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SEARCH AND SEIZURE AT CRUISING ALTITUDE: AN ANALYSIS OF THE RE-BORN FEDERAL AIR MARSHALS AND FOURTH AMENDMENT COMPLICATIONS IN THE TWENTY-FIRST CENTURY

KATHERINE STEIN*

I. INTRODUCTION

A FREELANCE WRITER’S account of the events that occurred on her Detroit to Los Angeles flight on June 29, 2004, Northwest 327, made waves across the internet this summer, and invited Americans to revisit their fears concerning air travel in a post-9/11 world. The writer, Annie Jacobsen in an article called “Terror in the Skies, Again,” detailed the actions of a group of fourteen Syrians aboard the flight, their simultaneous use of the lavatory, their apparent use of hand signals to communicate, and their congregation in the rear of the plane that led her to fear an imminent terrorist hijacking.1 The author saw one of the men take a full McDonald’s bag with him to the lavatory, return to the cabin with the bag (now nearly empty), and give one of his colleagues a “thumbs-up.”2 The mounting evidence of a potential hijacking prompted her to contact the flight attendant.3 The flight attendant reassured the writer’s husband that “there were people on board ‘higher up than you and me watching the men.’”4 These people are the Federal Air Marshals, newly reorganized and super-sized in order to fight terrorism in the skies. The suspicious men on Jacobsen’s flight turned out to be musicians in a touring band, hired

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2 Id.
3 Id.
4 Id.

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to perform at a San Diego casino, all interviewed by agents upon arrival, and described as “Syria’s answer to Wayne Newton.” The details of the flight were corroborated by Dave Adams, spokesman for the Federal Air Marshal Service. Nonetheless, this information did little to ease the mind of not just the author, but the thousands of Americans who came to know the harrowing tale via e-mail, blogs, or even the local news. Only two weeks prior to Jacobsen’s article, Time published an account of one writer’s glimpse into the training of the “new” Federal Air Marshals, who proclaim that, “[y]ou have to believe you’re Superman.”

Somewhere in between the invincible Superman and the unwavering fears of the anxious passenger lies the current state of the Federal Air Marshal program. This article will describe how the marshals have transformed from a cold-war era task force to a major component of the Department of Homeland Security’s response to continuing terrorist threats, and the growth problems that the marshals experienced while expanding. Further, the article will discuss the viability of applying current Fourth Amendment search and seizure jurisprudence to actions taken in the skies. A number of exceptions to the Fourth Amendment have been promulgated with respect to airport security and anti-hijacking measures, including (1) the Terry “stop and frisk” exception, (2) the border exception, (3) the administrative search exception, (4) the critical zone exception, and (5) the consent exception. This article will analyze these exceptions from the unique standpoint of the Federal Air Marshals, and analyze how courts may fashion these exceptions to answer Fourth Amendment questions in the skies.

The Supreme Court in Katz v. United States, noted that the Fourth Amendment protects people not places. But this article will explore, with respect to Federal Air Marshals, whether 30,000 feet in the air is one place where the search and seizure doctrine, and all its exceptions, may be inapposite to concerns faced while aboard an airplane.

6 Id.
7 Sally Donnelly, My Life as an Air Cop, TIME, June 28, 2004, at 42.
8 See discussion infra Part III, IV.
II. THE FORMATION AND HISTORY OF THE FEDERAL AIR MARSHALS

On November 1, 1955, Jack Graham committed the first major act of criminal violence against a United States airliner by killing 44 people after placing a bomb in his mother’s luggage in hopes of collecting the proceeds of her life insurance policy. After Fidel Castro took control of Cuba in 1959, a number of hijackings occurred, powered by anti-Castro citizens seeking to divert Cuban planes towards the United States. In 1961, President John F. Kennedy created the first United States sky marshal program to respond to the wave of hijackings diverting United States planes to Cuba (typically by Cuban exiles) after the Bay of Pigs invasion. Through a Presidential Directive issued in 1961, Kennedy initiated a small-scale program of eighteen “peace officers,” trained by the Federal Aviation Administration (“FAA”), who served on “high-risk” flights. Kennedy also passed protective legislation, including an amendment to the Federal Aviation Act of 1958, imposing at least twenty years imprisonment, and if the death of another person resulted from the commission or attempted commission, either death or life imprisonment for the seizure of aircraft. In 1974, the act was amended to create a “special aircraft jurisdiction of the United States,” which “begins when all external doors are closed following embarkation and continues until one such door is opened for disembarkation, or in the case of a forced landing, until competent authorities take over the responsibility for the aircraft and for the persons and property aboard.” To further prevent hijackings on an international level, the United States signed on to the Tokyo Convention in 1963, an international agreement developed

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11 Id.
12 Id.
15 Federal Aviation Act § 46501(2).
to resolve jurisdictional problems inherent in prosecuting airline hijackings.\textsuperscript{17}

Although the number of hijackings dropped in the period from 1962 to 1967 to a low of one per year, problems again surged in 1968 and 1969, with twenty-two and forty hijacking incidents, respectively.\textsuperscript{18} The first hijacking event in this series was committed by a United States Marine, who made an unsuccessful attempt to hijack a military flight out of South Vietnam.\textsuperscript{19} The remainder of the incidents occurring during this time period involved United States flights hijacked to Cuba; flight crews were instructed simply “not to resist hijackers.”\textsuperscript{20} Beginning in October of 1968, a Federal Aviation Administration task force created a hijacker profile.\textsuperscript{21} In addition to the United States hijackings, many other attempts occurred in the Soviet Union, Eastern Europe, and the Middle East.\textsuperscript{22} Extortion hijackings by the Popular Front for the Liberation of Palestine (“PLFP”), however, created the concern necessary to implement a comprehensive sky marshal program.\textsuperscript{23} After hijackers used explosives to destroy four planes—two American, one Swiss, and one British—in September of 1970, President Nixon introduced an anti-hijacking plan that included a sky marshal program to provide additional security to United States aircraft.\textsuperscript{24} President Nixon, on September 11, 1970, created the program through an executive order, but did not define the scope of the rights or powers of the reborn air marshals.\textsuperscript{25}

In 1973, the FAA began requiring the screening of all passengers and their carry-on luggage, regardless of whether they matched the hijacker profile, and the number of hijackings began a steady decline.\textsuperscript{26} Additionally, the Anti-hijacking Act of 1974 gave the FAA the power to monitor airline security, which had previously been conducted by the airlines themselves, in ac-

\textsuperscript{18} Id.
\textsuperscript{19} Historical Perspective, \textit{supra} note 10.
\textsuperscript{20} Id.
\textsuperscript{21} United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973).
\textsuperscript{22} Historical Perspective, \textit{supra} note 10.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{26} Davis, 482 F.2d at 901-02.
cordance with federal guidelines. As the rate of hijackings began to decline after 1972, program staffing steadily decreased, and the sky marshal program returned to obscurity.

