NOT UP IN THE AIR: A FEDERAL AIR MARSHAL'S ADMINISTRATIVE SEARCH PRIVILEGES IN FLIGHT

INTRODUCTION

Since the events of September 11th, we have often questioned what we are willing to sacrifice in order to maintain America's domestic security. Unfortunately, recent global events and the

increasing sophistication of terrorist methods have once again forced this question back to the forefront of the public mind.[1]

Consequently, many Americans have adamantly expressed their displeasure with government actions that they deem as a threat to their constitutional right to privacy. The backlash to these government measures, which have been established and utilized in the name of security, has been most visible in our nation's airports, where the practices of the Transportation Security Administration (TSA) have been viewed as especially heinous. Complaints against the TSA have included—but are not limited to—racial profiling,[2] the use of AIT scanners,[3] and body searches of passengers that are seen as invasive and unreasonable under the Fourth Amendment.[4] However, these complaints primarily stem from measures used in security screening procedures that allow passengers to enter the secure gated area. Nonetheless, it is only a matter of time before such controversy reaches beyond security checkpoints and up into the skies.

Though on-ground security measures implemented by the TSA may sometimes deter dangerous individuals from carrying out malicious plots in an airport, these measures have not always been enough to prevent such individuals from carrying out their dangerous plans in an aircraft.[5] A vital extension of the TSA, the Federal Air Marshal Service (FAMS), is exclusively responsible for preventing and eliminating such threats that may arise during flight.[6] To date, air marshals have only had to intercept a relatively low number of threats aboard an aircraft.[7] However, in light of recent events of the ever-increasing sophistication of

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[1] *See infra* notes 153-59 and accompanying text.

[2] *See infra* note 21.

[3] Scanners that use "advanced imaging technology" to "produce a crude image of an unclothed person" in order to detect dangerous contraband. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011). For a general discussion of this technology, see *id.* at 3-4.

[4] *See, e.g.*, Charisse Jones & Thomas Frank, *Backlash Grows Over Pat-Downs, Scanners*, USA TODAY, Nov. 18, 2010, at 1A (acknowledging that the general public has deemed such security measures to be unreasonable and a gross intrusion upon individual privacy).

[5] *See infra* notes 157-58 and accompanying text.

[6] *See infra* Part I.B.

[7] *See infra* note 44 and accompanying text.

globalized terrorism,[8] air marshals will be forced to be on greater guard against in-flight threats. Those concerned with invasions of privacy may, however, believe that an air marshal who would conduct searches similar to security checkpoint procedures, such as full body pat-downs or thorough carry-on baggage searches, violates the limitations of the Fourth Amendment.

Though the Fourth Amendment would generally prohibit TSA search procedures, as they are not based upon probable cause, the Fourth Amendment has been limited by a variety of judicial exceptions.[9] On the ground, the TSA is able to carry out many of its search activities through an exception to the Fourth Amendment commonly known as the administrative search exception.[10] Despite the exception's many characteristics and continuing evolution, some have claimed that at its foundation the administrative search is nonetheless a blanket, suspicionless search based upon indiscriminate routine.[11] Herein lies the problem for TSA air marshals attempting to conduct a search in flight, as their search would obviously not be a routine blanket search in which every passenger would undergo a search like an airport security screening. Rather, an air marshal's search would be based upon the individualized suspicion after detecting potentially dangerous activity.

Those quick to dispense of an air marshal's use of the administrative search in flight may not realize that numerous judicial decisions have unintentionally created two branches of the administrative search exception that provide for two different bases of application.[12] The first is what is known as the "dragnet" administrative search, which employs a routine, blanket, suspicionless search.[13] The second, known as the "special subpopulation" administrative search, is not based upon routine,

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[8] *See infra* notes 157-58 and accompanying text.

[9] *See infra* Part II.

[10] *See infra* Part III.A.

[11] *See* Katherine Stein, Comment, *Search and Seizure at Cruising Altitude: An Analysis of the Re-Born Federal Air Marshals and Fourth Amendment Complications in the Twenty-First Century*, 70 J. AIR L. & COM. 673, 700 (2005) ("The justification for the administrative search exception is grounded in the theory of uniform search systems that treat all citizens the same.").

[12] *See infra* Part III.

[13] *See infra* Part III.A.

but is rather based upon individualized suspicion when searching individuals deemed to have a lower expectation of privacy.[14] Considering this legal framework, as well as the urgent need for air marshals to maintain vital security interests, air marshals are thereby legally able to conduct an administrative search in flight in order to maintain national security in the sphere of air transportation.

The first part of this Comment will provide a brief history and overview of the TSA and the FAMS. This part will also provide a recount of the fundamental principles of the Fourth Amendment in regards to air transportation security measures. Part II will demonstrate that while other search exceptions exist, such search exceptions would not allow an air marshal to effectively search in flight and achieve his security objectives. This part will focus on the evolution of the administrative search and its special subpopulation branch that would thus afford air marshals the use of the exception in maintaining crucial security objectives. Finally, this Comment will conclude with various observations highlighting the importance of maintaining an effective federal air marshal initiative.

I. BACKGROUND

A. The Transportation Security Administration

While the TSA was not established until after the attacks of September 11th, airport and aircraft security is not itself a new-thought institution.[15]

Airport security initiatives were first implemented by President Nixon after an onslaught of hijackings on American

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[14] *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 270-72 (2011). It is important to note here that the terms "dragnet" and "special subpopulation" are not terms recognized by the judiciary but are exclusively credited to Primus' legal analysis that claims the Supreme Court has unintentionally created two different and distinct Fourth Amendment search exceptions "entangled" under the banner of the administrative search. See *infra* Part III for a detailed explanation regarding the development of the various facets of the administrative search.

[15] *See infra* notes 16-23 and accompanying text.

planes in the 1960s.[16] President Nixon issued a number of orders, including placing law enforcement officers on high-risk flights, using surveillance techniques in American airports, and requiring the Department of Transportation, the CIA, and other agencies to help develop innovative security measures.[17] The Federal Aviation Administration (FAA) then followed suit and "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.'"[18] Acceptable screening measures included behavioral profiling, magnometer checks, identification checks, and physical searches.[19]

President Nixon also issued an order mandating the screening of all passengers and carry-on items that were to be brought aboard general commercial flights.[20] In response, the FAA issued a directive, echoed by the courts, allowing the search of individuals meeting a specific "hijacker profile."[21] The FAA soon abandoned this profile approach and instead required airline personnel to screen *all* passengers in the presence of law enforcement personnel.[22] With the implementation of these

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[16] *See* Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 8 (2013) (discussing several incidents of hijacking in the early 1960s).

[17] *See* Statement Announcing a Program to Deal with Airplane Hijacking, PUB. PAPERS 742 (Sept. 11, 1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2659.

[18] Harawa, *supra* note 16, at 9 (quoting Aircraft Security; Screening Systems, 37 Fed. Reg. 2500, 2500 (Feb. 2, 1972) (to be codified at 14 C.F.R. pt. 121)).

[19] *Id.* at 10.

[20] *Id.* at 9-10.

[21] *See* United States v. Davis, 482 F.2d 893, 901 (9th Cir. 1973) (acknowledging that an airline was required to subject a passenger to a carry-on baggage search and magnometer clearance if the passenger met the hijacker profile). Though clouded in secrecy, the "hijacker profile" was based upon numerous factors such as suspicious activity. But unfortunately, there has been considerable evidence to infer that airport security workers viewed race or ethnicity as an important characteristic of the hijacker profile. Harawa, *supra* note 16, at 10. Though not entirely conclusive, remnants of the hijacker profile may still remain. After the events of September 11th, those of Middle Eastern descent have felt singled out by airport security measures. *See* Nicholas Poppe, *Discriminatory Deplaning: Aviation Security and the Constitution*, 79 J. AIR L. & COM. 113, 114-15 (2014) ("Despite the realities of the current political atmosphere, discrimination in the context of airline safety has serious implications for travelers, especially when carriers refuse passage to foreign travelers.").

