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## Safety in the Sky: Will Reforming and Restructuring the TSA Improve Our Security or Merely Infringe on our Rights?

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## SAFETY IN THE SKY: WILL REFORMING AND RESTRUCTURING THE TSA IMPROVE OUR SECURITY OR MERELY INFRINGE ON OUR RIGHTS?

KATHERINE A. LOWE\*

### INTRODUCTION

**T**HE DEADLY TERRORIST ATTACKS of September 11, 2001, were devastating proof that our airport and airline security needed a major overhaul. The Transportation Security Administration (TSA) was then created to “protect the nation’s transportation systems to ensure freedom of movement for people and commerce.”<sup>1</sup> The TSA’s goal was, and still is, to “provide the most effective transportation security in the most efficient way as a high performing counterterrorism organization.”<sup>2</sup> Now TSA is responsible for security operations at roughly 440 commercial airports throughout the United States, which include the screening of individuals, carry-on items, and checked luggage.<sup>3</sup> The threat of terrorism in this environment is ever-present and ever-changing; our security protocol must be even more so.

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<sup>1</sup> *Mission*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/about/tsa-mission> [<https://perma.cc/42DH-FU57>].

<sup>2</sup> *Id.*

<sup>3</sup> *Transportation Security Acquisition Reform Act: Examining Remaining Challenges: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. of Homeland Sec.*, 114th Cong. 1 (2016), <https://homeland.house.gov/hearing/transportation-security-acquisition-reform-act-examining-remaining-challenges/> [<https://perma.cc/TP7P-SW3S>] (statement of Michele Mackin, Director, Office of Acquisition and Sourcing Management, Government Accountability Office).

Since 2011, TSA has published an annual year-end review on its website.<sup>4</sup> According to its 2015 report, TSA personnel screened more than 708 million passengers, which is up more than 40 million passengers from 2014.<sup>5</sup> This computes to roughly 1.9 million passengers per day.<sup>6</sup> Along with passengers, TSA screened about 1.6 billion carry-on bags, 432 million checked items, and 12.9 million airport employees.<sup>7</sup> In these screenings, TSA discovered 2,653 firearms in carry-on bags within 236 airports, up from 2,212 in 2014, 1,813 in 2013, and 1,556 in 2012.<sup>8</sup> Of those discovered, eighty-three percent were loaded.<sup>9</sup> Along with firearms, TSA confiscated other dangerous devices such as grenades, gunpowder, ammunition, fake explosives (which are prohibited because they cause unnecessary disturbance), knives, and other prohibited items.<sup>10</sup> But these statistics beg the question: how many prohibited items were not found?

This Comment addresses the issues that the TSA faces, the current and proposed changes to overcome these issues, and the implications for the airline industry and the traveling public. Part I addresses the background of the TSA and related legislation, specifically how changes have occurred and what repercussions resulted. Part II explains the current state of the law and the projected modifications, including policy reasons. Part III discusses how the changes affect airlines and individuals traveling through the airports and what the changes mean for increased safety. Finally, Part IV concludes with the future of TSA reform and potential recommendations. This Comment is limited to assessment of domestic security and does not address the risk of foreign flights into the United States or how the TSA plans to mitigate such in-bound risk.

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<sup>4</sup> *TSA 2015 Year in Review*, TSA BLOG (Jan. 21, 2016), <http://blog.tsa.gov/2016/01/tsa-2015-year-in-review.html> [<https://perma.cc/Q54M-XCET>].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## I. THE HISTORY OF THE TSA AND ITS ABILITY TO MAKE US SAFER

### A. SECURITY BEFORE TSA AND INTRODUCTION OF THE TSA

Before the government standardized airport security with the TSA, anyone could meet a friend or family member at their arrival gate with a security voucher from a ticket agent; it was not necessary to actually be traveling to get through security. On the plane, the cockpit door sometimes remained open during flight, and children could be invited to see the controls. With regard to security personnel, screeners were hired by the airlines but lacked necessary basic training.<sup>11</sup> Unattractive wages and benefits resulted in hiring inexperienced workers, with “turnover rates exceed[ing] 100[%] a year at most large airports.”<sup>12</sup> Testing in May 2000 also revealed that fake credentials allowed undercover agents to access secure areas and bypass security checkpoints in seventy percent of the tests.<sup>13</sup> There were also no regulations in place to deal with employee or passenger background checks, which exposed airports, airplanes, and passengers to many potential threats.<sup>14</sup>

Everything changed with the terrorist attacks of September 11, 2001.<sup>15</sup> Security became a major topic of discussion, and security professionals became “major defenses to the terrorism threat.”<sup>16</sup> In response, Congress and President George W. Bush reacted quickly and efficiently, enacting the Aviation and Transportation Security Act on November 19, 2001.<sup>17</sup> It created the TSA under the Department of Transportation and gave the TSA responsibility for security in transportation related to, but not limited to, “civil aviation security, and related research and development activities.”<sup>18</sup> Twenty billion dollars was allotted to upgrade intelligence and security measures, including “stricter background checks and . . . tougher security requirements on

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<sup>11</sup> Alycia B. Taylor & Sara Steedman, *The Evolution of Airline Security Since 9/11*, INT’L FOUND. FOR PROTECTION OFFICERS (Dec. 2003), <http://www.ifpo.org/resource-links/articles-and-reports/protection-of-specific-environments/the-evolution-of-airline-security-since-911/> [https://perma.cc/8ETY-ZS8D].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C.A. § 114).

<sup>18</sup> *Id.*; *Mission*, *supra* note 1.

baggage checks.”<sup>19</sup> The idea was to prevent such attacks from happening in the future, but it has proved to be a daunting and difficult task. The TSA has yet to be completely successful.<sup>20</sup> Immediately following creation of the TSA, 65,000 federal personnel were employed to staff the new agency.<sup>21</sup> Congress later passed the Homeland Security Act, which moved the TSA from under the Department of Transportation to under the Department of Homeland Security (DHS).<sup>22</sup>

The changes in security happened fast.<sup>23</sup> The short-term goals involved implementation of criminal background checks on 750,000 airport employees, more law enforcement, a screening plan for all checked baggage—including X-ray machines and hand inspections, a larger air marshal program with more officers on flights, and a more vigorous and inclusive pre-screening program with more cross-checking with FBI and other watch lists for suspicious passengers.<sup>24</sup> These short-term goals were to be implemented within TSA’s first year of operation.<sup>25</sup> The long-term goals involved the creation of the new agency “to oversee all transportation security measures,” and the requirement that “all 28,000 airport baggage screeners [be] federal workers, all checked baggage [be] inspected with explosives detection machines, [and] Trusted-passenger programs [be] implemented, using new technologies to identify passengers and expedite screening.”<sup>26</sup> TSA implemented hand searches of luggage, pat-downs or wand searches of passengers along with walk-through detectors, vehicle checks for explosives, government-issued ID checks for each passenger at multiple points in the airport, requirements that only those with tickets could pass through security to the gate area, and limitations of only one carry-on item and one personal item per passenger.<sup>27</sup>

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<sup>19</sup> Taylor & Steedman, *supra* note 11.

<sup>20</sup> *TSA: Security Gaps: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. 1–3 (2015), <https://oversight.house.gov/hearing/tsa-security-gaps/> [<https://perma.cc/X5T4-EBG5>] (statement of Peter Neffenger, Administrator, Transportation Security Administration, Department of Homeland Security); see *Mission*, *supra* note 1.

<sup>21</sup> Taylor & Steedman, *supra* note 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (internal quotation marks omitted).

<sup>27</sup> *Id.*

B. PAST SECURITY PROBLEMS FACED BY THE TSA  
AND RESPONSES

Airports are targets for terrorism, so the success of TSA is very important.<sup>28</sup> Since September 11, 2001, the TSA has faced many unique security threats, and Congress has had to amend TSA's scope and authority to keep ahead of these threats.

Since the beginning of TSA, passengers have grumbled about the hoops they are forced to jump through and the time-consuming processes of security screening, despite knowing that these procedures are in place to keep them safe.<sup>29</sup> In an effort to alleviate some of this stress for frequent travelers, TSA started its PreP✓® Program (PreCheck) in 2011 to expedite approved passengers through security, ideally for the frequent business traveler.<sup>30</sup> These passengers save time by not removing shoes, belts, or light jackets, and leaving laptops and liquids in their bags.<sup>31</sup> The approval process includes an application, an appointment for providing fingerprints and official identification documentation, and a fee of eighty-five dollars.<sup>32</sup> The status lasts for five years.<sup>33</sup> Other trusted traveler programs, such as Global Entry and NEXUS, can participate in PreCheck without separate enrollment.<sup>34</sup> But the program is not without its pitfalls.