During the course of the 1980s, aircraft hijackings continued to decline, to an average of three per year between 1985 and 1991. The nature of airplane hijacking changed from the use of metallic weapons, now prevented by magnetometer scans, to the use of undetectable gasoline or explosives. This period of calm abruptly ended in 1985 with three hijackings, the most well-known of which was TWA Flight 847; Lebanese terrorists diverted an Athens-departing plane to Beirut, where a sixteen day standoff ensued, resulting in the killing of one passenger before the others were released. President Reagan responded to this increased terrorist threat by encouraging Congress to increase the number of air marshals aboard international flights. Congress responded by passing the International Security and Development Cooperation Act, which gave the Federal Air Marshal program statutory basis to further sustain and expand the program. The following years saw another dramatic decrease in United States aircraft hijackings, to a low of one per year from 1988 to 1991, and a phenomenal zero from 1999 to 2000. The Federal Air Marshal program was staffed by Civil Aviation Security specialists, who allocated 55% of their time to air marshal duties, and 45% to security specialist duties—inspections and investigations to ensure the compliance of airports and air carriers with FAA regulations. The number of Federal Air Marshals, entrusted with the mission of protecting United States aircraft in international airspace, rose to a high of 400 in 1987, and slowly declined to a low of only thirty-three active marshals by September 11, 2001.

28 Historical Perspective, supra note 10.
29 Rogers, supra note 17, at 506.
30 Id.
32 Historical Perspective, supra note 10.
33 Id.
35 Historical Perspective, supra note 10.
36 Id.
III. FEDERAL AIR MARSHALL SERVICE AFTER SEPTEMBER 11, 2001

Immediately after the September 11 hijackings, the Federal Air Marshal Service ("FAMS" or the "Service") grew exponentially. President Bush authorized an increase in the number of active marshals and FAMS received over 200,000 applications.37 While the current number of marshals is classified, it is estimated to be in the thousands.38 On November 19, 2001, Congress enacted the Aviation and Transportation Security Act,39 which dramatically expanded the Service's mission and workforce and transferred authority over the Service from the Federal Aviation Administration to the Transportation Security Administration ("TSA").40 The Aviation and Transportation of 2001 Security Act allowed deployment of Federal Air Marshals on selected flights and required this deployment on all flights determined to present high security risks.41 With the expansion of the Service came a commensurate budgetary increase from $4.4 million for the 2001 fiscal year to $545 million for 2003.42 The Deputy Secretary of Transportation responded to the legislation by setting a goal of hiring, training, and deploying thousands of new air marshals by July 1, 2002.43

A. Administrative & Structural Changes to FAMS

From September 11, 2001 to 2003, the FAMS went through another series of rapid administrative changes, creating some concern as to the effectiveness of the newly empowered service. After the passage of the Homeland Security Act, the FAMS moved again, with the TSA from the Department of Transportation to the newly created Department of Homeland Security

40 GAO REPORT, November 2003, supra note 38, at 1.
41 ATSA § 1.
42 GAO REPORT, November 2003, supra note 38, at 4.
43 GAO REPORT, November 2003, supra note 38, at 1.
Soon thereafter, in December of 2003, the Service moved from the TSA to the Bureau of Customs and Immigration Enforcement ("ICE"). A classified number of the thousands of air marshal applicants were screened, hired, trained, certified, and deployed on flights around the world. Today the FAMS serves as a key component of ICE, "the largest investigative arm of the Department of Homeland Security, in the war against terrorism." ICE states that this move "offers the Air Marshal Service multiple law enforcement resources, such as additional access to intelligence, better coordination with other enforcement agencies, and broader training opportunities." ICE includes, in addition to the marshals, immigration and customs agents, with the hope of eventual cross-training to create a "surge capacity" for responding to security threats. FAMS also expanded its mission, now aspiring "to be responsible for and protect air security and promote public confidence in our nation's civil aviation system through the effective deployment of Federal Air Marshals in order to detect, deter and defeat hostile acts targeting U.S. air carriers, airports, passengers and crews." The previous mission of FAMS was more limited—to prevent hijackings only on international flights.

In order to perform their new duties, marshals are issued personal digital assistants ("PDAs"), which are used during flights to transmit Surveillance Detection Reports, or observations of suspicious activities. These reports are then transmitted to the Tactical Information Branch of the Federal Air Marshal Service, which catalogs the reports in databases to determine trends in suspicious activities. The Service analyzes the reports with the goal of preventing future attacks in their infancy. This collection technique is also expected to aid in the ultimate mission of the newly expanded service, stopping potential hijacking ma-

46 ICE Federal Air Marshal Overview, supra note 37.
47 Id.
48 Id.
49 Id.
50 GAO Report, November 2003, supra note 38, at 1.
neuvers while in flight as necessary. Aside from the prevention of terrorism, marshals have been tapped to aid in the recovery of kidnapped or abducted children as part of the “Amber Alert” system, and identify those children who may be transported on passenger aircraft. As this article will discuss further, such additional goals may further compromise the already strained Service to effectively combat terrorism in the skies, if its attention is devoted to other, albeit legitimate, federal concerns.

B. HIRING, TRAINING, AND RETENTION ISSUES

In order to meet its new mission, the Service had to rapidly implement new policies and procedures and face the demand of hiring thousands of new marshals in a period of months. Executive Order 12968, passed in 1995, authorized the temporary use of interim security clearances, allowing preliminary background checks to be accomplished within 24 hours. Many suggest, however, that the rapid hire of thousands of marshals has compromised the ability of the Service to meet its goals. Even the FAMS director, Thomas Quinn, indicated that he would “certainly” prefer that new hires were not placed on flights before extensive background checks were completed. In order to hire and retain a sufficient number of marshals, applicants have not been required to pass certain marksmanship courses, and there exist reports that many new hires were given guns and placed on flights before FAMS completed more extensive background checks.

