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THE "COST" OF SECURING DOMESTIC AIR TRAVEL

I. INTRODUCTION

A mother was traveling through an airport in St. Petersburg, Florida on her way back from visiting her daughter in college. When she passed through a metal detector, she was told her bag needed to be searched. Before she had passed through the metal detector, she removed all metal objects from her person. She passed through the detector without setting off any alarm, and there was no indication of concern by security personnel about the bag she was carrying on the plane. This mother just happened to be picked at random to have her bag searched. She has never been convicted of a crime and she is white. She was pulled to the side, and the contents of her carry-on were dumped out on a table in public; her bra, panties and other personal items for all the travelers to see. The only reason she was searched was because she was randomly picked to be searched.[1]

A father was flying to Dulles Airport in Washington, D.C. from the Chicago-O'Hare International Airport for business. He passed through the security checkpoint at American Airlines at O'Hare and passed without being stopped. He was not chosen to be randomly searched. On his way back home, he was stopped at the security checkpoint at Dulles after his bag went through the x-ray machine. His entire bag was not searched, but he did have to surrender a corkscrew that was in his bag. This father did not intend to use the corkscrew for an illegal purpose on the airplane; he simply carries it to open a bottle of wine that he drinks at night in the hotel room. This may be an example of how the heightened airport security measures are working, but there is one problem: this father had the corkscrew since he left his home in Illinois.[2]

These two scenarios illustrate how inconsistent airline security is in the United States. The attacks of September 11, 2001 on the World Trade Center and the Pentagon changed the way everyone in the United States viewed airline security.[3] The weapons used by the hijackers on

1. Interview with Irene DiGuglielmo, Homemaker (Aug. 8, 2002).

2. Interview with James E. Miller, President, The Miller Research Group, Inc. (Apr. 13, 2002).

3. Michael Gilbert, *Americans Get Used to Increased Security as Way of Life*, The News Trib. ¶ 5 (Sept. 10, 2002).

September 11 were allowed on planes at the time.[4] People, from security experts to laypeople, have always questioned the effectiveness of airline security. After the Pan Am 103 incident over Lockerbie, Scotland,[5] airlines focused their security efforts on questioning whether passengers have kept their bags in their possession and if any stranger asked them to carry anything on the plane for them.[6] The concern with airline security changes is that many of them are enacted as a response to some event that illustrated a breach in the current measures or procedures.[7] Government officials viewed the massive security changes following September 11 as necessary because the previous measures were weak and inadequate, causing a crisis overnight for the newly created Transportation Security Administration ("TSA").[8] Even with the changes in airline security, have our new security measures improved air transportation or have they created additional problems?

The security changes since September 11 have not met their stated goals. "[The security changes] did create additional work right after the incident, but a lot of that has leveled off since then. . . . It's not on the forefront of people's minds."[9] Airport managers have been stretched to the max, and the transition has not been smooth, but the improvement has been phenomenal.[10] Some Americans have been frustrated with the rigidity of the security changes.[11] Rajeev Patel of Snyder, Texas, has questioned why he has been stopped for a random search at the gate

4. *Random Security Checks Must Be Useful or Be Gone*, The Pantagraph (Bloomington, IL) Editorial A12 ¶ 10 (Sept. 26, 2002) [hereinafter *Random Security*].

5. Richard Blystone, *Remembering the Lockerbie Tragedy* ¶ 6 <http://www.cnn.com / 2000/LAW/08/21/blystone.memories/index.html> (accessed Apr. 3, 2003). Pan Am Flight 103, en route from New York to Frankfort, exploded over Lockerbie Scotland on December 21, 1988. *Id.* The cause of the explosion was a bomb. *Id.* Two hundred and fifty-nine passengers died in the explosion, while another eleven died on the ground from the debris. *Id.* at ¶ 3. Two Libyan men were indicted for their roles in the bombing. CNN, *U.S. to Mark Anniversary of Lockerbie Bombing* ¶ 8 <http://www.cnn.com/US/9812/16/panam103. clinton/index.html> (accessed Apr. 3, 2003).

6. *Random Security*, *supra* n. 4, at ¶ 11.

7. *Id.* at ¶ 9.

8. Jim Sloan, *An Air of Caution*, Tampa Trib., Nation/World 1 ¶ 30 (Sept. 6, 2002).

9. Gilbert, *supra* n. 3, at ¶ 4.

10. Todd Hartman & Kevin Flynn, *DIA's Delicate Dilemma; Airport Officials Having to Balance Security Needs with Consumer Service*, 144 Rocky Mountain News, City Desk/Local 30A ¶ 10 (Sept. 6, 2002) [hereinafter Hartman & Flynn]. Tom Nunn, Director of Aviation Safety, Security and Regulatory Compliance, Frontier Airlines, said "[S]ince September 11, all of us have been stretched to the max. While it hasn't necessarily been smooth, in terms of how well the airport has done, compared to what we've been up against, it's phenomenal." *Id.*

11. *See e.g.* Julie Breaux, *Director of Odessa, Texas-Area Airport Has Had Plenty to Do Since Sept. 11*, Odessa American 1A ¶ 29 (Sept. 8, 2002) (quoting a passenger who has been frequently stopped).

three or four times since September 11, 2001.[12] Patel said, "[i]t just takes longer. I can't really blame them, but still."[13] For as many successes as the changes have had,[14] there have been several instances where the changes have produced less than desirable results.[15] The worst result was the Richard Reid incident. Reid boarded a flight in London that was bound for the United States, and he packed his shoes with explosives to allegedly bring down the American Airlines plane he was on.[16] This incident illustrated how easily clothes can be used to con-

12. *Id.*

13. *Id.* at ¶¶ 28, 30.

14. For example, here are two situations of how the new airline security measures succeeded in stopping an individual from breaching air safety. Subash Gurung had knives and a stun gun in his carry-on bag, which successfully passed a security checkpoint at Chicago-O'Hare International Airport. Kathleen Koch, *Passenger Profiling Beefed Up at Airports* ¶ 1 <http://www.cnn.com/2001/TRAVEL/NEWS/11/08/rec.passenger.profiling/index.html> (accessed Oct. 5, 2002) [hereinafter Koch I]. The airline passenger profiling system pegged Mr. Gurung as an individual who needed additional screening at the gate. *Id.* at ¶ 2. Upon conducting the additional screening, Mr. Gurung was arrested and not allowed to board the plane. *Id.* A second example was relatively more successful. Barry Brunstein flew round trip from Tampa, Florida to Memphis, Tennessee, with a layover in Atlanta. CNN, *FBI: Man Boarded 2 Flights with Gun in Luggage* ¶ 4 <http://www.cnn.com/2001/US/12/29/airport.gun/index.html> (accessed Oct. 5, 2002). The authorities claimed that Brunstein was trying to accumulate frequent-flyer miles, and that there was no connection to any planned terrorist act or incident. *Id.* at ¶ 3. Brunstein's gun was discovered when he was randomly selected at the gate in Memphis for additional screenings. *Id.* at ¶ 5. The only negative to the incident was that he was able to take the gun on two previous flights on the trip. *Id.* at ¶¶ 3, 5.

15. Former U.S. Senator and Vice President Al Gore has been randomly selected twice for additional security screenings. *Good Judgment*, 19 Investor's Business Daily, Issues & Insights, Editorial A16 ¶ 6 (Sept. 12, 2002). One commentator noted, "Sorting through Gore's shorts would not [be good judgment]." *Id.* at ¶ 9. Former Vice President Walter Mondale missed a flight because of "security-related" delays. *Id.* at ¶ 6. Even Lisa Beamer, wife of Todd Beamer, who cried "Let's roll" on United Airlines Flight 93, was randomly selected for additional security inspections. *Id.* But the most offensive example of the misgivings of the new security measures occurred to Marge Williams, a public relations and marketing executive from Detroit. Holly Hanson, *Fashion at the Gate Fly Through Security with Smart Clothing Choices*, Pitt. Post-Gazette, Arts & Ent. G-6 ¶ 17 (Sept. 29, 2002). Williams had flown monthly since September 11, 2001. *Id.* Many times she had gone through a metal detector, and the underwire of her bra set off the machine. *Id.* at ¶ 18. She was subjected to additional security measures, which in cases like these, are conducted in private due to the sensitivity of the subject matter of the search. *Id.* Instead, Ms. Williams had been subjected to these searches in public, which caused great humiliation. *Id.* The security personnel waved the metal detector wand over her body, and then several of them tugged at the bra to make sure that nothing was concealed either inside the bra or behind it. *Id.* at ¶ 19. Ms. Williams was embarrassed that such an invasive procedure was done for all travelers to see. *Id.* at ¶ 19.

16. *Id.* at ¶ 1. The attempt to blow up the plane was just some three months after the attacks of September 11. *Shoe Bomber Pleads Guilty While Laughing*, 130 Daily Herald, 6 ¶ 18 (Oct. 5, 2002). On October 4, 2002, Reid pleaded guilty to charges resulting from the plot. *Id.* at ¶ 1. He pleaded guilty to the following charges: "attempted use of a weapon of

ceal non-metal weapons.[17]

Public opinion also shows a trend that is disturbing to government security officials and airport managers.[18] An August 2002 poll showed that seventy-five percent of Americans made no changes to their lifestyle to reduce the chances of dying from an act of terrorism.[19] FirstAir.net Vice President Robert Laney said, "[o]ur survey shows that Americans remain very security conscious and that full trust remains to be restored in the handling of security at U.S. airlines."[20] Moreover, two-thirds of the respondents to an Associated Press poll in August 2002 felt concerned that the new security measures restricted their individual liberties.[21]

The airline security measures required to make the airways as safe as possible and reduce delays at airports have some conflicts with the constitutional requirements of the Fourth Amendment. This comment will focus on how technological efficiency of airport security interacts with the requirements of the Fourth Amendment. Part I will discuss the changes in airline security since September 11, 2001, key Fourth Amendment principles and the judicial recognition of airline security. Part II will examine the effectiveness of current and proposed security procedures, the constitutionality of proposed measures and the underlying policy considerations of all airline security procedures. Part III will propose a solution that meets both the goals of airline security and is technologically, constitutionally and fiscally feasible.

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mass destruction, attempted homicide, placing an explosive device on an aircraft, attempted murder, two counts of interference with flight crew and attendants, attempted destruction of an aircraft, and using a destructive device during a crime of violence." *Id.* at ¶ 7. Prosecutors are recommending that Reid receive 60 years to life. *Id.* at ¶ 9. FBI investigators are trying to find out who helped Reid plan the attack. *Id.* at ¶ 16.