TSA has been allowing non-enrolled passengers to use PreCheck lanes, frustrating paying members by allowing other passengers to access the benefit without undergoing enrollment.<sup>35</sup> This specifically happened to a group of early-morning passengers at McCarran Airport in Las Vegas in January 2014.<sup>36</sup> The TSA declared two security lines as PreCheck lines and al-

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<sup>28</sup> *Examining Critical Security Measures, Communications, and Response at our Nation's Airports: Hearing Before the Subcomm. on Transp. Sec. and the Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Sec.*, 114th Cong. 1–3 (2015), <https://homeland.house.gov/hearing/examining-critical-security-measures-communications-and-response-at-our-nations-airports/> [https://perma.cc/92GQ-9357] (opening statement of Rep. John Katko, Chairman, Subcomm. on Transp. Sec.).

<sup>29</sup> Charisse Jones, *TSA PreCheck Changes Ease Lines for Some*, USA TODAY (Oct. 18, 2015, 6:04 PM), <http://www.usatoday.com/story/travel/flights/2015/10/18/tsa-precheck-lines-wait-times/74004474/> [https://perma.cc/Y3H6-SJLG].

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Chris Morran, *TSA Just Decides Everyone in My Line is Qualified for Expedited Screening*, CONSUMERIST (Jan. 13, 2014), <http://consumerist.com/2014/01/13/>

lowed all passengers already in those lanes to proceed through the security checkpoint without following the usual security requirements.<sup>37</sup> Although the passengers were relieved to travel through security with ease, many were unsettled with the idea that random groups of unscreened travelers were considered as low-risk as the pre-vetted PreCheck members.<sup>38</sup> The process was used both to expedite the screening process and to act as a marketing tool to increase awareness and enrollment in PreCheck.<sup>39</sup>

A TSA representative explained the situation as a procedural normality, saying that TSA “also utilizes [PreCheck] lanes during certain times for other low-risk passengers who are identified through a real-time threat assessment process.”<sup>40</sup> This “real-time threat assessment process” is called “Managed Inclusion.”<sup>41</sup> It involves two parts: Behavioral Detection Officers (BDOs) and Passenger Screening Canines.<sup>42</sup> BDOs are a subset of TSA officers who are specially trained to observe passengers moving through security lines, checking for unusual behavior.<sup>43</sup> The canines are used to sniff for explosives and residue on passengers as they walk through the lines; identification from one of these canines would trigger a BDO to direct the passenger to enhanced screening.<sup>44</sup> The process also involves an electronic mat that assigns each individual passenger either regular screening or PreCheck, despite no trigger from either BDOs or canines.<sup>45</sup> But that was not what happened in Las Vegas; there were no canines and no electronic mat.<sup>46</sup> This was just one example where TSA limited its security protocol in an effort to be more passenger-friendly. But for the Managed Inclusion pro-

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tsa-just-decides-everyone-in-my-line-is-qualified-for-expedited-screening/ [https://perma.cc/FS4Q-3P2U].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Grant Martin, *5 Simple Things the TSA Still Needs to Fix in 2016*, SKIFT (Dec. 28, 2015, 7:30 AM), <http://skift.com/2015/12/28/5-simple-things-the-tsa-still-needs-to-fix-in-2016/> [https://perma.cc/3RC8-M63B].

<sup>40</sup> Morran, *supra* note 36.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; TSA, *Managed Inclusion*, YOUTUBE (Feb. 5, 2013), <https://www.youtube.com/watch?v=C6bwz8RcimI> [https://perma.cc/HL23-Q678].

<sup>43</sup> Michael W. Chapman, *TSA Spent \$900 Million on Behavior Detection Officers Who Detected 0 Terrorists*, CNSNEWS.COM (Nov. 25, 2013, 6:14 PM), <http://cnsnews.com/news/article/michael-w-chapman/tsa-spent-900-million-behavior-detection-officers-who-detected-0> [https://perma.cc/3KPX-9XU9].

<sup>44</sup> Morran, *supra* note 36; TSA, *supra* note 42.

<sup>45</sup> Morran, *supra* note 36; TSA, *supra* note 42.

<sup>46</sup> Morran, *supra* note 36.

gram described by some as “only slightly more accurate than a coin flip,” passengers prefer safety above expedition.<sup>47</sup> The program has been phased out, and the reasons and explanations will be discussed further in Parts II and III.

After implementation of the TSA, there had not been a live emergency situation at an airport but until November 1, 2013.<sup>48</sup> A gunman entered the Los Angeles International Airport, pulled an assault rifle from his bag, and started shooting.<sup>49</sup> The gunman, Paul Ciancia, was wounded when subdued by airport police, but he survived and agreed to plead guilty to all federal charges, which carry a mandatory life sentence among other penalties.<sup>50</sup> Ciancia targeted TSA employees, as evidenced by a hand-written note found in his duffel bag that said he wanted to “instill fear into their traitorous minds.”<sup>51</sup> The result was the death of one TSA agent, Gerardo Hernandez, and two others injured.<sup>52</sup> Hernandez was the first TSA agent to be killed in action since TSA’s creation.<sup>53</sup> But such a death and injury toll was small considering what could have happened; law enforcement officials stated that “Ciancia had five fully loaded magazines on his person and that ammo was found in a bag nearby. . . . ‘he had enough ammo to kill everyone in that terminal.’”<sup>54</sup> The shooting, and resulting chaos, sparked an investigation into airports’ emergency protocols.<sup>55</sup> The investigation revealed poor communication and coordination between agencies and emergency personnel, which is believed to have caused delays in

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<sup>47</sup> Tim Cushing, *TSA’s \$1 Billion ‘Behavioral Detection’ Program Only Slightly More Accurate Than a Coin Flip*, TECHDIRT (Nov. 15, 2013, 7:31 AM), <https://www.techdirt.com/articles/20131113/15104325233/tsas-1-billion-behavioral-detection-program-only-slightly-more-accurate-than-coin-flip.shtml> [https://perma.cc/M29Q-3DCN].

<sup>48</sup> *LAX Shooting Kills TSA Officer, Wounds Others*, CBS NEWS (Nov. 1, 2013, 10:35 PM), <http://www.cbsnews.com/news/lax-shooting-kills-tsa-officer-wounds-others/> [https://perma.cc/9J9Q-3LAQ].

<sup>49</sup> *Id.*

<sup>50</sup> Kate Mather & Richard Winton, *Federal Prosecutors to Seek Death Penalty in Fatal LAX Shooting*, L.A. TIMES (Jan. 2, 2015, 7:22 PM), <http://www.latimes.com/local/crime/la-me-lax-shooting-20150103-story.html> [https://perma.cc/3QJ9-PY6W]; see Matt Hamilton, *LAX Shooter’s Plea Agreement Reveals He Did Not Consider Himself a Terrorist, But a ‘Patriot’*, L.A. TIMES (Sept. 1, 2016, 9:35 PM), <http://www.latimes.com/local/lanow/la-me-ln-lax-shooter-guilty-plea-20160901-snap-story.html> [https://perma.cc/S2WP-MP65].

<sup>51</sup> Mather & Winton, *supra* note 50.

<sup>52</sup> *LAX Shooting*, *supra* note 48.

<sup>53</sup> Mather & Winton, *supra* note 50.

<sup>54</sup> *LAX Shooting*, *supra* note 48.

<sup>55</sup> Mather & Winton, *supra* note 50.



bringing aid to victims and caused issues with evacuation.<sup>56</sup> In response, Congress passed and President Barack Obama signed into law the Gerardo Hernandez Airport Security Act of 2015,<sup>57</sup> which will be discussed further in Part II.