Even as more extensive screenings are conducted, many have questioned whether the Service is selective enough. The Aviation and Transportation Security Act requires the TSA to raise suitability standards for airports, but made no such requirement for FAMS. After FAMS management conducted a random re-

54 GAO REPORT, November 2003, supra note 38, at 7.
55 Blake Morrison, Air Marshal Program in Disarray Insiders Say USA TODAY, Aug. 15, 2002, at 1.
56 Id.
view of 504 applicants who had passed clearance for an employment offer, 161 of these air marshal applications contained information suggesting “adjudication was lenient or questionable,” citing “financial, employment, and criminal” concerns.\textsuperscript{58} Sixty-two applicants had been arrested or faced allegations of misconduct, with alleged domestic violence and assault accounting for 58\%, followed by driving under the influence of alcohol and sexual harassment complaints as leading concerns.\textsuperscript{59} In one particularly questionable incident, FAMS made no additional inquiry before approving an applicant who was denied a gun permit by the State of New York.\textsuperscript{60}

Reportedly, a high number of failing scores on the marksmanship test precipitated the test’s elimination in March 2002, in order to quickly get more marshals on more flights.\textsuperscript{61} Passing the difficult marksmanship test would require potential marshals to “demonstrate their speed and accuracy in a confined environment similar to the environment on board an aircraft.”\textsuperscript{62} The training for the new marshals also eliminated a five-week course which included emergency evacuation and flight simulator training, components that nearly all would agree are essential for the new marshals to adequately ensure safety on passenger aircraft.\textsuperscript{63} Currently, training for air marshal candidates includes a two-phase training course: the first phase includes seven weeks of basic law enforcement officer training, including constitutional law instruction; the second phase emphasizes advanced firearm and defensive weapons proficiency.\textsuperscript{64}

Despite the over 200,000 applicants, retention rates for the new marshals have proved both problematic and costly. The estimated cost of hiring and training a new marshal is $40,275, yet four to ten percent of the new marshals have resigned from the Service since September of 2001.\textsuperscript{65} Former marshals who have separated from the program have voiced numerous complaints, including disorganized work schedules, overwork and fatigue, problems with dress code, and being forced to fly alone.

\textsuperscript{58} \textit{Inspector General Evaluation}, \textit{supra} note 13, at 8.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 9.
\textsuperscript{61} \textit{Id.} supra note 55.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{GAO Report, November 2003, supra} note 38, at 11.
\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{GAO Report, November 2003, supra} note 38, at 18, 19.
prompting fears that the marshal could easily be overcome and disarmed by a terrorist if discovered.\textsuperscript{66} Many marshals express concern that they must accept any seat an airline offers, even if it is not “tactically sound,” a policy Billie Vincent, former director of security for the FAA, decried as “idiocy.”\textsuperscript{67} American Airlines employees have been overheard saying that “air marshals have been causing a nuisance all week,” compromising the anonymity of the marshals, and saying that airlines were sick of “air marshals taking high-revenue seats.”\textsuperscript{68} Reports state further that internal policies require air marshals to continue their mission even if their cover has been blown, which may give an unarmed terrorist the ability to obtain a weapon onboard a flight.\textsuperscript{69}

This body of findings, taken largely from internal government investigations, brings greater weight to concerns voiced by those such as Jacobsen since the “reinvigoration” of the FAMS after September 11, 2001. Much greater faith in the FAMS seemed evident in October of 2001, where polled air travelers cited the presence of air marshals on flights of equal importance as armor-reinforced cockpit doors.\textsuperscript{70} Public and political support for the Air Marshals continues, and FAMS received special mention from President Bush in his 2005 State of the Union Address as they joined police and firefighters as among those “working every day to make our homeland safer.”\textsuperscript{71} Yet, while there are over 35,000 flights every day in the United States, it is estimated that air marshals only cover, at most, ten percent of flights.\textsuperscript{72} In fact the number of air marshals is on the decline, as former Homeland Security Chief Tom Ridge acknowledged to a House Appropriations Committee in 2004 with the less than reassuring suggestion that additional security could be provided by federal law-enforcement officials “traveling on government time.”\textsuperscript{73} The incongruence between the rapid hiring process and subsequent

\textsuperscript{67} Id.
\textsuperscript{68} Blake Morrison, \textit{Airline Allegedly Hindered Marshals}, \textit{USA TODAY}, Mar. 6, 2002.
\textsuperscript{69} Id.
\textsuperscript{73} Id.
cutbacks leaves one to question whether the FAMS can effectively increase security instead of serving as a mere figurehead for the panoply of post-September 11, 2001 safety initiatives.

C. Conduct Issues

Inadequate hiring techniques and poor retention rates aside, the FAMS has also experienced problems with the active marshals. Between October 2001 and July 2003, the Service collected data on almost 600 reports of misconduct by air marshals, classified into over forty categories, with abuses ranging from "insubordination or failure to follow orders" to "loss of government property" and "abuse of government credit cards." Also noted were repeated incidents of abusiveness towards airline personnel during boarding. As of 2002, at least three incidents involving the conduct of individual marshals were under investigation by federal authorities, ranging from the discharge of a weapon in a Las Vegas hotel, leaving a gun in a United Airlines lavatory (later discovered by a passenger), and the removal of a marshal from a flight for smelling of alcohol.

While these reports are distressing to those who have placed confidence in the air marshals' ability to adequately protect aircraft passengers, it ought to be noted that when the job of an air marshal and other agencies charged with the protection of the public is done correctly, there is no news to report. Marshals have reported 2,083 mission-related incidents from September 15, 2001 to September 16, 2003, ranging from reports of suspicious persons, to medical problems, searches, and arrests.

While Annie Jacobsen was dismayed by the lack of action from marshals on her frightening flight, at least 28 arrests or detentions were made by or at the request of air marshals between September of 2001 and September of 2003. Recently, on Northwest Airlines Flight 1057 from Pittsburgh to the Twin Cities, an air marshal arrested a woman for threatening to kill him after he moved her to the rear of the plane for making rude comments to fellow passengers. She was arrested and hand-

74. GAO REPORT, November 2003, supra note 38, at 18.
75. Id.
76. Morrison, supra note 55.
77. GAO REPORT, November 2003, supra note 38, at 39.
78. Id.
cuffed after she hit and attempted to choke the air marshal, and she was turned over to police in Minneapolis. In a similar story, a 36-year old Greek man was arrested by Air Marshals after assaulting another passenger and verbally threatening the pilot; the Athens-bound flight was diverted to Shannon, Ireland. More recently, on January 18, 2005, Federal Air Marshals briefly detained Argentina’s foreign minister, Rafael Biesla, at the Miami International Airport after he allegedly asked the flight crew to enter the cockpit and question pilots about his flight’s delay.

Although these incidents may seem decidedly minor in comparison to the terrorist attacks of September 11, such incidents test marshal compliance with the Fourth Amendment when conducting searches and seizures of suspicious or disruptive passengers. United States marshals and their deputies may carry firearms and make arrests without warrant for any offense against the United States committed in their presence, or upon reason to believe that the person to be arrested has committed or is committing a felony. As of September 2003, marshals conducted 12 searches of passengers, made 28 arrests and discharged firearms on three occasions. While the total of these incidents comprise a mere two percent of all reported incidents, this number is certain to climb as marshals appear on more flights and as tensions regarding aircraft security remain high.