17. Hanson, *supra* n. 15, at ¶ 1.

18. *See generally Seventy Percent of International Business/First Class Passengers Traveling Less Than a Year Ago; Seventy-five Percent to Curtail Travel Around 9/11; Twenty-eight Percent Have Weak Trust of U.S. Air Security: FirstAir.Net Survey; Cost Savings Important to Eighty-five Percent and Seventy-five Percent are Buying First/Business Class On-Line*, PR Newswire, Fin. News (Sept. 5, 2002) [hereinafter *Seventy Percent*] (giving the results of a FirstAir.net opinion poll).

19. Gilbert, *supra* n. 3, at ¶ 7. Knight Ridder/Tribune conducted the poll. *Id.*

20. *Seventy Percent*, *supra* n. 18, at ¶ 5. Laney further commented that, "at the same time, while Americans are still traveling less than a year ago, as security concerns abate, they expect to travel more in the future. And they have significant economic issues with the high costs of travel." *Id.*

21. Gilbert, *supra* n. 3, at ¶ 35 (describing the poll about anti-terrorism measures, which include changes in airport security).

II. BACKGROUND

Prior to 1973, airline security consisted of an air piracy profile, a magnetometer search for metal objects for any passenger who met the profile and a search of a passenger's carry-on baggage and person for anyone activating the magnetometer.[22] The profile consisted of several "objective characteristics to identify potential hijackers."[23] The current security system, which remained in place after September 11, 2001, was initiated by presidential order in 1972, requiring a mandatory search of all carry-on baggage and a magnetometer screening of all passengers for metal objects.[24]

A. AIRLINE SECURITY SINCE SEPTEMBER 11, 2001

Federal law requires that all persons wanting to board an aircraft must submit to the screening and inspection of his or her person under all applicable procedures.[25] Airport security includes many different layers of procedures to attempt to prevent anything from slipping by to endanger those using air transportation.[26] To help coordinate all the different layers of security, Congress created the TSA, under the governance of the Department of Transportation.[27] The TSA has the power to regulate all security relating to civil aviation and all other modes of transportation under the control of the Department of Transportation.[28]

The screeners have several ways of executing their duties of actual screening of passengers and baggage. Once all passengers cross through the security checkpoints, a limited amount of passengers are randomly selected for a more thorough screening procedure.[29] In addition to those picked for random screening, any passenger who exhibits suspicious be-

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22. *U.S. v. Davis*, 482 F.2d 893, 898 (9th Cir. 1973).

23. *Id.* The characteristics were developed at an aviation and security professionals' symposium, hosted by the Federal Aviation Administration. *Id.* For more information on the symposium, *see* H. Comm. on Interstate and For. Commerce, *Hearing on Aviation Safety and Aircraft Piracy: FAA Report on Detection Devices*, 91st Cong., 98-102 (Feb. 5, 1969).

24. *Davis*, 482 F.2d at 901.

25. 49 C.F.R. §1540.107 (2002).

26. *See Random Security*, *supra* n. 4, at ¶ 2.

27. 49 U.S.C. §114 (2002).

28. 49 U.S.C. §114(d). §114(d) states:

> Functions. The Under Secretary shall be responsible for security in all modes of transportation, including—
> 1) carrying out chapter 449, relating to civil aviation security, and related research and development activities; and
> 2) security responsibilities over other modes of transportation over other modes of transportation that are exercised by the Department of Transportation.

Id.

29. U.S. Dept. of Transp., *Fact Sheet: Answers to Frequently Asked Questions Concerning the Air Travel of People Who Are or May Appear to Be of Arab, Middle Eastern or South*

havior will be selected for additional screenings.[30] The additional screenings consist of a hand-held metal detector and a pat-down search, but may also include more thorough measures if the initial screening shows concealment of a prohibited item.[31] At the security checkpoints, those passengers who do not set off the metal detector can only be subjected to additional screenings on a random basis, and those who do set off the metal detector will automatically be subjected to the additional screenings.[32] If a search requires the removal of clothing, the passenger has the right to choose a public or private inspection.[33]

To complement the initial and random screenings, the *Aviation and Transportation Security Act* required that all checked baggage by passengers be screened.[34] In order for the checked baggage to be screened appropriately, airports were also required to install explosive detection systems by December 31, 2002 to screen that baggage.[35] While the detection equipment is unavailable for the sixty-day grace period, screeners must use at least one alternative means of screening the checked baggage.[36] The airline asked the government for an additional thirty

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Asian Descent and/or Muslim or Sikh 2 <http://www.faa.gov/acr/dotat-rno.doc> (accessed Oct. 5, 2002).

30. *Id.* at 3 n.3.

31. *Id.* at 3.

32. *Id.*

33. *Id.*

34. *Aviation and Transportation Security Act of 2001*, Pub. L. No. 107-71, §110(c), 115 Stat. 597, 615 (2001). Airports were required to implement this measure within sixty days of passage of the legislation. *Id.* "A system must be in operation to screen all checked baggage at all airports in the United States as soon as practicable but not later than the [sixtieth] day following the date of enactment of the *Aviation and Transportation Security Act*." *Id.*

35. *Id.* § 110(d) states:

> (1) In general. – The Under Secretary of Transportation for Security shall take all necessary action to ensure that –
> (A) explosive detection systems are deployed as soon as possible to ensure that all United States airports described in section 44903(c) have sufficient explosive detection systems to screen all checked baggage no later than December 31, 2002, and that as soon as such systems are in place at an airport, all checked baggage at the airport is screened by those systems; and
> (B) all systems deployed under subparagraph (A) are fully utilized; and
> (C) if explosive detection equipment at an airport is unavailable, all baggage is screened by an alternative means.

Id.

36. *Id.* § 110(e) states:

> (e) Mandatory Screening Where EDS Not Yet Available. – As soon as practicable but not later than the [sixtieth] day following the date of enactment of the Aviation and Transportation Security Act and until the requirements of subsection (b)(1)(A) are met, the Under Secretary shall require alternative means for screening any piece of checked baggage that is not screened by an explosive detection system. Such alternative means may include [one] or more of the following:
> (1) A bag match program that ensures that no checked baggage is placed aboard an aircraft unless the passenger who checked the baggage is aboard the aircraft.

day extension to the grace period,[37] which was rejected by the Department of Transportation.[38] Three and a half million bags are checked as "belly baggage" each day, and only ten percent of those are screened for explosives.[39] It is estimated that "2,200 [machines will be needed] to screen the 1.3 billion bags it handles every year."[40]

Congress gave the TSA the right to compile passenger lists, or passenger profile lists, of those individuals who should be subjected to additional security screenings.[41] The profiling system highlights those passengers who purchase one-way tickets, pay with cash, or have an unusual travel history.[42] These lists and their criteria are a growing cause for concern among the American public.[43] The federal government maintains that many people on the list are stopped not because of their names being on the list, but their names resemble those on the list.[44] As evidence, the government points to the fact that two of the September 11 hijackers used their real names to board the plane.[45] However, no fed-

(2) Manual search

(3) Search by canine explosive detection units in combination with other means.

(4) Other means or technology approved by the Under Secretary.

Id.

37. CNN, *Government Rejects Delay In Bag Check Deadline* ¶ 5 <http://www.cnn.com / 2001/TRAVEL/NEWS/12/19/baggage.screening/index.html> (accessed Mar. 27, 2003).

38. *Id.* at ¶ 1. "DOT officials say airlines were told to 'step up to the plate' and work to meet the deadline and its requirements." *Id.* at ¶ 4. Representative James Oberstar (D-Ohio), ranking member of the House Transportation Committee, called the request for the airline industry's extension "'appalling'" and remarked that the industry wanted the government to foot a larger portion of the responsibility for the new security. *Id.* at ¶¶ 9-10.

39. CNN, *Mineta Outlines Bag Screening Guidelines* ¶ 5 <http://www.cnn.com /2002/ TRAVEL/NEWS/01/16/rec.airport.security/index.html> (accessed Oct. 8, 2002) [hereinafter *Mineta*].

40. Kathleen Koch, *Airlines to Receive Guidance on Bag Screening* ¶ 4 <http:// www.cnn. com/2002/TRAVEL/NEWS/01/11/airlines.baggage/index.html> (accessed Oct. 5, 2002) [hereinafter Koch II].

41. 115 Stat. at 599.

42. Koch I, *supra* n. 14, at ¶ 5.

43. Alan Gathright, *No-Fly Blacklist Snares Political Activists*, S.F. Chron. A1 ¶ 3 (Sept. 27, 2002). Many believe that the profile lists will target activists and dissidents. *Id.* at ¶ 5. Twenty members of a Wisconsin activist group were detained by airline officials for additional screenings, forcing them to miss a meeting with congressional representatives. *Id.* at ¶ 3. The group still has not been informed why they were stopped, especially since only one member's name resembled a name on the airline's no-fly list. *Id.* at ¶ 23. Rebecca Gordon, a veteran activist from San Francisco and co-founder of War Times, said, "'I think it's a combination of an attempt to silence dissent by scaring people and probably a lot of bumbling and inept implementation of some bad security protocols.'" *Id.* at ¶ 16. Gordon and fellow activist Jan Adams were detained for additional screenings at San Francisco International Airport after their boarding pass was marked with an "S," the designation requiring further scrutiny. Gathright, The S.F. Chron. at ¶ 17.

44. *Id.* at ¶ 5.

45. *Id.* at ¶ 6.

eral agency knows who is responsible for maintaining the list.[46] Some passengers do not know how or why their name gets on the list, and others, who are on the list, are never taken off of it after being cleared as a suspected security threat by the authorities.[47] Norman Mineta, United States Secretary of Transportation, insists that the system does not take ethnicity into account.[48] Others in the field believe that the system should be more discriminating.[49]

In addition to passenger and baggage screenings and the passenger profiling lists, several other security measures were also put in place to improve airline security.[50] First, with regard to screening airline passengers, the TSA is responsible for everyday federal screening operations, developing recruiting and retention standards for federal screeners, testing and training federal screening workers, overseeing the actual hiring and training of the federal screeners at all airports,[51] and many other duties.[52] The TSA has control over all aspects of the federal

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46. *Id.* at ¶ 11.

47. *Id.* at ¶ 10. Jayashri Srikantiah, an attorney with the American Civil Liberties Union of Northern California, illustrates this concern with the following quotation:

> The problem is that this list has no public accountability: People don't know why their names are put on or how to get their names off. We have heard complaints from people who triggered the list a first time and then were cleared by security to fly. But when they fly again, their name is triggered again.

Gathright, *supra* n. 43, at ¶ 10.

48. Koch II, *supra* n. 40, at ¶ 9 (describing the explanation that was supported by Norman Mineta, U.S. Sec. of Transp).