Another blow to the TSA came with the online publishing of the master keys for TSA-approved luggage locks.<sup>58</sup> On November 24, 2014, after *The Washington Post* published a high-resolution picture of the master keys, a security researcher published the 3D printing files to GitHub,<sup>59</sup> an online hosting service for software code and application development. Now anyone with a 3D printer can print exact replicas.<sup>60</sup> According to TSA spokesperson Mike England, the TSA's stance was that "[t]he reported ability to create keys for TSA-approved suitcase locks from a digital image does not create a threat to aviation security . . . . These consumer products are 'peace of mind' devices, not part of TSA's aviation security regime."<sup>61</sup> The TSA may be right in expressing no aviation security concern that the copied master keys could allow for items to be *stolen* from luggage, but there should be a concern that the copied master keys could allow for items to be *placed in* luggage, specifically hazardous items. The agency should also be concerned that such a breach occurred because it is well within the realm of possibility that the next release of information could be fatal to TSA's aviation security regime.

Finally, threats to our security can come from inability to detect threats, as evidenced by covert testing done by the Inspector General in May and September 2015<sup>62</sup> and by TSA employ-

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<sup>56</sup> *Id.*

<sup>57</sup> *Examining Critical Security Measures*, *supra* note 28, at 1–3 (opening statement of Rep. John Katko, Chairman, Subcomm. on Transp. Sec.).

<sup>58</sup> Timothy Geigner, *Why Backdoors Always Suck: The TSA Travel Locks Were Hacked and the TSA Doesn't Care*, TECHDIRT (Sept. 18, 2015, 1:54 PM), <https://www.techdirt.com/articles/20150917/10383032284/why-backdoors-always-suck-tsa-travel-locks-were-hacked-tsa-doesnt-care.shtml> [<https://perma.cc/G5HW-FEDG>].

<sup>59</sup> *3D Reproduction of TSA Master Keys*, GITHUB, <https://github.com/Xyl2k/TSA-Travel-Sentry-master-keys> [<https://perma.cc/G2FU-5XWA>].

<sup>60</sup> Swati Khandelwal, *Lockpickers 3D-Printed Master Key for TSA Luggage Locks and Blueprint Leaked Online*, THE HACKER NEWS (Sept. 10, 2015), <http://thehackernews.com/2015/09/tsa-master-keys-3d-printed.html> [<https://perma.cc/4S4T-JPW9>].

<sup>61</sup> Geigner, *supra* note 58.

<sup>62</sup> *See TSA: Security Gaps*, *supra* note 20, at 2–3 (statement of John Roth, Inspector General, Department of Homeland Security).

ing seventy-three workers with alleged terrorist ties.<sup>63</sup> The testing, which revealed TSA's security shortcomings, was the final straw leading to the current state of political and public pressure to reform the agency that is supposed to keep our nation safe.

The Office of Inspector General (OIG) regularly tests the TSA and the effectiveness of its security protocols, typically using Homeland Security Red Teams to pose as passengers and try to get potential weapons through security checkpoints.<sup>64</sup> The report for the most recent testing is classified, but according to the Inspector General the results were "disappointing and troubling."<sup>65</sup> Undercover agents carrying fake firearms and bombs made it through security in sixty-seven of seventy tests.<sup>66</sup> Despite these obviously negative findings, TSA claims that it prevented about 119,000 dangerous items from being carried onto airplanes during the 2015 fiscal year.<sup>67</sup> Also, the White House Press Secretary, Josh Earnest, stated that the President has full confidence in the agency despite its failures in the covert testing, saying that TSA agents "do very important work that continue[s] to protect the American people and continue[s] to protect the American aviation system."<sup>68</sup> Earnest further stated that the TSA uses a multi-layer security approach screening individual passen-

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<sup>63</sup> See Svati Kirsten Narula, *The TSA Failed to Spot 73 Aviation Workers on the US Government's Terrorism Watchlist*, QUARTZ (June 9, 2015), <http://qz.com/423476/the-tsa-failed-to-spot-73-aviation-workers-on-the-us-governments-terrorism-watchlist/> [https://perma.cc/ZCF3-GFK2].

<sup>64</sup> Justin Fishel et al., *EXCLUSIVE: Undercover DHS Tests Find Security Failures at US Airports*, ABC NEWS (June 1, 2015, 7:04 AM), <http://abcnews.go.com/US/exclusive-undercover-dhs-tests-find-widespread-security-failures/story?id=31434881> [https://perma.cc/M2KC-P64C].

<sup>65</sup> *TSA: Security Gaps*, *supra* note 20, at 2–3 (statement of John Roth, Inspector General, Department of Homeland Security); Nicholas C. Fondacaro, *Classified TSA Investigation Shows Gaping Holes in Security System*, WATCHDOG (Nov. 4, 2015), <http://watchdog.org/245667/tsa-investigation-hearing-security/> [https://perma.cc/F8DQ-H4S8].

<sup>66</sup> Keith Laing, *Lawmakers Press TSA on 'Alarming' Airport Security Gaps*, THE HILL (Nov. 3, 2015, 6:42 PM), <http://thehill.com/policy/transportation/259042-law-makers-press-tsa-on-alarming-airport-security-gaps> [https://perma.cc/4ZLZ-72HR].

<sup>67</sup> *Transportation Security Acquisition Reform Act: Examining Remaining Challenges*, *supra* note 3, at 1 (statement of Jill Vaughan, Assistant Administrator, Transportation Security Administration, Department of Homeland Security).

<sup>68</sup> Press Briefing, Josh Earnest, Press Sec'y, The White House Office of the Press Sec'y, Daily Press Briefing by Press Secretary Josh Earnest, 6/2/15 (June 2, 2015, 12:56 PM), <https://www.whitehouse.gov/the-press-office/2015/06/02/daily-press-briefing-press-secretary-josh-earnest-6215> [https://perma.cc/GB23-3VXK].

gers at the checkpoint is only one layer.<sup>69</sup> The message was effectively that the multi-layer approach makes failure in one layer acceptable because the other layers will filter out the mistakes of the failed layer.<sup>70</sup> On the contrary, we should be concerned with *any* failure in our aviation security measures, work to eliminate such failures, and not be content with assuming that a different security layer would protect us if there were a real threat.

Inspector General John Roth appears not to share the same lack of concern expressed by the White House.<sup>71</sup> Roth stated that the results were consistent for each airport tested and that “[i]t would be misleading to minimize the rigor of our testing, or to imply that our testing was not an accurate reflection of the effectiveness of the totality of aviation security.”<sup>72</sup> Roth found obvious technology and procedural failures, in addition to obvious human error,<sup>73</sup> which will all be discussed thoroughly in Part II. Roth also stated that layers of security were “simply missing,”<sup>74</sup> which knocks a gaping hole into the White House Press Secretary’s idea that TSA’s multi-layer approach can protect us if one layer fails.<sup>75</sup> Other layers of security cannot maintain aviation safety if they are nonexistent.

Just one month after the testing results were released, a DHS report exposed another TSA blunder where seventy-three aviation employees with terrorist ties had been missed in TSA’s vetting process.<sup>76</sup> TSA uses another multi-layer process to vet its aviation workers, which includes checking applications and credentials and regularly comparing names of workers with secured access at commercial airports to names on the Consolidated Terrorist Watchlist.<sup>77</sup> But the process fell short in that initial stage as TSA lacked the control to ensure that aviation workers “1) had not committed crimes that would disqualify them from having unescorted access to secure airports area[s], and 2) had lawful status and were authorized to work in the United

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<sup>69</sup> *Id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See TSA: Security Gaps*, *supra* note 20, at 3 (statement of John Roth, Inspector General, Department of Homeland Security).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See* Press Briefing, Josh Earnest, *supra* note 68.

<sup>76</sup> *See* Narula, *supra* note 63.

<sup>77</sup> U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-15-98, TSA CAN IMPROVE AVIATION WORKER VETTING (2015), [https://www.oig.dhs.gov/asets/Mgmt/2015/OIG\\_15-98\\_Jun15.pdf](https://www.oig.dhs.gov/asets/Mgmt/2015/OIG_15-98_Jun15.pdf) [<https://perma.cc/ZS2W-LJZW>].

States.”<sup>78</sup> TSA had been relying on airport personnel to perform such checks.<sup>79</sup> Further, the report found that TSA’s records used to compare names against the watchlists were incomplete and inaccurate, and TSA reportedly did not have full access to the watchlists.<sup>80</sup> DHS recommended that TSA request and review additional watchlist data, require that airports improve verification of the work eligibility of applicants, revoke credentials when the right to work expires, and improve the quality of vetting data.<sup>81</sup>

With the potential risks, actual risks, and reports of TSA ineffectiveness, it is not surprising that there are rising public and political pressures to reform the agency charged with keeping the skies, and our country, safe.