Virtually all aviation security responsibilities now reside within the DHS, and most fall to the TSA, including conducting passenger and baggage screening and overseeing security measures for airports. The Aviation and Transportation Security Act requires the development of enhanced screening programs, or Computer-Assisted Passenger Pre-Screening (“CAPPS”), to “evaluate all passengers before they board the aircraft.” This legislation prompted the creation of CAPPS II which, upon implementation, “will analyze passengers’ travel reservations, housing information, family ties, identifying details in credit re-

80 Id.
82 BROADCAST NEWS, Argentina’s Foreign Minister Detained at Airport (Jan. 18, 2005), 2005 WLNR 726991.
84 GAO REPORT, November 2003, supra note 38, at 39.
85 Id.
ports, and other personal information to determine if they’re ‘rooted in the terrorist community.’”87 FAMS is the only aviation security component outside the reach of the TSA. Whether this distinction will make a difference for the privacy implications of air travel remains to be seen. The remainder of this article addresses the development of Fourth Amendment jurisprudence as it pertains to the conduct of the Federal Air Marshals.

IV. AIRLINE PASSENGERS & FOURTH AMENDMENT DEVELOPMENTS

Modern Fourth Amendment jurisprudence has developed from the contours defined in Katz v. United States.88 In Katz, Justice Harlan’s concurrence articulated the rule that became the threshold test for the Fourth Amendment. A “search” takes place when (i) a person’s subjective expectation of privacy is invaded, as long as (ii) society is prepared to recognize that expectation as reasonable.89 Therefore, when there is no reasonable expectation of privacy the Fourth Amendment is not implicated and any search or seizure is presumed reasonable.90 Courts have routinely decided that the screening of an airline passenger constitutes a search within the meaning of the Fourth Amendment.91 Unless an exception applies, searches conducted without a warrant supported and unsupported by probable cause have been found unconstitutional.92 Courts have found a number of exceptions applicable to justify warrantless searches at airports.93 Courts, analyzing airport checkpoint searches under the Fourth Amendment’s generalized proscription against unreasonable searches have considered the following factors in determining reasonableness: “public necessity, efficacy

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89 Id. at 361.
90 United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973).
91 See, e.g., id. (holding airport security was a “search for the purposes of the Fourth Amendment”); United States v. Epperson, 454 F.2d 769, 772 (4th Cir. 1972) (holding that use of a magnetometer was a search within the meaning of the Fourth Amendment).
92 Davis, 482 F.2d at 904.
93 See discussion infra Part IVA (describing methodologies for permitting warrantless searches in airports).
of the search, and degree of intrusion."\textsuperscript{94} As Judge Friendly noted in \textit{United States v. Edwards}, "when the risk is the jeopardy to thousands of human lives . . . the danger alone meets the test of reasonableness."\textsuperscript{95} This section will analyze theories used to support searches of persons at airports before applying these theories to an in-flight search and seizure by Federal Air Marshals.

A. \textsc{Terry Stop and Frisk}

In \textit{Terry v. Ohio}, the Court articulated a new standard for determining what constitutes a seizure during citizen encounters with police officers.\textsuperscript{96} In \textit{Terry}, an undercover police officer observed two individuals passing the same store window a dozen times, stopping each time to peer inside. Suspicious that the individuals may be "casing" the store for a potential robbery, the officer approached and asked their names. The individuals "mumbled something" and the officer grabbed Terry and felt the outside of his clothing for weapons, finding a pistol.\textsuperscript{97} Although the officer did not have a warrant, the Supreme Court upheld the search and seizure as reasonable because the officer had "reasonable grounds to believe [Terry] was armed and dangerous."\textsuperscript{98} Thus, even without probable cause, a police officer can stop and briefly detain an individual if the officer has a reasonable suspicion, based on articulable facts, that criminal activity is underway. Once such a stop is made, an officer may pat down the outer clothing for the limited purpose of discovering weapons if there is reasonable suspicion to believe that the individual is armed and dangerous.\textsuperscript{99} As a result, an officer, upon reasonable suspicion, can make a stop without seizure and conduct a limited weapons frisk without implicating the Fourth Amendment as a "search."

Application of the \textit{Terry} "stop and frisk" exception to airline passengers has routinely been used to validate warrantless searches in the context of air travel.\textsuperscript{100} In \textit{United States v. Lopez}, after Pan Am employees indicated that Lopez met the hijacker

\begin{itemize}
\item \textsuperscript{94} \textit{United States v. Skipwith}, 482 F.2d 1272, 1275 (5th Cir.1973).
\item \textsuperscript{95} \textit{498 F.2d 496, 500 (2d Cir. 1974) (quoting United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972)).}
\item \textsuperscript{96} 392 U.S. 1 (1968).
\item \textsuperscript{97} \textit{Id.} at 7.
\item \textsuperscript{98} \textit{Id.} at 30.
\item \textsuperscript{99} \textit{Id.} at 25-26.
\item \textsuperscript{100} \textit{See, e.g., United States v. Lopez}, 328 F. Supp. 1077, 1094 (E.D.N.Y. 1971).
\end{itemize}
profile, activated the magnetometer, and failed to produce identification, a search by United States marshals produced heroin wrapped in foil.\textsuperscript{101} While the search did not uncover a weapon, as \textit{Terry} had originally envisioned, the court stated that the officer “need not close his eyes to evidence of other crimes which he may uncover.”\textsuperscript{102} Analogizing the situation to \textit{Terry}, the court found the search was justified on the premise of a “continuum of probability” that crime is possible in the near future.\textsuperscript{103} The search that followed Lopez’s activation of the magnetometer was only as intrusive as necessary to identify what had triggered the magnetometer, after he had met the “hijacker profile” and additionally failed to produce identification.\textsuperscript{104} Thus, the marshal’s conduct mirrored the officer’s conduct in \textit{Terry} with similar levels of suspicion.

Although \textit{Terry} has been applied to airport searches countless times, in \textit{People v. Hyde}, the California Supreme Court concluded that the “theoretical and practical underpinnings of \textit{Terry} [were] inapposite to . . . the problem of airport searches.”\textsuperscript{105} While \textit{Terry} permits a superficial pat-down for weapons, this same reasoning could not serve as blanket justification for the “search of defendant’s hand luggage.”\textsuperscript{106} Distinguishing the airport context, the court emphasized that under the \textit{Terry} doctrine, “the safety of bystanders is a relevant factor to support a search only when those persons are placed in a position of danger as an immediate consequence of the police officer’s act.”\textsuperscript{107} Airport searches, on the other hand, are made to deal with a danger which would otherwise occur only after the plane was airborne (while the officer remains safely on the ground).\textsuperscript{108}

\textbf{B. \hspace{1em} Border Search Exception}

When a person is stopped and searched at an international border, courts have long held that such searches are within the plenary power of the Executive Branch.\textsuperscript{109} The scope of a rou-