[22] *Davis*, 482 F.2d at 901-02 & n.25.

routine checks, the FAA effectively established the modern airport security procedure that we know today.

After the attacks of September 11th, President George W. Bush was quick to create new security measures and various agencies that immediately amplified airport security. With the Aviation and Transportation Security Act (ATSA), the federal government established the TSA under the Department of Transportation.[23] Consequently, airport and aircraft security was not left to the airlines but rather was under direct control of the government. By making national security in airports a paramount concern, the federal government moved the TSA under the newly created Department of Homeland Security with the ultimate purpose of "[p]rotect[ing] the Nation's transportation systems to ensure freedom of movement for people and commerce."[24]

How the TSA is to fulfill its purpose was not fully stated in the ATSA or by any Homeland Security directives.[25] Nonetheless, the TSA on the ground has used many methods and technologies to increase airport security including, but not limited to, "bottled liquids scanners," AIT scanners, full body pat-downs, "explosives trace detection," and carry-on baggage checks.[26] While many of these methods have been viewed as controversial due to accusations of objective unreasonableness,[27] many TSA screening methods, in addition to many other methods used by airlines prior to the creation of the TSA, are protected under several search exceptions of the Fourth Amendment.[28] Many of the cases challenging airport security protocols have been concerned with routine searches conducted before a passenger is allowed to enter

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[23] *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified at 49 U.S.C. 45107 (2012)).

[24] *See History*, TRANSP. SECURITY ADMIN. (July 23, 2014), http://www.tsa.gov/about-tsa/history; *Mission*, TRANSP. SECURITY ADMIN. (July 23, 2014), http://www.tsa.gov/about-tsa/mission.

[25] *See* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011) ("The Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public.").

[26] *See Technology*, TRANSP. SECURITY ADMIN. (July 23, 2014), http://www.tsa.gov/about-tsa/technology (providing detailed descriptions of various security measures).

[27] *See supra* notes 3-4 and accompanying text.

[28] *See infra* Part II.

the secured gated area.[29] Accordingly, searches that are conducted on an aircraft are assigned to a vital extension of the TSA: the Federal Air Marshal Service.

B. The Federal Air Marshal Service

The FAMS is actually an older institution than its supervising agency, the TSA. President John F. Kennedy first utilized "sky marshals" due to the hijacking of American planes by Cuban nationals after the Bay of Pigs invasion.[30]

These sky marshals were exclusively trained by the FAA and were subject to the 1974 jurisdictional amendment to the Federal Aviation Act of 1958.[31] This amendment stated that aircraft jurisdiction "begins when all external doors are closed following embarkation and continues until one such door is opened for disembarkation, or, in the case of a forced landing, until competent authorities take over the responsibility for the aircraft and for the persons and property aboard."[32] In sum, sky marshals were charged to contain hijackers and then deliver them to the proper authorities.[33]

Though the role of sky marshals did not change, their presence in flight slowly decreased as a result of a lower number of hijackings in the 1980s.[34] The screening of all passengers, which then included a newer magnometer search, also changed the nature of hijackings from using handguns or other similar weapons to using chemicals and explosives.[35] As a consequence, a

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[29] *See infra* notes 62-64, 69-72, 85-87 and accompanying text.

[30] Stein, *supra* note 11, at 675 (describing incidents in which Cuban exiles attempted to hijack and divert American planes to Cuba).

[31] *See* Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409.

[32] William G. Phelps, *Validity, Construction, and Application of Provisions of Federal Aviation Act (49 U.S.C.A. Appx. §§ 1472(i)(l), (n)) Punishing Air Piracy and Certain Acts Aboard Aircraft in Flight, or Boarding Aircraft*, 109 A.L.R. FED. 488, § 2[a] (2004).

[33] This amendment is in line with several key principles of international law. That is, criminal jurisdiction aboard an aircraft is defined by the aircraft's State of registry. However, criminal acts in an airport or on a tarmac are subject to the basic territorial jurisdiction of the State in which the airport or tarmac is located. *See* Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft art. 3-4, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

[34] *See* Stein, *supra* note 11, at 677.

[35] *Id.*

period of calm ensued before the infamous hijacking of TWA Flight 847.[36] In response, President Ronald Reagan revamped the obscure sky marshal service that led to creation of the modern Federal Air Marshal Service.[37] But like the original sky marshal service, this program too fell to obscurity with only thirty-three active air marshals immediately prior to 2001.[38]

After the September 11th hijackings, the FAMS became a permanent fixture in the war against terrorism with a dramatic increase in the number of agents.[39] With the ATSA, the FAMS moved from the FAA to the TSA and thus became a specific law enforcement agency within the Department of Homeland Security.[40] According to the TSA, the FAMS is a vital extension of its security service in providing in-flight law enforcement in order to "to promote public confidence in the security of our nation's transportation domain."[41]

Federal air marshals "blend in with passengers and rely on their training, including investigative techniques,[42] criminal terrorist behavior recognition, firearms proficiency, aircraft specific tactics, and close quarters self-defense measures to protect the flying public."[43] Fortunately, to this day, air marshals have only been involved in a few instances of in-flight threats to passenger safety.[44] Nonetheless, there have been several instances

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[36] *Id.* TWA Flight 847 was not a domestic or international American flight. Regardless, Lebanese terrorists still managed to bring aboard weapons that were used to kill one passenger after a sixteen-day standoff.

[37] President Reagan accomplished this goal by encouraging Congress to pass the International Security and Development Cooperation Act "which gave the Federal Air Marshal program statutory basis to further sustain and expand the program." *Id.*

[38] *Id.*

[39] "President Bush authorized an increase in the number of active marshals and FAMS received over 200,000 applications. While the current number of marshals is classified, it is estimated to be in the thousands." *Id.* at 678 (footnote omitted).

[40] *Federal Air Marshals*, TRANSP. SECURITY ADMIN. (Feb. 26, 2013), http://www.tsa.gov/about-tsa/federal-air-marshals (explaining both the purpose and history of the service).

[41] *Law Enforcement*, TRANSP. SECURITY ADMIN. (July 23, 2014), http://www.tsa.gov/about-tsa/law-enforcement.

[42] Air marshals have been issued personal digital assistants ("PDAs") to report and transmit observations of suspicious activity. *See* Stein, *supra* note 11, at 679.

[43] *Federal Air Marshals*, *supra* note 40.

[44] *See, e.g.*, Anahad O'Connor, *Air Marshals Intervene in Incident on Plane*, N.Y. TIMES (Apr. 7, 2010), http://www.nytimes.com/2010/04/08/us/08flight.html (describing incident in which a diplomat from Qatar lit a cigarette and continued to make sarcastic

after 2001 that have demonstrated that the security methods of the TSA on the ground are not enough to fully eliminate threats aboard an aircraft.[45] Therefore, considering the real possibility that criminals are able to bypass on-ground security to carry out malicious plans in flight, air marshals must be given the legal ability to employ methods "to detect, deter, and defeat hostile acts targeting U.S. air carriers."[46]

C. The Fourth Amendment and Federal Air Marshals

Much of our modern Fourth Amendment jurisprudence has evolved from the landmark case, *Katz v. United States*.[47] Today, privacy is in fact a vital consideration of the Fourth Amendment as "[a] 'search' takes place when (i) a person's subjective expectation of privacy is invaded, as long as (ii) society is prepared to recognize that expectation as reasonable."[48] Courts have held that airport security measures are searches under the Fourth Amendment and are thus analyzed under the basis of

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remarks that air marshals perceived as a threat). Though it appears that air marshals have only had to act in very few instances, a former Department of Homeland Security spokesman once stated that "[i]f the air marshals are doing their job properly, the public does not learn about the incidents or potential catastrophes they've prevented." Emanuella Grinberg, *Federal Air Marshals Back in Spotlight After Attempted Plane Bombing*, CNN (Dec. 30, 2009, 10:58 PM), http://www.cnn.com/2009/TRAVEL/12/30/federal.air.marshals/.