## II. CURRENT AVIATION SECURITY LAWS AND REGULATIONS AND PROJECTED CHANGES

### A. OVERVIEW OF CURRENT SECURITY MEASURES AND ISSUES TSA IS FACING

Under TSA’s current screening protocol, TSA employs a risk-based, technology-driven approach.<sup>82</sup> The risk-based processes include TSA officers questioning passengers about their travel, employing random screening techniques, and utilizing specific risk-based programs.<sup>83</sup> One such program is Secure Flight, a prescreening program that identifies high-risk and low-risk travelers prior to their arrival at the airport by comparing their personal information to trusted traveler lists and watchlists, including FBI’s No Fly List and Center for Disease Control’s (CDC) Do Not Board List.<sup>84</sup> The technology processes include “millimeter wave advanced imaging technology and walk-through metal detectors.”<sup>85</sup> The millimeter wave technology screens for both metallic and non-metallic weapons or explosives hidden under clothes, but passengers can decline this screening unless their boarding pass specifically requires it from

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Security Screening*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening> [<https://perma.cc/S5WF-7SRC>].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

the Secure Flight results.<sup>86</sup> If passengers cannot or choose not to use the millimeter wave technology or the walk-through metal detector, TSA agents will follow a traditional pat-down procedure.<sup>87</sup>

But the extensive TSA protocol is not perfect, as evidenced by the alarming testing results.<sup>88</sup> Within the month of the release of the testing results, the Senate confirmed a new administrator, Peter Neffenger, with only one dissenting vote.<sup>89</sup> Neffenger then somewhat defended the results of the testing, stating that it “was not a deliberate test of the entire system and while there were areas for improvement noted by the Inspector General—with which [agency officials] concurred—that the system as a whole remains effective and, as a result of this series of tests, has only gotten stronger.”<sup>90</sup> Nevertheless, the Secretary of DHS summoned top TSA leadership and required an immediate plan of action to correct deficiencies.<sup>91</sup> The plan put forward by DHS and TSA called for security improvement in three areas: technology, personnel, and procedures.<sup>92</sup> Inspector General John Roth stated: “This plan is appropriate because the checkpoint must be considered as a single system: the most effective technology is useless without the right personnel, and the personnel need to be guided by the appropriate procedures. Unless all three elements are operating effectively, the checkpoint will not be effective.”<sup>93</sup>

Security is not a partisan issue, so Democrats and Republicans can, and do, work together to pass meaningful legislation that

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* Pat-downs can be completed in private, if requested, with a companion of choice. *Id.* Pat-downs may also be required if a passenger sets off an alarm on any of the security equipment. *Id.*

<sup>88</sup> See *TSA: Security Gaps*, *supra* note 20, at 3 (statement of John Roth, Inspector General, Department of Homeland Security).

<sup>89</sup> Nicole Duran, *Senate Confirms New Leader for Dysfunctional TSA*, WASH. EXAMINER (June 22, 2015, 8:27 PM), <http://www.washingtonexaminer.com/senate-confirms-new-leader-for-dysfunctional-tsa/article/2566810> [https://perma.cc/DDZ8-ZVUS].

<sup>90</sup> See *TSA: Security Gaps*, *supra* note 20, at 3 (statement of Peter Neffenger, Administrator, Transportation Security Administration, Department of Homeland Security).

<sup>91</sup> *Id.* at 4 (statement of John Roth, Inspector General, Department of Homeland Security).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

will make a difference.<sup>94</sup> Current laws that have been passed include Gerardo Hernandez Airport Security Act of 2015<sup>95</sup> and Transportation Security Acquisition Reform Act (TSARA).<sup>96</sup> Since the testing failures, the House of Representatives has unanimously passed more reform legislation.<sup>97</sup> Among the bills passed are H.R. 2750, Improved Security Vetting for Aviation Workers Act; H.R. 2843, TSA PreCheck Expansion Act; H.R. 2127, Securing Expedited Screening Act; H.R. 3102, Airport Access Control Security Improvement Act; and H.R. 2770, Keeping Our Travelers Safe and Secure Act.<sup>98</sup> Each, or a similar version, is expected to become law given the seriousness of the deficiencies and vulnerabilities of the TSA's current protocols and the bipartisan support behind them.<sup>99</sup> There are also several programs created by the agency itself to battle the missing security processes, which the agency is entitled to do under its administrative authority. These include Secure Flight, PreCheck, and Managed Inclusion.

#### B. TECHNOLOGICAL ADVANCEMENTS, LEGISLATION, AND FUTURE INVESTMENTS

TSA must stay at the forefront of technological advances to stay a step ahead of the terrorist threats that confront the country. Understanding how the new technology works and how it can make air travel safer is essential to TSA's mission.

TSARA was signed into law on December 18, 2014, after passing both chambers of Congress unanimously.<sup>100</sup> The act generally aims to achieve greater transparency and accountability for

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<sup>94</sup> See *Examining Critical Security Measures*, *supra* note 28, at 1 (opening statement of Rep. John Katko, Chairman, Subcomm. on Transp. Sec.).

<sup>95</sup> Gerardo Hernandez Airport Security Act of 2015, 49 U.S.C. § 44903 (2015).

<sup>96</sup> Transportation Security Acquisition Reform Act, Pub. L. No. 113-245, 128 Stat. 2871 (2014).

<sup>97</sup> Daniel Wilson, *House Passes Bills Tightening TSA Screening Processes*, LAW 360 (July 27, 2015, 8:11 PM), <http://www.law360.com/articles/683686/house-passes-bills-tightening-tsa-screening-processes> [<https://perma.cc/H9Q2-LLKM>].

<sup>98</sup> *Id.*

<sup>99</sup> See *Examining Critical Security Measures*, *supra* note 28, at 1 (opening statement of Rep. John Katko, Chairman, Subcomm. on Transp. Sec.); Wilson, *supra* note 97.

<sup>100</sup> Anthony Kimery, *Infrastructure Security TSA Reform Bill Signed into Law by Obama*, HOMELANDSECURITYTODAY.US (Dec. 29, 2014), <http://www.hstoday.us/focused-topics/infrastructure-security/single-article-page/tsa-reform-bill-signed-into-law-by-obama/423945e3da1c375031934cb4a62c01ca.html> [<https://perma.cc/93HG-SP5B>].

the TSA.<sup>101</sup> Specifically, it requires the TSA to “develop and share with the public a strategic 5-year technology investment plan; share key information with Congress on technology acquisitions, including cost overruns, delays, or technical failures within [thirty] days of identifying the problem; establish principles for managing equipment in inventory to eliminate expensive storage of unusable or outdated technologies; and report on its goals for contracting with small businesses.”<sup>102</sup> The strategic 5-year technology investment plan had to be developed and submitted to Congress within 180 days from enactment.<sup>103</sup> TSA must also, under this law, identify what security measures are and will be taken to protect the technology “from physical or cyber theft, diversion, sabotage[,] or attack.”<sup>104</sup>

By August 2015, TSA had deployed 15,000 units of security technology to airports around the country.<sup>105</sup> In January 2016, a little more than a year after the law’s enactment, the Subcommittee on Transportation Security under the House Committee on Homeland Security held a hearing to determine the TSA’s progress in implementing the requirements of TSARA.<sup>106</sup> Subcommittee Chairman John Katko stated concern that “bureaucracy and stagnation are preventing TSA and [DHS] from being responsive to legitimate security threats facing our nation.”<sup>107</sup> The hearing revealed immature technology leading to failures on eleven of twenty-two passenger and baggage screening systems tested.<sup>108</sup> TSA is also working with DHS Science and Technology (S&T) to ensure that “homeland security technologies are reliable, interoperable[,] and effective.”<sup>109</sup> S&T provides the testing and evaluation oversight for DHS programs, which reveals more problems in implementation of TSARA.<sup>110</sup> For ex-

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Transportation Security Acquisition Reform Act: Examining Remaining Challenges*, *supra* note 3, at 1 (statement of Michele Mackin, Director, Office of Acquisition and Sourcing Management, Government Accountability Office).

