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## Applying the Fourth Amendment's National-Security Exception to Airport Security and the TSA

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# **APPLYING THE FOURTH AMENDMENT'S NATIONAL- SECURITY EXCEPTION TO AIRPORT SECURITY AND THE TSA**

R. GREGORY ISRAELSEN\*

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## I. INTRODUCTION

THE FACE of airport security was destined to change on the morning of September 11, 2001 (9/11). After nineteen armed terrorists attacked four U.S. flights, crashing them into the World Trade Center, the Pentagon, and a field in Pennsylvania,<sup>1</sup> a nation that had spent decades combating aviation-based terrorism was ready to fight back.

Over the years, as the nation fought for friendly skies, the fight to maintain constitutionally guaranteed freedoms continued in the halls of Congress, in the agencies of the Executive Branch, and in the courts. Historically, the judiciary has used many different frameworks to balance the state's interest in maintaining safe air travel with the individual's Fourth Amendment rights.<sup>2</sup> Over time, however, each framework for considering airport security measures has fallen short of the mark.<sup>3</sup> The administrative-search exception, although commonly used in the courts today when considering TSA action and other airport security measures, does not meet the needs of airport security in post-2001 America.

This article examines the different frameworks and the problems with each. In particular, it examines the currently vogue administrative-search exception and its application in the courts. In recent years—post-2001—courts have increasingly ignored the actual test required for the administrative-search exception to apply, instead allowing the interest in “no more 9/11s” to supplant the true balancing that the exception requires. This article argues that because the administrative-search exception is ill-suited for modern airport security measures—particularly those implemented by the TSA—courts should use a different framework. This article further examines the suitability of extending the national-security exception to the airport security context. While historically applied only in electronic surveillance cases, the national-security exception may be a more appropriate framework for courts to use in considering Fourth Amendment airport security cases because it would enable courts to avoid the difficult—if not impossible—task of squaring

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<sup>1</sup> Michael Howard Saul, *America Grieves, Reflects*, WALL ST. J. (Sept. 11, 2011, 8:41 AM), <http://online.wsj.com/article/SB10001424053111904353504576564342677754296.html>.

<sup>2</sup> See John Rogers, *Bombs, Borders, and Boarding: Combatting International Terrorism at United States Airports and the Fourth Amendment*, 20 SUFFOLK TRANSNAT'L L. REV. 501, 518–32 (1997).

<sup>3</sup> See *infra* Part II.C.

modern TSA search procedures with case law developed under pre-2001 airport security measures.

This article begins by examining the history of threats to aviation security and the corresponding development of aviation security law in the courts. Part II provides an overview of each of the frameworks used for considering Fourth Amendment concerns, details the flaws with each, and narrows in on the administrative-search exception—the post-2001 framework that is most often used for considering Fourth Amendment concerns involving the TSA, technology, or search procedures. Part III then considers the national-security exception. It begins with a history of how the national-security exception developed and where it has been applied. It then considers whether the exception could be applied to the airport security context and what the scope of the exception would be. Part IV concludes with recommendations for courts going forward on how to best balance the state's interest in promoting aviation security with the privacy and other rights of the individual.

## II. HISTORY OF AIRPORT SECURITY

### A. THREATS TO AVIATION SECURITY AND THE GOVERNMENT'S RESPONSE

Many consider the first skyjacking of an American aircraft to have occurred in May 1961 when National Airlines Flight 337 was diverted from Miami to Cuba.<sup>4</sup> Politically motivated skyjackings increased rapidly,<sup>5</sup> peaking in 1969 with thirty-three successful skyjackings.<sup>6</sup> The Federal Aviation Administration (FAA)

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<sup>4</sup> See Rogers, *supra* note 2, at 504 (“[T]his event marked the first such incident involving an American aircraft.”); *United States v. Davis*, 482 F.2d 893, 897 & n.4 (1973). *But cf.* Dolan Morgan, *The First Hijacking Myth*, FORTNIGHT J. 4 (Dec. 8, 2011), <http://fortnightjournal.com/dolan-morgan/258-the-first-hijacking-myth.html> (explaining that the year 1911 was actually “the first time anyone ever complained of the theft of a flying machine” (quoting *Plane Stolen; Sherriff in Air*, BALTIMORE SUN, Aug. 9, 1911)).

<sup>5</sup> This article does not go into great detail on the history of threats to aviation security, particularly in the United States. Many other articles have provided fantastic summaries of the relevant history. See generally Rogers, *supra* note 2, at 504–10 (giving a detailed history of aviation terrorism and the U.S. response through the mid-1990s); Brittany R. Stancombe, *Fed Up with Being Felt Up: The Complicated Relationship Between the Fourth Amendment and TSA’s “Body Scanners” and “Pat-Downs”*, 42 CUMB. L. REV. 181, 183–92 (2012) (beginning in 2001 and describing the advent of the TSA, as well as modern search and security measures, including advanced imaging technology (AIT)—“body scanners”).

<sup>6</sup> *United States v. Albarado*, 495 F.2d 799, 804 (2d Cir. 1974).

responded by mandating the screening of select passengers who fit "skyjack profiles" and then eventually by screening all passengers before allowing them to fly.<sup>7</sup> Ultimately, a search regime developed that "remained in place for decades, even after . . . September 11."<sup>8</sup> This regime included screening in which all passengers, before boarding at the gate, were required "to pass through a magnetometer and surrender their carry-on items or their person for a more intrusive search in the event that the magnetometer was alerted."<sup>9</sup> Naturally, with each new search procedure came new legal challenges. As discussed in more detail below, courts use a variety of methods for evaluating airport security measures. Courts have evaluated airport searches as stop-and-frisk searches, border searches, consensual searches, and administrative searches.

## B. MODERN SCREENING METHODS

In 2001, the Transportation Security Administration (TSA) was created as part of the Aviation and Transportation Security Act.<sup>10</sup> The federal government took control of screening all passengers and their bags at airports in November 2002.<sup>11</sup> The TSA was moved from the Department of Transportation to the Department of Homeland Security (DHS) on March 1, 2003.<sup>12</sup> In the years since 2001, TSA security measures have gradually tightened, requiring everything from passenger shoe removal to a ban on most liquids.<sup>13</sup>

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<sup>7</sup> Alexander A. Reinert, *Revisiting "Special Needs" Theory via Airport Searches*, 106 NW. U. L. REV. COLLOQUY 207, 210 (2012).

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

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

<sup>10</sup> Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 597 (2001) (codified at 49 U.S.C. § 114(a)). This Act was signed into law on November 19, 2001.

<sup>11</sup> See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG NO. 04-37, AUDIT OF PASSENGER AND BAGGAGE SCREENING PROCEDURES AT DOMESTIC AIRPORTS 1 (2004).

<sup>12</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 403, 1502, 116 Stat. 2135, 2178, 2308 (2002) (codified at 6 U.S.C. §§ 203, 542) (allowing for the transfer of certain agencies, including the TSA, to the Department of Homeland Security); *Conyers v. Merit Sys. Prot. Bd.*, 388 F.3d 1380, 1381 n.1 (Fed. Cir. 2004) (noting that the "TSA was transferred from the Department of Transportation to the Department of Homeland Security, effective March 1, 2003").

<sup>13</sup> See *Need for Removal of Shoes at Checkpoint*, TSA (Jan. 7, 2013), <http://www.tsa.gov/press/news/2013/01/07/need-removal-shoes-checkpoint>; *3-1-1 for Carry-Ons*, TSA, <http://www.tsa.gov/traveler-information/3-1-1-carry-ons> (last modified Aug. 22, 2013).

In 2007, the TSA began testing new technology—known as advanced imaging technology (AIT)—to detect explosives and other metal and nonmetal threats to aviation security.<sup>14</sup> Two types of technology have been developed and used in airports: “millimeter wave and backscatter. Millimeter wave technology bounces electromagnetic waves off the body to create a black and white three-dimensional image. Backscatter technology projects low level X-ray beams over the body to create a reflection of the body displayed on the monitor.”<sup>15</sup> In 2010, the TSA implemented AIT as the primary screening method for passengers at airports nationwide.<sup>16</sup> But “AIT screening is optional for all passengers. Passengers who opt out of AIT screening will receive alternative screening, including a physical pat-down.”<sup>17</sup> As it implemented AIT as the primary screening method, the TSA also introduced new pat-down procedures.<sup>18</sup> A pat-down performed following the post-2010 procedures is referred to as an “enhanced pat-down.”<sup>19</sup>

In February 2011, the TSA began testing Automated Target Recognition (ATR) software, which works with millimeter wave AIT.<sup>20</sup> ATR software uses the same millimeter wave screening technology, but instead of requiring a TSA agent to analyze images of actual passenger scans, the system itself “performs all necessary image analysis to determine the location of anomalies found during a scan of the passenger, thereby removing the human factor from the image review process. The AIT with ATR then displays information regarding the location of the anomalies on an avatar to facilitate secondary screening.”<sup>21</sup> In 2012, Congress passed the FAA Modernization and Reform Act, which, among other things, requires the use of ATR technology

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<sup>14</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG NO. 12-06, TSA PENETRATION TESTING OF ADVANCED IMAGING TECHNOLOGY (Nov. 2011), [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_SLR\\_12-06\\_Nov11.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_SLR_12-06_Nov11.pdf).

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

<sup>16</sup> Colleen Deal, Comment, *Faith or Flight?: A Religious Dilemma*, 76 J. AIR L. & COM. 525, 526–27 (2011).

<sup>17</sup> TSA PENETRATION TESTING OF ADVANCED IMAGING TECHNOLOGY, *supra* note 14.

<sup>18</sup> *TSA Statement on New Pat-down Procedures*, TSA (Oct. 28, 2010), <http://www.tsa.gov/press/releases/2010/10/28/tsa-statement-new-pat-down-procedures>; Deal, *supra* note 16, at 539.

<sup>19</sup> See Deal, *supra* note 16, at 539–40.

<sup>20</sup> TSA PENETRATION TESTING OF ADVANCED IMAGING TECHNOLOGY, *supra* note 14.

<sup>21</sup> *Id.*

for all passenger screening beginning on June 1, 2012.<sup>22</sup> In mid-2013, the TSA began removing backscatter scanners from airports.<sup>23</sup>

### C. AIRPORT SECURITY IN THE COURTS

Beginning with the advent of airport security measures in the 1960s, individuals have been concerned with the risk to individual privacy rights posed by airport security searches.<sup>24</sup> Because of the nature of the searches, courts have struggled to reconcile the interest in passenger safety with the constitutional protections afforded the passenger against unwarranted government intrusion into personal privacy.<sup>25</sup> These constitutional protections are based on the Fourth Amendment and its subsequent jurisprudence.<sup>26</sup>

The Fourth Amendment reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>27</sup>

As a threshold question in Fourth Amendment cases, courts must consider whether a government action is a “search or seizure.”<sup>28</sup> From the beginning, airport security searches have,

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<sup>22</sup> FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 826, 126 Stat. 11, 132 (2012) (to be codified at 49 U.S.C. § 44901(d)(2)).