\textsuperscript{101} \textit{Id.} at 1081-82.
\textsuperscript{102} \textit{Id.} at 1098.
\textsuperscript{103} \textit{Id.} at 1094.
\textsuperscript{104} \textit{Id.} at 1092
\textsuperscript{105} \textit{People v. Hyde}, 524 P.2d 830, 832 (Cal. 1974).
\textsuperscript{106} \textit{Id.} at 183.
\textsuperscript{107} \textit{Id.} at 834.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} See United States v. Ramsey, 431 U.S. 606, 616 (1977) (finding that searches of persons and property crossing into the country are “reasonable simply by virtue of the fact that they occur at the border”).
tine border search includes inspection of a "border entrant's luggage and outer clothing in a reasonable manner based on subjective suspicion alone, or even on a random basis . . . and may be characterized as routine."\textsuperscript{110} Due to the true impossibility of conducting searches on the actual border, courts have held that an airport at which an international flight lands is the "functional equivalent" of a border.\textsuperscript{111} Courts justify this rule based on the special need for border searches. As explained in \textit{United States v. Montoya de Hernandez}, customs officials at the border are charged with "protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics or explosives."\textsuperscript{112} As evaluated under the Reasonableness Clause of the Fourth Amendment, the state interest in the prevention of smuggling contraband creates a diminished expectation of privacy contributes to the constitutionality of such searches.\textsuperscript{113} As such, routine border searches "do not require reasonable suspicion, probable cause, or a warrant."\textsuperscript{114}

A more intrusive search can bring a border search to the level of non-routine. \textit{United States v. Braks}\textsuperscript{115} listed relevant factors in assessing whether a border search is non-routine:

(1) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe; (2) whether physical contact between Customs officials and the suspect occurs during the search; (3) whether force is used to effect the search; (4) whether the type of search exposes the suspect to pain or danger; (5) the overall manner in which the search is conducted; and (6) whether the suspect's reasonable expectation of privacy, if any, are [sic] abrogated by the search.\textsuperscript{116}

Methods of search that courts have found to indicate that the scope of the routine border search was exceeded include body

\begin{itemize}
  \item \textsuperscript{110} United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993).
  \item \textsuperscript{111} \textit{Id.} at 1290.
  \item \textsuperscript{112} United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985).
  \item \textsuperscript{113} \textit{Id.} at 537.
  \item \textsuperscript{114} United States v. Robles, 45 F.3d 1, 13 (1st Cir. 1995) (denying motion to suppress evidence resulting from warrantless border search).
  \item \textsuperscript{115} 842 F.2d 509 (1st Cir. 1988) (holding that asking woman to lift her skirt, revealing a bulge in her girdle that turned out to be cocaine, did not exceed the scope of a routine border search).
  \item \textsuperscript{116} \textit{Id.} at 512.
\end{itemize}
cavity searches, strip, and x-ray searches. When a search is non-routine, the search must be supported by some level of individualized suspicion.

C. CRITICAL ZONE APPROACH

A more recent corollary to the border search exception is the critical zone approach, which defines an airport as a critical zone, and thus subject to a different Fourth Amendment analysis. In United States v. Moreno, the Fifth Circuit denied a motion to suppress drug evidence, even after a simple Terry style pat-down did not reveal any drug evidence. The officer then ordered Moreno to remove his coat, and the ensuing search yielded heroin. In refusing to exclude the evidence, the Fifth Circuit reiterated that, in Terry, the intrusion entailed by the search had been strictly confined to what was minimally necessary not only to insure the personal safety of the investigating officer, but also the safety of others. Using this as a starting point, the court continued to suggest that while the safety of the police officer was at issue in Terry, in airports, the overriding concern is “thwarting air piracy which often involves the safety of passengers and crew on tremendous aircraft after the plane is airborne with a heavy cargo,” and the officer remains safely on the ground.

The Fifth Circuit refined this expansive view of the Terry doctrine in United States v. Skipwith. Holding that a different standard applies to searches in the general airport area and those conducted at the boarding gate, it appeared the court now considered some zones more critical than others. After Skipwith presented himself for boarding, stated he had no identification, and admitted he was using an alias, he followed the marshal to be searched, resulting in the discovery of cocaine. The court concluded that the standard for initiating a search at the boarding gate would be similar to that of an international border,
even for a domestic flight.\footnote{Id. at 1276.} This conclusion both expands and limits the decision in \textit{Moreno}. It narrows \textit{Moreno} in that the search is limited to the point where one boards the aircraft, eliminating from search persons merely passing through. Thus, under this new standard, the search of Moreno would have been unreasonable because it occurred in an airport bathroom.\footnote{\textit{Moreno}, 475 F.2d at 50.} The decision expands \textit{Moreno} by articulating that passengers presenting themselves for boarding are subject to search on the basis of "mere suspicion" and nothing more.\footnote{\textit{Skipwith}, 482 F.2d at 1276.}

\section*{D. The Administrative Search Exception}

Another avenue courts have used to find exception to Fourth Amendment protections is the administrative search. An administrative search is an examination conducted by the government in an effort to supervise a regulated activity.\footnote{\textit{John Rogers, Bombs, Borders, and Boarding: Combating International Terrorism at United States Airports and the Fourth Amendment}, 20 SUFFOLK TRANSNAT'L L. REV. 501, 524 (1997).} The FAA is required to screen "all passengers and property that will be carried in the cabin of an aircraft . . . before boarding."\footnote{49 U.S.C. § 44901(a) (2000).} The \textit{Davis} court rationalized such procedures on a deterrence theory, explaining that

"screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all."\footnote{United States v. Davis, 42 F.2d 893, 908 (9th Cir. 1973).}

The administrative search approach was applied in \textit{Davis}, where a passenger who was late for a flight had his briefcase inspected by an airline employee, resulting in the discovery of a weapon.\footnote{Id. at 896.} The Supreme Court has indicated approval of such searches, noting that where "the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasona-
ble searches calculated to advance the Government’s goal.” This justification, admittedly, can certainly stretch the Fourth Amendment to its furthest edges. However, nearly all would recognize after the events of September 11, 2001, the possible harm is certainly substantial enough to allow such limited searches.

E. Consent Exception

When a person voluntarily relinquishes his or her Fourth Amendment rights, police are free to conduct searches and seizures. The determination of whether or not consent to search was “voluntary” or the product of express or implied duress or coercion, is a fact question to be determined from the totality of the circumstances. In order to determine voluntary consent, there must be a balancing of two competing interests: “the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.” There exist in this doctrine, however, two very slippery tenets: (1) consent may be either express or implied, and (2) police need not notify persons they are free to go before consent is considered voluntary. The inquiry to be made by courts in determining whether consent was given is simply “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”

When a person is questioned, remains free to ignore the officer’s questions, and leaves the encounter, “there [has] . . . been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.” In United States v. Mendenhall, a woman suspected of being a drug courier was approached by Drug Enforcement Agency agents at the Detroit Airport. After the agents identified themselves, they asked to see her identification and ticket, which she produced, allowing agents to discover the

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135 Id. at 226.
136 Id. at 227.
137 United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973).
141 Id. at 547.
ticket was assigned to a different name than her license.\textsuperscript{142} The agent returned her ticket and asked her to accompany him to the DEA office.\textsuperscript{143} When asked if she would allow a search of her person and her handbag, she agreed, allowing the agents to discover heroin on her person.\textsuperscript{144} As Mendenhall was twice notified she was free to leave and "had an 11th-grade education," she was capable of giving and did give consent to the search.\textsuperscript{145}