49. *Id.* Neil Livingstone, Chairman and CEO, Global Options, states, "We are concerned about people from a particular region of the world. They tend to be young, they tend to be male. And we ought to spend most of our time looking for them." *Id.* at ¶ 10. An editorial in Investor's Business Daily suggests using the good judgment theory. "But discriminate is exactly what screeners should do. It's worth noting that one definition of discriminate is 'to use good judgment.'" *Good Judgment*, *supra* n. 15, at ¶ 8.

50. These security measures will only be discussed briefly because they have little or no Fourth Amendment questions.

51. 49 U.S.C. §114(e).

52. 49 U.S.C. §114(f). §114(f) states:

> Additional duties and powers. In addition to carrying out the functions specified in subsections (d) and (e), the Under Secretary shall –
> 1) receive, assess, and distribute intelligence information related to transportation security;
> 2) assess threats to transportation;
> 3) develop policies, strategies, and plans for dealing with threats to transportation security;
> 4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government;
> 5) serve as the primary liaison for transportation security to the intelligence and law enforcement communities;
> 6) on a day-by-day basis, manage, and provide operational guidance to the field security resources of the Administration, including Federal Security Managers as provided by section 44933;

security screeners.[53] In order to be hired as a security screener, a person must achieve a satisfactory score on a federal security personnel selection exam, be a United States citizen, meet all employment standards,[54] other qualifications as determined by the Under Secretary of Transportation for Security, and be able to perform the duties "without any impairment due to illegal drugs, sleep deprivation, medication or alcohol."[55] Second, the last line of defense on a hijacked airliner is now

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7) enforce security-related regulations and requirements;
8) identify and undertake research and development activities necessary to enhance transportation security;
9) inspect, maintain, and test security facilities, equipment, and systems;
10) ensure the adequacy of security measures for the transportation of cargo;
11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;
12) require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel;
13) work in conjunction with the Administrator of the Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations;
14) work with the International Civil Aviation Organization and appropriate aeronautic authorities of foreign governments under section 44907 to address security concerns on passenger flights by foreign air carriers in foreign air transportation; and
15) carry out such other duties, and exercise such other powers, relating to transportation security as the Under Secretary considers appropriate, to the extent authorized by law.

Id. The department also has the power to purchase or lease any real or personal property necessary to carry out its objectives. 49 U.S.C. §114(j). Finally, the TSA has the power, like any other federal agency, to issue regulations necessary to carry out its directives. 49 U.S.C. §114(k)(1).

53. *See* 49 U.S.C. §114 (giving TSA control of all airline security).

54. The employment standards are delineated in 49 U.S.C. §44935(f).

55. 49 U.S.C. §44935(e)(2)(A). All security screeners are subject to background checks, 49 U.S.C. §44935(e)(2)(B), and cannot be convicted of certain crimes. *Id.* The crimes are listed in the *Airport Security Improvement Act of 2000*:

(xiii) a felony involving a threat;
(xiv) a felony involving –
(I) willful destruction of property;
(II) importation or manufacture of a controlled substance;
(III) burglary;
(IV) theft;
(V) dishonesty, fraud, or misrepresentation;
(VI) possession or distribution of stolen property;
(VII) aggravated assault;
(VIII) bribery; and
(IX) illegal possession of a controlled substance punishable by a maximum term of imprisonment of more than 1 year, or any other crime classified as a felony that the Administrator determines indicates a propensity for placing contraband aboard an aircraft in return for money.

Airport Security Improvement Act of 2000, Pub. L. No. 106-528, §2(d)(4), 114 Stat. 2517, 2519 (2000). Federal screeners cannot begin their work in airports until they have completed 40 hours of classroom training or an equivalent program, worked 60 hours of on-the-

an air (sky) marshal. The TSA allows for air marshals to be placed on all flights.[56] However, air marshals are only required to be placed on flights with high security risks.[57]

B. Fourth Amendment Standards

The purpose of the Fourth Amendment is to prevent "arbitrary and oppressive [governmental] interference" with the personal privacy and security of citizens.[58] The Fourth Amendment does not protect personal privacy from all forms of government intrusion because other parts of the Constitution are designed to protect their respective intrusions.[59] "A search begins with the planning of the invasion and continues 'until effective appropriation' of the fruits of the search 'for subsequent proof of an offense.'"[60] A person is considered to be seized under the Fourth Amendment when "'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"[61] The judicial system plays the role of setting the limits for searches valid under the Fourth Amendment and "will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[62]

In determining a Fourth Amendment violation, courts examine the public interest versus the individual interest.[63] Persons trying to invoke the protections of the Fourth Amendment have to meet both a subjective

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job training, and passed an on-the-job examination. 49 U.S.C. §44935(g)(2). The screeners must also undergo continuous training on new technologies. 49 U.S.C. §44935(h)(1).

56. 115 Stat. at 607.

57. *Id.* Additionally, air carriers are required to provide air marshals seats on flights at no charge to the federal government. *Id.* The carriers are also required to provide a seat on a flight for an off-duty air marshal returning home. *Id.* The following people are eligible to be air marshals: 1) retired law enforcement officers, 2) retired members of the Armed Forces, and 3) individuals from flight crews who lost their jobs following September 11, 2001. *Id.*

58. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (citing *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *U.S. v. Ortiz*, 422 U.S. 891, 895 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). The Fourth Amendment states:

> 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 [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

59. *Katz v. U.S.*, 389 U.S. 347, 350 (1967).

60. *Davis*, 482 F.2d at 896.

61. *Buffkins v. City of Omaha*, 922 F.2d 465, 468 (8th Cir. 1990), *cert. denied*, 502 U.S. 898, 116 L. Ed.2d 225, 112 S. Ct. 273 (1991).

62. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

63. *Martinez-Fuerte*, 428 U.S. at 555.

and objective expectation requirement.[64] The Fourth Amendment protections extend to private areas, but not public areas.[65] At one time, it was held that the protections were limited simply to tangible property,[66] but the Supreme Court has most recently held that the Fourth Amendment protections include certain intangible properties.[67] The Fourth Amendment is subordinate to the judicial process, and searches without authority from a judge are "per se unreasonable under the Fourth Amendment – subject to only a few specifically established and well-delineated exceptions."[68]

The Fourth Amendment does not bar all searches and seizures; only those that are unreasonable.[69] To determine reasonableness, the courts must look at the governmental interest that underlies the intrusion of the search against the interest of the individual.[70] In other words, "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search entails.'"[71] The government official making the intrusion must have specific articulable facts used in conjunction with rational inferences to support a finding of reasonableness.[72] Because the Fourth Amendment is one of reasonableness, the facts of each case must be evaluated by an objective standard.[73] Anything less than that would allow

64. *Davis*, 482 F.2d at 905 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). "'*Katz* imposes a twofold requirement [for Fourth Amendment protection], first that a person have [sic] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.*

65. *Katz*, 389 U.S. at 351

66. *Id.* at 352-53.

67. *Id.* at 353. "[O]nce it is recognized that the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.*

68. *Id* at 357; *Carroll v. U.S.*, 267 U.S. 132, 153, 156 (1923) (allowing the search of an automobile where obtaining a warrant is impracticable because the vehicle may leave the scene); *McDonald v. U.S.*, 335 U.S. 451, 454-56 (1948) (eliminating need for a search warrant when police enter as the result of an emergency); *Brinegar v. U.S.*, 338 U.S. 160, 174-77 (1948) (allowing search in absence of probable cause when crime is in commission); *Cooper v. Cal.*, 386 U.S. 58, 62 (1966) (allowing search of vehicle while being held in police custody); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) (allowing search without warrant while police are in pursuit of suspect).

69. U.S. Const. amend IV.

70. *Terry*, 392 U.S. at 20-21.

71. *Id.* at 21.

72. *Id.*

73. *Id.* at 22. In his dissent in *Martinez-Fuerte*, Justice Brennan stated,

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be

searches to be legal if they are based on only a hunch.[74] "'If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."[75]

Some searches under the Fourth Amendment are classified as administrative.[76] An administrative search does not require probable cause as long as the search is "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime."[77] In order for an administrative search to meet the requirements of the Fourth Amendment, it must meet the standard of reasonableness.[78]

One way to have a search avoid the requirements of the Fourth Amendment is for the government to acquire the individual's consent to be searched.[79] When consent to be searched is given, the consent must be given voluntarily.[80] The test for whether consent was voluntary is to be determined by examining the totality of the circumstances.[81] Before looking at the circumstances, the government must show some form of consent-in-fact.[82] Consequently, the government has the burden of proving that the consent given was voluntary.[83] The government can show consent-in-fact either expressly or implicitly.[84]

One example of Fourth Amendment searches that is frequently questioned is the checkpoint search.[85] The Supreme Court has held that a checkpoint stop is a seizure under the Fourth Amendment.[86] In the context of border checkpoints, the checkpoints do not require a reasonably articulable suspicion because "the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."[87] A checkpoint stop only

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> judged against an *objective standard*. . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more that inarticulate hunches, a result this Court has consistently refused to sanction.

428 F.2d at 569 (emphasis in original).

74. *Id.*

75. *Id.* (citing *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

76. *Davis*, 482 F.2d at 908.

77. *Id.*

78. *Id.* at 910.

79. *Id.* at 913.

80. *Id.*

81. *Id.* at 914.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See Martinez-Fuerte*, 428 U.S. at 551. Checkpoint stops are selected as an illustrative example because airline security screenings are checkpoints.

86. *Id.* at 556.

87. *Id.* at 557.

allows for a few questions and production of a document or two.[88] The checkpoint stops have been classified as administrative in nature when weighing the intrusiveness on the right to travel.[89]

In *U.S. v. Martinez-Fuerte*, the defendant was transporting illegal immigrants over the U.S.-Mexico border.[90] The illegal women were found in the defendant's car as he was stopped at a border checkpoint in San Clemente, California, sixty-six miles north of the U.S.-Mexico border.[91] The court applied a reasonableness test to determine whether the stops violated the Fourth Amendment.[92] The court held that checkpoint stops for brief questioning fit the warrant exception of the Fourth Amendment.[93] The defendant was convicted.[94] The court based its decision on the theory that the intrusiveness of brief questioning at permanent checkpoints was minimal and reasonable.[95]

U.S. v. Epperson specifically addressed the constitutionality of a

88. *Id.* at 558.

89. *Id.* at 561 n. 14.