<sup>23</sup> See Ron Nixon, *Unpopular Full-Body Scanners to Be Removed from Airports*, N.Y. TIMES (Jan. 18, 2013), [http://www.nytimes.com/2013/01/19/us/tsa-to-remove-invasive-body-scanners.html?\\_r=0](http://www.nytimes.com/2013/01/19/us/tsa-to-remove-invasive-body-scanners.html?_r=0); Joe Sharkey, *A Farewell to ‘Nudity’ at Airport Checkpoints*, N.Y. TIMES (Jan. 21, 2013), <http://www.nytimes.com/2013/01/22/business/a-farewell-to-nudity-at-airport-checkpoints.html>.

<sup>24</sup> See Reinert, *supra* note 7, at 208 (referring to the “slew of constitutional challenges to new security measures imposed by airlines and the [FAA]” in the 1960s).

<sup>25</sup> See *id.* (“[I]t is difficult to find the right doctrinal fit for searches like these. The searches affect large portions of the population, are based on no suspicion whatsoever, and are public in nature. Under traditional Fourth Amendment probable cause and warrant requirements, they would clearly not pass muster.”).

<sup>26</sup> See *id.*

<sup>27</sup> U.S. CONST. amend. IV.

<sup>28</sup> See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (“A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” (footnotes omitted)).

without question, been considered searches under the Fourth Amendment.<sup>29</sup>

If the government action is a search, then the general rule is that a warrant is required.<sup>30</sup> But “in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable.’”<sup>31</sup> Therefore, in the context of airport security—where every passenger is searched, regardless of individualized suspicion—the warrant and probable cause requirements are impracticable. As a result, courts require the government to defend its airport security regimes under one of the specific, defined exceptions to the Fourth Amendment.<sup>32</sup>

Over the years, courts have used several different frameworks for analyzing warrantless searches at airport security checkpoints.<sup>33</sup> Specifically, courts have applied theories based on the stop-and-frisk search, consent, the critical-zone approach, and the administrative-search exception.<sup>34</sup> These theories represent a progression; they are not all used by courts today.<sup>35</sup>

Each of these theories, however, has its shortcomings.<sup>36</sup> Particularly given the development in passenger screening technology

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<sup>29</sup> *United States v. Davis*, 482 F.2d 893, 904 (9th Cir. 1973), *overruled by* *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (“It is entirely clear . . . that throughout the period since late 1968 the government’s participation in the development and implementation of the airport search program has been of such significance as to bring any search conducted pursuant to that program within the reach of the Fourth Amendment.”); *see United States v. Moreno*, 475 F.2d 44, 48 (5th Cir. 1973) (“Although the problem of aerial hijacking is well known to the public, we think it appropriate, nevertheless, to single out our reasons for treating airport security searches as an exceptional and exigent situation under the Fourth Amendment.”).

<sup>30</sup> *California v. Carney*, 471 U.S. 386, 390 (1985) (“This fundamental right [protected by the Fourth Amendment] is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer.”).

<sup>31</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829 (2002) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

<sup>32</sup> *Rogers*, *supra* note 2, at 512–13.

<sup>33</sup> *See United States v. Hartwell*, 436 F.3d 174, 176 (3d Cir. 2006) (“[C]ourts have not settled on a single framework for analyzing warrantless searches at airport checkpoints”); *Rogers*, *supra* note 2, at 512–13.

<sup>34</sup> *Rogers*, *supra* note 2, at 512–13.

<sup>35</sup> *See id.* at 518–32.

<sup>36</sup> *See id.* at 538–41, 544.



as well as the shifting attitudes of the government and the traveling public since 2001, a new approach may be necessary.<sup>37</sup>

### 1. *The Stop-and-Frisk Search*

Before 1973, “airlines were required only to stop and search those persons fitting a specially-designed ‘hijack’ profile.”<sup>38</sup> People that fit the profile were asked to go through a metal detector.<sup>39</sup> If they triggered the metal detector twice—after emptying their pockets—they were asked for identification.<sup>40</sup> Lack of identification would lead to “a frisk of [their] person[s].”<sup>41</sup>

The stop-and-frisk framework justified airport searches for a time, but in *United States v. Davis*, the Ninth Circuit rejected *Terry v. Ohio*<sup>42</sup>—the foundation for the stop-and-frisk framework—as “inapposite to the validity of pre-boarding screening searches of passengers and luggage.”<sup>43</sup> The stop-and-frisk framework cannot be applied to airport security for two reasons: “(1) [cases like *Terry*] impose a requirement for justification of individual searches that pre-boarding screening searches cannot meet, and (2) they permit searches [that] are in some respects more extreme, and in other respects less so, than required to meet the need relied upon to justify pre-boarding screening searches.”<sup>44</sup> Discarding stop-and-frisk in favor of a new framework in the airport security context left *Terry* and its progeny open for continued use by law enforcement while allowing the courts to become more comfortable with the increasingly intrusive security measures used at airport security checkpoints.<sup>45</sup>

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<sup>37</sup> Other scholars have suggested as much. See, e.g., Reinert, *supra* note 7, at 209–10, 225–29 (arguing for a return to the “special needs doctrine”); Rogers, *supra* note 2, at 541–48 (arguing for a modified critical-zone approach).

<sup>38</sup> WILLIAM E. RINGEL ET AL., SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 16:4 (2d ed. 2012) (stating that “the FAA mandated the screening of all passengers and carry-on luggage [in 1973]”). See also Aircraft Security, Screening System, 37 Fed. Reg. 2500, 2500 (Feb. 2, 1972).

<sup>39</sup> RINGEL ET AL., *supra* note 38.

<sup>40</sup> *Id.*

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

<sup>42</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>43</sup> *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973), *overruled by* *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007).

<sup>44</sup> *Id.* at 906 (distinguishing *Adams v. Williams*, 407 U.S. 143 (1972), *Sibron v. New York*, 392 U.S. 40 (1968), and *Terry v. Ohio*, 392 U.S. 1 (1968)).

<sup>45</sup> See *Davis*, 482 F.2d at 907.

## 2. *The Critical-Zone Approach*

The critical-zone approach developed as an extension to the stop-and-frisk framework.<sup>46</sup> A pair of 1973 Fifth Circuit decisions “set forth the extent of the critical zone doctrine.”<sup>47</sup> One of the first decisions using the approach was *United States v. Moreno*.<sup>48</sup> Starting with a *Terry* frisk, the court held that “the airport was a ‘critical zone’ and, therefore, subject to special Fourth Amendment considerations.”<sup>49</sup>

In *United States v. Skipwith*, the court clarified that there is a different standard for searches performed in the airport generally and for those performed at the gate.<sup>50</sup> The reasonableness of the search depended on “the potential harm to the public, the probability that the search would avert the potential harm, and the degree and nature to which the search intruded into the individual’s privacy.”<sup>51</sup>

Opponents of the critical-zone approach as applied to searches in the general area of the airport charge that “its application oversteps the limitations of the [stop-and-frisk] exception.”<sup>52</sup> For searches performed at the boarding gate, however, later “decisions have held that those who present themselves for boarding on an aircraft are subject to a search of their persons and effects on the basis of mere suspicion alone.”<sup>53</sup>

## 3. *Consent*

Any search can be performed without a warrant if a person gives voluntary and intelligent consent.<sup>54</sup> Whether consent is “voluntary or . . . the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances.”<sup>55</sup>

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<sup>46</sup> Rogers, *supra* note 2, at 528–29.

<sup>47</sup> *Id.* at 530.

<sup>48</sup> *Id.* at 528; *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973).

<sup>49</sup> Rogers, *supra* note 2, at 529.

<sup>50</sup> *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973).

<sup>51</sup> Rogers, *supra* note 2, at 529–30 (analyzing *Skipwith*, 482 F.2d at 1275–76).

<sup>52</sup> *Id.* at 531.

<sup>53</sup> *Id.* at 531–32. Note that the administrative-search exception, used for evaluating modern airport searches, does not even require mere suspicion. See *infra* note 75 and accompanying text.

<sup>54</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

<sup>55</sup> *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (citing *Schneckloth*, 412 U.S. at 227).

Consent is often a preferred approach for the government.<sup>56</sup> Notwithstanding any Fourth Amendment protections, any time an individual consents to a search, it may be lawfully performed.<sup>57</sup> In many cases, the government agent wishing to perform the search need not inform the individual of her right to refuse a search.<sup>58</sup>

In *United States v. Davis*, the Ninth Circuit established a three-prong test for determining the reasonableness of a pre-flight search.<sup>59</sup> One element of that test was that “potential passengers may avoid the search by electing not to fly.”<sup>60</sup> The Ninth Circuit reasoned that to be reasonable, “an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it.”<sup>61</sup> It then “follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.”<sup>62</sup> In other words, the search’s validity required allowing the traveler to walk away from the proposed search.

Many other cases over the years followed *Davis*. Including passenger consent as an element further strengthened airport security searches against Fourth Amendment scrutiny.<sup>63</sup>

But in 2007, the Ninth Circuit reversed course. In *United States v. Aukai*, the Ninth Circuit reasoned that “requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world.”<sup>64</sup>

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<sup>56</sup> See *Schneckloth*, 412 U.S. at 228.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* at 227.

<sup>59</sup> *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973), *overruled by* *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (“[A] screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided [(1)] that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, [(2)] that it is confined in good faith to that purpose, and [(3)] that potential passengers may avoid the search by electing not to fly.”).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 910.

<sup>62</sup> *Id.* at 910–11.

<sup>63</sup> Even if a court’s analysis under a different approach was not bulletproof, by reinforcing it with the additional element of consent, a Fourth Amendment violation would be almost impossible to find. See *id.* at 913.

<sup>64</sup> *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007). The Ninth Circuit’s rejection of consent makes sense from a security standpoint, but the legal analysis is not so easy. Before 9/11, courts stressed that the ability to walk away from a security screening was always necessary for that screening to survive

To do so “would afford terrorists multiple opportunities to attempt to penetrate airport security by ‘electing not to fly’ on the cusp of detection until a vulnerable portal is found.”<sup>65</sup> It “would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks.”<sup>66</sup> Thus concerned, the Ninth Circuit expressly overruled any of its cases that “predicated the reasonableness of an airport screening search upon either ongoing consent or irrevocable implied consent.”<sup>67</sup>

Another concern with using consent for Fourth Amendment considerations at the airport is whether agreeing to pass through airport security represents true consent. This situation presents somewhat of a Hobson’s choice. There is no other option; if a person wishes to fly commercially, she must submit to TSA screening procedures.<sup>68</sup> But courts have held this to not be a constitutional concern: “[T]he Constitution does not guarantee the right to travel by any particular form of transportation”; therefore, an individual “does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him.”<sup>69</sup> Such a conclusion is unlikely to satisfy the prospective business traveler or young adventurer who wishes to avoid the Morton’s fork between AIT screening and an en-

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Fourth Amendment scrutiny. *Davis*, 482 F.2d at 913. The Ninth Circuit emphatically made this point itself in *Davis*. *Id.* Yet in *Aukai*, the Ninth Circuit simply stated that “[t]he constitutionality of an airport screening search . . . does not depend on consent.” *Aukai*, 497 F.3d at 960. Curiously, the only support offered by the court for this assertion was the Supreme Court’s holding in *United States v. Biswell* that the legality of “a regulatory inspection system of business premises that is carefully limited in time, place, and scope . . . depends not on consent but on the authority of a valid statute.” *Id.* at 959–60 (citing *United States v. Biswell*, 406 U.S. 311, 315 (1972)).