Demonstrating the slippery nature of the consent doctrine, the Supreme Court reached the opposite result under very similar facts in \textit{Florida v. Royer}.\textsuperscript{146} Royer, like Mendenhall, arrived at the airport, and appeared to agents to meet the "drug courier profile," and when approached, also gave the agent a ticket and identification with mismatched names.\textsuperscript{147} The difference is that while in \textit{Mendenhall} the agents returned the identification and ticket before requesting her to follow the agents to the investigation room, in \textit{Royer} the agents did not.\textsuperscript{148} Justice White noted "in the absence of probable cause and exigent circumstances, the validity of the search depended on Royer's purported consent."\textsuperscript{149} Making the distinction between the two factually similar cases, Justice White found that "Royer could not leave the airport without [his identification and luggage]."\textsuperscript{150}

Another wrinkle in the consent doctrine applied to the airport environment is the passenger's simple choice to not fly if he or she does not wish to consent to search.\textsuperscript{151} The court in \textit{Davis} held 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."\textsuperscript{152} The court did not specify at what point a passenger may or must exercise this right.\textsuperscript{153} \textit{United States v. Hartwell} noted the potential difficulties with this rule—\textit{Davis} "did not determine at what point in the boarding process a passenger may decide not to fly and thereby withdraw his consent."\textsuperscript{154}

\textsuperscript{142} \textit{Id.} at 548.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 548.
\textsuperscript{145} \textit{Id.} at 558.
\textsuperscript{146} 460 U.S. 491 (1983).
\textsuperscript{147} \textit{Id.} at 493-94.
\textsuperscript{148} \textit{Compare Mendenhall,} 446 U.S. at 548, \textit{with Roger,} 460 U.S. at 494.
\textsuperscript{149} \textit{Roger,} 460 U.S. at 497.
\textsuperscript{150} \textit{Id.} at 503.
\textsuperscript{151} \textit{See Davis,} 482 F.2d at 910-11.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{United States v. Pulid-Baquerizo,} 800 F.2d 899, 902 (9th Cir. 1986).
ditionally, as recent security measures have restricted the airport access of non-passengers, courts have noted the "Fourth Amendment does not require the TSA agents to give a prospective passenger who has triggered an alarm the option of avoiding a secondary search by choosing not to fly."\textsuperscript{155} Earlier courts have found that signs situated near the entrance to the airline's boarding gate declaring "PASSENGERS AND BAGGAGE SUBJECT TO SEARCH" served as sufficient indication that the accused was free to step out of line if she did not want to be searched, even though she had not been expressly informed that search could be avoided by not proceeding to the designated area.\textsuperscript{156} The \textit{Hartwell} court found that consent to search may be imputed upon any passenger, as "after the events of September 11, 2001, any claims by the defendant that he did not know of the screening requirements would be implausible."\textsuperscript{157}

While this leaves little instruction for lower courts applying the consent rule in any number of circumstances, a near bright line emerges in the restricted context of airport stops when a passenger is not denied their personal effects necessary to continuing to their final destination, no seizure has occurred, and when the Fourth Amendment is not implicated. However, difficulties emerge when the above exceptions are applied to the unique situation of a passenger already on board the plane.

V. APPLYING AIRPORT SEARCH AND SEIZURE LAW TO FEDERAL AIR MARSHALS

In determining how searches, seizures, and arrests can be conducted in keeping with Fourth Amendment guarantees, some would argue that the sensitive nature of an aircraft in flight would eliminate the need for interest-balancing altogether. Judge Friendly, even in an era of arguably less concern about aircraft safety argued that:

\begin{quote}
[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice
\end{quote}

\textsuperscript{156} United States v. Edwards, 498 F.2d 496, 501 (2d Cir. 1974).
\textsuperscript{157} \textit{Hartwell}, 296 F. Supp. 2d at 605.
of his liability to such a search so that he can avoid it by choosing not to travel by air. 158

Unfortunately, given both the current state of FAMS and the frailties of human nature (not exclusive to law enforcement), Americans are not likely willing to check all of their Fourth Amendment rights as they check their bags. This section will evaluate how the Fourth Amendment protections can still apply to passengers who are certainly not “free to leave” when onboard an aircraft.

In the event of violence on any aircraft by a passenger, no Fourth Amendment concern is present. Naturally, once a marshal has probable cause that a felony has been committed or is about to be committed, arrest and attendant search is appropriate. Probable cause serves as the necessary element for a warrantless arrest, “though the arresting officer need not have in hand evidence which would suffice to convict.” 159 “For an arrest, the prototypical seizure, there must be probable cause to believe a crime has been committed and the person to be arrested committed it.” 160 Therefore, in the cases presented by the woman and man who threatened flight crew and passengers and who assaulted air marshals, the Fourth Amendment was not implicated. 161 Cases more applicable to the topic are those like Annie Jacobsen addressed in her article that gave a renewed fear of flying to many Americans. 162 When passengers conduct themselves in a manner some may find suspicious, such as frequent trips to the restroom, or even carrying a McDonald’s bag to the restroom, accompanied with meeting any racial profile marshals may be using, how can one determine when a search may be made and when a seizure has taken place?

A. Consent

One way to analogize the unique situation of Federal Air Marshals on commercial flights is to liken their presence to that of officers conducting bus sweeps. Since the Court began applying

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161 See supra Part IIC (describing the cases of a woman and man, both detained and arrested on their flights for threatening and assaulting passengers, crew, and marshals).
162 See Jacobsen, supra note 1.
a "totality of the circumstances" standard to consent in Schneckloth v. Bustamonte, in case after case the Court has held that a reasonable person in the situation in question would feel free to terminate the encounter, or refuse the request to search.\textsuperscript{163} In United States v. Drayton, plainclothes police officers did not "seize" passengers on the bus when, as part of routine drug and weapons interdiction effort, they boarded the bus at a rest stop and began asking passengers questions, notwithstanding officers' failure to explicitly inform passengers that they were free to refuse to cooperate, and that one officer waited at the front of the bus near the exit.\textsuperscript{164} Because the officers did not draw or brandish their weapons, made no intimidating movements, left aisle free so that passengers could exit, and spoke to passengers individually and in polite, quiet voices, passengers remained free to decline search or questioning.\textsuperscript{165} This situation, where a passenger is confined to a seat (although ostensibly free to leave), and another officer remains at the front door of the bus, is similar to that of an aircraft with Federal Air Marshals onboard. If one of the men on Jacobsen's flight was questioned by an officer at his seat, in a polite and calm manner and no intimidating movements were made, it would seem that this would not amount to a seizure for the purpose of triggering Fourth Amendment rights, under the argument, true or not, that he would be free not to answer the questions of the officer if he did not care to.