90. *Id.* at 548. Defendant was arrested for illegally transporting aliens. The United States Border Patrol erected a permanent checkpoint on Interstate 5 near San Clemente, California, sixty-six miles north of the Mexican border. *Id.* at 545. The property housing the checkpoint is also used as a weighing station for the State of California. *Id.* at 546. Orange cones funnel traffic into two lanes, each patrolled by a uniformed border agent. *Id.* U.S. Border Patrol vehicles block the unused lanes of traffic. *Id.* The border agents visually screen the cars as they approach, and most cars proceed through without any questioning or close examination. *Id.* at 546. Some cars, however, are directed to a secondary inspection area. *Id.* Cars held here are generally detained for about three to five minutes. *Id.* at 547. Defendant approached the checkpoint with two female passengers, who were illegal Mexican aliens. *Id.* The women entered the United States at San Ysidro using false papers, and they met the defendant in San Diego, where he agreed to transport them north . *Id.* At the San Clemente checkpoint, defendant's car was directed to the secondary inspection area. *Id.* at 547. Defendant proved that he was a legal alien, but the women admitted to entering the United States illegally. *Id.* Prior to trial, defendant moved to suppress evidence obtained from the stop at the checkpoint on grounds that the stop violated the Fourth Amendment. *Id.* at 548. His motion was denied, and he was convicted on both counts. *Id.* Defendant appealed, and the Ninth Circuit Court of Appeals reversed the conviction, holding that the stop violated the Fourth Amendment unless the stop was based on a reasonable articulable suspicion. *Id.* at 549. A similar case arose in Sarita, Texas, and the Fifth Circuit Court of Appeals held that the stop did not violate the Fourth Amendment. *Id.* at 550. The only difference between the checkpoints in California and Texas is the Texas checkpoint stops all vehicles for brief questioning. *Id.* Because of the conflicting rulings from the Fifth and Ninth Circuits, the United States Supreme Court granted certiorari. *Id.* at 551.

91. *Id.* at 545-47.

92. *Id.* at 565. Factors of reasonableness, with regard to checkpoint stops, include "the location and method of operation of the checkpoint, factors that are not susceptible to the distortion of hindsight, and therefore will be open to post-stop review notwithstanding the absence of a warrant." *Id.* at 565-66.

93. *Id.* at 566.

94. *Id.* at 548.

95. *Id.* at 562.

magnetometer in an airport.[96] Defendant Epperson was convicted of attempting to board an aircraft engaged in interstate commerce while carrying a concealed weapon.[97] Epperson activated the magnetometer because he was carrying several metal objects on his person, and he activated the magnetometer after removing the metal objects.[98] The U.S. Marshal running the magnetometer searched Epperson's jacket and found a loaded pistol.[99] The court reasoned that the searches forbidden by the Fourth Amendment were those searches that did not meet the standard of reasonableness.[100] The court also used a two step balancing test in determining the validity of the search: 1) "the search must be 'justified at its inception'" and 2) "'reasonably related in scope to the circumstances which justified the interference in the first place.'"[101] Using this test, the court held that a physical search following an activation of the magnetometer did not violate the Fourth Amendment.[102]

In *U.S. v. Davis*, defendant Davis was told at the loading gate that "a routine security check was necessary."[103] An airline employee opened Davis's briefcase and found a loaded gun.[104] Government officials then took Davis to a private room, searched his person, and took him into custody.[105] The court extended the constitutional protections of initial air passenger screenings, holding that the screenings themselves are not

96. *U.S. v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972), *cert. denied*, 406 U.S. 947, 32 L. Ed.2d 334, 92 S. Ct. 2050 (1972).

97. *Id.* at 770. Defendant Epperson was boarding a flight to New York City on November 29, 1970. *Id.* Before reaching the gate, all passengers went through a magnetometer to scan for metal objects. *Id.* Epperson appealed his conviction to the United States District Court for the Eastern District of Virginia, which was denied. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 771.

101. *Id.*

102. *Id.* at 772.

103. *Davis*, 482 F.2d at 896.

104. *Id.* Defendant was charged with one count of attempting to board an aircraft with a concealed weapon. *Id.* at 895. Defendant and his friend checked in for a Trans World Airlines (TWA) flight, departing from San Francisco International Airport to Bangkok, Thailand, with a stopover at Los Angeles International Airport. *Id.* at 896. Defendant was only scheduled to fly the leg from San Francisco to Los Angeles. *Id.* at 896. When defendant reached the gate, a TWA employee told him that a "routine security check" was required. *Id.* The employee opened defendant's briefcase and discovered a gun. *Id.* He asked a U.S. Customs Serv. agent to check the gun, and the agent said the gun was loaded. *Id.* The employee, customs agent and a U.S. Deputy Marshal escorted the defendant to a nearby room to search his person. *Id.* After the search the marshal took defendant into custody. *Id.* at 896. Defendant pleaded not guilty and moved to suppress the evidence obtained during the search. A magistrate denied the motion and convicted defendant. *Id.* Defendant appealed to the U.S. District Court, which affirmed his conviction. *Id.* Defendant then appealed to the Ninth Circuit Court of Appeals. *Id.*

105. *Id.*

"per se" violations of the Fourth Amendment, but the searches must be done with the passenger's consent.[106] The court reasoned that when consent to a search is required, the consent must be given voluntarily and free from duress or coercion.[107] It is the government who bears the burden of proving consent.[108]

In *Terry v. Ohio,* defendant Terry was convicted of carrying a concealed weapon on the street.[109] The undercover police officer suspected that the suspects were casing a department store and feared that defendant Terry had a gun. He apprehended the individuals and frisked the outside of Terry's jacket.[110] The court held that a police officer can conduct a limited search of a person's outer clothing to discover the existence of weapons when the officer has a reasonable belief that the person may be armed and dangerous.[111] The *Terry* Court reasoned that a warrantless search, including a frisk, must be accompanied by a reasonable suspicion, not just "inarticulate hunches."[112]

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106. *Id.* at 895-96.

107. *Id.* at 914.

108. *Id.*

109. *Terry*, 392 U.S. at 8. Defendant was charged with carrying a concealed weapon. *Id.* at 7. Officer McFadden was patrolling in plain clothes in downtown Cleveland. *Id.* at 5. Defendant and his friend were standing on a corner. *Id.* McFadden patrolled the area for thirty years to prevent shoplifting and pickpocketing. *Id.* He walked around and observed individuals' habits and behavior *Id.* at 5. McFadden looked at defendant and his friend and did not like the way that they looked. *Id.* He took up a position about 300 to 400 feet from the two men. *Id.* at 5-6. He observed them walk past a store window and peer in and then confer. *Id.* at 6. The men repeated the action about five or six times. *Id.* They then began walking down the street. *Id.* at 6. McFadden became suspicious, believed they were casing the store, and feared that one of them had a gun. *Id.* McFadden saw the men stop in front of another store and approached them, identifying himself as a police officer. *Id.* at 6-7. After one of the men "'mumbled something,'" McFadden grabbed the defendant and began to pat him down on the outside of his clothing. *Id.* at 7. McFadden found a gun in one of defendant's pockets in his overcoat, but he could not remove it. *Id.* He ordered the men into a store, where he completely removed defendant's coat and took out the gun. *Id.* at 7. McFadden patted down the other man and found a second gun. *Id.* He testified that his hands never went underneath the outer garments of either man. *Id.* Defendant moved to suppress evidence discovered during the pat down. *Id.* The trial court denied the motion, but rejected the prosecution's argument that McFadden had probable cause to pat down the men to find weapons. *Id.* at 7-8. Both men waived a jury trial, pleaded not guilty, and were convicted. *Id.* at 8. The Court of Appeals affirmed the conviction, and the Supreme Court of Ohio dismissed the appeal, holding that "no 'substantial constitutional question' was involved." *Id.* The U.S. Supreme Court granted certiorari on the issue of "whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth [Amendment]." *Id.*

110. *Id.* at 6-7.

111. *Id.* at 30.

112. *Id.* at 21-22.

C. Judicial Recognition of Airline Security Measures

Using an airplane to travel across the United States has become commonplace just like "boarding a bus or train fifty years ago, or mounting a horse-drawn carriage around the turn of the twentieth century."[113] The right to travel is an important aspect of the liberty that one cannot be deprived of without due process under the Fifth Amendment.[114] "Governmental restrictions upon freedom to travel are to be weighed against the necessity advanced to justify them, and a restriction that burdens the right to travel 'too broadly and indiscriminately' cannot be sustained."[115] The right to travel cannot be granted because the individual abrogated another constitutional right, "absent a compelling state interest."[116]

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113. *U.S. v. $124,570 U.S. Currency*, 873 F.2d 1240, 1242 (9th Cir. 1989). Claimant Campbell was set to fly on United Airlines from Seattle (Sea-Tac) International Airport to Los Angeles on January 5, 1987, when he placed his locked briefcase on the x-ray scanner conveyer belt. *Id.* at 1241. The security officer, Boswell, operating the scanner stopped the conveyer when he noticed a dark mass on his screen, detecting something in Campbell's suitcase. *Id.* The officer asked Campbell to open the briefcase, but Campbell was reluctant, and he finally assented when he agreed to open it behind a screen. *Id.* A second officer, Kangas, searched the briefcase and discovered a large amount of United States currency. *Id.* This officer briefly questioned Campbell, and then she released him and the briefcase. *Id.* The security officers have an agreement at Sea-Tac to report sums of currency exceeding $10,000 to the United States Customs Service. *Id.* In return the Customs Service gives the security employees a $250 reward. *Id.* Kangas called Customs Agent Symms to report that Campbell was carrying a large amount of money in his briefcase. *Id.* She gave Symms a description of Campbell, his briefcase and his destination. *Id.* Symms called Drug Enforcement Administration Agent Guevarra at Los Angeles International Airport, relaying to him all the information learned from Kangas. *Id.* Guevarra and Agent Amato met Campbell's flight at Los Angeles International and began running surveillance on him. *Id.* The agents approached Campbell after he retrieved his checked baggage, and they began to question him. *Id.* Campbell admitted to the agents that he was carrying $130,000, but that the money did not belong to him; it belonged to a friend. *Id.* at 1242. He told the agents that his friend hired him "to ransom a stolen painting," and that he took the money with him to Seattle because he did not feel comfortable leaving the money at home. *Id.* Campbell gave no identifying information for his friend. *Id.* DEA agents took the briefcase to their office for investigation because they did not believe Campbell's story. *Id.* Amato told Campbell to open the briefcase or he would get a search warrant. *Id.* Campbell opened the briefcase and found currency, among other things. *Id.* A narcotic's sniffing dog detected an illegal narcotic on the currency. *Id.* The United States filed a civil forfeiture claim, and Campbell moved to suppress the evidence recovered from the search of the briefcase. *Id.* His motion was denied, and the court found for the United States. *Id.*

114. *Kent v. Dulles*, 357 U.S. 116, 125 (1958). Freedom of movement is deeply rooted in American society. *Id.* at 126. Travel may be necessary for one to perform his livelihood. *Id.* "'[O]ur nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'" *Id.* (quoting Chafee, Three Human Rights in the Constitution of 1787 at 197 (1956)).