<sup>65</sup> *Aukai*, 497 F.3d at 960–61 (footnotes omitted).

<sup>66</sup> *Id.* at 961.

<sup>67</sup> *Id.* at 962.

<sup>68</sup> *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006); Bob Burns, *Passengers Who Refuse Screening Are Denied Access to the Secure Area*, TSA BLOG (Jan. 23, 2012, 7:23 PM), <http://blog.tsa.gov/2012/01/passengers-who-refuse-screening-are.html>. Many people in the United States actually did decide to give up flying after the TSA began using AIT scanners as the primary screening method. See *Why We Campaign*, WE WON’T FLY, <http://wewontfly.com/why/> (last visited Sept. 21, 2013).

<sup>69</sup> *Gilmore*, 435 F.3d at 1136–37. But note that while the Constitution may not guarantee the right to air travel, statutory law does. See 49 U.S.C. § 40103(a)(2) (2006) (“A citizen of the United States has a public right of transit through the navigable airspace.”).

hanced pat-down,<sup>70</sup> either of which may make him feel that his personal privacy is being violated.

#### 4. *The Administrative-Search Exception*

As courts turned away from the earlier frameworks, they began to apply the administrative-search exception. In recent years, the administrative-search framework has been the doctrine of choice for courts analyzing Fourth Amendment concerns related to airport security.<sup>71</sup>

At the core of the administrative-search exception is a balancing of the government's legitimate interests and the individual's right to be free from government intrusion.<sup>72</sup> Beyond this basic test, however, courts have differed in their application of the administrative-search exception to airport security cases.<sup>73</sup>

Most circuits view airport security screening as an "administrative search,"<sup>74</sup> which allows for a balancing of "the individual's privacy expectations against the [g]overnment's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."<sup>75</sup> In the context of "blanket suspicionless searches," the Supreme Court explained that a reasonable search must be "calibrated to

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<sup>70</sup> Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 10 (D.C. Cir. 2011) ("[A]ny passenger may opt-out of AIT screening in favor of a [pat-down], which allows him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive is least invasive.").

<sup>71</sup> See, e.g., *id.* ("[S]creening passengers at an airport is an 'administrative search'"); see also *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.").

<sup>72</sup> See Rogers, *supra* note 2, at 524. Perhaps a more cynical way of viewing the real-world results of the exception is to say that "governments are sovereign and sovereignty means being able to violate the constitutional rights of small fry without making them whole." Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78 (2000). That is, where the government's interests outweigh those of the individual, the individual ultimately loses.

<sup>73</sup> This problem has been exacerbated by the fact that the Supreme Court has never specifically addressed the question of what framework is most appropriate for analyzing airport security cases. Reinert, *supra* note 7, at 219.

<sup>74</sup> See, e.g., *Marquez*, 410 F.3d at 616 ("Airport screenings of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment."). The Supreme Court has never expressly held that airport security measures are administrative searches. See *United States v. Aukai*, 497 F.3d 955, 959 n.2 (9th Cir. 2007).

<sup>75</sup> *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989).

the risk” and referred to airport security as it existed in 1997 as one example of such a search.<sup>76</sup> But the Court added the caveat that “where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”<sup>77</sup> In sum, determining the constitutionality of a suspicionless checkpoint search requires balancing the “‘gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’”<sup>78</sup>

#### a. TSA Is Not Law Enforcement

One key consideration in determining the scope of a Fourth Amendment exception for modern airport security is how to characterize TSA screening agents. Different Fourth Amendment evaluation standards exist for armed forces, law enforcement, and administrative agency employees.

The TSA’s mission is to “[p]rotect the [n]ation’s transportation systems to ensure freedom of movement for people and commerce.”<sup>79</sup> Yet “[t]he legal system doesn’t generally allow the government to stop the potentially dangerous *before* they commit crimes.”<sup>80</sup> Only the “U.S. armed forces and intelligence agencies”—of which the TSA is neither—“exist to pre-empt enemy attacks.”<sup>81</sup> The Constitution does not prevent armed forces and intelligence agencies from making preemptive strikes because the military does not operate under “vague legal balancing tests”; rather, the military operates under the “clarity of the rules of war,” which provide that troops “have the right to use force against enemy armed forces at any time, not merely at the mo-

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<sup>76</sup> Chandler v. Miller, 520 U.S. 305, 323 (1997).

<sup>77</sup> *Id.*

<sup>78</sup> Illinois v. Lidster, 540 U.S. 419, 426–27 (2004) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)); see also Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 455 (1990) (examining the effect of sobriety checkpoints on reducing drunk driving to determine whether such checkpoints were reasonable); United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973) (“The equation must also take into account the likelihood that the search procedure will be effective in averting the potential harm.”).

<sup>79</sup> *Mission, Vision and Core Values*, TSA, <http://www.tsa.gov/about-tsa/mission-vision-and-core-values> (last modified Mar. 25, 2013).

<sup>80</sup> John Yoo, *The Real Problem with Obama’s Drone Memo*, WALL ST. J. (Feb. 7, 2013, 7:19 PM), <http://online.wsj.com/articles/SB10001424127887323951904578288380180346300.html>.

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

ment before 'an operational leader' . . . seizes a plane or places a bomb."<sup>82</sup>

In contrast, for law enforcement to perform a search, the officer must either have a warrant or have at least a "reasonable suspicion" of a crime—such as in a *Terry* frisk.<sup>83</sup> The search's allowable intrusiveness depends on either the scope of the warrant or the level of suspicion.<sup>84</sup> The courts, however, moved away from evaluating airport searches under *Terry* precisely because airport searches were too different from those performed by law enforcement officers.<sup>85</sup>

Courts have made it clear that the TSA is not a law enforcement agency and TSA employees are not law enforcement officers.<sup>86</sup> "[T]here can be no doubt that neither the [DHS] nor the [TSA] is a public law enforcement agency within the contemplation of the statute. Neither agency has as its predominant purpose or mission the enforcement of penal laws."<sup>87</sup> Instead, "both agencies are statutorily organized and authorized to protect national security."<sup>88</sup> The TSA "security functions do not involve . . . traditional law enforcement functions . . . like the investigation of crime, or the arrest, prosecution[,] or detention of criminal suspects."<sup>89</sup>

The remaining standard for evaluating TSA airport searches is as an administrative search. If a government interest exists "beyond the normal need for law enforcement," an administrative authority may perform a reasonable search to fulfill the govern-

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<sup>82</sup> *Id.* The military must use different rules for terrorists than ordinary courts use for criminals because "[b]y pretending to treat terrorists as if they were ordinary criminal suspects, the government makes it more likely that ordinary suspects will be treated as if they were terrorists." James Taranto, *Not the Drones They Thought They Knew*, WALL ST. J. (Feb. 11, 2013), <http://online.wsj.com/articles/SB10001424127887324196204578298094023943834.html>.

<sup>83</sup> See Rogers, *supra* note 2, at 519–20.

<sup>84</sup> See *id.*

<sup>85</sup> See *supra* note 45 and accompanying text.

<sup>86</sup> See *People v. Speer*, 255 P.3d 1115, 1122 (Colo. 2011).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (citing 6 U.S.C. § 111(b)(1) ("The primary mission of [the DHS] is to . . . prevent terrorist attacks within the United States[,] [and under] 49 U.S.C. § 114(d)[, the] TSA Under Secretary [is] responsible for 'security in all modes of transportation.'")).

<sup>89</sup> *Id.* (citing 6 U.S.C. § 111(b)(2) ("[P]rimary responsibility for investigating and prosecuting acts of terrorism shall be vested not in [the DHS], but rather in [f]ederal, [s]tate, and local law enforcement agencies with jurisdiction over the acts in question.")).

ment's interest.<sup>90</sup> But therein lies the difficulty with the TSA's position; TSA agents have less constitutional wiggle room than their armed forces or law enforcement counterparts, yet the TSA's mission to "[p]rotect the [n]ation's transportation systems" implicates power akin to that granted to the armed forces under the "rules of war."<sup>91</sup>

As a result, some federal courts have struggled with the question of defining the TSA. In *Electronic Privacy Information Center*, the D.C. Circuit dismissed the question out of hand, stating that the argument that "the TSA does not engage in 'law enforcement, correctional, or intelligence activity' borders upon the silly."<sup>92</sup> Other courts have rightly recognized that the TSA's actions must be limited to the administrative ends of protecting national security. "Given the broad discretion already granted to TSA agents to search the traveling public, it is important to deter unconstitutional conduct and to ensure that [the] TSA's broad powers are not improperly exploited for law-enforcement purposes."<sup>93</sup>

#### b. Circuit Split on the Test for Weighing Administrative Searches

There is a circuit split regarding the appropriate test for determining the constitutionality of airport security search procedures. The Supreme Court has held on multiple occasions that some kinds of warrantless searches need not employ the least intrusive means available to be consistent with the Fourth Amendment.<sup>94</sup> But note that the Court has not addressed air-

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<sup>90</sup> Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989).

<sup>91</sup> *Mission, Vision and Core Values*, *supra* note 79. Note, however, that even the rules of war do not allow the military unfettered discretion, particularly in relation to U.S. citizens within the nation's boundaries. Even the rules of war require that a citizen "associate [himself] with the military arm of the enemy government" in order for the military to have the right to engage that individual in battle. Yoo, *supra* note 80.

<sup>92</sup> Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 8 (D.C. Cir. 2011). Because it completely dismissed the question, the court failed to address how the case would be affected if TSA search agents were not law enforcement. *See id.*

<sup>93</sup> United States v. Fofana, 666 F.3d 985, 994 (6th Cir. 2012) (Moore, K., dissenting).