[45] *See infra* note 157.

[46] *Federal Air Marshals*, *supra* note 40.

[47] 389 U.S. 347 (1967). In *Katz*, the defendant was convicted for transmitting gambling information via a payphone in violation of federal law. *Id.* at 348. The Government "introduce[d] evidence of the [defendant's] telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls." *Id.* In short, the Supreme Court found that an individual has a reasonable expectation of privacy in telephone conversations, and, therefore, such conversations are constitutionally protected by the Fourth Amendment. *Id.* at 352. Ultimately, the Court held that the FBI agents had violated the Fourth Amendment by not obtaining a warrant based upon probable cause. *Id.* at 357 ("[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.") (footnote omitted).

[48] Stein, *supra* note 11, at 685 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). In short, expectations of privacy are indeed subject to changing societal perceptions.

reasonableness.[49] That is, airport and aircraft security measures are to be strictly analyzed under the reasonableness standard, as they do not require the traditional Fourth Amendment search requirement of a warrant supported by probable cause.[50] As such, any search conducted by an air marshal in flight, whether that be reporting suspicious activity[51] or conducting a physical search of a passenger or a search of luggage, would be analyzed under a reasonableness standard. But, as this Comment will discuss, this standard of reasonableness should be used to determine if a Fourth Amendment search exception truly applies.[52]

II. OTHER FOURTH AMENDMENT SEARCH EXCEPTIONS

Individuals have challenged the security measures implemented by both governmental and non-governmental entities.[53] But, as will be demonstrated, the courts have justified these security measures via Fourth Amendment search exceptions. Although the TSA mainly justifies its security methods via the administrative search exception,[54] the following search exceptions have upheld security measures in the past. More importantly, while these exceptions are effective to justify searches on the ground, they are not necessarily effective when applied to searches or seizures in flight. Essentially, these exceptions either (a) do not provide the necessary legal framework for the FAMS to be able to conduct a search aboard an aircraft or (b) the application of these exceptions run the risk of

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[49] "Courts have routinely decided that the screening of an airline passenger constitutes a search within the meaning of the Fourth Amendment. Unless an exception applies, searches conducted without a warrant supported and unsupported by probable cause have been found unconstitutional." *Id.* (citing United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973)).

[50] *See id.* at 685-86.

[51] *See supra* note 42 (describing an air marshal's PDA device). Again, according to *Katz*, surveillance may be considered a search if it invades an individual's reasonable expectation of privacy. *See Katz*, 389 U.S. at 353.

[52] *See infra* Parts II.A-B.

[53] *See infra* notes 62-64, 69-72, 85-87 and accompanying text. Recall also that screening at airports were conducted by airlines in the presence of law enforcement personnel before 2001 when the federal government took full control of airport security. *See supra* notes 18-21 and accompanying text.

[54] *See infra* note 91 and accompanying text.

compromising an air marshal's ability to conduct an effective search.

A. Terry *Stop-and-Frisk*

The Court first formulated the stop-and-frisk exception in *Terry v. Ohio*.[55] In *Terry*, a police officer witnessed two men whom he believed were potentially planning to rob a local store.[56] When the officer approached one of the men, the officer frisked the outside of his clothing and found a pistol.[57] Though the officer did not have a warrant, the Supreme Court deemed the search reasonable and not in violation of the Fourth Amendment, as the officer had "reasonable grounds to believe [the man] was armed and dangerous."[58] Therefore, an officer may approach an individual if the officer has reasonable suspicion that a crime is underway.[59] More importantly though, once the stop is made, the officer is only allowed to pat down the outer limits of the suspect's clothing for the limited purpose of discovering dangerous weapons on the person.[60]

Administrators of security prior to the TSA were able to justify the stop and search of several individuals after such individuals had set off a magnometer.[61] However, *United States v. Davis* demonstrates that the underlying principles of the stop-and-frisk exception are not applicable to an airport and, accordingly, aircraft security.[62]

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[55] 392 U.S. 1 (1968).

[56] *Id.* at 5-6.

[57] *Id.* at 6-7.

[58] *Id.* at 30.

[59] *See id.* at 30.

[60] *Id.* However, in *United States v. Lopez*, a search for weapons led to the discovery of heroin wrapped in tinfoil hidden in the defendant's pockets. United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971). The district court did not suppress the evidence because it applied the principles of *Terry* to hold that the discovery of heroine was within the "continuum of probability." *Id.* at 1094, 1099.

[61] *See, e.g.*, United States v. Epperson, 454 F.2d 769 (4th Cir. 1972) (holding that a magnometer alert leading to the search and discovery of a concealed weapon and ammunition was reasonable under the Fourth Amendment).

[62] United States v. Davis, 482 F.2d 893, 906-07, 913-15 (9th Cir. 1973) (holding that the consent exception is applicable to airport screening), *overruled by* United States v. Aukai, 497 F.3d 955, 960-62 (9th Cir. 2007) (justifying airport screening via the administrative search exception rather than the consent exception).

Most notably, the court in *Davis* explained that the *Terry* frisk was not just premised upon reasonable suspicion of criminal activity, but was mainly premised on the specific search for weapons that threatened an officer's immediate safety.[63] Consequently, an air marshal's search under the stop-and-frisk exception would be limited to a search for weapons and not for other possibly dangerous or illegal materials.

Furthermore, in line with the principles of *Terry*, the California Supreme Court in *People v. Hyde* held that a frisk on the outside of a person's clothing does not "justify an unrestricted baggage search."[64] Consequently, an air marshal attempting to search carry-on luggage in flight would be limited in his use of the *Terry* frisk, as he could not search an individual's luggage for either weapons or other illegal contraband.[65]

B. Consent Searches

The issue of seizure also complicates an air marshal's ability to conduct an effective search in flight. To that end, when an individual consents to a search request from a law enforcement officer he waives his Fourth Amendment rights and the officer is free to conduct searches and seizures.[66] Since consent may be implied,[67] the Supreme Court created a test to determine whether consent was given: "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[68]

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[63] *Davis*, 482 F.2d at 907 (citing Terry v. Ohio, 392 U.S. 1, 26 (1968)). The Court in *Terry* also acknowledged that the officer "is entitled [to conduct a search] for the protection of himself and others." *Terry*, 392 U.S. at 30.

[64] People v. Hyde, 524 P.2d 830, 832-33 (Cal. 1974) ("Nowhere in [*Terry*] can a suggestion be found that an officer in such circumstances is entitled to undertake a more thorough or intrusive search beyond a superficial pat-down for weapons.").

[65] *Id.* at 832 ("*Terry* was explicit in permitting an officer who makes an investigative stop of suspicious individuals on the street 'to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.'" (quoting *Terry*, 392 U.S. at 30)).

[66] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

[67] United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973).

[68] Florida v. Bostick, 501 U.S. 429, 436 (1991). For an illustration of this principle, see *I.N.S. v. Delgado*, 466 U.S. 210, 220-21 (1984) (holding that under the circumstances, individual workers were free to decline questioning by immigration agents).

In terms of airport security, the Court has held several airport searches and consequent seizures to be in violation of the Fourth Amendment because the suspected passenger was not allowed the option to refuse search and leave the airport. For example, in *Florida v. Royer*, the Supreme Court found that airport security administrators were in violation of the consent exception when a suspect was not given the option to either leave the airport or yield to search.[69] In brief, the defendant was suspected of being a drug courier, and was asked by narcotics officers to proceed to a small interrogation room for questioning.[70] However, before the defendant could even consent to the search, the officers confiscated his identification and luggage.[71] Justice White stated that because "[the defendant] could not leave the airport without [his identification and luggage]" the defendant was deprived of his ability to consent to the search.[72] Ultimately, the reasoning of *Royer* and *United States v. Drayton*[73] poses a special dilemma in flight.