115. *Davis*, 482 F.2d at 912.

116. *Id.* at 913.

The only searches that are covered under the Fourth Amendment are those conducted by the government and its agents.[117] The Fourth Amendment has four tests to determine whether the private conduct in question is attributable to the government: 1) nexus test; 2) symbiotic relationship; 3) joint action; and 4) public function.[118] Administrative searches, like other governmental searches, are still governed by the reasonableness standard.[119] "Screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose. . . ."[120] "A generalized law enforcement search of all passengers as a condition for boarding a commercial aircraft would plainly be unconstitutional."[121] The United States has "'significantly involved itself'" in passenger and baggage screening from the inception of airport security.[122] With regard to airline security, the courts generally use the public function test, holding that routine security meets the requirements of the constitution because the "compelling public interest in curbing air piracy generally outweighs their limited intrusiveness."[123] "Each element of the airport security program [is] to make certain that neither the passenger's right to travel nor his right to personal privacy is burdened beyond the clear necessities of current circumstances."[124]

117. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1446 (10th Cir. 1995).

118. *Id.* at 1447. The nexus test asks whether "'there is a sufficiently close nexus' between the government and the challenged conduct such that the conduct 'may be fairly treated as of the State itself.'" *Id.* at 1448 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). The symbiotic relationship looks at "if the state 'has so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.'" *Id.* at 1451 (quoting in part, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). The joint action test examines whether "a private party is a 'willful participant in joint action with the State or its agents.'" *Id.* at 1453 (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)). The public function test questions "if the state delegates to a private party a function 'traditionally exclusively reserved to the State,'" *Id.* at 1456 (citing *Jackson*, 419 U.S. at 352), "then the private party is necessarily a state actor." *Id.* (citing *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 624-28 (1991); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978)).

119. *$124,570 U.S. Currency*, 873 F.2d at 1243.

120. *Davis*, 482 F.2d at 908.

121. *$124,570 U.S. Currency*, 873 F.2d at 1243. The Court in *Davis* said, "It is significant that the regulations establishing the airport search program do not authorize or require compelled searches." 482 F.2d at 911.

122. *Id.* at 897 (citing *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967).

123. *U.S. v. Doe*, 61 F.3d 107, 109-10 (1st Cir. 1995).

124. *Davis*, 482 F.2d at 913.

III. ANALYSIS

This section will examine the effectiveness, legality, and policy considerations of both the current security measures and the necessary, proposed security measures.

A. CURRENT SECURITY MEASURES

1. *Effectiveness*

The effectiveness of the current security measures is poor. The necessary security issues needed to make the skies safer will never get done because of Congressmen pandering to airline interests.[125] One security measure that is under fire is the passenger screenings.[126] Most of the calls for changes in the screening methods following the September 11 attacks resulted from the information that the hijackers did not use explosives or metal objects, but instead they used items that cannot be easily detected by a metal detector.[127] The current security scanning systems cannot detect weapons, such as those made from graphite epoxy and other similar materials.[128] The purpose of the additional, random security screenings was to pick up weapons or other suspicious materials that the initial metal detectors and x-rays did not catch.[129]

Unfortunately, these random screenings generally only search those individuals who pose no real threat to airline security.[130] If the initial screeners perform their job as expected, the random screenings are redundant.[131] However, others believe that it is nonsensical to eliminate the random screenings.[132] Those who support the random screenings say that even though the initial screening personnel is trained by the federal government, it is not worth removing an extra layer of security.[133] "The best security involves multiple layers, where you have back-

125. *See Return Security To Upright Position*, N.Y. Daily News Editorial 42 ¶ 7 (Sept. 26, 2002). "Most distressing, though, is Washington's congenital inability to stay the course when it comes to securing the skies. Airline watchdogs have decried this decades-long pattern of urging more security, then retreating from costly measures under industry pressure." This opinion is most commonly associated with those commentators who have a cynical view of any changes to airline security measures. *Id.*

126. *See id.* at ¶ 6.

127. Ed Scannell & Cathleen Moore, *Airport Technology Expected To Improve In Attack Aftermath*, Computerworld ¶ 2 <http://www.computerworld.com/securitytopics/security/story/0,10801,63822,00.html> (Sept. 13, 2001) [hereinafter Scannell].

128. *Id.* at ¶ 3.

129. *Return Security*, *supra* n. 125, at ¶ 3.

130. *Id.* at ¶ 6. *See supra* n. 12 (illustrating examples of individuals stopped for random screenings).

131. *Random Security*, *supra* n. 4, at ¶ 8.

132. *Return Security*, *supra* n. 125, at ¶ 6.

133. *Id.*

ups and backups to backups."[134] In the early stages of the era of federal screeners, the screeners are doing their job effectively, and there are less news reports of screeners allowing guns and other weapons through security checkpoints. After looking at the embarrassments the screenings have caused, they do not meet the goals of airline security.

In conjunction with passenger screenings, Congress has also taken steps to enhance the screening of baggage that is placed in the belly of the aircraft.[135] Not all baggage gets screened, and the only time the baggage is matched with the passenger is at check-in.[136] That method of screening is not effective because there is no guarantee that each and every passenger will actually get on the plane. It is not efficient for the airlines to have to match bags to passengers on each and every flight because connecting flights would be delayed and passengers get bumped from flights by overbooking and flying standby.[137] As an example, in January 2002, "93 American Airlines flights at St. Louis's Lambert Airport were delayed two different days . . . after the FAA questioned the airline's inspections of some checked bags."[138] Only screening baggage, but not people, for explosives is not the answer.[139] Passengers expect the airline system to perform at a high level of efficiency,[140] and if long delays cause economic hardship, air travel will be reduced, and there will be little need for security measures.

Other security measures have mixed results in the realm of effectiveness. First, another security measure being criticized is the air (sky) marshal program. Many flights do not have an air marshal on board.[141]

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134. *Random Security, supra* n. 4, at ¶ 2.

135. *See Mineta, supra* n. 39 (illustrating Congress's improvements to baggage screening).

136. Sloan, *supra* n. 8, at ¶ 11.

137. *Mineta, supra* n. 39, at ¶ 8. "Airlines have warned that this option could cause massive delays if they [are] forced to remove bags every time a passenger misses a connection or is bumped from an overbooked flight." *Id.*

138. Koch II, *supra* n. 40, at ¶ 12.

139. *See Mineta, supra* n. 39, at ¶ 11. "You have to allow for the possibility of a suicide bomber, someone who doesn't care if [they are] on the airplane and it blows up' said Pat Friend, president of the Association of Flight Attendants." *Id.*

140. CNN, *Bill Would Delay Bag Screening* ¶¶ 6-7 <http://www.cnn.com/2002/TRAVEL/ADVISOR/11/14/airport.security.ap/index.html> (accessed Nov. 14, 2002).

141. Sloan, *supra* n. 8, at ¶ 11. Some pilots have never had an air marshal on their plane. Patricia Valenzuela, *Local Pilot Says Little Has Changed In The Air*, Daily Democrat ¶ 13 <http://www.dailydemocrat.com/archives/index.inn?loc=detail&doc=/2002/September/09-621-news3.txt> (Sept. 10, 2002). Lanny Ropke, a pilot for 39 years, 29 with American Airlines, has never had an air marshal on his plane. *Id.* at ¶ 2. Those who are cynical of the program believe that the sky marshals are only used on the flights going to and from Washington D.C. *Id.* at ¶ 14. Ropke said, "[T]hey fly out of Washington, D.C. because they are protecting the senators and congressmen." *Id.*

There are some credible problems with the air marshal program.[142] Moreover, the air marshal program can be greatly effective if it receives a little fine-tuning.[143] Second, one of the best changes made was placing the security screening personnel under the control of the TSA.[144] Because the federal screeners were just put in place at most airports, it is hard to judge the results.[145] However, the screeners will be relatively more successful than the private companies because there is more accountability, since the screeners are now federal employees.

B. Proposed Security Measures

Because of the many problems in the current airline security measures noted above, this section will examine what measures should be adopted, meeting two goals: 1) maximum safety in the skies and 2) efficiency in moving airline passengers through airports.

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142. Sloan, *supra* n. 8, at ¶ 23. First, every flight needs to have an air marshal because it is not possible to foresee every possible security problem that may occur. *Id.* Second, having an air marshal alone is not sufficient because the marshal must be properly trained. *Id.* "Air marshals, too, are being rushed through training, and the [training] standards are being compromised to get more armed marshals aboard." *Id.* at ¶ 22. An example of poor hiring and training occurred on a flight originating from Philadelphia International Airport. On a Delta Airlines flight between Atlanta and Philadelphia, air marshals restrained an unruly passenger and held all the other passengers at gunpoint. *World News Tonight with Peter Jennings*, "A Closer Look Air Marshals Fright" ¶ 4 (ABC Oct. 3, 2002) (TV broadcast, transcript available in LEXIS, News, Transcripts) [hereinafter *World News Tonight*]. A sky marshal detained Dr. Bob Rajcoomar, who was of Middle Eastern descent and a naturalized U.S. citizen, and Judge James Lineberger because of the way they appeared and looked at the sky marshal. *Id.* at ¶ 11. After doing some investigating, ABC News reporter Lisa Stark discovered that this individual hired as a sky marshal failed a psychological exam during his application to become an officer with the Philadelphia Police Department. *Id.* at ¶ 13. A psychological exam is not required for sky marshals. *Id.* at ¶ 14.

143. All air marshals should be required to meet the same standards of those who graduate from police academies, including passing a psychological examination. *Id.* at ¶ 15.

144. The main idea behind federalizing the screeners is that better paid and trained personnel will produce better results, which, in this case, means less weapons getting through security checkpoints. *Return Security*, *supra* n. 125, at ¶ 2.

145. This creates two problems. First, the new screeners have to prove themselves, *Random Security*, *supra* n. 4, at ¶ 8, because government cannot make laws based on the results of untested personnel. *Return Security*, *supra* n. 125, at ¶ 6. Technically, the Congress can make laws based on untested information, but it would be unwise and may endanger the air passengers. Making laws based on untested screeners would be like a doctor making a diagnosis and giving a prescription without examining the patient. Second, because Congress mandated that the screeners be federalized, the Transportation Security Administration is scrambling to get all the screeners hired. Sloan, *supra* n. 8, at ¶ 20. "Fifty percent of the applicants don't show up, and [fifty] percent of the remaining applicants don't qualify." *Id.* at ¶ 21.