<sup>94</sup> *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2632–33 (2010) (police department's audit of employee's pager messages was not unreasonable despite department's failure to use the least intrusive means in reviewing the messages); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663–65 (1995) (school district's random drug testing of athletes was not unreasonable despite the availability of



port security specifically. Thus, the Ninth Circuit has, on several occasions when considering whether a warrantless search in the airport security context was reasonable under the Fourth Amendment, affirmed its rule that an airport screening search must be no more intrusive than necessary.<sup>95</sup>

But the D.C. Circuit rejected the no-more-intrusive-than-necessary approach in 2010 when considering whether warrantless searches using AIT scanners were acceptable under the Fourth Amendment.<sup>96</sup> The D.C. Circuit cited the Supreme Court's language from *Quon*, which said that "[t]his Court has 'repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment.'"<sup>97</sup> This approach, the direct opposite of that taken by the Ninth Circuit, created a circuit split. Furthermore, the D.C. Circuit did not acknowledge or address the requirement that for an administrative search, "the means employed must bear 'a close and

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less intrusive means, namely "drug testing on suspicion of drug use"); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002) (school district's blanket drug testing of all students who participate in competitive extracurricular activities was not unreasonable despite the availability of less intrusive means); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (police inventory search of arrested person's container or articles in possession was not unreasonable when done in accordance with established inventory procedures, even if it may have been less intrusive to seal the container or article instead of search it); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 (1976) (holding that immigration border checkpoints are not unreasonable given the strong public interest and minimal intrusion on Fourth Amendment interests, despite the argument that there are less intrusive means to achieving the same end; but the Court also contended that there may not actually be less intrusive means in this case). Note that none of the cases cited by *Quon*, which the D.C. Circuit relied on in *Electronic Privacy Information Center*, dealt with airport security. See *Quon*, 130 S. Ct. at 2626–35. The closest case was *Martinez-Fuerte*, but even then the Court only analyzed procedures at a border checkpoint. See *id.* Furthermore, the Court emphasized the extremely minimal intrusion on Fourth Amendment rights—most notably that "[n]either the vehicle or its occupants are searched." *Martinez-Fuerte*, 428 U.S. at 558.

<sup>95</sup> *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)).

<sup>96</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>97</sup> *Id.*; *Quon*, 130 S. Ct. at 2632 (internal quotation marks omitted). Note that *Quon* was a case addressing the "'special needs' of the workplace" exception, not airport security. See *Quon*, 130 S. Ct. at 2630. In addition, the D.C. Circuit ignored the fact that the Supreme Court elsewhere in its opinion repeatedly noted the importance of analyzing "whether the search was too intrusive." See, e.g., *id.* at 2631.

substantial relation' to the government's interest in pursuing the search."<sup>98</sup>

Either approach may potentially be the correct one. The Ninth Circuit's approach remains consistent with its prior case law on airport security measures.<sup>99</sup> Furthermore, the Supreme Court has never expressly held that an airport security search amounts to an administrative search.<sup>100</sup> In fact, the Court has not even considered any case relating to the Fourth Amendment concerns raised by airport security measures for many years, and certainly not since 2001.<sup>101</sup> Because the Court's other cases were not related to airport security,<sup>102</sup> it is possible that the Ninth Circuit considered the Supreme Court's language rejecting the least-intrusive-means framework to be inapplicable. One possible justification for such an approach is that "[w]here a special need exists, 'what is required is a fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests' to determine if the program is reasonable under the Fourth Amendment."<sup>103</sup> In airports, it may be reasonable to hold the government to a stricter standard—the least intrusive means necessary—because the airport search is already necessarily more intrusive than some of the other types of searches analyzed by the Court. Airport searches are warrantless, universally applied even in the absence of reasonable suspicion, and physically intrusive—passengers are either subjected to AIT scanners or enhanced pat-downs.

On the other hand, the D.C. Circuit's approach may retain merit because the Supreme Court's language is broad. Arguably, there are no significant disparities between these various Fourth Amendment contexts. In a field that is closely analogous to air-

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<sup>98</sup> Compare *Elec. Privacy Info. Ctr.*, 653 F.3d 1, with *United States v. Lifshitz*, 369 F.3d 173, 190–92 (2d Cir. 2004) (citation omitted) (stating that a search should “not sweep so broadly as to draw a wide swath of extraneous material into its net”). Maybe the D.C. Circuit thought this issue was too obvious for words, but its failure to address it simply leads to more confusion regarding the proper approach to considering Fourth Amendment concerns as they relate to airport security.

<sup>99</sup> See *Aukai*, 497 F.3d at 962 (quoting *Davis*, 482 F.2d at 913).

<sup>100</sup> *Id.* at 959 n.2.

<sup>101</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>102</sup> See cases cited *supra* note 94.

<sup>103</sup> *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573, at \*16 (S.D.N.Y. Dec. 7, 2005), *aff'd* 460 F.3d 260 (2d Cir. 2006) (quoting *N.G. v. Connecticut*, 382 F.3d 225, 231 (2d Cir. 2004)) (internal quotation marks omitted) (addressing the New York City subway inspection program where inspectors randomly stopped passengers to inspect containers).

port security—border checkpoint screening—the Supreme Court rejected the limitation that the chosen search method be the “least intrusive means.”<sup>104</sup>

The other circuits remain scattered. The Fifth and Eleventh Circuits align with the Ninth Circuit in requiring that an airport screening search be no more intrusive than necessary.<sup>105</sup> The Second Circuit’s position is subject to multiple valid interpretations, and thus is unclear.<sup>106</sup> The Third Circuit’s position on the question is also unclear; in *United States v. Hartwell*, the Third Circuit held that progressively intrusive search procedures did not violate the Fourth Amendment because they were “minimally intrusive.”<sup>107</sup> But in a footnote, the court noted that in so holding, it declined to set “the outer limits of intrusiveness in the airport context.”<sup>108</sup> In the same footnote, the court went on to clarify that it was refraining from “devis[ing] any bright-line test” for future cases; instead, the court was *merely holding* that the particular search under review was acceptable under *Brown*’s weighing of the “‘gravity of the public concerns served by the seizure, the degree to which the seizure advances the public in-

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<sup>104</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–64 (1976).

<sup>105</sup> Compare *United States v. Skipwith*, 482 F.2d 1272, 1275–76 (5th Cir. 1973) (“The search procedures have every indicia of being the most efficacious that could be used.”), and *United States v. Herzbrun*, 723 F.2d 773, 776–77 (11th Cir. 1984) (quoting *Skipwith*, 482 F.2d at 1275), with *Aukai*, 497 F.3d 955.

<sup>106</sup> Compare *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) (noting that “to be reasonable the search must be as limited as possible commensurate with the performance of its functions”), with *Cassidy v. Chertoff*, 471 F.3d 67, 80 (2d Cir. 2006) (“[W]hat matters” at a ferry security checkpoint “is not whether the defendants could have . . . devis[ed] a less intrusive means of searching passengers, but whether the means they chose unconstitutionally trenches on plaintiffs’ privacy interests in an unreasonable way”); see also *VanBrocklen v. United States*, 410 F. App’x 378, 379–80 (2d Cir. 2011) (dismissing a pro se litigant’s Fourth Amendment claim, noting that “[r]easonableness under the Fourth Amendment does not require employing the least intrusive means” (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 837 (2002))). It is interesting to note that although the *Cassidy* court claimed that the government need not “employ[ ] the least intrusive means,” it upheld the “search of carry-on baggage . . . [as] minimally intrusive.” *Cassidy*, 471 F.3d at 80–81.

<sup>107</sup> *United States v. Hartwell*, 436 F.3d 174, 178–81 (3d Cir. 2006). Reasonable minds can differ on *Hartwell*’s meaning. For example, the petitioner in *Electronic Privacy Information Center* used *Hartwell* to argue for the least intrusive means test, while the court used *Hartwell* to argue against the least intrusive means test. See *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10–11 (D.C. Cir. 2011) (citing *Hartwell*, 436 F.3d at 180).

<sup>108</sup> *Hartwell*, 436 F.3d at 180 & n.10.

terest, and the severity of the interference with individual liberty.’”<sup>109</sup>

The existence of a circuit split provides further evidence that the proper method of analysis for airport security searches remains unclear. Even among different courts applying the administrative-search doctrine, the outcome may differ depending on the specific prongs of the particular test used in that circuit.

### c. Privacy Concerns

In determining the reasonableness of a search, the Fourth Amendment requires a consideration of “the degree to which [the security measure] intrudes upon an individual’s privacy.”<sup>110</sup> Indeed, in many cases, a holding of reasonableness under the Fourth Amendment may be strengthened precisely because a particular search technique is so unintrusive.<sup>111</sup> It logically follows that the opposite may be true as well.<sup>112</sup>

In the airport security context, even minor privacy violations can escalate into major concerns. TSA officers search millions of passengers every day.<sup>113</sup> Any Fourth Amendment violation is a problem; when multiplied by millions, unacceptable. Because of the “sacred nature” of the Fourth Amendment,<sup>114</sup> the administrative-search doctrine balances the government interest (discussed below<sup>115</sup>) against the privacy interests of the individual being searched.

The most well-known privacy concern related to airport security has arisen in the last few years with the installation of AIT scanners as the primary screening method used at airports nationwide.<sup>116</sup> A national backlash occurred, and everything from

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<sup>109</sup> *Id.* at 178–79, 180 n.10 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

<sup>110</sup> *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

<sup>111</sup> *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 557–60 (1976) (“[T]he . . . intrusion on Fourth Amendment interests is quite limited.”).

<sup>112</sup> That is, a search becomes less reasonable as the search technique becomes more intrusive.

<sup>113</sup> *See TSA Myth or Fact: Leaked Images, Handcuffed Hosts, Religious Garb, and More!*, TSA BLOG (Nov. 18, 2010), <http://blog.tsa.gov/2010/11/tsa-myth-or-fact-leaked-images.html>.

<sup>114</sup> *See, e.g., Fixel v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974) (“The sacredness of a person’s . . . right of personal privacy . . . [is a] paramount consideration[] in our country and [is] specifically protected by the Fourth Amendment.”); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (“[A] person’s body and home [are] areas afforded the greatest Fourth Amendment protection.”).

<sup>115</sup> *See infra* Part II.C.4.d.

<sup>116</sup> *See Deal, supra* note 16, at 526–27.

passengers wearing anti-TSA t-shirts<sup>117</sup> to stripping at security checkpoints<sup>118</sup> has been the norm ever since.<sup>119</sup>

One reason for potential privacy concerns is that AIT scanners are different in kind from previous scanning technology.<sup>120</sup> Magnetometers and metal-detecting wands merely detect whether metal is present, but AIT scanners, by contrast, produce images of unclothed individual passengers.<sup>121</sup> In *Electronic Privacy Information Center*, the D.C. Circuit—which upheld the constitutionality of AIT scanners against Fourth Amendment review—acknowledged that “it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not.”<sup>122</sup> The court also concluded that “the TSA’s policy substantially changes the experience of airline passengers.”<sup>123</sup> Some have argued that such scans amount to a “virtual strip search.”<sup>124</sup> Such sentiments are shared by at least a portion of the public, as evidenced by the public outcry against the use of AIT scanners as the primary scanning method in all airports.<sup>125</sup>

The D.C. Circuit also found the TSA’s steps to protect passenger privacy to be adequate.<sup>126</sup> “[W]e must acknowledge the steps the TSA has already taken to protect passenger privacy, in par-

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<sup>117</sup> See, e.g., *I Was Molested by the TSA T-Shirts*, ZAZZLE, [http://www.zazzle.com/i\\_was\\_molested\\_by\\_the\\_tsa\\_t\\_shirts-235344171002364128](http://www.zazzle.com/i_was_molested_by_the_tsa_t_shirts-235344171002364128) (last visited Sept. 22, 2013).