To that end, the Court's ruling in *Drayton* also factored in a passenger's constructive ability to refuse search. In that case, police officers did not violate the Fourth Amendment while searching a bus at a rest stop.[74] The passengers were not only physically free to leave the bus, but the officers did not use intimidating actions that would have coerced the passengers to comply with the bus sweep and submit to seizure.[75]

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[69] Florida v. Royer, 460 U.S. 491, 507-08 (1983).

[70] *Id.* at 493-94.

[71] *Id.* at 494.

[72] *Id.* at 503 n.9. This important factual determination distinguishes the Supreme Court's reasoning in prior cases that examine a passenger's ability to refuse a search and leave the airport. For example, in *United States v. Mendenhall*, the passenger also arrived at the airport fitting the drug courier profile. 446 U.S. 544, 547 (1980). However, unlike the passenger in *Royer*, Mendenhall's ticket and identification were returned before she was asked to proceed to interrogation room with narcotics officers. *Id.* at 548. Moreover, it was clear that Mendenhall consented to a search when she proceeded to the interrogation room after the possessions she needed in order to leave the airport were returned. *Id.* at 558.

[73] 536 U.S. 194 (2002).

[74] *Id.* at 203-04.

[75] *Id.* The passengers were free to leave because the officer left the aisle open for exit. *Id.* at 205. However, the Supreme Court chose instead to focus on the fact that the officers did not take any actions that would have coerced the passengers into consenting to search. *Id.* at 203-04.

Simply put, an air marshal could not conduct a search in flight via the consent exception because passengers are not able to leave the airplane during flight. As Justice Souter's dissent explains, this situation alone would create an "atmosphere of obligatory participation" that would essentially coerce an incompliant passenger to yield to a search.[76] In reality, an air marshal's questioning would not be enough to conduct an effective search—an air marshal would eventually need to actively engage in search and thus submit a passenger to seizure in order to accomplish his objective. Therefore, the reasoning of *Drayton* and *Royer*[77] would make an air marshal's ability to conduct a search completely dependent on a passenger's direct and unforced consent, which is virtually unattainable in flight.

C. Border Searches

The Supreme Court has long held that searches occurring at an international border are exempt from the traditional requirements of the Fourth Amendment.[78] Such searches are routine at the border where each entrant is subject to search.[79] These searches are justified if they include a reasonable inspection of the border entrant's outer clothing and luggage based upon "subjective suspicion alone, or even on a random basis, if the search and seizure may be characterized as routine."[80]

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[76] *Id.* at 212 (Souter, J., dissenting). Though the majority and dissent generally disagree in *Drayton*, there is an important parallel between the two competing arguments. Specifically, though the majority chose to focus more on the officer's actions, the majority did acknowledge that the open aisles allowing the passengers to exit contributed to the passengers' ability to discontinue the police encounter. *Id.* at 203-05 (majority opinion). But, it is known that a passenger on an airplane has no ability to leave during flight even if the aisles were left open for exit. Therefore, we may still apply the principles of *Drayton* in an in-flight situation that ultimately prevents an individual from discontinuing an encounter with an air marshal.

[77] *See supra* notes 69-72 and accompanying text.

[78] *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); United States v. Ramsey, 431 U.S. 606, 616 (1977).

[79] *See Montoya*, 473 U.S. at 537.

[80] United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993). "Routine" is an important term within the border search exception and ultimately demonstrates that an air marshal may be unduly hindered in conducting a border search in flight. Specifically, *United States v. Braks* list several factors that could make a border search non-routine: "(i) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe; (ii) whether physical contact between Customs officials

As there is an inherent difficulty in conducting searches at an actual border during air travel, the airport at which an international flight may land could be considered a border for the purpose of this exception.[81] But, as perpetuated by the underlying principles of seminal cases such as *United States v. Montoya de Hernandez*, a border search must be executed *exclusively* at an international border with the purpose of preventing contraband or dangerous activity from entering the United States.[82] Though an air marshal could possibly conduct a search aboard an international flight,[83] an air marshal could obviously not conduct a search aboard a domestic flight using the border search exception under the limitation imposed by *Montoya*.

D. Critical Zone

The critical zone approach evolved from both the stop-and-frisk and border search exceptions.[84] In *United States v. Moreno*, the Fifth Circuit evaluated the mechanics of the *Terry* frisk to ultimately conclude, an "airport, like [a] border crossing, is a critical zone in which special [F]ourth [A]mendment

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and the suspect occurs during the search; (iii) whether force is used to effect the search; (iv) whether the type of search exposes the suspect to pain or danger; (v) the overall manner in which the search is conducted; and (vi) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search." United States v. Braks, 842 F.2d 509, 512 (1st Cir. 1988) (footnotes omitted). Again, though an air marshal would not conduct a "routine" search within the normal, non-legal context of the term, an air marshal's search could be further complicated by any one of these many factors, thus not allowing an agent to conduct an effective search under the border exception.

[81] *See* Stein, *supra* note 11, at 699-700.

[82] *Montoya*, 473 U.S. at 537 ("Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.").

[83] *See* Stein, *supra* note 11, at 699. Considering the premise of *Montoya*, an air marshal could conduct a border search on an inbound international flight. Several circuits have also held that the same principle applies to outbound flights. *See* United States v. Ezeiruaku, 936 F.2d 136, 143 (3d Cir. 1991) (quoting *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991), and agreeing with the Second, Fifth, Eighth, Ninth and Eleventh Circuits that the substantial interest in preventing laundered currency leaving the United States allows the border search to "encompass[] persons exiting as well as persons entering our borders").

[84] *See* R. Gregory Israelsen, *Applying the Fourth Amendment's National-Security Exception to Airport Security and the TSA*, 78 J. AIR L. & COM. 501, 509 (2013).

considerations apply."[85] But the Fifth Circuit then qualified this approach in *United States v. Skipwith*, when it acknowledged that there are different standards for searches that are performed in the airport generally and for those performed at the gate.[86] In its clarification, the Fifth Circuit incorrectly concluded that a search at a boarding gate is reasonable as it is similar to a search at a border, even for domestic flights.[87] This conclusion is contradicted by later Supreme Court decisions, namely *Montoya de Hernandez*, in which the foundation of the border search exception is based upon preventing crime or dangerous contraband from entering the United States.[88]

Therefore, in regards to domestic flights, the Fifth Circuit's clarification in *Skipwith* does not allow a domestic flight to be considered a critical zone. Though the Fifth Circuit's original conclusion in *Moreno* could possibly label an aircraft as a critical zone in domestic flight, the latter conclusion in *Skipwith*, requiring that the aircraft serve as the equivalent of an international border, would consequently not afford an air marshal the benefit of the critical zone approach on domestic flights. Unfortunately, dangerous incidents aboard an aircraft, namely the attacks of September 11th, have occurred aboard domestic flights.

E. National-Security Exception

Since air travel is a matter of national security, it would appear that the national security search exception would provide air marshals with the legal framework to conduct a search in flight. Essentially, because the executive branch historically has had the constitutional power to protect the nation from possible threats, the Supreme Court has exempted the principles of the Fourth Amendment in matters of national security.[89]

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[85] United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973) (footnote omitted).

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

[87] *See id.*

[88] *See supra* notes 82-83 and accompanying text. Again, the border search exception is meant to protect against dangerous contraband or activity from entering or exiting the United States. It is not meant to police domestic contraband or illegal activity.

[89] *See, e.g.*, United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973).

While this exception is generally broad, it has been applied narrowly, mainly in cases involving warrantless wiretapping.[90] This narrow application has led the national security exception to be largely undeveloped and undefined in other spheres. This is most true in the sphere of airport security where the judiciary has consistently utilized the administrative search exception to justify search procedures.[91] In sum, the basic nature of the national security exception is broad and still undeveloped.