1. *Effectiveness*

Elimination of random searches is essential in making airline security safer and more efficient.[146] One way to make random screenings obsolete is to improve the initial screening technology in the airports. Many airline security experts predict that one of the first improvements that will be made by airports is better screening technology.[147] The new technology will be able to detect more than just metal objects.[148] While waiting for the new technology to become available, it is best to make improvements to the existing equipment for the time being.[149] Increased technology makes the human screeners work more efficiently because they can focus on those passengers who pose the greatest threat.[150] The best way to protect airports is to combine several technologies.[151] One technology that is more effective than a simple metal detector is a magnetometer, or more commonly called body scanning.[152] The body scanning technology is currently available, but it is not in widespread use.[153]

In conjunction with the magnetometer, airports can install technologies that puff air on individuals passing through the magnetometer, and the air is analyzed for explosive residue.[154] No airport has any technol-

146. *See Good Judgment, supra* n. 15 (illustrating examples of random security screenings). One quick way to reach this goal is for Congress to pass a bill currently in the U.S. House of Representatives. Tom Ramstack, *House Prepares Airline Relief Bill;.Limits Liability, Eases Searches*, Wash. Times Page One A01 (Sept. 28, 2002). The bill would eliminate the need for random searches at passenger gates and create a profiling system that would identify suspected terrorists before check-in at airports. *Id.* at ¶ 3.

147. Scannell, *supra* n. 127, at ¶ 1.

148. Allan Chernoff, *New Devices Could Boost Airport Security* ¶ 2 <http://www.cnn.com/2001/TRAVEL/NEWS/12/26/rec.security.devices/index.html> (accessed Oct. 5, 2002).

149. *Id.* at ¶ 11.

150. Scannell, *supra* n. 127, at ¶ 17. Marc Enger, former U.S. Army intelligence officer and current executive vice president of security operations at Digital Defense, Inc., a computer security consulting company, states, "[Y]ou want humans to check the false positives, as opposed to making the humans look at all luggage and each passenger. Technology can let the human intervene in security more effectively." *Id.*

151. Chernoff, *supra* n. 148, at ¶ 5. Kenneth Wood of Barringer Technologies, Inc. said, "[y]ou need a multitude of technologies, a system of technologies, to provide as total a solution as you can to contraband your terrorist threat." *Id.*

152. The body scanning technology is currently being used by the United States Customs Service to catch smugglers. Kathleen Koch, *Airports Seek Bomb-Detection Options* ¶ 4 <http://www.cnn.com/2001/us/12/30/explosive.detection/index.html> (accessed Oct. 5, 2002) [Hereinafter Koch III] .

153. Scannell, *supra* n. 127, at ¶ 5.

154. Chernoff, *supra* n. 148, at ¶ 3. There are two companies that currently make the air puff technology: Barringer Technologies, Inc. makes The Sentinel, and Ion Track Instruments has the Entry Scan. *Id.*

ogy with the ability to check for explosives on people.[155] Obviously, the air puff technology is designed to detect explosives, but the magnetometer will also detect explosives because the device gives the screener a mechanical survey of the passenger's clothing and body.[156] These technologies are much more effective than current screening technology because the magnetometer can detect much more than metal objects.[157]

Moreover, database technology can be used more effectively prior to any security screenings at the airport. The U.S. Department of Transportation wants to require airlines to make changes to their reservation systems to be able to red flag a suspected terrorist's name.[158] The government believes that security can be improved by stopping terrorists as soon as they get into the airport.[159] While this may be a very effective way to stop known terrorists, it has two problems. First, if the terrorist flies under an alias, the profile would need to have all known aliases listed in the database. Second, it will not be feasible for sometime because the current software in the reservations system can only perform one function.[160] "'The reservation system is meant for doing one thing: acting at a very secure high speed with high availability. It is not looking for triggers,' like a terrorist's name in the passenger list for a flight."[161] The flagging function would be easy to write in if the reservation software was a relational database.[162]

Requiring the airlines to upgrade their computer networks "could cause a bottleneck that would bring the . . . networks . . . to a halt."[163]

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155. *Id.* at ¶ 4. Paul Eisenbraun of Ion Track Instruments stated, "[t]here has not been any real device at any of the security checkpoints that has the ability to detect any explosives on people." *Id.* Both Ion Track Instruments and Barringer Technologies are awaiting federal approval of their respective technologies. *Id.*

156. Kathryn A. Buckner, *School Drug Tests: A Fourth Amendment Perspective*, 1987 U. Ill. L. Rev. 275, 290 n. 95 (1987).

157. The air puff technology is ninety-nine percent effective. Koch III, *supra* n. 152, at ¶ 5.

158. Jennifer DiSabatino, *Air Security May Require IT Overhaul* ¶ 2 <http://www.cnn.com/2001/TECH/industry/10/23/airport.security.idg/index.html> (accessed Oct. 5, 2002) [hereinafter DiSabatino I].

159. *See id.* (allowing airlines to have suspected terrorists detained prior to entering security checkpoints).

160. *Id.*

161. *Id.* at ¶ 13.

162. *Id.* at ¶ 2. A database is "a file or collection of data structured in logical relationships." Matt Hayden, *Teach Yourself Networking in 24 Hours*, 394 (1st ed. SAMS Publishing 1998) [Hereinafter Hayden]. A relational database is "a program that allows files to be related to each other so that changes in one file are reflected in other files automatically." George Beckman, *Computer Confluence*, 467 (3rd ed. Addison Wesley Longman, Inc. 1999).

163. DiSabatino, *supra* n. 158, at ¶ 2. IBM built the first reservations database, a transactional database, forty years ago. *Id.* at ¶ 6. The transactional database is stored on a mainframe computer system. *Id.* A global distribution system gives travel agents and Internet sites remote access to the reservations system. *Id.* at ¶ 7. One company is begin-

Implementing these possible changes will be expensive and take a long time, even if enough changes are made only to make the system temporarily functional.[164] The Federal Aviation Administration wants to get the changes in place as soon as possible, but the administration is not sure who would be responsible for funding the project.[165] However, making the changes is not just a matter of changing some code; a structural overhaul is necessary.[166] One possible solution would be to create a new database, which would allow the reservation system to send the names of passengers first to the global distribution system, and then to the new database to scan the passenger profiles, which would have the ability to do the queries that the old system cannot.[167]

The Central Intelligence Agency is supporting an additional data analysis tool, similar to that used in casinos, to be used with reservation systems.[168] The technology can be a very effective security tool because the technology runs in batch mode,[169] and for reservations made within forty-eight hours, the software spools information from the mainframe reservation system and analyzes the records in almost real time.[170] The technology has the capability to detect transposed digits in a driver's license number, and whether a passenger lives near a suspected terrorist.[171] Currently, the largest use of the software is analyzing data from 400 different sources with about one million records in total.[172] This

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ning to make changes to the reservations system. Sabre Holdings Corp., who created the global distribution system, is contracting with Compaq Computer Corp. to move the transactional database from the mainframe to a server. *Id.* at ¶ 8.

164. *Id.* at ¶ 9. Sabre's contract with Compaq will be worth about $100 million. *Id.* at ¶ 8.

165. *Id.* at ¶ 20.

166. *Id.* at ¶ 21. Tom Cook, former president of Sabre Holdings, stated that "[T]he code is old and structured. Making changes in the TPF environment is orders of magnitude more difficult than it is in a modern environment." *Id.* at ¶ 21.

167. *Id.* at ¶ 24. Michael Hulley, vice president of the Global Travel and Transportation Industry unit at IBM, says that biometric capability could be added to the new database. *Id.* at ¶ 25. One option would be to use a retinal scanner. *Id.*

168. Jennifer DiSabatino, *CIA-Backed Analysis Tool Eyed For Passenger Checks* ¶ 1 <http://www.cnn.com/2002/TECH/industry/01/03/cia.data.analysis.idg/index.html> (accessed Oct. 5, 2002) [hereinafter DiSabatino II]. Systems Research and Development Corp. in Las Vegas, Nevada created the software. *Id.* at ¶ 4. Its purpose was to clean incorrectly entered reservation data and check for connections between passengers and suspected terrorists. *Id.* "[I]t can check a passenger's name, address, phone number, and other identifying information against those of people who are believed to be terrorists." *Id.*

169. Batch mode (processing) is "a situation common in early mainframe environments in which many tasks were scheduled to run at a specific time late in the evening. The user never interacted with the computer in batch processing." Hayden, *supra* n. 162, at 393.

170. DiSabatino II, *supra* n. 168, at ¶ 6.

171. *Id.* at ¶ 5.

172. *Id.* at ¶ 9.

software can catch trends that may not be visible by the human eye.[173] The best use for this software is for airlines because of the size of their reservation databases and the amount of information available.[174]

Beyond screening technology, there are other steps that can be taken to improve the effectiveness of the security measures. First, some airlines are utilizing facial recognition technology at their ticket counters in an attempt to catch suspected terrorists.[175] Facial recognition technology has the potential to be highly effective in airport security, but it is not yet ready.[176] The reason that the facial recognition technology is not in effect right now is that there are several major limitations on the technology, such as identity fraud and the limited number of images in databases.[177] Second, air marshals are not enough;[178] pilots should be armed.[179]

2. *Legal Considerations*

Simply because the above security measures are most effective, they can only be adopted if they pass constitutional muster. The two proposed security measures that are subject to the search requirements of the Fourth Amendment are the magnetometer and the passenger profiling

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173. *Id.* at ¶ 10.

174. *Id.* at ¶ 11. The original use of the software was to prevent credit card fraud and to track big winners and cheaters in the gaming industry. *Id.* at ¶ 8.

175. Scannell, *supra* n. 127, at ¶ 11. Facial recognition technology, created by Viisage Technology, Inc., is already used in two airports in Europe in conjunction with the screening technologies used at U.S. airports. *Id.* at ¶ 12. Tom Colatosti, President and CEO of Viisage, explains how the facial recognition technology works: "Facial recognition systems scan passers-by, taking identifiable facial measurements such as the distance between eyes, angle of the nose and thickness of lips. The systems can find a match against a database in less than one second." *Id.* at ¶ 13. Three U.S. airports plan on implementing facial recognition technology: Logan International Airport in Boston, T.F. Green Airport in Providence, and Fresno Yosemite International Airport in California. Jack H. Daniel III, *Reform in Airline Security: Panic or Precaution?*, 53 Mercer L. Rev. 1623, 1635 (2002).