<sup>118</sup> *Man Strips at Oregon Airport to Protest Security Measures*, REUTERS (Apr. 18, 2012, 3:38 PM), <http://www.reuters.com/article/2012/04/18/us-usa-strip-airport-idUSBRE83H17Z20120418>.

<sup>119</sup> Such a reaction from the public is problematic because “controversial programs require public support to be sustained. . . . ‘Otherwise [the President is] going to find [him]self in a politically vulnerable position.’” Peter Baker, *Obama’s Turn in Bush’s Bind*, N.Y. TIMES (Feb. 9, 2013), <http://www.nytimes.com/2013/02/10/world/obamas-turn-in-bushs-bind-with-defense-policies.html> (discussing President Obama’s evolution on anti-terror policies, and how his policies compare to those of President George W. Bush).

<sup>120</sup> Reinert, *supra* note 7, at 220 n.75.

<sup>121</sup> See *id.*

<sup>122</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011).

<sup>123</sup> *Id.* at 7.

<sup>124</sup> E.g., Stancombe, *supra* note 5, at 210 (arguing that AIT body scanners are the equivalent of virtual strip searches and therefore violate the Fourth Amendment).

<sup>125</sup> See, e.g., Kim Zetter, *National Opt-Out Day Called Against Invasive Body Scanners*, WIRED (Nov. 12, 2010, 6:00 PM), <http://www.wired.com/threatlevel/2010/11/national-opt-out/> (activists calling for passengers to decline AIT scans and enhanced pat-downs on “National Opt-Out Day”).

<sup>126</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10–11.

ticular distorting the image created using AIT and deleting it as soon as the passenger has been cleared.”<sup>127</sup> No other circuit has explicitly considered AIT scanners from a constitutional perspective, but it is telling that the D.C. Circuit found the TSA’s privacy-protection measures to be adequate. Normally the Supreme Court does not allow unconstitutional statutes—or government actions—to stand “merely because the [g]overnment promise[d] to use [them] responsibly.”<sup>128</sup> Yet in 2011—before Congress changed the law to require the TSA to protect passenger privacy<sup>129</sup>—the D.C. Circuit held that the Fourth Amendment or related privacy concerns<sup>130</sup> do not prevent the TSA from using AIT scanners.<sup>131</sup> The court performed no analysis of whether the use of AIT scanners *actually improved* security and simply ignored or rejected the privacy concerns.<sup>132</sup> The only real

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<sup>127</sup> *Id.* But note that this reasoning is flawed. It does not matter what privacy intrusions the government is *not* making (i.e., “the steps the TSA has already taken to protect passenger privacy”); instead, what matters is what privacy intrusions the TSA is *still making*. *Id.* at 10. “It is the objective effect of the [s]tate’s actions on the privacy of the individual that animates the Fourth Amendment.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 52 (2000) (Rehnquist, J., dissenting).

<sup>128</sup> *United States v. Stevens*, 559 U.S. 460, 462 (2010). This argument is particularly compelling in the body scanner context because despite the government’s promise that scans produced using AIT scanners cannot be saved, some have been. See, e.g., Joel Johnson, *One Hundred Naked Citizens: One Hundred Leaked Body Scans*, GIZMODO (Nov. 16, 2010, 11:00 AM), <http://gizmodo.com/5690749/these-are-the-first-100-leaked-body-scans> (describing a millimeter wave scanner in a Florida federal courthouse on which U.S. Marshals had improperly saved 35,000 images of scans of individuals); see also Baker, *supra* note 119 (“We make policy assuming that people in power might abuse it. To do otherwise is foolish.”).

<sup>129</sup> See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 826, 126 Stat. 11, 132 (2012) (to be codified at 49 U.S.C. § 44901(l)).

<sup>130</sup> One of several privacy concerns was that “the Chief Privacy Officer of the DHS failed to discharge her statutory duties generally to ‘assur[e] that the use of technologies’ does not ‘erode[ ] privacy protections’ and, more specifically, to make an assessment of the rule’s impact upon privacy.” *Elec. Privacy Info. Ctr.*, 653 F.3d at 8–9 (citing 6 U.S.C. § 142(a)(1), (4)). The Chief Privacy Officer’s most recent assessment at the time had been made nearly two years earlier in 2009, before the TSA “decided to extend the use of AIT from primary screening at six airports . . . to primary screening at every airport.” *Id.* at 9. But the court “infer[red] from the absence of any subsequent assessment” that the Chief Privacy Officer had made “a determination . . . that her prior efforts remain[ed] sufficient.” *Id.* Such a non sequitur would be problematic in any case, but it is especially disturbing in this case because the Fourth Amendment is so strongly protected in almost all other contexts. See, e.g., *Fixel v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974).

<sup>131</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 11.

<sup>132</sup> See *id.* at 10–11.

reasoning offered by the court for its outcome was “the obvious need for the TSA to continue its airport security operations without interruption.”<sup>133</sup> But such reasoning does not constitute the balancing required by the analysis; instead, the court is supposed to examine whether evidence showing the effectiveness of the given security measure—in this case, the use of AIT scanners—further the government interest, and if so, to what extent it does so.<sup>134</sup>

Congress has taken steps to require the TSA to consider passengers’ privacy concerns. In 2012, Congress passed the FAA Modernization and Reform Act of 2012, which includes a section on “[p]rivacy protections for air passenger screening with advanced imaging technology.”<sup>135</sup> This law requires that “any advanced imaging technology used for the screening of passengers” be “equipped with and employ[ ] automatic target recognition software; and . . . compl[y] with such other requirements as the Assistant Secretary [of Homeland Security] determines necessary to address privacy considerations.”<sup>136</sup>

In other contexts—particularly the national-security exception as it relates to warrantless electronic surveillance—the Court has been more eager to avoid involvement by simply allowing Congress to exercise a check on the Executive Branch. With the FAA Modernization and Reform Act of 2012, Congress has codified privacy measures with regard to AIT scanners.<sup>137</sup> But it remains to be seen whether those privacy portions of the statute are carried out by the Executive.<sup>138</sup>

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<sup>133</sup> *Id.* at 11.

<sup>134</sup> For further discussion of the D.C. Circuit’s flawed reasoning, see R. Gregory Israelsen, *The D.C. Circuit’s EPIC Failure in Electronic Privacy Information Center v. United States Department of Homeland Security*, 78 J. AIR L. & COM. (forthcoming 2013).

<sup>135</sup> FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 826, 126 Stat. 11, 132 (2012) (to be codified at 49 U.S.C. § 44901(*l*)).

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

<sup>137</sup> *See id.*

<sup>138</sup> In other contexts, the TSA has proven uncooperative in complying with externally imposed restrictions. *See, e.g., infra* note 212 and accompanying text. But also note that the TSA recently announced that it would remove its last 174 backscatter scanners from airports, replacing them with the less intrusive millimeter wave scanners. Jack Nicas, *TSA to Halt Revealing Body Scans at Airports*, WALL ST. J. (Jan. 18, 2013, 6:15 PM), <http://online.wsj.com/article/SB10001424127887323783704578250152613273568.html>. By June 1, 2013, all airport scanners will “filter images to depict only potentially hazardous items on a generic human silhouette, rather than an image of the traveler’s body.” *Id.*

## d. Government Interest

Balanced against the interests of individuals—to be free from government intrusion and to maintain privacy of their persons and possessions—is the government’s interest in protecting its citizens. “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”<sup>139</sup> No one wants another 9/11.<sup>140</sup>

Nevertheless, when considering the reasonableness of searches, the Court requires that *each incremental change* in the search procedure be shown to improve security.<sup>141</sup> The Fourth Amendment is too sacred to accept anything less.<sup>142</sup>

The natural question to ask when balancing a previously unconsidered search procedure with the Fourth Amendment’s reasonableness requirement is to what extent the search furthers the government’s interest. That is, when the TSA implements new technology or a new search procedure, the question should be whether the new technology or technique actually results in an increase in public safety.<sup>143</sup> If an improvement has been made, the amount of improvement should then be considered. This increase in privacy benefits is then weighed against the increase in privacy costs to the individual.<sup>144</sup>

Regardless of whether a given search procedure is “no more intrusive than necessary,”<sup>145</sup> an objective analysis of whether the

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<sup>139</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

<sup>140</sup> *See, e.g., United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002) (“[T]he events of September 11, 2001, only emphasize the heightened need to conduct searches at this nation’s international airports.”).

<sup>141</sup> *See Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (“[W]e are unconvinced that the incremental contribution to . . . safety of the [search procedure] justifies the practice under the Fourth Amendment.”).

<sup>142</sup> *See cases cited supra* note 114.

<sup>143</sup> If there is no improvement in security, there is no legally justifiable reason to intrude on an individual’s Fourth Amendment interest in privacy. *See, e.g., Prouse*, 440 U.S. at 659. The administrative-search exception does not apply in such cases because the procedure under review does not actually improve security and thus offers nothing to the government interest side of the balancing test. Of course, cynics point out that politicians may be interested in “security theater”—making security changes for show to convince the public that the government is responding in some way—but such changes ought to hold no weight in a Fourth Amendment analysis.

<sup>144</sup> As discussed elsewhere in this article, the problem is that courts often do not actually perform this balancing; they merely pay lip service to the administrative-search analysis.

<sup>145</sup> *See supra* Part II.C.4.b.



search procedure, as implemented, is effective at preventing air terrorism may have a bearing on the Fourth Amendment reasonableness of the given search procedure.<sup>146</sup>

For example, in the case of AIT scanners, security experts are divided about the security improvements actually achieved by the scanners.<sup>147</sup> Outside of the TSA's own studies—which for obvious reasons are likely to find only one outcome<sup>148</sup>—few analysts have said that post-2001 TSA procedures are completely effective at improving the safety of air travel.<sup>149</sup> Even other members of the government have pointed out the less-than-stellar results of AIT scanners: the Office of the Inspector General “identified vulnerabilities in the screening process at the passenger screening checkpoint at the domestic airports where [it]

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<sup>146</sup> Such an analysis would be appropriate in any other administrative-search analysis. See, e.g., *Martinez-Fuerte v. United States*, 428 U.S. 543, 569 (1976) (Brennan, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)). But after 9/11, no court has ever performed a rigorous balancing of the effectiveness of a new airport security measure against its intrusion on privacy. See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10–11 (D.C. Cir. 2011) (where the D.C. Circuit did not consider any objective measures related to the effectiveness of AIT scanner technology).