Specifically, while the judiciary has justified wiretapping when used to collect foreign intelligence, it has also had difficulty in distinguishing a *domestic* security interest from a *national* security interest. That is, in *United States v. United States District Court*, also known as the *Keith* case,[92] the government charged three defendants with conspiracy to destroy government property, with one defendant charged with bombing a CIA building in Michigan.[93] The government argued that prior surveillance collected without a warrant was admissible because of the President's authority to gather intelligence information to protect the national security.[94] However, the Supreme Court ultimately concluded that a warrant was required because "this case involve[d] only the domestic aspects of national security" and was not used to collect information from "foreign powers or their agents."[95] To that end, it is possible that though the government has labeled air travel as matter of national security through the creation of the TSA, an air marshal's search aboard a domestic flight may only involve domestic aspects of national security, thus voiding the use of the national security exception. But more importantly, "[g]iven the difficulty of defining [a] domestic security interest, the danger of abuse in acting to protect [national security] becomes apparent."[96] Unlike the national security

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[90] *See* Israelsen, *supra* note 84, at 529-32.

[91] *See id.* at 512 & n.71 (citing United States v. Hartwell, 436 F.3d 174, 177 (3d Cir. 2006) ("We hold that the search was permissible under the administrative search doctrine."); United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005) ("Airport screenings of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment.")).

[92] United States v. U.S. District Court (*Keith*), 407 U.S. 297 (1972).

[93] *Id.* at 299.

[94] *Id.* at 301.

[95] *Id.* at 321-22.

[96] Israelsen, *supra* note 84, at 536-37 (quoting *Keith*, 407 U.S. at 314).

exception, other search exceptions are typically used in consistency with factually specific scenarios to ensure each search is reasonable per the foundations of the Fourth Amendment.[97]

III. THE ADMINISTRATIVE SEARCH EXCEPTION

As demonstrated above, other Fourth Amendment search exceptions are not conducive to allowing an air marshal to conduct a legal and effective search in flight. However, the administrative search exception provides the legal framework for an air marshal to conduct a search in flight. At its core, the administrative search exception allows for a warrantless search when a specific need or government interest that is beyond the normal need for law enforcement[98] is at stake.[99] Though this is the basic presumption of the administrative search, it is vital to understand that the judiciary has unintentionally created two branches of this search that are essentially divided by the presence of reasonable,

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[97] *See supra* notes 55-88 and accompanying text.

[98] According to the Supreme Court's conclusion in *City of Indianapolis v. Edmond*, an administrative search must serve a purpose that is independent of law enforcement. 531 U.S. 32, 37 (2000). In *Edmond*, the city of Indianapolis attempted to justify a narcotics checkpoint "to advance 'the general interest in crime control.'" *Id.* at 44 (quoting Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)). However, the Court found that general crime control is not a governmental interest independent of law enforcement. *Id.* But in other cases, the judiciary has held that ensuring the safety of mass transportation mediums such as trains, airplanes and highways is a special governmental need independent of law enforcement. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 270-71 (2d Cir. 2006) (justifying administrative searches aboard city subways); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (evaluating a highway sobriety checkpoint); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (evaluating drug testing of railroad employees). But more importantly, the judiciary has consistently recognized that preventing terrorist attacks on mass transit "constitutes a special need that is distinct from ordinary post hoc criminal investigation." *MacWade*, 460 F.3d at 271 (citing United States v. Hartwell, 436 F.3d 174, 179 (3d Cir. 2006) (rejecting a Fourth Amendment challenge to an airport checkpoint due to the government's need to "prevent[] terrorist attacks on airplanes")). In sum, though the TSA and the FAMS conduct searches that are similar to activities carried out by law enforcement, their use of the administrative search is first justified by protecting a special governmental interest. *Contra* Israelsen, *supra* note 84, at 513-15 (arguing that the TSA is not entitled to the administrative privilege because the TSA conducts searches that are similar to searches conducted by typical law enforcement or the armed services).

[99] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (citing *Skinner*, 489 U.S. at 618).

individualized suspicion.[100] The first branch, the dragnet administrative search, retains the basic presumption of the administrative search by employing a blanket, suspicionless search. The second branch, the special subpopulation administrative search, also retains the basic presumption of the administrative search by employing a search supported by reasonable, individualized suspicion. Ultimately, given the constraints of actual flight, the special subpopulation branch of the administrative search allows an air marshal to conduct a legal and effective search while also fairly balancing the interests of maintaining national security and individual privacy.

A. The Dragnet Administrative Search Under Camara v. Municipal Court

The dragnet search is a search "in which the government searches or seizes every person, place, or thing in a specific location or involved in a specific activity based only on a showing of a generalized government interest."[101]

The Supreme Court initially carved out the first form of the dragnet search in *Camara v. Municipal Court*.[102] The Court held that a warrantless search and inspection of all buildings to ensure code compliance could be justified under the reasonableness standard of the Fourth Amendment when health and safety were the substantial government concerns in question.[103] The Court's ultimate conclusion[104] was later used to permit safety inspections of homes and businesses, various traffic checkpoints, and of course, security lines in airports.[105]

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[100] Primus, *supra* note 14, at 259-60.

[101] *Id.* at 263.

[102] 387 U.S. 523 (1967).

[103] *Id.* at 537-39.

[104] Though the *Camara* Court established the foundation of the administrative search exception, it did not allow the municipality of San Francisco to conduct its proposed inspection without advanced judicial approval. *Id.* at 538-39.

[105] *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoint stops); New York v. Burger, 482 U.S. 691, 712 (1987) (upholding a warrantless search conducted under a statute permitting searches of all junkyard businesses); United States v. Aukai, 497 F.3d 955, 956-57 (9th Cir. 2007) (upholding pre-boarding security measures at an airport).

Presumably, a blanket suspicionless search conducted in the furtherance of a vital government interest eliminates the requirement of individualized suspicion and burdens innocent individuals.[106] But in the absence of individualized suspicion, the judiciary has gradually placed limitations upon the dragnet search in order to maintain constitutional reasonableness.

First and foremost, the courts have held that an administrative search in general must balance the government's interest against the degree of intrusion upon individual privacy.[107] At the outset, the Supreme Court held that a search must be "minimally intrusive" in order to achieve this balance.[108] But later, the Court held that a government agency did not need to employ the least intrusive means possible to be consistent with Fourth Amendment reasonableness.[109]

Second, recognizing that a suspicionless search indeed burdens innocent individuals, the Court demonstrated a preference for individualized suspicion when it could be employed.[110] Ultimately, the Court held that a dragnet search must be absolutely necessary and narrowly tailored in achieving the governmental interest at issue.[111]

Finally, the Court gradually recognized that not requiring a showing of individualized suspicion could lead to arbitrary searches and harassment by government officials.[112] Accordingly,

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[106] *See* Primus, *supra* note 14, at 263.

[107] *See id.* at 264 ("[B]ecause the [building] inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizens privacy." (quoting *Camara*, 387 U.S. at 537)).

[108] *See id.* at 265 & n.60.

[109] *See, e.g.*, Ontario v. Quon, 560 U.S. 746, 763 (2010) ("This Court has 'repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.'" (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 663 (1995))). In *Quon*, a police sergeant's personal text messages were examined after he had allegedly violated department phone usage rules. *Id.* at 751-53. The sergeant argued this was an unreasonable invasion of privacy under the Fourth Amendment. *Id.* at 754.

[110] Primus, *supra* note 14, at 266.

[111] *See id.* ("The Court's preference for individualized suspicion regimes over dragnets was in keeping with its view that administrative searches were justified only if they were absolutely necessary."); *see also id.* at 266 n.64 (citing Delaware v. Prouse, 440 U.S. 648, 659 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 276-79 (1973) (Powell, J., concurring)).

[112] *See id.* at 267-68.

the Court has generally required that some method be employed with the search in order to limit government discretion.[113] Presumably, an absence of harassment or arbitrariness ensures that a dragnet meets general reasonableness.