Ten years prior to Drayton, in what can be considered a companion case, the Supreme Court found that a "seizure" may not have occurred when two officers boarded an Atlanta-bound bus in Fort Lauderdale, and requested, and obtained consent to search Bostick's luggage.\textsuperscript{166} The Court held that, under a totality of the circumstances analysis, a seizure may not have occurred, noting that "[t]he Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation."\textsuperscript{167} Justice O'Connor, writing for the Court, pointed out that "if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure."\textsuperscript{168} Observing the parallel between

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{167} Id. at 439.
\textsuperscript{168} Id. at 434 (emphasis added).
the bus sweep and air travel, she found that "similar encounters in airports... implicates no Fourth Amendment interest." \(^{169}\)

In a potential action to suppress evidence found during a search or seizure obtained by Federal Air Marshals while in flight this language could be easily applied, with the reasoning that the passenger could simply refuse to engage in the officer's questioning, despite being actually confined to the seat, as opposed to the more "constructive" confinement in Drayton and Bostick. \(^{170}\) To further bolster this argument, it is unlikely that a search would take place in the hopes of finding illegal drugs or similar contraband, as such a search would reveal the identity of the Federal Air Marshals, who are unlikely to compromise their anonymity for an onboard search for drugs. On an even more practical level, marshals would not likely be able to perform an extensive search of the passenger's personal effects, due to safety issues that concern items in overhead bins, and such a search could be postponed, without threat to safety, until the flight has terminated and marshals may act on a reasonable suspicion without fear of "blowing their cover."

The question remains, however, whether bus passengers are even arguably more "free to leave" than an airline passenger, due to the societal pressures attendant in such situations. The dissent in Drayton argued that the three police officers created an "atmosphere of obligatory participation" such that a reasonable person would not have felt free to end the encounter. \(^{171}\) The thrust of both Bostick and Drayton concerns not whether the passenger truly felt "free to leave," but the acceptability of the police conduct (no guns drawn or explicit threats). \(^{172}\) When a request is made by a person in a position of authority at a close physical distance, studies of interpersonal distance and compliance demonstrate that the smaller the space, the more pressure people feel to comply with what they are asked to do. \(^{173}\) Additionally,

people approached at a close distance by an authority in a tightly enclosed space with no opportunity to move further away or

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\(^{169}\) Id.

\(^{170}\) One must wonder, if courts chose to apply this doctrine, if the key factual inquiry in a suppression hearing would become whether the seatbelt light was "on" or "off."

\(^{171}\) Drayton, 536 U.S. at 212 (Souter, J., dissenting).


\(^{173}\) Id. at 190.
leave feel discomfort and tension; at the same time, people who find their space invaded in this manner are more willing to comply with the request of the person making them feel uncomfortable.\textsuperscript{174}

While the Supreme Court has held that a refusal to cooperate without more does not furnish sufficient justification needed for detention or seizure, for a Federal Air Marshal to compromise his or her anonymity, there likely will be "more" sufficient to rise to the level of reasonable suspicion to conduct a search or seizure.\textsuperscript{175}

To the extent that these social findings are true with regard to buses, it would follow they apply with even stronger force to air travel. As for the issue of consent, one must simply ask if these findings make a difference in the Fourth Amendment analysis, or if consent has been given once we reach an airport, submit ourselves to screening before entering the terminal and arrive at our gate. Following the case law regarding air travel since the 1970s, coupled with the Supreme Court's holdings in \textit{Bostick} and \textit{Drayton}, the natural answer from the consent exception is that by the time a passenger actually boards a plane, consent has been given many times over, and absent a verbal refusal, no right remains.

Additionally, there seems to be considerable statutory support to the notion that consent is implicitly given in exchange for the privilege of flying. The Aviation and Transportation Security Act of 2001 creates an implied agreement to search, as a condition of flying, so long as the search is conducted "for a purpose referred to in this section."\textsuperscript{176} For an in-flight search involving the air marshals, that purpose is the "protection against violence and piracy," a duty the statute charges to the FAA.\textsuperscript{177} Although the statute has yet to be challenged from a criminal law stand-

\begin{footnotesize}
\textsuperscript{174} Id. at 193.
\textsuperscript{176} Id.
\textsuperscript{177} § 44902. Refusal to transport passengers and property.
\begin{itemize}
  \item[(c)] Agreeing to Consent to Search - An agreement to carry passengers or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier is deemed to include an agreement that the passenger or property will not be carried if consent to search the passenger or property for a purpose referred to in this section is not given.
\end{itemize}
\end{footnotesize}
point, it seems to quite effectively take the Fourth Amendment out of air travel altogether.

B. **Terry Stops and Seizures**

As discussed above, a *Terry* stop is permissible when a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." To determine whether a marshal acted reasonably in conducting a "stop and frisk," the court looks at "specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Under this analysis, the safety of passengers will naturally be a dominant factor, allowing a marshal to frisk a passenger once he has a reasonable suspicion that he or she will soon commit a felony or act in a way that will place other passengers in danger.

While this analysis of factor balancing seems to be an easy judgment, the issue in potential prosecution will be when a "stop" has ended and when a "seizure" for the purposes of the Fourth Amendment has occurred. The Supreme Court has explained that a "seizure" occurs when "there is some meaningful interference with an individual's possessory interest in that property." In *Terry v. Ohio*, the Court found that a seizure of a person occurs when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." The Supreme Court has long held that the Fourth Amendment requires that a seizure of a person tantamount to an arrest must be "reasonable," and that non-arrest investigatory detentions will be limited in length as a federal constitutional necessity. While these model codes seem to preclude a non-arrest detainment of an aircraft passenger by a Federal Air Marshal, the Supreme Court has not defined any temporal limit to the detention period, assuming only that it is to be brief. The Court explicitly declined to create any bright-line test for non-arrest detentions, concluding it is "appropriate to examine whether the police diligently pursued a means of investigation

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178 Terry v. Ohio, 392 U.S. 1, 27 (1968).
179 Id.
181 Terry, 392 U.S. at 19.
183 Id. at 886 (citing Terry, 392 U.S. at 10).
that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.\footnote{184}{United States v. Sharpe, 470 U.S. 675, 686 (1985).}

The answer for Federal Air Marshals in this situation is to pursue their objective immediately after detainment has occurred, allowing a \textit{Terry} stop and frisk upon a reasonable suspicion that the safety of passengers is in danger, and an immediate decision as to whether probable cause exists for the marshal to make an arrest, or whether the suspicious activity was innocent. While naturally, this will not always be an easy determination to make, increased training and experience of the marshals should aid in this decision making process.