<sup>147</sup> See Leon Kaufman & Joseph W. Carlson, *An Evaluation of Airport X-Ray Backscatter Units Based on Image Characteristics*, 4 J. TRANSP. SEC. 73 (2011); *infra* notes 148–49 and accompanying text.

<sup>148</sup> See BRUCE SCHNEIER, *LIARS AND OUTLIERS: ENABLING THE TRUST THAT SOCIETY NEEDS TO THRIVE* 199, 201 (2012).

[T]he TSA has a self-preservation interest. . . . The TSA . . . would never suggest returning airport security to pre-9/11 levels and giving the rest of its budget back so it could be spent on broader anti-terrorism measures that might make more sense, such as intelligence, investigation, and emergency response. It's a solution that goes against the interests of the TSA as an institution.

*Id.*

<sup>149</sup> By contrast, there are multiple examples of security experts finding that most post-9/11 security measures have not improved airplane security. See, e.g., *infra* note 218 and accompanying text; see also Kaufman & Carlson, *supra* note 147, at 73 (discussing the security flaws in body-scanners); Bruce Schneier, *Video Shows TSA Full-Body Scanner Failure*, SCHNEIER ON SECURITY (Mar. 12, 2012), [https://www.schneier.com/blog/archives/2012/03/video\\_shows\\_tsa.html](https://www.schneier.com/blog/archives/2012/03/video_shows_tsa.html) (Schneier describes a video “showing a blogger walking through two different types of full-body scanners with metal objects. Basically, by placing the object on your side, the black image is hidden against the scanner’s black background.”); *Nackscanner bei Markus Lanz*, YOUTUBE (Jan. 14, 2010), <http://www.youtube.com/watch?v=nrKvweNugnQ> (clip of German TV segment showing a body scanner catching a subject’s cell phone and swiss-army knife, but missing all the components to make a bomb).

conducted testing.”<sup>150</sup> It concluded that “improvements can be made in the operation of new passenger screening technologies to prevent individuals with threat objects from entering airport sterile areas undetected.”<sup>151</sup>

e. A Difficult Balancing Act

In practice, the administrative-search analysis’s required balancing presents a difficult task for courts. On one hand, a judge is faced with upholding the individual liberties that the Constitution was enshrined to protect. On the other hand, no court wants to create a security weakness in the name of liberty that could later be exploited by terrorists.<sup>152</sup>

The balancing portion of the analysis is meant to limit the scope of the exception. But many courts and members of the public may ask why the scope of such an exception matters at all. “We don’t want another 9/11, so the inconvenience or loss of privacy is worth it,” so the saying goes. And for the most part, the government has succeeded in preventing additional terrorist incidents.<sup>153</sup> “In the process, however, government officials have occasionally lost sight of their mission, or strayed from it, and have violated individual privacy rights . . . .”<sup>154</sup>

One reason the balancing may be so difficult for courts is that the required facts may not be readily available. There may not be much evidence in favor of or against the security measure’s effectiveness. Alternatively, there may be convincing evidence that a large number of travelers feel that their privacy is violated by the new measure, or no evidence of passenger sentiments at all. But every case is different because of the nature of the test; “[t]he balancing test articulated in the airport screening cases . . . is fact-sensitive.”<sup>155</sup> The facts are what matter to the analysis.

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<sup>150</sup> TSA PENETRATION TESTING OF ADVANCED IMAGING TECHNOLOGY, *supra* note 14.

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

<sup>152</sup> Notably, this is a false dilemma. The administrative-search exception does not ask courts to leave openings for terrorists; it merely asks them to weigh search procedures against the privacy interests of the individual. If a given search technique significantly improves security and has little impact on privacy, then the exception allows it. It is only ineffective search techniques, or those that impermissibly invade individual privacy interests, that are disallowed.

<sup>153</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 477 (4th ed. 2007) (“In almost every instance, [anti-terrorism] measures have succeeded in protecting the American people from harm.”).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 594.

Surprisingly, few appellate courts analyzing airport security measures actually look at the facts of the particular case.<sup>156</sup> Whether relevant facts are not before the court or the court simply chooses to ignore them is not clear. For example, in *Electronic Privacy Information Center*, the D.C. Circuit failed to perform any analysis of the facts regarding the security enhancements offered by AIT scanners.<sup>157</sup>

The balancing portion of the analysis is what protects privacy rights. Because the government may violate those rights, “[s]pecial care is . . . required in sorting out protected activities from those that could lead to violence or serious disruption of society and in selecting appropriate investigative techniques for each.”<sup>158</sup> That is, limiting the scope of the exception matters precisely because it is what makes the exception reasonable. Thus, by allowing the exception, the Constitution permits reasonable searches to take place, but courts should also limit the searches that may take place to reasonable ones.

Even if a new technology or search technique results in an increase in public safety, the test’s balancing requirement means that the increased benefit must be weighed against the corresponding invasion of privacy.<sup>159</sup> If, for example, a new TSA rule were implemented that required passengers to remove all clothing before being scanned, TSA officials would likely find and prevent an increased number of dangerous items—such as weapons—from getting past the security checkpoints. As a result, the government’s interest in maintaining safe air travel would be enhanced, but the corresponding cost to passenger privacy would be so great that few courts would allow such a policy to stand.

Of course, placing a limit on the scope of the government generally—or the TSA specifically—may arguably create an

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<sup>156</sup> See *id.* Obviously, appellate courts are not finders of fact. But because the administrative-search analysis is so fact specific, the appellate court ought to use the lower court’s findings of fact in performing the analysis. See FED. R. CIV. P. 52(a)(6).

<sup>157</sup> See *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10–11 (D.C. Cir. 2011).

<sup>158</sup> *Id.*

<sup>159</sup> Another approach might be to simply look at whether the new security measure, standing alone, has any impact on security. This approach seems less ideal in light of the Court’s language requiring that each incremental change in a search procedure must improve security. See *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

opening that terrorists may exploit. But such a tradeoff has been a consideration since the nation's founding:

The tradition of liberty in the United States casts a shadow over all national security surveillance, and is an overriding problem in addressing terrorism concerns. The core openness of our society permits all of us, including the potential terrorist, considerable freedom to move about, to associate with others, and to act in furtherance of political aims. As recent terrorist incidents in the United States have created a sense of urgency among citizens and government officials to find better preventive strategies, reflection has also reminded us that hasty actions to thwart terrorism may threaten the freedoms that permit an open society. Thus, in seeking ways to investigate potential terrorist activity, just as in fashioning better responses to terrorist incidents, the measures adopted must not undermine our basic freedoms.<sup>160</sup>

Courts analyzing airport security measures frequently cite to *City of Indianapolis v. Edmond*, in which dicta explained that airport security checkpoints were not affected by the holding limiting the city's drug interdiction checkpoints because at airports the need "to ensure public safety can be particularly acute."<sup>161</sup> But merely quoting that line should not exempt courts from performing the required balancing. *Edmond* did not exempt airport security measures from the administrative-search analysis; at most, it only adjusted the weight of the relevant factors.<sup>162</sup> To be exempted from the Fourth Amendment's warrant requirement, the government still must have a compelling interest that outweighs the privacy concerns of the individual.

#### D. DIFFERENT TIMES, DIFFERENT FRAMEWORK

Since 2001, most courts have applied the administrative-search theory.<sup>163</sup> But case law in which the administrative-search exception upholds airport security searches against Fourth Amendment challenges was primarily developed before the TSA even existed and before the implementation of many modern search procedures. This is particularly true with regard to the

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<sup>160</sup> *Id.* at 478–79.

<sup>161</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000).

<sup>162</sup> *See id.* That is, the government interest need not be as strong, or individual privacy interests must be stronger. A broader interpretation might be that there is no alternative reading required; *Edmond* simply acknowledged that the government interest is always stronger ("particularly acute"), and therefore the individual interest requirement is simply correspondingly heightened. *See id.*

<sup>163</sup> Note that this includes the only court to date to consider the constitutionality of AIT scanners. *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

use of AIT scanners and enhanced pat-down techniques. Therefore, some scholars have argued that the bounds of the exception may be too narrow for modern search procedures.

Furthermore, the Supreme Court has specifically singled out airport-security searches as being different from other administrative searches by placing different—fewer—restrictions on airport security measures.<sup>164</sup> This lends further support to the idea that airport security screening is ill-fitted for analysis under the administrative-search doctrine. For example, in *City of Indianapolis v. Edmond*, the Court held that a police narcotics checkpoint violated the Fourth Amendment.<sup>165</sup> The majority used a lot of surprising language, including such dicta as: “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”<sup>166</sup> The Court also hypothesized that “an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route” would be acceptable under the Fourth Amendment, but noted that authorities could not “simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.”<sup>167</sup> One could easily imagine how such language could be translated to the airport context: “authorities could not simply stop passengers as a matter of course to see if there just happens to be a terrorist boarding the plane.”<sup>168</sup> But lest any future court attempt to use the Supreme Court’s limitations on the administrative-search exception in the airport context, the Court finalized its opinion by stating that its holding “does not affect the validity of border searches or searches at places like airports and government buildings.”<sup>169</sup> The Court’s reason for excepting those searches was simply that they occur at places “where the need for such measures to ensure public safety can be particularly acute.”<sup>170</sup> Such a blanket exception lends credence to the argument that airport searches should be—or at least reasonably could be—considered under a differ-

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<sup>164</sup> See, e.g., *Edmond*, 531 U.S. 32.

<sup>165</sup> *Id.* at 48.

<sup>166</sup> *Id.* at 42.

<sup>167</sup> *Id.* at 44; see also Yoo, *supra* note 80 and accompanying text.

<sup>168</sup> The author did not find any court that actually attempted to use the Court’s language in this way.

<sup>169</sup> *Edmond*, 531 U.S. at 47–48.

<sup>170</sup> *Id.* Later courts that have examined airport searches have pointed to this language to justify TSA search measures. See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011).

ent Fourth Amendment framework than other administrative searches.

Given the shortcomings of applying the administrative-search exception to modern TSA technology and procedures, and the still-essential government interest in protecting the nation's security—particularly the safety of air travel—a new approach to considering Fourth Amendment concerns in the airport security context is needed. Other scholars have argued for the same.<sup>171</sup> This article argues that the national-security exception—traditionally applied to electronic surveillance—may be an appropriate framework for courts to use when examining the Fourth Amendment concerns related to airport security.

### III. THE NATIONAL-SECURITY EXCEPTION

#### A. HISTORY OF THE NATIONAL-SECURITY EXCEPTION

In 1928, the Supreme Court held in *Olmstead v. United States* that the Fourth Amendment did not cover wiretapping.<sup>172</sup> In the years following, the Attorney General began tapping telephone lines of “syndicated bootleggers” and in other “exceptional cases where the crimes [were] substantial and serious, and the necessity [was] great.”<sup>173</sup> Wiretapping became “an important law enforcement tool.”<sup>174</sup>

Congress restricted the use of wiretapping in the Federal Communications Act of 1934, which made it illegal for a person “to intercept and divulge or publish the contents of wire and radio communications.”<sup>175</sup> But the Justice Department interpreted the Act and a subsequent Supreme Court decision construing the Act to mean that “only the interception and divulgence of [wire communications] outside the Federal establishment was . . . unlawful,” and continued to perform “national security wiretaps.”<sup>176</sup>

In the 1967 *Katz v. United States* decision, the Court overruled *Olmstead*, holding that the Fourth Amendment required warrants for electronic surveillance.<sup>177</sup> But the Court specifically ex-

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<sup>171</sup> See, e.g., Rogers, *supra* note 2 (arguing for a modified critical-zone approach).