The TSA has been able to employ the constructs of the dragnet administrative search to justify screening methods prior to passenger boarding.[114] Though some screening procedures of the TSA have become controversial, the courts have found that a dragnet search is absolutely necessary to maintain the national security within the sphere of aviation.[115] But nonetheless, these factors that have called for routine, indiscriminate searches do not allow an air marshal to conduct an administrative search in flight. Though many factual scenarios may arise, it is obvious that an air marshal's search would involve individualized, reasonable suspicion that is absent in a dragnet administrative search.

B. The Special Subpopulation Administrative Search Under United States v. Martinez-Fuerte *&* New Jersey v. T.L.O.

After the development of the dragnet search, the judiciary then unintentionally created the second branch of the administrative search—the special subpopulation search.[116] "Special subpopulations are groups of individuals with reduced expectations of privacy, including students, government employees, probationers, and parolees."[117] While a dragnet analysis is triggered by a search of every individual in a location or involved in a certain activity, the special subpopulation analysis is triggered by the presence of individuals that are deemed to have a lesser expectation of privacy.[118]

The evolution of the special subpopulation rationale came about with two seminal cases. First, in *United States v. Martinez-*

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[113] *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21 (1978) (holding that a warrant containing a preexisting search plan for a business inspection would be required in order to limit government discretion and thus justify an administrative search).

[114] *See supra* note 91 and accompanying text.

[115] *See infra* notes 156-59 and accompanying text.

[116] *See* Primus, *supra* note 14, at 270.

[117] *Id.* at 270-71 (footnotes omitted).

[118] *Id.* at 263, 271.

Fuerte,[119] border patrol officers conducted several dragnet searches at different immigration checkpoints by inspecting all vehicles, thus in line with a vital premise of the dragnet administrative search.[120] However, the officers were given discretion as to who they could refer to a secondary screening area.[121] Despite the presence of such individualized suspicion in administering the secondary search, the Supreme Court did not separate the two searches but rather consolidated both searches as a single, legitimate administrative search.[122]

Ultimately, the Court would implicitly create the special subpopulation under the banner of the administrative exception in *New Jersey v. T.L.O.*[123] In *T.L.O.*, the Supreme Court upheld a vice principal's warrantless search of a student's purse.[124] In its decision, the Court first utilized the underlying principle of *Camara* to determine the government had a legitimate interest beyond the need of law enforcement in maintaining order and safety in schools.[125] The Court also relied upon *Martinez-Fuerte* "to support the idea that a warrant supported by individualized probable cause is not an indispensable requirement of the Fourth

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[119] 428 U.S. 543 (1976).

[120] *Id.* at 545 (consolidating several incidents in which border patrol officers conducted an administrative search leading to the arrest of the respondents).

[121] *Id.* at 547.

[122] *See id.* at 563. In its conclusion, the Court stated:

> We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the . . . checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.

Id. at 563-64 (citation and footnote omitted). Though not stated explicitly, the Court acknowledged all the considerations of the dragnet administrative search, but ultimately justified an administrative search that contained individualized suspicion. *Id.*

[123] 469 U.S. 325 (1985).

[124] *See id.* at 327-28.

[125] *Id.* at 339 ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.").

Amendment."[126] The Court then used these two cases not to justify a dragnet search, but rather to justify a targeted search of an individual within a special subpopulation.[127] As the Court explained, students are a part of a subpopulation with a lesser expectation of privacy because of the way they are highly regulated and supervised.[128]

The *T.L.O.* Court indirectly categorized the dragnet and special subpopulation search under the same administrative banner when Justice Blackmun in his concurring opinion implemented the "special needs test" into the administrative search analysis.[129] Simply put, the special needs test forms the foundation of both branches of the administrative search.[130] Ultimately, the implementation of the special needs test "entangled" the two branches of the administrative search by requiring the Court to analyze the balance between the government's interest and the intrusion upon individual privacy.[131]

Despite the confluence of the two branches under the special needs test, we may see the special subpopulation search varies greatly in its underlying foundations. First, a special subpopulation is not required to be "minimally intrusive" and may involve "full-blown" searches of people or property.[132] But more

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[126] Primus, *supra* note 14, at 275 (citing *T.L.O.*, 469 U.S. at 342 n.8); *see also supra* note 50 and accompanying text.

[127] "That is, the Court drew on two dragnet administrative search cases to establish the propriety of relaxing the Fourth Amendment's privacy protections in a case involving no nondiscretionary dragnet at all, but instead a targeted search of a person within a special subpopulation having a reduced expectation of privacy." Primus, *supra* note 14, at 275.

[128] *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) ("In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally. . . . [T]eachers have a degree of familiarity with, and authority over, their students . . . .").

[129] Justice Blackmun introduced, and essentially defined, the special needs tests by stating that "[o]nly 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." *Id.* at 351 (Blackmun, J., concurring).

[130] *See supra* note 99 and accompanying text.

[131] Primus, *supra* note 14, at 276 ("If the government can demonstrate that it has such a special need, then the court will balance the government's interest against the degree of intrusion to determine whether the search is reasonable.").

[132] *Id.* at 271.

importantly, since a special subpopulation search is not applied on an indiscriminate or suspicionless basis, the Court is not necessarily concerned with strictly limiting government discretion.[133] Since discretion is present, a subpopulation search must involve a reasonable amount of individualized suspicion among a special subpopulation.[134] Again, such reasonable suspicion does not have to amount to traditional probable cause.[135]

IV. THE SPECIAL SUBPOPULATION SEARCH AND AIR MARSHALS

As noted, the simple dragnet administrative search, as well as other Fourth Amendment search exceptions, does not allow an air marshal to conduct a legal and effective search of an aircraft during flight. Considering the limitations that in-flight searches would entail, an air marshal would conduct a search in such a way that is based upon reasonable, individualized suspicion. As such, an air marshal would more than likely conduct a search of the person, carry-on luggage, or report suspicious activity to authority on the ground.[136] Regardless, considering the evolution and characteristics of the special subpopulation administrative search, air marshals are afforded a legal framework in order to utilize this exception to conduct a legal and effective search in flight.

The legal framework will first require us to demonstrate that airline passengers belong to a special subpopulation like students or parolees that have a diminished expectation of privacy.[137] After such analysis, we must analyze the following elements:

> 1. the special need of the government, beyond the need of law enforcement, to maintain security aboard American aircraft;[138] and

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[133] *See id.* at 271-72.

[134] *See id.*

[135] *See supra* notes 49-50 and accompanying text.

[136] *See supra* Part I.C.

[137] This framework is derived from *O'Connor v. Ortega* in which the Court formalized its rationale in *T.L.O.* and consequently relied on both reduced expectations of privacy and the special needs test in order to validate an administrative search of a government employee. *See* O'Connor v. Ortega, 480 U.S. 709, 720, 724-25 (1987).

[138] Though Justice Blackmun's special needs test requires that the administrative search only be used when the traditional Fourth Amendment requirements of probable cause and a warrant would be impracticable, it is unnecessary to analyze this element.

> 2. the balance between this governmental interest and the degree of intrusion upon individual privacy.[139]

A. Diminished Expectation of Privacy

As discussed above, a special subpopulation search may only take place among a group of individuals who are deemed to have a lower expectation of privacy.[140] However, it is certain that individual airline passengers both within the airport and aboard an aircraft are considered a special subpopulation with the requisite expectation of privacy to be subject to a special subpopulation administrative search. As demonstrated in *Camara* and *T.L.O.*, we know that the Supreme Court has viewed individuals or businesses that are highly regulated and supervised as subpopulations with a lesser expectation of privacy.[141] *Camara* essentially created the foundation of the modern administrative search (encompassing both branches) by implicitly[142] allowing a search of buildings that were regulated by local municipalities for the legitimate government purpose of maintaining health and safety.[143]

In *T.L.O.*, the Court utilized a core principle espoused in *Camara* by acknowledging the fact that students are in an environment where they are highly regulated and frequently supervised.[144] Furthermore, before and after the Court's decision in *T.L.O.*, this basic foundation was used to determine that numerous groups, which were highly regulated and supervised such as parolees, probationers, and border entrants, are a part of

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First, like the notion espoused in *Martinez-Fuerte*, it would be impracticable to require the TSA on the ground to produce a warrant to search every individual passenger due to the incessant flow of people entering the secured gated area. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) ("A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car . . . ."). Second, it would be impracticable and nearly impossible for an air marshal to produce a warrant in flight.

