, and maintaining the newly implemented AIT scanners will cost somewhere between $1.2-$1.85 billion dollars per year.[122] There is no doubt that these costs will be handed down to the American consumer and taxpayer. Even worse is the realization that the average air-faring American citizen will be essentially paying for the privilege to have their Fourth Amendment privacy rights, as well as their own dignity, violated. Again, have the costs finally outweighed the reward?

To illustrate the effectiveness of AIT scanners in another way, not one incident of terrorism has involved the use of AIT

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[120] 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 10-11.

[121] *Id.*

[122] *Id.* at 4.

scanners since their wide spread implementation in 2007. The incident that really pushed the question to the forefront came in the wake of the terrorist efforts of Umar Farouk Abdulmutallab in attempting to blow up Northwest Airlines Flight 253 using a ceramic underwear bomb on Christmas Day in 2009. Even those who cried for AIT implementation have had a hard time concurring on whether or not the AIT scanner technology would have been effective in detecting the explosive substance found in Abdulmutallab's underwear.[123]

A tactic that made an immediate impact, however, was the reaction to the proliferation of commercial airline hijacking of the late 1960s, seen in the requirement of all passengers being subjected to magnetometer and luggage screening.[124] The implementation of magnetometer security measures caused a huge decline in air terrorism across the board almost immediately.[125] Although these are two seemingly incomparable periods of time and two seemingly incomparable security measures, the overall argument here is that the American public is always in a constant tug of war to balance its privacy rights versus the governmental need to invade those rights in order to keep the American public safe. The balance that does not offend constitutional conviction is the circumstance in which the value of the reward gained by the public outweighs the inconvenience costs of the intrusion. This balancing approach started with *Terry v. Ohio* and still remains the controlling test to this day. In essence, Americans have given up their last privacy rights in American airports by allowing the TSA to intrude on every crevice of their bodies and possessions, with absolutely no prompt or justification for their doing so, and have really gained nothing in return.

In advocating the public acceptance of the implementation of the AIT scanners, the TSA has actively advertised that "more than [ninety-nine] percent of passengers choose to be screened by

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[123] Brittany R. Stancombe, *Fed Up with Being Felt Up: The Complicated Relationship Between the Fourth Amendment and TSA's "Body Scanners" and "Pat-Downs"*, 42 CUMB. L. REV. 181, 200-201, (2012).

[124] *See* Daniel, *supra* note 30, at 1625.

[125] *Id.*

this technology over alternative screening procedures."[126] The TSA also boasts a seventy-eight percent approval rating of their use of AIT scanners in America's airports amongst American air travelers polled.[127] Two important factors must be realized before any meaningful discussion of this statistic might occur. First, this poll was conducted by Gallup on January 5-6, 2010, a mere ten days after the attempted terrorist attacks of Umar Farouk Abdulmutallab in attempting to blow up Flight 253.[128] Second, if ninety-nine percent of passengers truly feel more comfortable having someone review a naked image of them, how much less intrusive is the alternative they have in "opting out?" If it is the case, however, that the majority of the American public is in favor of undergoing AIT scanner screenings before every flight they attempt to board, all in the name of "increased" security, then the TSA, at the very least, owes it to the American public to provide a greater transparency about how the AIT process actually operates and what exactly is done with any information procured by the scanner.

B. Greater TSA Transparency in SSI and SOP Details

The rapid narrowing of privacy rights seen in American airports is unlike anything ever seen in the average American's day-to-day life. While privacy rights have expanded in the American home,[129] to some extent in Americans' rights to their

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[126] *Advanced Imaging Technology*, TSA, http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait (last visited Aug. 29, 2014).

[127] Jeffrey M. Jones, *In U.S., Air Travelers Take Body Scans in Stride*, GALLUP (Jan. 11, 2010), http://www.gallup.com/poll/125018/Air-Travelers-Body-Scans-Stride.aspx.

[128] *Id.* The inference here being that while there might have been a seventy-eight percent approval rating of the TSA's use of AIT scanners, this poll was conducted in the immediate wake of a terrorist attack, thereby tainting the results due to some amount of paranoia and the artificial need for security felt by the American public due to such a horrific event.