<sup>172</sup> *Olmstead v. United States*, 277 U.S. 438, 465–66 (1928).

<sup>173</sup> PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 693 (3d ed. 2011) (internal quotation marks omitted).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (quoting 47 U.S.C. § 605 (1964 ed.)).

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

<sup>177</sup> *Katz v. United States*, 389 U.S. 347, 353–59 (1967).

cepted from its holding cases "involving the national security."<sup>178</sup> Congress did the same. In response to *Katz*, it enacted the Omnibus Crime Control and Safe Streets Act of 1968.<sup>179</sup> The Act recognized, and specifically exempted from limitation,

the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.<sup>180</sup>

In 1972, the Supreme Court held in *United States v. United States District Court*,<sup>181</sup> also known as the *Keith* case, that the requirements of the Fourth Amendment applied even in cases involving threats to domestic security.<sup>182</sup> The United States had charged three defendants with conspiracy to destroy government property.<sup>183</sup> One of the defendants was also charged with bombing a CIA office in Michigan.<sup>184</sup> "The government argued that a warrant was not required because of the President's authority to 'gather intelligence information' and to 'protect the national security.'"<sup>185</sup> The Court acknowledged that "domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.'"<sup>186</sup> But even so, the Court held that warrants are still "required for the type of domestic security surveillance involved in this case."<sup>187</sup> Congress could, however, "consider protective standards" for surveillance involving the domestic security; those protective

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<sup>178</sup> *Id.* at 358 n.23.

<sup>179</sup> 18 U.S.C. §§ 2510-2520 (2006).

<sup>180</sup> *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (quoting 18 U.S.C. § 2511(3)).

<sup>181</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

<sup>182</sup> *Id.* at 324 (holding that "prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe").

<sup>183</sup> *Id.* at 299.

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

<sup>185</sup> Michael P. O'Connor & Celia Rumann, *Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 *FORDHAM INT'L L.J.* 1234, 1253 (2003) (quoting *U.S. Dist. Court (Keith)*, 407 U.S. at 300-01).

<sup>186</sup> *U.S. Dist. Court (Keith)*, 407 U.S. at 322.

<sup>187</sup> *Id.*

standards would “differ from those already prescribed for specified crimes in Title III.”<sup>188</sup> The Court continued,

Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.<sup>189</sup>

Thus, although it is reasonable to infer from the case “that national security wiretaps may not have to meet all the Fourth Amendment requirements applicable in criminal investigations,” the Court “did not specify what alternative processes might be appropriate in such cases.”<sup>190</sup>

In the years after *Keith*, other courts allowed the Executive Branch to conduct warrantless surveillance “for the purpose of gathering foreign intelligence.”<sup>191</sup> It was in this context that Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA).<sup>192</sup> FISA “established warrant requirements to govern certain instances of foreign intelligence gathering[ ] and a process for assembling a panel of judges . . . to enforce them.”<sup>193</sup> After FISA was passed, the Executive Branch “took the position that it retained inherent authority to conduct so-called ‘black bag jobs,’ i.e., surreptitious physical entries onto premises to search for tangible items.”<sup>194</sup> But Congress amended FISA to include physical searches in 1994<sup>195</sup> and has since amended the Act to include “pen register and trap-and-trace orders . . . and . . . subpoenas for business records in the hands of third parties.”<sup>196</sup>

History shows that the President has the constitutional power to protect national security. Where Congress has regulated to require a warrant, the courts have upheld the regulation. But at nearly every turn, the Executive Branch has filled in the gaps by performing warrantless searches in the name of national secur-

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 322–23.

<sup>190</sup> *DYCUS ET AL.*, *supra* note 153, at 495.

<sup>191</sup> *See, e.g.*, *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973).

<sup>192</sup> *SHANE & BRUFF*, *supra* note 173, at 702.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 707.

<sup>195</sup> Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 302, 108 Stat. 3423, 3444–46 (1994) (codified at 50 U.S.C. § 1822).

<sup>196</sup> *SHANE & BRUFF*, *supra* note 173, at 708.



ity. While the national-security exception has traditionally been limited to the electronic-surveillance-through-wiretapping sphere, this article examines the possibility of extending the national-security exception to examining executive power in the airport-security context.

## B. APPLYING THE NATIONAL-SECURITY EXCEPTION TO THE TSA

Examining the constitutionality of airport security searches under the framework of the Executive's inherent power to protect the national security—the “national-security exception”—may provide an approach that better protects both national-security interests as well as constitutional privacy rights of air travelers. The administrative-search doctrine, as discussed above, is ill-suited to a world with the TSA.<sup>197</sup> Most courts pay lip service to the idea of balancing, but then, due to the national-security interest inherent in airport security—namely, preventing airplane terrorism—place a thumb on the scale in favor of the government.<sup>198</sup> The danger of such an approach is that it may not adequately protect the vital interests of individuals under the Fourth Amendment. Because courts already treat airport security checkpoints differently<sup>199</sup> than other administrative searches—namely, with fewer Fourth Amendment restrictions—the courts should explicitly recognize that fact. Applying the national-security exception would allow courts to move away from the confusing and inconsistent airport-security-checkpoint-special-administrative-search doctrine to a judicial framework that protects individual travelers as well as the nation as a whole.<sup>200</sup> At the same time, courts could finally avoid the difficult—if not impossible—task of squaring the TSA's new search regime with case law decided under pre-2001 screening procedures.<sup>201</sup>

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<sup>197</sup> See *supra* Part II.C.4.

<sup>198</sup> One example is the lack of analysis of the security benefits of body scanners by the D.C. Circuit in *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 653 F.3d 1, 10–11 (D.C. Cir. 2011). See Israelsen, *supra* note 134.

<sup>199</sup> See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>200</sup> It would also protect the administrative-search exception for use in non-airport security contexts.

<sup>201</sup> See Reinert, *supra* note 7 (arguing that the TSA's new search regime is much more difficult to square with fundamental Fourth Amendment principles than the FAA's initial airport screening procedures).

### 1. *Does the Exception Apply?*

Historically, courts have applied the national-security exception only to electronic surveillance—warrantless wiretapping.<sup>202</sup> Even then, courts have applied the exception narrowly. For example, the D.C. Circuit in *United States v. Ehrlichman* declined to apply the exception to a case in which government agents broke into a psychiatrist's office to gather evidence.<sup>203</sup> The court held that no national-security exception to the warrant requirement could be invoked without specific authorization by the President or Attorney General.<sup>204</sup> Furthermore, the concurrence argued that even if the Supreme Court were to allow the national-security exception to justify warrantless surveillance, it would only be when "practical realities require a . . . surveillance . . . that does not lend itself to the warrant procedure."<sup>205</sup> Scholars have also explored the question whether the national-security exception to the warrant requirement may be limited to only electronic surveillance cases.<sup>206</sup>

Those questions may not matter in the context of airport security. It is unquestionably settled that warrantless airport security searches are permissible,<sup>207</sup> precisely because the practical realities of airport security require the ability to search every passenger, regardless of whether any individualized suspicion exists. To impose a warrant requirement at the airport would be impracticable.<sup>208</sup> Thus, the question whether the national-secu-

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<sup>202</sup> See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972); *Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975) (holding that the government must obtain a warrant before installing a wiretap on a domestic organization that is not an agent of or collaborating with a foreign power, even if the wiretap is used to gather foreign intelligence to protect national security).

<sup>203</sup> *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976).

<sup>204</sup> *Id.* at 925.

<sup>205</sup> *Id.* at 938 (Leventhal, J., concurring).

<sup>206</sup> See William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 67–68 (2000) ("In light of the potentially greater intrusiveness of electronic surveillance, it may be reasonable to expect greater executive discretion to conduct warrantless searches than warrantless wiretaps."); Andrew Puzder, *The Fourth Amendment and Executive Authorization of Warrantless Foreign Security Surveillance*, 1978 WASH. U. L. Q. 397 (1978) (examining efforts to legislatively limit executive discretion in this area); David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611, 627–28 (1983) (arguing that a general national-security exception to the Fourth Amendment warrant requirement would be unconstitutional).

<sup>207</sup> See Rogers, *supra* note 2, at 519.

<sup>208</sup> See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829 (2002) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

ity exception could be used to escape the warrant requirement is unnecessary. Because there is no question that airport security agents do not need to obtain pre-seizure judicial approval, the question is simply what the scope of the national-security exception would be if it were applied in airport security cases.

## 2. Courts Already Treat Airport Security Differently

It is helpful to note that in airport security cases, courts already apply a standard apart from the typical administrative-search doctrine.<sup>209</sup> For example, in a typical Fourth Amendment case, after finding a violation, a court will not allow any further action on the part of the government.<sup>210</sup> By contrast, when considering the legality of the TSA using AIT scanners for screening airport passengers in *Electronic Privacy Information Center*, the D.C. Circuit held that the TSA unjustifiably “fail[ed] to initiate notice-and-comment rulemaking before announcing it would use AIT scanners for primary screening.”<sup>211</sup> But citing “the obvious need for the TSA to continue its airport security operations without interruption,” the court decided to simply “remand the rule to the TSA” rather than vacate it.<sup>212</sup> While the court considered and rejected the Fourth Amendment claims—using a cur-

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<sup>209</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>210</sup> See, e.g., *id.* at 44, 48 (narcotics checkpoint program found in violation of Fourth Amendment was terminated).

<sup>211</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 11 (D.C. Cir. 2011).