<sup>106</sup> Judi Ritter Sutherland, ‘Bureaucracy and Stagnation’ Preventing TSA from Addressing Security Threats, HOMELANDSECURITYTODAY.US (Jan. 14, 2016, 6:16 PM), <http://www.hstoday.us/single-article/bureaucracy-and-stagnation-preventing-tsa-from-addressing-security-threats/e5928d181c28bf9721364a5f33974a33.html> [<https://perma.cc/RQJ7-N34M>].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

ample, if a vendor of the proposed technology fails testing by S&T, it increases costs to the government and TSA.<sup>111</sup> TSA's solution is implementing a Third Party Test Program in December 2016, which will allow the technology to be refined by an outside entity before it enters TSA's official formal testing and evaluation.<sup>112</sup>

The main technology breakthrough employed by TSA is its millimeter wave advanced imaging technology (AIT). These systems are full body scanners that reproduce images of passengers' bodies that are analyzed by image operators "to identify objects or anomalies that could pose a threat to an aircraft or to the traveling public."<sup>113</sup> Software was added to protect the privacy of passengers being scanned, which will be discussed further in Part III.<sup>114</sup> These scanners can detect metallic and non-metallic objects and liquids without physically touching passengers, which makes them desirable compared to past screening techniques, such as pat-downs.<sup>115</sup> But these systems are only effective if they can detect threats *and* if the operators can resolve or respond to detected threats.<sup>116</sup> The issue of the operators' abilities will be discussed in the next section.

### C. ISSUES, CURRENT POLICIES, AND PROGRAMS, AND PROJECTED CHANGES FOR TSA PERSONNEL

TSA personnel must make real-time assessments of threats and risks, implement the procedures, and analyze technological detections. Ultimately, personnel keep TSA's multi-layer security approach functioning; if personnel do not do their job effectively, the remaining layers break down as well.

Even if AIT scanners detect every threatening or dangerous object on passengers attempting to board an aircraft, such detection is irrelevant if the TSA agents analyzing the data are una-

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<sup>111</sup> *Transportation Security Acquisition Reform Act: Examining Remaining Challenges*, *supra* note 3, at 3 (statement of Jill Vaughan, Assistant Administrator, Transportation Security Administration, Department of Homeland Security).

<sup>112</sup> *Id.*; Sutherland, *supra* note 106.

<sup>113</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-559T, AVIATION SECURITY: TSA HAS TAKEN STEPS TO IMPROVE OVERSIGHT OF KEY PROGRAMS, BUT ADDITIONAL ACTIONS ARE NEEDED (2015), <http://www.gao.gov/products/GAO-15-559T> [<https://perma.cc/V5SK-PT2S>].

<sup>114</sup> *See id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*



ble to understand or resolve the threat detected.<sup>117</sup> Testing completed by TSA to determine human error and effectiveness of the technology with human operators has proved inconclusive.<sup>118</sup>

Although Managed Inclusion, discussed further in the next section, is discontinued, its parts are still being used as security layers: the Behavior Detection and Analysis Program and the National Explosives Detection Canine Team Program (NEDCTP).<sup>119</sup> Under the Behavior Detection and Analysis Program, BDOs identify passengers who potentially pose a risk by observing behaviors such as stress, fear, or deception.<sup>120</sup> If a passenger is identified, he or she is referred to additional screening, and if such screening yields further cause for concern, the passenger is referred to law enforcement.<sup>121</sup> TSA has worked to improve BDO training so that each officer understands which behaviors to detect, but testing is still being conducted to determine the effectiveness of this type of screening.<sup>122</sup>

The NEDCTP enlists 800 canine teams—a canine and its handler—to sniff passengers and baggage to detect explosives or other residue.<sup>123</sup> In assessing the effectiveness of NEDCTP, TSA “did not analyze the [test] results beyond the pass and fail rates,” and therefore missed an opportunity to determine if the canine teams were more effective at detecting certain types of explosives or if different or additional training could improve the deficiencies.<sup>124</sup> But these canine teams are surprisingly effective and have been described as “one of the most reliable security tools that exist today,” according to North Carolina Representative Richard Hudson, Chairman of the House Subcommittee on Transportation Security.<sup>125</sup> Screening by canines

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<sup>117</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-678T, AVIATION SECURITY: TSA HAS TAKEN STEPS TO IMPROVE OVERSIGHT OF KEY PROGRAMS, BUT ADDITIONAL ACTIONS ARE NEEDED (2015), <http://www.gao.gov/products/GAO-15-678T> [<https://perma.cc/F8YA-NHZQ>].

<sup>118</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-199T, AVIATION SECURITY: IMPROVED TESTING, EVALUATION, AND PERFORMANCE MEASUREMENT COULD ENHANCE EFFECTIVENESS (2015), <http://www.gao.gov/products/GAO-16-199T> [<https://perma.cc/3Q8J-LYX5>].

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Utilizing Canine Teams to Detect Explosives and Mitigate Threats: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 113th Cong. 1

is a “less invasive, highly effective approach” and can be expanded as a “primary layer of security” with common standards across federal, state, local, and private-sector explosive detection canine teams.<sup>126</sup> Canine teams, and law enforcement and canine handlers, also serve as an important piece of Visible Intermodal Prevention and Response (VIPR), which means that they can eliminate terrorist threats by virtue of being seen.<sup>127</sup> Unfortunately, the teams are expensive, costing taxpayers roughly \$18,000 in start-up costs for each canine team.<sup>128</sup>

Finally, TSA’s Aviation Workers program completes security threat assessments for all applicants that apply for unescorted access to secure areas, including a thorough background check with the help of airport operators and the FBI.<sup>129</sup> After TSA failed to detect seventy-three workers with terrorist ties as mentioned in Part I, the TSA and FBI have worked together to resolve the lack of complete information available to the TSA for its vetting process.<sup>130</sup> Both agencies have secured state records of criminal history and worked to expand and complete existing records for use with TSA’s vetting procedures.<sup>131</sup>

#### D. LAWS, REGULATIONS, AND FUTURE IMPROVEMENTS IN TSA PROCEDURES

Proper procedures are a vital part of TSA success because they outline how personnel and technology should work together and how TSA’s multi-layer security platform ought to function. A breakdown in procedures can mean a breakdown for the entire system.

TSA’s PreCheck, as introduced previously, is an expedited screening process for pre-approved passengers.<sup>132</sup> Prior to this

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(2014), <https://homeland.house.gov/hearing/subcommittee-hearing-utilizing-canine-teams-detect-explosives-and-mitigate-threats/> [<https://perma.cc/QT6J-24LH>] (opening statement of Rep. Richard Hudson, Chairman, Subcomm. on Transp. Sec.).

<sup>126</sup> *Id.* at 2.

<sup>127</sup> *Id.* at 8 (statement of Melanie Harvey, Director, Threat Assessment Division, Transportation Security Administration, Department of Homeland Security).

<sup>128</sup> *Id.* at 4–5 (statement of Rep. Bennie G. Thompson, Ranking Member, H. Comm. on Homeland Sec.).

<sup>129</sup> GAO-15-559T, *supra* note 113.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-465T, AVIATION SECURITY: TSA’S MANAGED INCLUSION PROCESS EXPANDS PASSENGER EXPEDITED SCREENING, BUT TSA HAS NOT TESTED ITS SECURITY EFFECTIVENESS (2015), <http://www.gao.gov/products/GAO-15-465T> [<https://perma.cc/6HJJ-NNXS>].

program, TSA employed the same level of screening for all passengers, without regard to the risk imposed by each passenger.<sup>133</sup> When TSA introduced expedited screening, it was reserved for passengers age twelve and younger, passengers age seventy-five and older, and certain flight crew.<sup>134</sup> It then expanded to other groups, such as “members of the U.S. armed forces, Congressional Medal of Honor Society Members, members of the Homeland Security Advisory Council, and Members of Congress.”<sup>135</sup> The application process outlined above began in December 2013.<sup>136</sup>

TSA’s Managed Inclusion program started in November 2012<sup>137</sup> to pre-screen passengers with observation techniques by BDOs and canine units, but it received poor reviews and has been discontinued.<sup>138</sup> The program began as a way to alleviate long waits in standard screening lines by using an underutilized expedited PreCheck lane, but its use expanded to include other unjustified purposes.<sup>139</sup> Some argue that the program was primarily used as advertising for PreCheck to encourage passengers to enroll, which was effectively confirmed by former administrator of TSA, John Pistole, in a hearing before the Appropriations Committee for the 2015 fiscal year.<sup>140</sup> Passengers qualify as low-risk under Managed Inclusion on a flight-by-flight basis, and Pistole stated that it was “like we are doing a free sample for people to encourage them to sign up for TSA PreCheck.”<sup>141</sup>

Further, a report from the Government Accountability Office (GAO) found that TSA had not scientifically proven that the

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<sup>133</sup> GAO-15-559T, *supra* note 113.