176. Scannell, *supra* n. 127, at ¶ 14. As an example of success, two of the hijackers on September 11 had profiles in the FBI terrorist database, and if the airports were using the facial recognition technology, those hijackers may never have been able to get on the plane. *Id.*

177. *Id.* at ¶ 15. Additionally, in certain conditions, the technology is more likely to produce false positives and missing people in the database. Daniel, *supra* n. 175, at 1635 (citing a study by the U.S. Dept, of Defense). There are also other technologies that employ biometric scanning to identify individuals, but those technologies are years away from widespread use. Scannell, *supra* n. 127, at ¶ 6.

178. Valenzuela, *supra* n. 141, at ¶ 13.

179. *Id.* at ¶ 18. This measure has the endorsement of the American Airlines pilots union. *Id.* Those opposed to this measure say arming pilots is not an effective measure because not all people are good with guns. *Id.* at ¶ 19. Many people do not feel comfortable with this measure because a misfired bullet could pierce the fuselage and cause a dangerous drop in cabin pressure. *Id.* at ¶ 22.

databases.[180] The use of a magnetometer as a method of screening airline passengers is a search within the parameters of the Fourth Amendment.[181] The administrative search caused by the magnetometer is so limited that it is excused from the warrant requirement.[182] "The ultimate standard of the Fourth Amendment is reasonableness[,][183] [a]nd the reasonableness of a search depends upon the facts and circumstances and the total atmosphere of each case."[184] In examining each case, the court must look at the governmental interest involved that justifies the invasion of privacy.[185] The need for a thorough inspection is critical in airline security because if a plane is hijacked, it can be used as a weapon of mass destruction to kill not only those in the plane, but also those on the ground.[186] Two concerns exist with the use of the magnetometer for airport screening: 1) The purpose to stop hijackings may dissipate while the magnetometers exist, and 2) a search simply used for finding weapons may expand to search for contraband, beyond its express purpose of airline safety.[187]

In support of these concerns, the court in *Davis* stated that even if the government interest is compelling and substantial, the means supporting that interest must be applied narrowly so as not to stifle fundamental liberties.[188] The amount of the invasion of privacy is relatively minimal with a magnetometer because the search image is extremely brief, and it is less intrusive because there is no physical contact, and objectively, there is no discretion given to the screener.[189] The other option to make sure that no weapons or explosives are carried onto a plane would be to physically search all passengers, which would be a more intrusive approach as opposed to the magnetometer.

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180. Air marshals will not be discussed in this subsection because they do not raise any issues under the Fourth Amendment, and therefore, would be beyond the scope of this comment.

181. *Epperson*, 454 F.2d at 770.

182. *Id.* at 771.

183. *U.S. v. Albarado*, 495 F.2d 799, 804 (2d Cir. 1973) (citing *Cady v. Dombrowski*, 413 U.S. 433 (1973)).

184. *Id.* (citing *Chimel v. California*, 395 U.S. 752, 765 (1969)).

185. *Id.*

186. *Id.* at 804-05. Justice Oakes wrote,

> Depriving a hijacker of his weapon is critical, because by means of a weapon like a pistol or even a knife the hijacker may literally turn the plane itself into a weapon, threatening not only those within it, but those on the ground as well. In short, the plane may become a weapon of mass destruction that no ordinary person would have any way of obtaining except through a hijacking.

Id.

187. *Id.* at 805.

188. *Davis*, 482 F.2d at 912-13.

189. Buckner, *supra* n. 156, at 290 n. 95.

The constitutionality of the magnetometer and air puff can be inferred by analogy to *Martinez-Fuerte* and *Epperson*. The magnetometer used in *Epperson* was implemented for the sole purpose of detecting metal on passengers[190] because that was the composite material of most weapons like guns and knives. Today, guns and knives are made from materials that are non-metallic and escape the capabilities of the older magnetometers. The purpose of the new magnetometers remains the same from the magnetometers in *Epperson*. Additionally, opponents of the new magnetometers will argue that the body scanning will be too large of an invasion of privacy because the scan will penetrate the surface of a passenger's clothing unlike the current magnetometers. This argument fails when one looks at the United States Supreme Court's decision in *Martinez-Fuerte*.[191] The standard governing checkpoint searches is one of reasonableness. It is reasonable to believe that a passenger who attempts to bring down a plane may attempt to do so by using explosives or other objects not made of metal. Consequently, it is reasonable to be able to scan a person's body for explosives and other objects because it is the least intrusive way to prevent those objects from being carried onto an airplane. Any other alternative form of search will be more intrusive because a person will physically do the search. Therefore, the use of a magnetometer and air puff technology to screen for non-metal objects would be constitutional.

Profiling of passengers and the use of profiling technologies, such as face recognition software, raises several concerns about the Fourth Amendment. The U.S. Supreme Court has favorably articulated that government officials have the right to stop an individual and ask for cursory information.[192] This information includes the identification of the official to the individual, a request for an interview, and asking to see the individual's identification and airline ticket.[193] This information can be obtained as long as "'a reasonable person would feel free to disregard the police and go about his business' and 'as long as the police do not convey a message that compliance with their requests is required.'"[194] The government has the burden of proving consent, and showing mere lawful submission does not meet that burden.[195] For a seizure to be in compliance with the Fourth Amendment requirements, "the officers must have had a reasonable articulable suspicion that [the person] had committed

190. *Epperson*, 454 F.2d at 770.

191. *See generally Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding the constitutionality of permanent checkpoint screenings).

192. *U.S. v. Taylor*, 956 F.2d. 572, 580 (6thCir. 1992) (Keith, J., dissenting), *cert. denied*, 506 U.S. 952, 121 L. Ed.2d 330, 113 S. Ct. 404 (1992).

193. *Id.* at 577 (majority opinion).

194. *Id.* at 580 (Keith, J., dissenting).

195. *Id.* at 588.

or was about to commit a crime,"[196] and the suspicion must be "more than an unparticularized hunch or suspicion."[197] For example, "innocent travellers [sic] cannot 'be subject to virtually random seizures' merely because of their race."[198] Some circumstances cannot be given any weight in determining the reasonable articulable suspicion because the amount of innocent travelers subjected would be too large.[199] For example, the court in *Berryman* held that the purchase of a one-way ticket with cash was not sufficient by itself to establish a reasonable suspicion, even though it fit the drug courier profile.[200]

The profiling done at airports under the proposed security measures occurs by two parties: the airline ticket agents and the federal security screeners, who would be responsible for measures like the face recognition technology. All of the above rules apply to the federal screeners because they are agents of the federal government. The face recognition technology would be within the requirements of the Fourth Amendment because any screening beyond the initial screening all travelers must submit to would be based on a reasonable articulable suspicion. The face recognition technology uses very specific measurements of an individual's physical features to determine if there is a match with a person in the database. The people would only be in the database if they were on a

196. *Buffkins*, 922 F.2d at 469.

197. *Id.*

198. *Id.* at 470.

199. *U.S. v. Berryman*, 717 F.2d 651, 654 (1st Cir. 1983), *cert. denied*, 465 U.S. 1100, 80 L. Ed.2d 125, 104 S. Ct. 1594 (1984). On September 8, 1981, defendant's flight arrived at Logan International Airport in Boston from Fort Lauderdale, Florida. *Id.* at 652. Fort Lauderdale is a "'source city'" for many illegal narcotics. *Id.* Two DEA agents saw Berryman be the last to exit the aircraft, walk quickly to the baggage claim, and constantly look over his shoulders. *Id.* At the baggage claim, defendant retrieved one bag and was looking around as if someone was suppose to meet him. *Id.* He later admitted that he was waiting for his wife to pick him up. *Id.* at 652. As the defendant waited along the curb, the agents began to question him. *Id.* The agents asked if they could ask him a few questions, and after he agreed, they asked where he came from. *Id.* at 653. Defendant provided the agents with his ticket and identification. *Id.* The defendant had a one-way ticket, which was paid for in cash. *Id.* The defendant consented to having his suitcase searched, and one agent informed him that he could refuse permission. *Id.* The suitcase contained a gift-wrapped package and a card. *Id.* The defendant consented to having the package x-rayed. *Id.* The agents were still suspicious about the package, so the defendant consented to the agents opening the package, in which the agents found two bags of cocaine. *Id.* The agents then detained the defendant. *Id.* at 652 He was charged with knowingly possessing with intent to distribute a controlled substance. *Id.* The defense moved to suppress, but the district court denied the motion. *Id.* Defendant was convicted and he appealed to the Court of Appeals for the First Circuit. *Id.*

200. *Id.* at 656. "The profile is simply a collage of otherwise innocent characteristics designed to guide the focus of the agent's observations, and only when the characteristics are combined in a suspicious manner, or lead agents to observe independently suspicious conduct is official intrusion warranted." *Id.*

terrorist watch list, as an example. Innocent travelers would not be subjected to any further inspection beyond the initial screening.

The profiling of passengers has not been challenged in the appellate courts, but the constitutionality can be analogized with *Davis* and *Terry*. The *Davis* court was quite concerned about the consent to be searched at the security checkpoints. The same consent would be required for the profiling done by airline ticket agents because the ticket counter in effect serves as another checkpoint. Consent at this point cannot be voluntary because the passenger cannot turn back and refuse the search without incurring a legally cognizable injury. If the passenger wants to board the plane, he is required to consent to the search. If the passenger wants to refuse the search, he is not allowed to board the plane, and he cannot recover the money he paid for the ticket if the ticket is non-refundable.

The reasoning the *Terry* court used in making its decision is very relevant to the passenger profiling issue. For a search to be within the warrant exception, the search must be based on a reasonable suspicion, not just a hunch.[201] Basing the profiling on a terrorist watch list or a most wanted list will meet the *Terry* requirement, but simply using the purchase of one way tickets or paying in cash as reasons to flag a passenger for a search will result in many innocent travelers being searched for no reason at all. In effect, all air travelers who purchase a ticket at the last minute can be subjected to a search. Therefore, measures such as face recognition technology pass constitutional muster, but profiling by ticket agents will only pass constitutional muster if the profiling is very specific to each individual, will not subject large amounts of innocent travelers to unnecessary screenings, and consent is obtained from the passengers.

On the other hand, the profiling done by the airline ticket agents would be done by a private party, and would only be subjected to the above rules if it meets one of the four tests, making the conduct attributable to the government.[202] The profiling by ticket agents meets the "nexus test" because the government mandates that all airline passengers be screened for weapons before boarding a plane, and the ticket agents' conduct would be following government mandates and aiding the government screeners in selecting those individuals who should be selected for further screenings and searches.