139 *See* Primus, *supra* note 14, at 271-72.

140 *See supra* note 118 and accompanying text.

141 *See* New Jersey v. T.L.O., 469 U.S. 325, 348 (1985).

142 *See* Camara v. Mun. Court, 387 U.S. 523, 538-39 (1967).

143 *Id.* at 537 (explaining that municipalities have long instituted building codes and compliance investigations with little to no opposition).

144 *See T.L.O.*, 469 U.S. at 340-41.

special groups subject to different Fourth Amendment considerations.[145] Of course, the Court in *T.L.O.* did not simply state that individuals who were highly regulated or supervised were subject to one reduced standard of privacy, but rather looked to the totality of the circumstances to determine the exact degree of reduction in the expectation of privacy.[146] But nonetheless, by the virtue of regulation and supervision, there is a reduction of privacy allowing one to consider airline passengers a special subpopulation.

The TSA on the ground regulates and administers security protocols in airports. With current screening methods, airline passengers attempting to enter the secured gated area are regulated and supervised; TSA agents closely monitor them, their belongings are examined and screened, and they are directed through various searches of their person.[147] Because of this tightly supervised and regulated scheme, it is apparent that individual passengers are subjected to a lesser expectation of privacy.

Beyond initial security checkpoints, passengers may continue to be supervised by the use of "additional security measures undisclosed to the public."[148] Though it may be argued that this supervision ends once a passenger boards an aircraft, the fact that all air transportation security is highly monitored, regulated, and maintained by both the TSA on the ground and the FAMS in the air, constructively carries the idea that a passenger in flight is still deemed to have a lesser expectation of privacy. Furthermore, individual passengers in flight[149] are also a part of a highly

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[145] *See, e.g.*, Samson v. California, 547 U.S. 843, 847 (2006) (parolees); Griffin v. Wisconsin, 483 U.S. 868, 879-80 (1987) (probationers); United States v. Montoya de Hernandez, 473 U.S. 531, 532-33 (1985) (border entrants).

[146] *See T.L.O.*, 469 U.S. at 338 ("We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that '[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.'" (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1977))).

[147] *See supra* note 26 and accompanying text.

[148] *See Layers of Security*, TRANSP. SECURITY ADMIN. (Feb. 19, 2015), http://www.tsa.gov/about-tsa/layers-security.

[149] The *T.L.O.* Court also remarked that students have a diminished expectation of privacy because of their "close association with each other." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). Though airline passengers are often complete strangers to one

regulated activity by the virtue of the FAA.[150]

B. Special Need to Maintain National Security

There is little doubt that the judiciary considers national security a vital government interest. This need has been articulated in numerous decisions, even in cases not applying the administrative search exception. However, it is important to remember that this special need is an interest beyond the need of law enforcement.[151] But again, there is little doubt that programs and screening methods used to detect and prevent terroristic activity are not directed "to detect evidence of ordinary criminal wrongdoing."[152]

After the attacks of September 11th, the federal government realized that the risk of hijacking and the subsequent loss of life is a very real threat and thus implemented new measures to maintain domestic security, specifically in the sphere of air travel.[153] This new policy led lower courts to be reactionary in a sense in that when a particular event occurred, the need to employ methods to protect domestic security became much more necessary.[154] For example, after the attacks on the subway systems of Moscow in 2004, and London and Madrid in 2005, the Second Circuit upheld random baggage searches on subways in New York City.[155] Because these international bombings demonstrated a potential threat to domestic security, the court concluded that an attack on the subways system was "substantial

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another, they are still in close association with one another due to the constraints of the aircraft's cabin.

[150] *See* 49 U.S.C. § 40101 (2012) (providing the FAA the ability to create regulations to ensure safety aboard aircraft).

[151] *See supra* note 98 and accompanying text.

[152] Derek M. Alphran, *Changing Tides: A Lesser Expectation of Privacy in a Post 9/11 World*, 13 RICH. J.L. & PUB. INT. 89, 115 (2009) (quoting Indianapolis v. Edmond, 531 U.S. 32, 41 (2000)).

[153] *See supra* notes 23-24 and accompanying text (discussing the creation of the Department of Homeland Security and the TSA).

[154] Alphran, *supra* note 152, at 92-93.

[155] MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006) (upholding suspicionless searches on subways by utilizing the special needs doctrine).

and real," and thus upheld the City's Container Inspection Program.[156]

With the current events and terroristic threats present in today's society, it is likely that the judiciary will continue to be reactionary and realize that dangerous, terrorist activity aboard an aircraft is still a very real threat. Even after September 11th, dangerous individuals were able to bypass security and would have been able to execute their malicious plans if it was not for some intervening circumstance.[157] Even very recent events such as the missing Malaysia Airlines Flight 370 or bomb threats against Delta and Southwest flights continue to demonstrate the need to maintain rigid security aboard aircraft.[158] Furthermore, the specific need to maintain the FAMS may be correlated with the small number of air marshals immediately prior to 2001.[159] That is, since the dramatic increase of agents via the policies of President Bush, the events of September 11th have not been repeated.

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[156] MacWade v. Kelly, No. 05CIV6921RMBFM, 2005 WL 3338573, at *17 (S.D.N.Y. Dec. 7, 2005), *aff'd*, 460 F.3d 260 (2d Cir. 2006). The "Container Inspection Program" allowed the New York Police Department to conduct random baggage searches aboard subways. *See id.* at *5.

[157] *See, e.g.*, Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES (Dec. 25, 2009), http://www.nytimes.com/2009/12/26/us/26plane.html (detailing an event in which a Nigerian man attempted to ignite an explosive device hidden in his undergarments aboard a plane destined for Detroit); Fox Butterfield, *Threats and Responses: The Shoe Bomb Case; Qaeda Man Pleads Guilty to Flying With Shoe Bomb*, N.Y. TIMES (Oct. 5 2002), http://www.nytimes.com/2002/10/05/us/threats-responses-shoe-bomb-case-qaeda-man-pleads-guilty-flying-with-shoe-bomb.html (detailing an event in which a British man attempted to ignite an explosive device hidden in his shoe aboard a plane destined for Miami).

[158] *See Two U.S. Airliners Searched at Atlanta After Bomb Threats*, BBC (Jan. 24, 2015), http://www.bbc.com/news/world-us-canada-30971220 (detailing an event in which bomb "threats were received against Delta and Southwest flights coming from Portland and Milwaukee respectively"); Tania Branigan & Kate Hodal, *Missing Malaysia Airlines Flight May Have Turned Around Before It Vanished*, GUARDIAN (Mar. 9, 2014, 3:27 PM), http://www.theguardian.com/world/2014/mar/09/missing-malaysia-airlines-flight-mh370-turned-around-search (revealing possibilities that Malaysia Airlines Flight 370 may have been hijacked).

[159] *See supra* note 38 and accompanying text.

C. Balance Between Special Need and Intrusion Upon Privacy

Unlike the national security search exception, the administrative search employs the special needs balancing test in order to maintain domestic security while being mindful of excessive or arbitrary intrusions upon individual privacy.[160] Though the judiciary has long justified the screening methods used by the TSA, recent controversy regarding the use of AIT scanners, full body pat-downs, and baggage searches has engendered special focus on the degree of intrusion factor of the special needs test.[161]

Recall that an air marshal in flight may conduct a search that would involve some sort of physical search of the person or a search of any carry-on baggage, aside from reporting evidence of suspicious individual activity.[162] Considering the on the ground controversy regarding physical pat-downs or invasive baggage searches, as well the "atmosphere of obligatory participation" engendered by the cabin of an aircraft in flight, the level of intrusion upon individual privacy would seem to outweigh any government interest.[163] However, several key principles demonstrate that such methods are not excessively intrusive so as to outweigh the government's interest in maintaining security in flight.