<sup>212</sup> *Id.* Note that after a year passed without the TSA responding to the D.C. Circuit’s order to the TSA to initiate notice-and-comment proceedings on its use of AIT scanners for primary screening, the Electronic Information Privacy Center filed a Petition for Writ of Mandamus asking the court to enforce its own order. Petition for Writ of Mandamus to Enforce this Court’s Mandate at i, *In re Elec. Privacy Info. Ctr.*, No. 12-1307 (D.C. Cir. Jul. 17, 2012). The petition was “denied in light of the Government’s representation that ‘the process of finalizing the AIT Rulemaking documents so that the NPRM may be published is expected to be complete by or before the end of February 2013.’” Order, *In re Elec. Privacy Info. Ctr.*, No. 12-1307 (D.C. Cir. Sept. 25, 2012) (quoting Declaration of John P. Sammon at 9, *In re Elec. Privacy Info. Ctr.*, No. 12-1307). The TSA finally initiated notice-and-comment proceedings on AIT scanners in mid-2013, over two years after the D.C. Circuit mandated the proceedings. See Susan Stellin, *Trying Passenger Patience*, N.Y. TIMES (Apr. 15, 2013), [http://www.nytimes.com/2013/04/16/business/public-pours-scorn-on-airport-body-scanners.html?\\_r=0](http://www.nytimes.com/2013/04/16/business/public-pours-scorn-on-airport-body-scanners.html?_r=0). Additionally, the TSA recently announced that it would be removing all backscatter scanners from airports and that, after June 1, 2013, all airport scanners would display potentially hazardous items on a generic passenger image rather than on images of actual individual passengers. See Nicas, *supra* note 138.

sory administrative-search analysis<sup>213</sup>—the point here is that the court treated the TSA differently on the basis of its “essential security operation.”<sup>214</sup>

The D.C. Circuit erred for several reasons, not the least of which being that it simply failed to balance the competing interests of the case. The court did not look closely at the privacy concerns asserted by the passengers; it instead merely accepted the TSA’s claim that it was seeking to protect passenger privacy.<sup>215</sup> Independent of the TSA’s claim about passenger privacy lie the actual experiences of individual passengers—if an individual feels violated, an agency’s claim that the person should not feel that way means little. The fact that the lawsuit was brought ought to have provided at least a minimum level of evidence that a real privacy concern did in fact exist.

The D.C. Circuit also failed to address any evidence that AIT screeners actually improve passenger security.<sup>216</sup> Instead, it merely accepted at face value—with no supporting evidence—the assertion that “an AIT scanner, unlike a magnetometer, is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form.”<sup>217</sup> But this claim lies in sharp contrast to the facts about AIT scanners. “The scanners cannot detect [the plastic explosive] PETN directly; instead they look for suspicious bulges under clothing. Because PETN is a Silly Putty-like material, it can be fashioned into a thin pancake. Taped flat to the stomach, the pancake is invisible to scanning machines.”<sup>218</sup> Another option terrorists could use to defeat the scanners would be to “stick gum-size wads of the explosive in their mouths, then go through security enough times to accumulate the desired amount.”<sup>219</sup>

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<sup>213</sup> The D.C. Circuit spent little over a printed page—fewer than 640 words spanning four paragraphs—on its entire analysis of the Fourth Amendment issues in the case. See *Elec. Privacy Info. Ctr.*, 653 F.3d at 10–11.

<sup>214</sup> *Id.* at 8.

<sup>215</sup> See *supra* notes 122–29 and accompanying text.

<sup>216</sup> See *Elec. Privacy Info. Ctr.*, 653 F.3d at 10–11.

<sup>217</sup> *Id.* at 10.

<sup>218</sup> Charles C. Mann, *Smoke Screening*, VANITY FAIR (Dec. 20, 2011), <http://www.vanityfair.com/culture/features/2011/12/tsa-insanity-201112>. Mann’s article was based on a trip to the airport with security expert Bruce Schneier. *Id.* It is unclear whether the arguments noted above were raised in the *Electronic Privacy Information Center* case, but Schneier was a named party—against the Department of Homeland Security.

<sup>219</sup> *Id.*

Neither the existence of privacy concerns of air travelers nor of security imperfections of AIT scanners is dispositive. The problem in *Electronic Privacy Information Center* was that the D.C. Circuit failed to perform the requisite balancing.<sup>220</sup> Instead, the court simply pointed to *Edmond*<sup>221</sup>—“[t]he need to search airline passengers ‘to ensure public safety can be particularly acute’”—as the reason for finding that “the balance clearly favors the Government.”<sup>222</sup> Such a cavalier approach to “balancing” cannot be what the Court had in mind when it described the “sacred nature” of the Fourth Amendment.<sup>223</sup>

Because modern courts have proven unable or unwilling to perform a true administrative-search balancing for airport security in the wake of 9/11, a new framework for analyzing the issue is needed. The national-security exception, based on the Executive’s constitutional obligation to protect the nation’s security, provides that necessary framework.

### 3. *The Scope of the National-Security Exception as Applied to the TSA*

The scope of the national-security exception—as applied to airport security—is unclear because it is undefined. Congress expanded FISA to cover physical searches, but not those of the kind implicated in airport security.<sup>224</sup>

The *Keith* case acknowledged that there is no “question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest.”<sup>225</sup> But the Court went on to state that “[i]mplicit in [the President’s] duty [to preserve, protect, and defend the Constitution] is the power to protect our [g]overnment against those who would subvert or overthrow it by unlawful means.”<sup>226</sup>

Yet in recognizing the difficulty of the question, the Court explained, “Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest

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<sup>220</sup> See *Elec. Privacy Info. Ctr.*, 653 F.3d at 10–11.

<sup>221</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>222</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10 (quoting *Edmond*, 531 U.S. at 47–48).

<sup>223</sup> See cases cited *supra* note 106 and accompanying text.

<sup>224</sup> See SHANE & BRUFF, *supra* note 173.

<sup>225</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 308 (1972) (citing *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967)).

<sup>226</sup> *Id.* at 310.

becomes apparent.”<sup>227</sup> One reason that applying the national-security exception would be preferable to the administrative-search exception is that courts would likely be more vigilant against “mission creep.”<sup>228</sup> Using the national-security exception reminds a court that the true question is whether the national-security interest in the given fact-specific case outweighs the important Fourth Amendment protections being violated. By examining airport security questions in such a context, courts can be explicit in acknowledging that they are putting a “thumb on the scale” to allow the TSA to prevent terrorism in aviation.

At the same time, by acknowledging the weight given to the government’s interest in security, a court will undoubtedly be more conscious of the need to ensure that the individual’s privacy interests are not being put on the altar for naught. An individual whose privacy is violated can sue for relief, thereby allowing courts to further define the contours of the exception.

One way that a court could perform a proper analysis under the airport national-security exception would be to consider actual security improvements. If a new technology is being questioned, then the actual improvement in the battle against terrorism can be measured and considered. If a new search technique or procedure is before the court, again, the actual security improvement can be evaluated. If the government cannot show an improvement in security, if the improvement is merely marginal, or even if the improvement is questionable, the court can then determine whether the national-security interest is really being advanced by the change.

Actual security improvements can be weighed against the corresponding increased intrusion on the individual’s privacy. The degree of intrusion would be dictated by the facts of the case, but the more a security measure intrudes on an individual’s privacy, the more the government should be required to show that the security measure actually increases security. Conversely, the less a security measure intrudes on privacy, the less scrutiny that measure must undergo. Even measures formerly forbidden<sup>229</sup> by

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<sup>227</sup> *Id.* at 314.

<sup>228</sup> One example of mission creep may include TSA officers “fish[ing] for evidence of criminal conduct far removed from the agency’s mandate of ensuring flight safety.” Scott McCartney, *Is Tougher Airport Screening Going Too Far?*, WALL ST. J. (July 16, 2009, 1:44 PM), <http://online.wsj.com/article/SB10001424052970204556804574261940842372518.html>.

<sup>229</sup> This is theoretical, since no court has ever struck down an airport security measure for failing the administrative-search balancing test.

the courts may now be acceptable, whether because privacy standards have changed<sup>230</sup> or because technology has made the measure more effective.<sup>231</sup>

Performing a balancing in full view of the fact that a warrantless search is being performed on millions of suspicionless passengers with the goal of improving national security would help a court keep proper perspective. While both the administrative-search exception and the national-security exception require balancing, the weighting of the factors is different. Divorcing the airport search analysis from non-analogous administrative searches would further help protect the Fourth Amendment rights of those being searched at airports nationwide. The concomitant restrictions imposed on administrative searches in other contexts have mostly been severed from application to airports; completely cutting the cord prevents courts from taking the additional leeway granted in those same cases.<sup>232</sup>

Applying the national-security exception to airport security would be a step in the right direction. It would help the courts avoid the difficult task of fitting modern search techniques into the ill-suited administrative-search exception. The national-security exception would help courts remember the reason for allowing the search in the first place. Therefore, Fourth Amendment concerns would be weighed seriously, resulting more often in outcomes that could protect the individual as well as the country.

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<sup>230</sup> See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 584 (2009) ("The distribution of public opinion and professional notions of reasonableness, however, do not remain constant.").

<sup>231</sup> For example, a pat-down twenty years ago might have only uncovered a handgun concealed on a passenger's body, whereas today, when combined with Explosives Trace Detection technology, a pat-down could expose an otherwise undiscovered security risk, such as nonmetal explosives. See *Security Technologies*, TSA, <http://www.tsa.gov/about-tsa/security-technologies> (last modified July 23, 2013).

<sup>232</sup> This is a key point—in many administrative-search cases, courts find particularly intrusive Fourth Amendment searches reasonable "only because" they are limited by some factor. But when those courts specifically exempt airports from application, that does not mean that the same search would be acceptable at an airport; it simply means that the court declined to extend its holding to cover such a search. Furthermore, many administrative-search airport security cases were decided before the creation of the TSA and the advent of its security measures. Those earlier cases are frequently not analogous to modern fact patterns. Moving away from the administrative-search exception would help courts remember this fact when analyzing cases involving the TSA.

## IV. CONCLUSION

Regardless of which approach courts apply going forward, they ought to make some changes. One option is to begin performing a true balancing when examining TSA search procedures using the administrative-search exception. But a better approach is to acknowledge that the administrative-search doctrine does not apply to airport security and instead analyze the Fourth Amendment issues using the national-security exception.

The national-security exception presents the best option because it reminds courts that the government's interest is national security, and that the government is being allowed special privileges because of the importance of that interest. And at the same time, because those special privileges are allowed, courts will also be careful to limit government action to what is actually effective in fulfilling those interests. In addition, individuals' privacy interests counterbalance the scope of those special privileges. As in other national-security exception cases—i.e., warrantless wiretapping—the close, skeptical scrutiny of the courts can only help to protect the privacy interests of the individual.

Congress can help with this issue as well. Congress has been supported by the Supreme Court in its efforts to reign in warrantless executive searches, even when those searches have been performed under the guise of national security.

In the case of national security, it is in the interests of all Americans, and particularly the elected members of Congress, to maximize scarce resources. The nation has spent over \$1.1 trillion on homeland security since 9/11.<sup>233</sup> AIT scanners alone cost \$1.2 billion per year.<sup>234</sup> But according to security experts, "[t]he only useful airport security measures since 9/11 . . . were locking and reinforcing the cockpit doors[ ] so terrorists can't break in, positive baggage matching[,] . . . and teaching the passengers to fight back. The rest is security theater."<sup>235</sup> As such, Congress should update the laws regulating the TSA to strike a reasonable balance between national security and every citizen's interest in freedom from government intrusion.

Such a change in the courts and Congress would be a step in the right direction in America's quest for not only safer but also friendlier skies.

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<sup>233</sup> Mann, *supra* note 218.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (quoting Bruce Schneier).