<sup>134</sup> GAO-15-465T, *supra* note 132.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-150, AVIATION SECURITY: RAPID GROWTH IN EXPEDITED PASSENGER SCREENING HIGHLIGHTS NEED TO PLAN EFFECTIVE SECURITY ASSESSMENTS (2014), <http://www.gao.gov/products/GAO-15-150> [<https://perma.cc/L9DW-B3XX>].

<sup>138</sup> Grant Martin, *TSA Ends Precheck Free Rides with Shut Down of Managed Inclusion Program*, SKIFT (Sept. 18, 2015, 7:20 AM), <http://skift.com/2015/09/18/tsa-ends-precheck-free-rides-with-shut-down-of-managed-inclusion-program/> [<https://perma.cc/N2C4-BFB3>].

<sup>139</sup> See GAO-15-150, *supra* note 137.

<sup>140</sup> *Department of Homeland Security Appropriations for 2015: Hearing Before Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 113th Cong. 35 (2014), <https://www.hsdl.org/?view&did=758336> [<https://perma.cc/K32Q-3J99>] (statement of John Pistole, Administrator, Transportation Security Administration., Department of Homeland Security).

<sup>141</sup> *Id.*

BDOs could “reliably and effectively identify high-risk passengers who may pose a threat to the U.S. aviation system.”<sup>142</sup> TSA’s testing was laden with issues, including selecting airports without randomization, collecting data unevenly, and failing to get an adequate sample size.<sup>143</sup> Under established evaluation techniques for TSA’s programs, TSA must collect data that is sufficiently free of bias or error to prove the effectiveness of its procedures.<sup>144</sup> Now, TSA is focused on increasing enrollment in PreCheck rather than allowing “low-risk” travelers to use its benefits without paying.

Secure Flight, another TSA program to identify high-risk passengers, has evolved since its introduction in 2009.<sup>145</sup> Previously, the program identified high-risk passengers prior to their arrival at the airport by comparing their credentials to the No Fly List, compiled by the FBI and composed of individuals with known terrorist ties, and the Selectee List, composed of individuals that required enhanced screening.<sup>146</sup> Subsequent improvements in the program provided access to a greater number of databases with more complete information, such as Terrorist Screening Database (TSDB), which allowed the TSA to identify passengers as high-risk, low-risk, and unknown risk.<sup>147</sup> These improvements led to the creation of PreCheck.

However, the GAO identified two major errors with Secure Flight: matching errors and mistakes at screening checkpoints.<sup>148</sup> To address system-matching errors, GAO recommended that TSA create a mechanism to “systematically document the number and causes of the Secure Flight system’s matching errors” for the Match Review Board to use to investigate causes and implement changes to improve Secure Flight.<sup>149</sup> TSA has created the process as recommended but is still finalizing how the process will improve the overall program.<sup>150</sup> The mistakes at the screening checkpoints were caused by TSA personnel not ensuring that “passengers receive a level of screening that corresponds to the level of risk determined by Secure

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<sup>142</sup> GAO-15-465T, *supra* note 132.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> GAO-15-678T, *supra* note 117.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

Flight.”<sup>151</sup> TSA has no process in place to determine the root causes of the errors and has yet to create one.<sup>152</sup> Secure Flight cannot be an effective procedure to eliminate threats if TSA personnel cannot implement its findings when passengers are being submitted for screening.

### III. THE IMPLICATIONS OF TSA REFORM ON PASSENGERS AND THE AIRLINE INDUSTRY

Representative John Katko, who has sponsored and advocated most of the TSA reform bills, has urged airport stakeholders, passengers, airlines, law enforcement, emergency first responders, and TSA to “work together to exercise plans and improve coordination among relevant entities.”<sup>153</sup> But at what cost must passengers comply with TSA protocol aimed at maintaining our national security? And to what degree are airlines expected, and needed, to participate in the security process?

#### A. WHAT PASSENGERS SHOULD EXPECT

One of the biggest complaints from passengers is the privacy concern of TSA’s use of AIT.<sup>154</sup> These scanners generate images of scanned passengers to identify threats, but many passengers raised privacy concerns, claiming that the generated image was a nude picture of each passenger, which, unsurprisingly, caused severe resistance to the new technology.<sup>155</sup> TSA began developing privacy software called Automated Target Recognition (ATR),<sup>156</sup> and Congress passed the FAA Modernization and Reform Act of 2012<sup>157</sup> that required all AIT scanners to be equipped with ATR by June 2012, later changed to May 2013.<sup>158</sup> TSA now has a disclaimer on its website that the imaging produced by AIT “auto-detects potential threats by indicating their location on a generic outline of a person,” which is “identical for all passengers.”<sup>159</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Examining Critical Security Measures*, *supra* note 28, at 2 (opening statement of Rep. John Katko, Chairman, Subcomm. on Transp. Sec.).

<sup>154</sup> GAO-15-559T, *supra* note 113.

<sup>155</sup> *Redfern v. Napolitano*, 727 F.3d 77, 80 (1st Cir. 2013).

<sup>156</sup> GAO-15-559T, *supra* note 113.

<sup>157</sup> FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, 126 Stat. 11 (2012).

<sup>158</sup> *Ruskai v. Pistole*, 775 F.3d 61, 63–64 (1st Cir. 2014).

<sup>159</sup> *Security Screening*, *supra* note 82.

Several cases had been filed challenging the constitutionality of the AIT scanners, alleging that the scanners violated the Fourth Amendment and passengers' rights to privacy, but the most recent case was dismissed as moot after the AIT scanners had been fitted with ATR software.<sup>160</sup> The interest of protecting against terrorism seemed compelling enough for most courts to justify such "searches," but none of the cases actually dove into that analysis.<sup>161</sup> There is a gap in the jurisprudence, leaving room to argue that TSA procedures and technology are unconstitutional if they become more intrusive than they are today.<sup>162</sup>

Another issue with TSA's procedures as they relate to passengers is the lack of flexibility and understanding for non-traditional situations in security screening. For example, a man sued the TSA and its agents after he was arrested for "creating a public disturbance" at Richmond International Airport on December 30, 2010.<sup>163</sup> The plaintiff, Aaron Tobey, believed that AIT screening was unconstitutional and had written the text of the Fourth Amendment on his chest in silent protest.<sup>164</sup> When he was selected for enhanced screening with the AIT scanner, Tobey removed his sweatpants and t-shirt, revealing the text, and although he was told by the TSA agent that he need not remove his clothes, he stated that he "wished to express his view" that the enhanced screening was unconstitutional.<sup>165</sup> The agent then radioed for assistance and Tobey was arrested without further question, despite that he had remained calm and did not refuse any TSA request.<sup>166</sup> Tobey was later charged with disorderly conduct in a public place, but the charges were dismissed and Tobey was permitted to board his flight without further incident, but he had been held over an hour.<sup>167</sup>

The Court held that Tobey's actions may have been "bizarre," but that was not enough to justify an arrest as bizarre behavior does not equal disruptive behavior.<sup>168</sup> It was unreasonable for Tobey to be arrested merely because he acted in an unfamiliar way toward the TSA security agents.<sup>169</sup> The Court noted that

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<sup>160</sup> See, e.g., *Redfern*, 727 F.3d at 77.

<sup>161</sup> See *Ruskai*, 775 F.3d at 70, 77; *Redfern*, 727 F.3d at 80.

<sup>162</sup> See *Ruskai*, 775 F.3d at 70, 77; *Redfern*, 727 F.3d at 80.

<sup>163</sup> *Tobey v. Jones*, 706 F.3d 379, 383–84 (4th Cir. 2013).

<sup>164</sup> *Id.* at 384.

<sup>165</sup> *Id.* at 383–84.

<sup>166</sup> *Id.* at 384.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 388.

<sup>169</sup> See *id.*

TSA regulations prohibit any person from “interfer[ing] with . . . [TSA] screening personnel in the performance of their duties,”<sup>170</sup> or “attempt[ing] to circumvent . . . any security system, measure, or procedure.”<sup>171</sup> But Tobey had not violated either provision.<sup>172</sup> This case serves as a reminder to TSA that it and its agents are required to behave reasonably in a variety of potential circumstances that may arise in an airport, and courts are not deferential to TSA action merely because airport security is a compelling interest.