[129] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding Texas state law unconstitutional because it infringed upon the homosexual conduct of two consenting adult males within the privacy of their homes); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding Connecticut law unconstitutional because it infringed the right of consenting adults to partake in birth control pharmaceuticals in the privacy of their homes); Stanley v. Georgia, 394 U.S. 557 (1969) (holding Georgia law unconstitutional

own person,[130] and even in public phone booths,[131] there are also places where privacy expectations have narrowed.[132] The important realization here, however, is that any narrowing of Americans' Fourth Amendment privacy rights has not occurred so rapidly as that seen in American airports.[133] It is also extremely important to realize that any narrowing of such Fourth Amendment privacy rights has mandated some explanation from the governmental entity seeking to narrow those rights and required a showing of a strong and compelling governmental interest to do so.[134]

No such explanation has been provided by the TSA in explaining its protocols or methodologies in procuring, analyzing, and effectively storing data mined by the AIT scanners. This veil of secrecy has been continually cultivated by the reiteration that information cannot be allowed to disseminate to the American

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in as much as it made pornographic materials illegal to citizens in the privacy of their home).

[130] *See* Roe v. Wade, 410 U.S. 113 (1973) (holding constitutional a woman's privacy rights to her body and decision to pursue an abortion); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that a strong compelling government interest must be established before any mandatory vaccination may be administered to all citizens); United States v. Dionisio, 410 U.S. 1 (1973) (providing Fourth Amendment protection for any part of one's "person" that is not knowingly exposed to the public constantly (facial features, voice, handwriting)); Missouri v. McNeeley, 133 S. Ct. 1552 (2013) (holding that the metabolization of alcohol does not automatically justify an exception to the Fourth Amendment in drunk-driving cases). *Contra* Maryland v. King, 133 S. Ct. 1958 (2013) (holding that DNA "swab" after arrest for "serious crime" was reasonable under the Fourth Amendment).

[131] *See* Katz v. United States, 389 U.S. 347 (1967).

[132] *See* Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (holding that drivers of vehicles on public thoroughfares have a lowered expectation of privacy in their vehicles in the face of a compelling governmental regulation and interest); Griffin v. Wisconsin, 483 U.S. 868 (1987) (holding that probationers give up Fourth Amendment privacy rights against searches of their homes, person, etc.); Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (holding that any high school student attempting to partake in competitive extracurricular activities waives their Fourth Amendment privacy rights against drug testing in light of the school's interest of "preventing and deterring drug use among its schoolchildren"); O'Connor v. Ortega, 480 U.S. 709 (1987) (upholding government employer searches into the offices of governmental employees); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (holding that suspicionless drug-testing for Customs Services employees was not in violation of their Fourth Amendment privacy rights as it was in the nature of their work).

[133] *Compare supra* notes 32-42, *with supra* notes 129-32.

[134] *See supra* note 132.

public because it would allow terrorists to gain access to that same information and thus lead to a loss of tactical advantage by the TSA over the terrorist forces. This justification again lies in the American facilitation of the War Against Terror in order to maintain the "security of transportation"[135] for all American citizens. If there has ever been a more vague and incredulous justification for such a decimation of American constitutional rights, it is not easily recallable. It is time, quite simply, for the TSA to reveal the reasoning, need, and justification of such intrusive screening techniques forced upon every American air traveler. If the TSA allowed the American public to gain some insight into the Sensitive Security Information and Standard Operating Procedure protocols they are routinely subjected to, then there might just be an opportunity left to establish a fair amount of trust and faith in an organization that has consistently hidden itself from the American public.

Proponents of AIT scanner implementation have routinely relied on two separate, but equally flawed, assertions. One assertion is that "[n]o passenger is ever required to submit to an AIT scan."[136] Instead, the passenger could opt for the far more appealing physical "pat-down."[137] This logic is flawed in that it assumes, incorrectly, that either one of these methods has ever been utilized as a primary method of screening in American airports. In fact, the exact opposite is true. Both methods were secondary methods of heightened screening until the TSA suddenly implemented the AIT as the primary screening method in 2009-2010.[138] The TSA effectively ushered in a "2-for-1" deal on both methods of privacy crushing investigations becoming the norm at once. Again, all with no notice, justification, or explanation to the American public. The second arrow in the AIT proponent's quiver is usually the assertion that "[e]ach image produced by a scanner passes through a filter to obscure facial features[,] . . . is viewable on a computer screen only by an officer

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[135] 49 C.F.R. § 1520.5(a)(3) (2013).

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

[137] *Id.*

[138] *Id.* at 2-4.

sitting in a remote and secure room[,] . . . [and a]s soon as the passenger has been cleared, moreover, the image is deleted."[139] Also, there is a strict TSA policy that no officer who is viewing the AIT images is "permitted to bring a cell phone or camera into the secure room."[140] This assertion is perhaps the biggest hoax played on the American public thus far. Utilizing the Freedom of Information Act, the tech magazine *Gizmodo* sequestered 100 of the 35,000 nude body scans saved on an AIT machine in a Florida courthouse in 2010.[141] This simple but heroic act proved almost conclusively that AIT scanners not only have the capability to save scanned images but are being actively used to do so in massive quantities.[142] It is difficult to fathom how many more images have been stored, mismanaged, or abused, all with no repercussion.