\section*{C. Border Search Exception}

The applicability the border search exception to justify a warrantless search and seizure by a Federal Air Marshal during a flight will depend largely on whether the flight is international or domestic. Originally, Air Marshals served only on international flights to prevent hijacking. Since September 11, 2001, marshals are deployed largely on domestic flights, in response to the nature of the terrorist attacks.\footnote{185}{GAO Report, November 2003, \textit{supra} note 38, at 1.} The balance of Fourth Amendment considerations differs for those searches not conducted at the border.\footnote{186}{United States v. Montoya de Hernandez, 473 U.S. 571, 537-40 (1968) (discussing fact that routine border searches are functionally different in nature than routine non-border searches).} Generally, Fourth Amendment protections are inherently stronger, and therefore safeguarded to a greater extent, when the searches or seizures occur within the interior of the country.\footnote{187}{See id.} Thus, in order to advance this theory as an exception to the Fourth Amendment, the flight must be international for the border search approach to apply.

In contrast, on an international flight, the border search exception can be easily applied to inbound flights, under the plenary power of the Executive Branch to control the persons and items entering the country.\footnote{188}{See \textit{supra} Part III B.} On an international flight \textit{leaving} the United States, most circuits have held that the same rationale applies to outbound, as well as inbound flights.\footnote{189}{United States v. Ezeiruaku, 936 F.2d 136, 143 (3rd Cir. 1991) (joining the "Second, Fifth, Eighth, Ninth and Eleventh Circuit Courts of Appeals in concluding that the traditional rationale for the border search exception applies as well in the outgoing border search context").} The
Fifth Circuit observed that given the substantial national interest in regulating the exportation of domestic currency at the border and the similar features of incoming and outgoing border-crossing searches for Fourth Amendment purposes, we hold that in the context of a routine stop and search for currency, the rationale applied to border searches under the fourth amendment encompasses persons exiting as well as persons entering our borders.190

Thus, on either inbound or outbound international flights, searches and seizures not incident to arrest performed by Federal Air Marshals can likely take place and will require a lesser quantum of suspicion by the marshal in order to preserve the safety of passengers without Fourth Amendment entanglements.

D. CRITICAL ZONE APPROACH

The critical zone approach, as most recently articulated in United States v. Skipwith, expanded the doctrine to allow a search based on “mere suspicion,” but only in a “critical zone,” such as the flight boarding area.191 Taking this justification to its logical conclusion, this exception can be applied with equal force on the aircraft itself. Barring application of the consent exception, the critical zone approach presents the most logical argument for exception to the Fourth Amendment, second only to the statutorily authorized consent exception. In order to comply with the competing considerations of Moreno, an air marshal would merely need to demonstrate that the totality of the circumstances presented reasonable suspicion, and that the aircraft, even while in flight, served as the functional equivalent of a border.192

E. ADMINISTRATIVE SEARCHES

The justification for the administrative search exception is grounded in the theory of uniform search systems that treat all citizens the same. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.193 Thus, this exception used to justify the large-

190 Id.
191 United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973).
192 See infra Part IV.C.
193 Id.
scale screening will be inapplicable to actions taken by Federal Air Marshals during actual passenger flights.

VI. PROPOSED SUGGESTIONS

The most critical issues facing FAMS and its future effectiveness in preventing hijacking and terrorist events reside in improving the overall efficiency and security of the Service itself. Of primary importance is improved training and hiring within the Service. Fourth Amendment concerns aside, poorly trained Air Marshals, not equipped to cope with the realities of an in-flight hijacking, bear the risk of the tragedy confronted by Iraqi Airways in December of 1986. On Christmas Day, terrorists attempted to seize an aircraft using grenades and guns.\textsuperscript{194} Armed guards on the flight responded with their own fire, resulting in the "total destruction" of the flight and 71 passengers dead.\textsuperscript{195} Thus, reinstating complete weapons training, and requiring quarterly re-training for all marshals will significantly improve safety in the event of an attack. Additionally, the FAMS should take a cue from the Israeli airline, El Al, which uses air marshals on every flight, but are instructed in "hand-to-hand fighting."\textsuperscript{196} Officers must also receive training in analyzing whether the appropriate response to a potential attack is discharging firearms, or engaging in other negotiation techniques.

Next, all assurances possible must be made in order to maintain the anonymity of air marshals. The FAMS has been subject to numerous complaints about its strict dress code, often citing that the required "professional" dress compromises the anonymity of the air marshals.\textsuperscript{197} This, along with requirements that air marshals show identification and sign log books at flight gates\textsuperscript{198} have decreased the efficacy of the presence of air marshals on high-risk flights. The proposal to allow air marshals to carry magnetic identity cards, similar to those used by airport employees, is certainly progress.\textsuperscript{199}


\textsuperscript{195} Id.


\textsuperscript{198} See Larry Sander, \textit{Law Aims to Protect IDs of Undercover Air Marshals; Airport Security to Improve with Better Baggage Screening}, BRADENTON HERALD, Jan. 12, 2005.

\textsuperscript{199} Id.
To ensure all the Fourth Amendment protection airline passengers are due, emphasis must continue to be placed on conducting searches and otherwise bolstering security measures while passengers and law enforcement officers remain on the ground. After years of ever increasing airport security measures, persons wishing to fly are certainly on notice that both their person and their effects are subject to pre-flight screening, and that consent is implied in opting for air transportation. In flight, however, random searches of passengers who seem “suspicious,” as noted earlier, would serve to both compromise the identities of the marshals, and likely cause increased panic in what is already an extremely tense situation for many travelers. The ICE should continue to coordinate intelligence with other Department of Homeland Security agencies, and fly primarily on high-risk flights, while allowing time for increased training before hiring more new Air Marshals, even at the expense of fewer Marshals on lower-risk flights.

VII. CONCLUSION

The question of whether Fourth Amendment rights are eliminated as soon as the doors close remains to be answered. However, no matter what exception is used to justify a search or seizure aboard a plane by Federal Air Marshals, the balancing test the courts will engage in will most certainly put the interests of safety at the forefront, allowing marshals to conduct searches and seizures any time a marshal can come forward with plausible evidence that a true threat existed at the time. As Annie Jacobesen’s article suggests, national fear of a terrorist attack while aboard an airplane has subsided little, if at all during the past three years, and under the familiar Katz v. United States, it may well be that society is not willing to accept any claim of a reasonable expectation of privacy while aboard a plane, regardless of the Fourth Amendment implications.

What will determine society’s returned acceptance of a greater zone of privacy will be the increased or diminished confidence Americans have in the Federal Air Marshals aboard their flights. After two years of growing pains, and what is certainly a fair share of bad publicity, there is potential for the United States Immigration and Customs Enforcement Agency to create the “surge capacity” it envisions for security on all American borders. It is important to be mindful of Benjamin Franklin’s admonishment to the nation, “they that can give up essential liberty to obtain a little temporary safety deserve
neither liberty nor safety.” The only way the twin goals of liberty and security can be met are through effective work by Federal Air Marshals, and vigilant guardianship of Fourth Amendment rights by the courts.