The dissent, however, argued that an agent who faithfully performs his duty to fulfill TSA’s mission to protect against terrorism should be shielded from liability for infringing on one passenger’s rights.<sup>173</sup> That is certainly a persuasive view given the severe threats that TSA must protect us from, but the majority sent a clear message that TSA agents must be trained to assess the difference between a harmless passenger exhibiting bizarre or unconventional behavior and a passenger who poses a real risk or threat to national security.<sup>174</sup>

TSA is keenly aware of its less-than-sterling reputation and has created a program to intercept and address passenger concerns. Under current TSA policies, passengers may lodge complaints through the DHS Traveler Redress Inquiry Program (TRIP).<sup>175</sup> Common issues for which passengers should apply for TRIP include inability to print a boarding pass, denied or delayed boarding, denied or delayed entry or exit from the country, and continuous referral to additional screening.<sup>176</sup> Any aggrieved passenger must first file a complaint with the TSA through this program before challenging TSA’s security procedures in court.<sup>177</sup>

The TSA legislation is not only important to understand as it relates to passengers, but also as it relates to passenger luggage. Every month, roughly 350 individuals question the TSA for “sins against their luggage,” resulting in a need for the agency to be

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<sup>170</sup> 49 C.F.R. § 1540.109 (2016).

<sup>171</sup> 49 C.F.R. § 1540.105 (2016); *Tobey*, 706 F.3d at 389.

<sup>172</sup> *See Tobey*, 706 F.3d at 389.

<sup>173</sup> *Id.* at 394–95 (Wilkinson, J. dissenting).

<sup>174</sup> *See id.* at 386–89 (majority opinion).

<sup>175</sup> *DHS Traveler Redress Inquiry Program*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/passenger-support/travel-redress-program> [<https://perma.cc/B2BL-AU23>].

<sup>176</sup> *Id.*

<sup>177</sup> *See* 49 U.S.C.S. 46110(d).

transparent with its handling of baggage.<sup>178</sup> An article published by *The Washington Post* explains the path luggage takes after leaving the checked bag counter in an effort to provide that transparency.<sup>179</sup> The bags typically move along several conveyor belts and through a variety of scanners, and TSA agents rarely need to touch or open items with the “slick new systems to keep terrorist explosives off airplanes.”<sup>180</sup> However, any bag that is opened includes a notification to make the passenger aware and feel secure knowing that the TSA took appropriate measures to keep air travel safe.<sup>181</sup>

Finally, DHS wants to bring the public on board with its mission to protect national security with its If You See Something, Say Something™ campaign.<sup>182</sup> The campaign seeks to raise public awareness about suspicious activities related to terrorism and how to report them.<sup>183</sup> It is an extremely important campaign for airports where TSA relies on passengers to report unattended baggage, persons in possession of potentially dangerous items, or persons in restricted areas.<sup>184</sup>

Discrimination in screening practices is also a concern for some travelers. The biggest targets for these complaints are the BDOs, who face allegations of racial profiling when selecting minorities for enhanced screening.<sup>185</sup> TSA claims that “[r]acial profiling is not tolerated,” but it is still an issue that gets significant coverage whenever an allegation is made.<sup>186</sup>

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<sup>178</sup> Ashley Halsey III, *The Secret Life of Baggage: Where Does Your Luggage Go at the Airport?*, WASH. POST (Nov. 24, 2014), [https://www.washingtonpost.com/local/trafficandcommuting/where-oh-where-did-my-luggage-go/2014/11/24/16d168c6-69da-11e4-a31c-77759f1eacc\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/where-oh-where-did-my-luggage-go/2014/11/24/16d168c6-69da-11e4-a31c-77759f1eacc_story.html) [<https://perma.cc/SD8H-TEND>].

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*; *Security Screening*, *supra* note 82. Passengers may file a claim with TSA only if their luggage was lost or damaged during inspection; property lost or damaged during transport to the plane or baggage claim requires contacting the airline. *Security Screening*, *supra* note 82.

<sup>182</sup> *If You See Something, Say Something™*, TRANSP. SEC. ADMIN. (Dec. 13, 2015), <https://www.tsa.gov/news/top-stories/2015/12/14/if-you-see-something-say-somethingTM> [<https://perma.cc/GH2R-FPHG>].

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See, e.g.*, Khadija Saifullah, *Airport Screening Process Needs More Cultural Understanding*, DAILY TEXAN (Feb. 26, 2016), <http://www.dailytexanonline.com/2016/02/26/airport-screening-process-needs-more-cultural-understanding> [<https://perma.cc/C22Q-XFHJ>]; Ron Nixon, *TSA Lapses, Retaliation and Bonuses are Investigated by House Panel*, N.Y. TIMES (Feb. 23, 2016), <http://www.nytimes.com/2016/02/24/us/politics/tsa-lapses-retaliation-and-bonuses-are-investigated-by-house->



Luckily for frequent flyers, the goal and implementation of current and proposed TSA reform legislation is to subject most passengers to less intrusive screening,<sup>187</sup> which is evidenced by TSA's yearly publication about the percentage of passengers who received some type of expedited screening.<sup>188</sup> DHS and TSA are acutely aware of their reputation of tiptoeing the line between appropriate searches and inappropriate intrusions on privacy, and they are highly interested in changing the conversation.<sup>189</sup> It is true that there are passengers who pose an affirmative risk to air travel. TSA is working to improve its processes so that it is only using intrusive screening on those passengers who might pose a risk to air safety. If TSA is successful in its reform, we will see less litigation against the agency for its transgressions and more praise in the media for its success in preventing security breaches.

#### B. THE IMPACT ON AIRLINES AND THE INDUSTRY

TSA is highly important to the airlines because every airplane is safer when TSA personnel carefully screen each passenger and oncoming bag or item. TSA and the airlines have to work together for security on issues such as passenger screening and baggage safety.

With TSA programs such as Secure Flight and PreCheck, airlines have to work with TSA to provide its passenger lists prior to passengers arriving at the airports.<sup>190</sup> The security systems also make it necessary to open very few bags to check for prohibited items, resulting in happier passengers when their luggage arrives safely without needing inspection.<sup>191</sup> The changes being

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panel.html?\_r=0 [https://perma.cc/QZ3G-S4TH]; Amy McKeever, *Sikh Actor Waris Ahluwalia is Taking a Stand Against Airport Discrimination*, TRAVEL + LEISURE (Feb. 16, 2016), <http://www.travelandleisure.com/articles/waris-ahluwalia-aero-mexico-discrimination> [https://perma.cc/76XF-7NN6].

<sup>187</sup> See Wilson, *supra* note 97.

<sup>188</sup> See *TSA 2015 Year in Review*, *supra* note 4.

<sup>189</sup> See, e.g., Warner Todd Huston, *TSA Spokesperson Tweets Photo of Passenger's Bag Carrying \$75K in Cash*, BREITBART (July 2, 2015), <http://www.breitbart.com/big-government/2015/07/02/tsa-spokesperson-tweets-photo-of-passengers-bag-carrying-75k-in-cash/> [https://perma.cc/86NP-2QGK]; Abby Reed, *Local Woman Says New TSA Screenings Invade Privacy*, NEWSWEST9.COM (Nov. 5, 2010), <http://www.newswest9.com/story/13455808/local-woman-says-new-tsa-screenings-invade-privacy> [https://perma.cc/9879-UFVU].

<sup>190</sup> GAO-15-150, *supra* note 137.

<sup>191</sup> See Halsey, *supra* note 178.

implemented are positive for the airline industry and should continue.

If the TSA is doing its job effectively, the air travel process is smoother, more enjoyable, and safer for every passenger, which increases the likelihood that passengers will fly again. Therefore, airlines rely on TSA protocols to keep their customers happy and coming back. Because failures in TSA security protocol discourage the public from utilizing air travel, the industry has a huge stake in TSA's success. It is in the airline industry's best interest to help TSA to accomplish its goals. When a terrorist attacks a plane, the plane and the airline make the news; the TSA agent that allowed the threat to pass through security or the airport staff that failed to detect the threat almost never do. Therefore, TSA's success has a direct effect on airlines and the industry's prosperity.