Perhaps the most intriguing and important question that begs to be answered about the future of the average American's privacy rights in light of the ever-increasing grasp that the TSA wields through its taskforces and subcommittees, like VIPR, is "Where will it stop?" If the TSA continues to infiltrate train, subway, and bus stations through agencies like VIPR, even in the face of inadequate training protocol and techniques,[143] then it is hard to imagine what would trigger such a large reform concerning their SSI and SOP protocol. This realization becomes even more ominous when one considers the recent expansion and presence of TSA and VIPR agents at rodeos, sporting events, music festivals, and highway weigh stations.[144] If the TSA intends on expanding into every avenue of American transportation and recreational affair, the least it could do is set some standard

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[139] *Id.* at 4.

[140] *Id.*

[141] Joel Johnson, *One Hundred Naked Citizens: One Hundred Leaked Body Scans*, GIZMODO (Nov. 16, 2010, 11:00 AM), http://gizmodo.com/5690749/these-are-the-first-100-leaked-body-scans.

[142] *Id.*

[143] Nixon, *supra* note 108. Mr. Nixon reiterated that, "Some T.S.A. officials told auditors that they had concerns that deploying VIPR teams to train stations or other events was not always based on credible intelligence. The auditors also said that VIPR teams might not have 'the skills and information to perform successfully in the mass transit environment.'" *Id.*

[144] *Id.*

ground rules concerning its SOP and what exactly will be done with SSI it procures in the course of such endeavors. The American public absolutely deserves that much. Again, have the costs finally outweighed the rewards?

CONCLUSION

When asked recently about the need for AIT scanners, former head of the TSA (2005-2009) Kip Hawley wrote:

> More than a decade after 9/11, it is a national embarrassment that our airport security system remains so hopelessly bureaucratic and disconnected from the people whom it is meant to protect. Preventing terrorist attacks on air travel demands flexibility and the constant reassessment of threats. It also demands strong public support, which the current system has plainly failed to achieve.[145]

Hawley continued by reiterating that the tactics utilized and employed by the attackers on 9/11 will never again be adequate to effectuate a terrorist attack.[146] It is important to realize that "[t]errorists are adaptive, and we need to be adaptive, too."[147] This fact, taken with the consideration that security "[r]egulations are always playing catch-up," lends to the ultimate assumption that no matter how intrusive and thorough the screening technique might be, the "terrorists design their plots around the loopholes."[148] You simply can't achieve a 100 percent effective system to root out and foil the terrorist plots of every single insurgent against the greatest country in the free world. There will always be terrorists trying to stay one step ahead of the game, but intruding into every crevice of every traveler passing through an American airport is in no way going to "fix" the outcome of the

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[145] Kip Hawley, *Why Airport Security Is Broken—And How to Fix It*, WALL ST. J. (Apr. 15, 2012, 3:46 PM), http://online.wsj.com/news/articles/SB10001424052702303815404577335783535660546.

[146] *Id.* Their efforts would be simply too barbaric in the face of reinforced cockpit doors and air marshal intervention.

[147] *Id.*

[148] *Id.*

game. Americans have finally paid in and given up far more than they will ever get in return. Enough is enough.

Approaches to domestic security have to become more honest, commonsense-based, and supported more fully by an American public that views the current transportation security in America as broken. The TSA cannot continue to cultivate a culture of unchecked discretion, because such a system will certainly lend itself to becoming a culture of abuse. The rapid implementation and use of the AIT screening measure is an absolute mockery of the vast sea of Fourth Amendment protections all Americans are afforded and should be able to enjoy freely. All the while, the TSA continues to operate under the secret guise of SSI and a set of SOPs that have never been made available to the public.[149] This veil of secrecy is ever-maintained, while the TSA continues to expand its grasp into many average Americans' day-to-day lives and activities. This is absolutely unacceptable. High time has come to reevaluate the cost paid by every American in continually having our Fourth Amendment rights violated by unjustified, overly intrusive screening techniques and protocol as compared to the supposed reward gained in the continued "War on Terror." If not, the "War on Terror" will continually become a war not waged on foreign insurgency or domestic terrorism, but rather a war waged on the Fourth Amendment rights of every American.

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

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