First, though the Supreme Court originally required intrusions on privacy to be "minimally intrusive" when it came to weighing the special needs doctrine within the context of the administrative search, this is no longer the case.[164] Rather, a recent circuit split has occurred namely between the Ninth Circuit and the D.C. Circuit as to whether security measures must be minimally intrusive in order to pass the special needs test.[165] While the Ninth Circuit has held that an administrative search must be "no more extensive nor intensive that necessary,"[166] the

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160 *See supra* note 134 and accompanying text.

161 *See supra* note 4 and accompanying text.

162 *See supra* note 51 accompanying text.

163 *See supra* notes 4, 76 and accompanying text.

164 *See supra* notes 111-12 and accompanying text.

165 Israelsen, *supra* note 84, at 515.

166 United States v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007) (quoting United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973)).

D.C. Circuit rejected this approach when evaluating the use of AIT scanners and subsequent full body patdowns in *Electronic Privacy Information Center v. U.S. Department of Homeland Security*.[167] In holding the use of scanners and pat-downs to be reasonable under the Fourth Amendment, the D.C. Circuit cited the vital premise of *City of Ontario v. Quon* stating, "[T]he Supreme Court[has] 'repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment.'"[168]

Indeed, the Supreme Court has upheld searches that may seem excessively intrusive as reasonable under the special subpopulation branch of the administrative search in several cases including *T.L.O.*[169] Furthermore, some have proposed that there is a relationship between the level of suspicion and the method used in response to such suspicion, in order to better evaluate the level of intrusion.[170] For example, an invasive search such as the search of private areas of the body or personal diaries would require strict Fourth Amendment probable cause.[171] But a full body pat-down or search through luggage as an air marshal may employ is not so entirely invasive and would only need to be prompted by reasonable suspicion.[172] Therefore, this theory of invasiveness used to evaluate the relationship between the level of intrusiveness and the strong interest of national security adequately allows an air marshal to conduct a special subpopulation administrative search in flight.

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

[168] *Id.* at 10 (quoting Ontario v. Quon, 560 U.S. 746, 763 (2010)).

[169] *See, e.g.*, Samson v. California, 547 U.S. 843, 847 (2006) (administrative search of parolee's person); Griffin v. Wisconsin, 483 U.S. 868, 871 (1987) (administrative search of probationer's residence); O'Connor v. Ortega, 480 U.S. 709, 713 (1987) (administrative search of government employee's personal office); New Jersey v. T.L.O., 469 U.S. 325, 328 (1985) (administrative search of high school student's purse).

[170] *See* Christopher Slobogin, *Let's Not Bury* Terry*: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1082 (1998).

[171] *See id.* at 1083. Slobogin proposes an elaborate scheme in which the justification for a search is based upon a percentage of certainty that the suspect is engaging in illegal activity. *See id.* at 1082-84.

[172] *See id.* at 1083 ("For short stops, pat downs, and many of the actions that the Court excludes from Fourth Amendment oversight . . . I would require reasonable suspicion, which I would define to be something like a 20% to 30% chance of success.") (footnote omitted).

CONCLUSION

The screening procedures implemented by the TSA may cause one to question their reasonableness under the Fourth Amendment, and to that end, society should never have to sacrifice its constitutional freedoms for this sake of greater security. But on the same token, it cannot be denied that the global and incessant nature of terrorism and international crime still pose a significant risk to the safety of American air passengers. The judiciary and the general public have not denied the existence of this real threat. In fact they have recognized that danger to American airways is indeed a real danger to national security.[173] Ultimately, TSA security measures are indeed reasonable under the Fourth Amendment.[174]

In retrospect, unlike the national security or international border search exceptions that do not take consideration of individual privacy in combatting terrorism, the administrative search, both on the ground and in the sky, advances national security objectives while still protecting the right to privacy under the Fourth Amendment. While it is likely that the special need of the government to protect national security clearly takes priority over the detriment of concerns of individual privacy, one cannot ignore that the administrative search exception attempts to balance this governmental interest against arbitrary or unnecessary intrusion. The general public should also be comforted knowing that the special subpopulation branch of the

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[173] Air marshal Robert J. MacLean leaked information that claimed the TSA suspended air marshal missions aboard overnight flights amid intelligence that forewarned of a possible terrorist attack aboard American airliners. He was removed from the service due to his disclosure, and later argued that he was exempt from dismissal under the Whistleblower Protection Act. *See* Cassie Suttle, Note, *The Aviation and Transportation Safety Act and Whistleblowers—How* MacLean *and the Federal Circuit Sent National Security into a Nose Dive*, 79 J. AIR L. & COM. 183, 183-84 (2014) (citing MacLean v. Dep't of Homeland Sec., 714 F.3d 1301 (Fed. Cir. 2013), *aff'd*, 135 S. Ct. 913 (2015)). In Supreme Court proceedings, the Justices appeared to be in MacLean's favor by acknowledging that airplane hijacking is still a real threat. *See* Robert Barnes, *In Whistleblower Case, Supreme Court Seems Sympathetic to Former Air Marshal*, WASH. POST (Nov. 4, 2014), http://www.washingtonpost.com/politics/courts_law/in-whistleblower-case-supreme-court-seems-sympathetic-to-former-air-marshal/2014/11/04/8c96638e-645f-11e4-9fdc-d43b053ecb4d_story.html.

[174] Recall that, according to the Supreme Court's holding in *Katz*, expectations of privacy are subject to societal perspectives. *See supra* note 48 and accompanying text.

administrative search does not burden the privacy of the innocent, unlike the dragnet search that has brought about controversy in airports. Innocent air passengers' characterization as members of a special subpopulation leaves them free from search, whereas the special subpopulation exception *must* contain a reasonable amount of individualized suspicion in order to conduct a search. Of course, some might argue that the application of the subpopulation search should have to exceed the low standard of reasonable suspicion. These critics do bring a valid point that in terms of this element of the subpopulation search, certain measures should be taken to limit unlawful discrimination or the unnecessary use of force.

Nonetheless, an air marshal does indeed have administrative search privileges aboard an aircraft that he or she should utilize in order to maintain national security objectives. The agent possesses significant training and skills necessary to spot suspicious activity and prevent any dangerous activity even before the suspect may take one step in carrying out his or her malicious plan.[175] It is safe to say that air passengers aboard American aircraft would greatly benefit from an air marshal's ability to stop a crime in its infancy.

Most importantly, the example of protecting a specific sphere of national security, that is aircraft security, demonstrates that the Fourth Amendment must be more broadly construed in order to protect the nation's security. In other words, the Fourth Amendment should remain flexible in different factual scenarios that purvey a lower expectation of privacy, but not insomuch that flexibility produces harassment, arbitrariness, or unlawful discrimination.[176] Though a lower expectation of privacy does not excuse reasonableness, it does demonstrate that reasonableness is subjected to varying external factors.[177] Consequently, an air marshal's search abilities under the administrative search exception should be upheld considering that the incessant nature of globalized terrorism presents new challenges that may require greater means or innovative measures to counteract. Specifically, the special subpopulation branch of the administrative search

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[175] *See supra* note 43 and accompanying text.

[176] *See supra* note 21.

[177] *See supra* notes 48, 147-49 and accompanying text.

exception not only allows an air marshal to conduct a legal search, but also an effective one that is not limited by specific factual scenarios. In this way, an air marshal is able to combat the unpredictable methods of terrorism to protect domestic security while preserving constitutional reasonableness for individual passengers.

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