#### IV. RECOMMENDATIONS AND PROJECTIONS FOR FUTURE TSA LEGISLATION AND ACTION

TSA, DHS, Congress, and the public are grasping for better ways to improve security and eliminate risks but decrease the burden and inconvenience on passengers who pose no threat to aviation security. Legislation is not enough to create, change, and improve security. The agency must take action, and agency employees must meet higher expectations if TSA is ever to be thought of as more than a smoke screen.

##### A. CORRECTING HUMAN ERROR

One of the basic improvements to be made is with employee training. Human error issues were prevalent across the failures in every other area. Therefore, to improve this would improve the system as a whole.<sup>192</sup> As mentioned regarding Secure Flight, TSA has yet to design a plan to combat the human error issues in implementing the Secure Flight protocol for passengers at the security checkpoints.<sup>193</sup> This is extremely alarming because it effectively renders the Secure Flight program irrelevant when TSA personnel cannot enforce its findings.

It seems at the most basic level that TSA screeners must become accustomed to verifying the Secure Flight designation on each passenger's boarding pass when they verify the passenger's identity and flight information on the ticket as well. Repetition

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<sup>192</sup> See *supra* Part II.

<sup>193</sup> See *supra* notes 145–47 and accompanying text.

would be key. If each TSA officer checks the same places on each boarding pass for each passenger repeatedly, it would become a habit. Thus, it would be very unlikely that a TSA agent would miss such crucial information when it matters.

The program should also give TSA agents at the checkpoint a warning about possibilities of a threat, which would likely increase agents' effectiveness in screening because they would be more deliberate and careful in their searches. If every day and every search is monotonous, repetitive, and uneventful, the carefully selected procedures fall apart and the technology serves no purpose. The success of TSA depends on its personnel implementing all procedures without variation and utilizing all technology without missing detections.

#### B. EFFECTIVE UTILIZATION OF CANINE TEAMS

Another area of improvement is with the usage of canine teams. Given the positive findings of the effectiveness of explosive detection canine teams,<sup>194</sup> TSA should focus on securing the resources for future deployment of more canine teams.<sup>195</sup> With more canine teams comes more training and job opportunities within the TSA. It may be expensive, but the TSA, and the agencies responsible for testing it, should broaden testing spectrums and results to better define the role that canine teams could play in aviation security.<sup>196</sup> Under the same testing procedures, more results could be obtained by analyzing recurring patterns of each test and comparing results over time. Each canine team is an expensive investment,<sup>197</sup> but the agency should be investing in successful security techniques, not just the newest technology without training personnel how to use it. When balancing expense against national security, all reasonable costs should be absorbed to ensure the safety of the country.

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<sup>194</sup> See Andrea Sachs, *Don't Mind the Wet Nose: TSA Enlists More Dogs to Screen Passengers*, WASH. POST (Jan. 21, 2016), [https://www.washingtonpost.com/lifestyle/travel/dont-mind-the-wet-nose-tsa-enlists-more-dogs-to-screen-passengers-for-explosives/2016/01/20/26e11d98-b983-11e5-829c-26ffb874a18d\\_story.html](https://www.washingtonpost.com/lifestyle/travel/dont-mind-the-wet-nose-tsa-enlists-more-dogs-to-screen-passengers-for-explosives/2016/01/20/26e11d98-b983-11e5-829c-26ffb874a18d_story.html) [https://perma.cc/MK89-S39B].

<sup>195</sup> See *Utilizing Canine Teams*, *supra* note 125, at 2 (opening statement of Rep. Richard Hudson, Chairman, Subcomm. on Transp. Sec.).

<sup>196</sup> See GAO-16-199T, *supra* note 117.

<sup>197</sup> See *Utilizing Canine Teams*, *supra* note 125, at 4–5 (statement of Rep. Bennie G. Thompson, Ranking Member, H. Comm. on Homeland Sec.).

## C. INCREASED TESTING

Finally, the biggest improvement TSA can make is to increase testing procedures and testing frequency. While this may be expensive for an agency that already receives \$8 billion tax dollars per year,<sup>198</sup> it would be worth the cost.

Research shows that employee behavior changes and productivity increases when employees know they are being watched.<sup>199</sup> This theory could be applied to TSA agents if they know they are being tested. If every TSA employee came into work each day expecting to be tested or scrutinized, each would be alert, intently performing his or her duties to be the one agent that catches the threat being tested. The anticipation of testing or scrutiny would make TSA personnel more careful with every passenger as they would be unsure who was watching and when, which would result in greater effectiveness and less human error from lack of attention. The increased testing could be up to one day of testing per month, but if the employees do not know when the testing will take place, they will have to be careful, prepared, and diligent each day when screening passengers. But just threatening more testing may not be enough; the TSA would need to implement and publicize the repercussions of failing a test to its employees.

Aquatics is an industry that employs this type of frequent testing. Lifeguards must pass an aquatics test to be certified, and they must complete frequent audits to test their life-saving skills in real-time scenarios.<sup>200</sup> These audits are effective for education, suggestions, simple implementation of changes, and reinforcement of skills and procedures.<sup>201</sup> For maximum effectiveness and increased overall safety, the audits should be performed often and employ a variety of scenarios so the lifeguards do not identify the situation as a test.<sup>202</sup> The same logic could be applied to testing of TSA agents, and the consequences

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<sup>198</sup> Katie Pavlich, *Surprise: TSA Hasn't Improved Since Failing 95 Percent of Security Tests*, TOWNHALL.COM (Nov. 4, 2015), <http://townhall.com/tipsheet/katiepavlich/2015/11/04/surprise-tsa-is-still-sucking-terribly-n2075370> [<https://perma.cc/48N2-DUJ9>].

<sup>199</sup> *Hawthorne Effect*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Hawthorne\\_effect](http://www.newworldencyclopedia.org/entry/Hawthorne_effect) [<https://perma.cc/ZLU4-4USD>].

<sup>200</sup> Deborah L. Vence, *Feature Article—Safe in the Water*, RECREATION MGMT. (Jan. 2016), <http://recmanagement.com/feature/201601FE01/1> [<https://perma.cc/J4AA-DNXW>].

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

of failing are arguably just as great—the safety and security of human lives are at stake.

One concern that may arise from increased testing might be that fear of flying or of terrorism might increase if the public sees more prohibited items being confiscated. It is foreseeable that passengers may be uneasy if they are constantly seeing weapons or other prohibited items discovered on undercover agents administering the testing. However, the TSA can alleviate this concern by publishing its testing frequency and protocols. It is likely that passengers will feel much safer flying if they know that TSA employees are tested regularly. Many passengers know that now but have never seen it. Passengers would feel safer if they could see the testing, and success, of the TSA and its protocols when they travel through the nation's airports. If passengers feel safer, the pressure to reform the TSA and increase security effectiveness will lessen because the public would view the agency as successful in its purpose.

To have the number of personnel in place to implement such measures at all of the commercial airports in the nation is a big undertaking, but it is undoubtedly worth the cost when compared with the reward—safer skies. Implementation costs would be high, but it would likely be less costly long-term because much of the expense would be start-up costs of hiring and training more testing agents. A new, comprehensive testing plan could be implemented gradually as well, which would help with the costs, and it would allow more of the TSA's current budget to go to additional training and improvement of current protocol and ensure less of the budget goes to new technology that has not yet proven to be effective. As an added bonus, it would create more jobs for many Americans, which the public and political officials would likely support.

Ultimately, there are many changes that can be made to improve our security and lessen the burden that security measures place on the non-threatening traveling public. It is the difficult choice of deciding which changes to implement and when to implement them that the public leaves in the hopefully capable hands of government.

## V. CONCLUSION

Increased security measures and technology should make air travel safer and cause fewer headaches for travelers. There is always a way to improve aviation security, and we should be working together to accomplish that goal. However, just passing

legislation is not the answer; members of Congress cannot write this off as a “handled” issue and report back to their constituents for a pat on the back. To solve the security problem in this country, we need to act, not *talk* about acting. To require action under legislation is only the first step.

Testing more frequently and improving inefficiencies caused by human error are the most important aspects to solving the critical aviation safety issues that face the TSA. The agency was created to make air travel safe in the United States. It has come a long way since it began, but it will take activism and relentless supervision from agency officers to make the skies safe. Hopefully, the TSA is well on its way.