The symbiotic relationship test is met because if the U.S. Department of Transportation creates a regulation mandating airlines to flag passengers with certain characteristics, not necessarily physical, the government and the airline are interdependent and joint participants in

201. *Terry*, 392 U.S. at 21-22.

202. *See supra* n. 118 (listing the four tests of imputing conduct of a private actor to the government).

the activity. The joint action test is met because the airlines cannot operate without complying with the mandates. Finally, the conduct is attributable through the public function test because Congress reserves the exclusive right to create standards regarding the screening of airline passengers.

In conjunction with the public function test, routine security procedures are upheld because of the compelling state interest in curbing air piracy.[203] "The limited nature of the intrusion makes the individual interest inconsequential when compared with the government's overwhelming interest in controlling [air piracy]."[204] One cannot balance the general and individual interests because the general interest almost always outweighs the individual and "stretch[es] fourth amendment protections wafer thin."[205] The current "war on terrorism" can be analogized with the "war on drugs." The Sixth Circuit Court of Appeals brilliantly summarized the effect of the "war on drugs" and the effect on constitutional rights:

> Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time, our Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society. . . . The drug crisis does *not* license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we *cannot* suspend the precious rights guaranteed by the Constitution in an effort to fight the [w]ar on [d]rugs.[206]

Additionally, the "war on terrorism" does not give the government, working through the airlines, the right to profile based on race. After looking at the racial makeup of the hijackers of September 11, it is easy to see how an individual would be more inclined to more heavily scrutinize air travelers of Middle Eastern decent. Justice William Brennan, in his dissent in *Martinez-Fuerte*, examined the role of profiling Mexicans in the fight against illegal immigration.[207] The objective of checkpoints at the border was to prevent Mexicans from illegally entering the United States, and border officials had no objective standards to stop vehicles entering, only the ancestry of the passengers.[208] Brennan concluded that every person of Mexican ancestry was subject to stop, detention and

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203. *See Doe*, 61 F.3d at 109-10 (holding that preventing air piracy is a compelling state interest).

204. *Berryman*, 717 F.2d at 659.

205. *Id.* In offering similar analysis, the Sixth Circuit stated, "the valiant effort of our law enforcement officers to rid society of the drug scourge cannot be done in total disregard of an individual's constitutional rights. *Taylor*, 956 F.2d at 583 (Keith, J., dissenting).

206. *Id.* (quoting *U.S. v. Radka*, 904 F.2d 357 (6th Cir. 1990)).

207. *See generally Martinez-Fuerte*, 428 U.S. at 571-74 (Brennan, J., dissenting) (illustrating Brennan's concern about possible natural origin discrimination).

208. *Id.* at 572.

interrogation more than those of non-Mexican ancestry.[209]

The result of these stops is unnecessary delay and humiliation for those motorists stopped.[210] Brennan's comments are extremely relevant to airline security. First, only two of the hijackers on September 11 used their real names,[211] and innocent travelers who have names similar to real names of people on watch lists, or who look like those on watch lists, will be subject to extra scrutiny. Middle Eastern air travelers would be facing the same humiliation and embarrassment that those of Mexican ancestry face at the borders. The best way to avoid profiling based on race is to subject all air travelers to the extra scrutiny, but the courts have already said that subjecting all travelers to a law enforcement search as a precondition to flying is unconstitutional.[212]

C. Policy Considerations

One of the policy considerations that lawmakers, courts and experts always look at is cost. It is estimated that the TSA may incur expenses of $6.5 billion for fiscal year 2003.[213] Screening costs are $3 million per month and $100 million is being spent on bomb detectors for luggage.[214] The bag screening machines cost $1 million dollars each.[215] Arming pilots could cost $900 million to start and $250 million each year.[216] The money is generated from several sources. The TSA can impose a uniform fee on all air travelers to help pay for certain civil aviation security expenses.[217] The September 11 security fee, a $2.50 surcharge on each passenger ticket purchased, generated $2.2 billion in revenue.[218] Most of the TSA's $4.8 billion fiscal year 2003 budget will come from Congress.[219] For fiscal year 2002, Congress allocated $500 million for air-

209. *Id.* Justice Brennan wrote,

> Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists.

Id.

210. *Id.* at 573.

211. *See* Koch I, *supra* n. 14 (stating that not all September 11 hijackers used their real names).

212. *$124,570 U.S. Currency*, 873 F.2d at 1243 (declaring that giving all passengers a law enforcement search is unconstitutional).

213. Schneider & Goo, *Twin Missions Overwhelmed TSA; Airport Agency Strives to Create Self, Stop Terror*, Wash. Post A Section A1 ¶ 12 (Sept. 3, 2002).

214. Hartman & Flynn, *supra* n. 10, at ¶ 43.

215. Sloan, *supra* n. 8, at ¶19.

216. *Bill Would Delay Bag Screening*, *supra* n. 140, at ¶ 16.

217. 115 Stat. at 625.

218. Hartman & Flynn, *supra* n. 10, at ¶ 42.

219. *Id.*

craft security improvements[220] and $1.5 billion to reimburse airports for the money they have spent meeting the new federal guidelines.[221]

The problem with these funding sources is twofold. First, being dependent on government funding is not a stable funding source because tax revenues shrink during rough economic times and many government programs receive funding cuts. Second, the statutorily authorized security fee can only be raised so high before the prices of airline tickets gets too expensive for people to travel. Lost passengers spell trouble for already financially troubled airlines. These airlines do not have the extra cash to fund all the extra security, and raising ticket prices is very risky. United Airlines recently announced that the company lost $889 million dollars during the third quarter of 2002, its second biggest lost ever, and United expects fourth quarter losses to be even bigger.[222] United cites bleak industry conditions for its enormous losses.[223] As a result of these losses, United was forced to file for bankruptcy protection.[224] However, the economic factors put the airlines in a bind. The money is well spent because every breach in security costs the airlines between $5 million and $6 million.[225]

Another policy consideration that will have a serious impact on airline security is passenger frustration. The government is in a Catch-22.[226] With 2 million air travelers passing through airports daily, the security system has to be "porous enough" to filter all the passengers, yet the goal of airline security is to catch any and all "weapons" that can be used in air piracy.[227] The problem for the airlines is that many layers of

220. 115 Stat. at 628.

221. *Id.* at 630.

222. Dave Carpenter, *Bleak Forecast for United*, Daily Herald Business 1 (Oct. 19, 2002). The company's operating revenue dropped by $3.7 billion, or nine percent. *Id.* at 2. United has lost $4 billion since it last turned a profit in the second quarter of 2000. *Id.*

223. *Id.* at 1. The airline industry estimates losses for 2002 to reach $9 billion. CNN, *Airlines Resolve To Trim Costs* ¶ 2 <http://www.cnn.com/2003/WORLD/europe/01/02/biz.trav.airlines/index.html> (accessed Mar. 27, 2003). Delta Air Lines lost $1.3 billion alone. Patty Davis, *Delta CEO: Govt. Should Help Airlines* ¶ 8 <http://www.cnn.com /2003/TRAVEL/03/26/airline.troubles/index.html> (accessed Mar. 27, 2003).

224. Davis, *supra* n. 223, at ¶ 10. To help bring the airline out of bankruptcy, United's pilots agreed to take a temporary twenty-nine percent pay cut. CNN, *United Pilots, Others Accept Pay Cut* ¶ 4 <http://www.cnn.com/2003/TRAVEL/01/08/ual.unions/index.html> (accessed Mar. 27, 2003). Two other unions, the Transport Workers Union (meteorologists) and the Professional Airline Flight Control (dispatchers), have also agreed to take salary cuts. *Id.* at ¶ 2. United has asked the bankruptcy court to require temporary pay cuts for another union, the International Associations of Machinists and Aerospace Workers, because the union refuses to agree on wage reductions. *Id.* at ¶ 9.

225. *Id.*

226. Sloan, *supra* n. 8, at ¶ 8.

227. *Id.* at ¶ 9 Vincent said, "[w]e have a system that moves close to 2 million people a day, and in order to do that it has to be porous enough so people can move through it. Therein lies the problem that faces the U.S. government." *Id.*

security can cause long lines and delays and inconvenience, which ultimately cut into profits.[228] Poll numbers show the frustration of passengers. ". . . [O]nly twenty percent of travelers say they take security precautions they did not take a year ago."[229] FirstAir.net conducted a poll that showed that sixty percent of the respondents were less concerned about airline security in the past six months than they were in the first six months following the September 11 attacks.[230]

Furthermore, lawmakers were caught in an unenviable position. On one hand, lawmakers are sworn to uphold the Constitution, and they know that the laws they pass are subject to judicial review by the U.S. Supreme Court.[231] On the other, the media is questioning what could have been done to prevent the attacks, and the general public is terrified and looking for action to be taken that can return them to a familiar state of comfort.

III. CONCLUSION

The events of September 11, 2001 may have been created at an earlier time in someone's imagination,[232] but no one ever expected that figure of imagination to become reality. In response to an extraordinary set of events, came extraordinary actions, such as closing United States airspace to all non-military air traffic for three days. Those extraordinary actions also resulted in an airport security overhaul. As former United States Supreme Court Justice Oliver Wendell Holmes once said, "[G]reat cases like hard cases make bad law. . . ."[233]

The action taken by Congress and the appropriate executive agencies certainly met the goal of increasing airline security, but at a large cost, both literally and figuratively. Some of the measures are more effective than others. But just because a measure is effective does not mean that it is constitutional. The best measures are those that are both

228. *Return Security, supra* n. 125, at ¶ 4.

229. *Seventy Percent, supra* n. 20, at ¶ 4.

230. *Id.* at ¶ 3.

231. *See generally Marbury v. Madison*, 5 U.S. 137 (1803) (giving courts judicial review).

232. *See* quotation, *supra* n. 186 (quoting Justice Oakes from *Albarado*) (explaining the concern over hijackers using planes as weapons).

233. *Encyclopedia of Supreme Court Quotations* 27-28 (Christopher A. Anzalone, ed., M.E. Sharpe 2000) (quoting from *Northern Securities Co. v. U.S.*, 193 U.S. 197, 364-65 (1904). The entire quote reads:

> Great cases like hard cases make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate, overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure, which makes what previously was clear, seem doubtful, and before which even well-settled principles of law will bend.

Id.

effective and constitutional. Airline security should look like the following:

> 1) The initial screening should be done with a magnetometer, detecting for both metal and non-metal objects, that gives the screener a mechanical survey image of the person's clothing and an x-ray scan of his or her carry-on baggage.
> 2) All baggage going into the belly of the aircraft should be screened using an explosives detection system.
> 3) Airline ticket agents should only be able to profile those passengers who are on the FBI terrorist watch list and only subject individuals with those names to additional security screenings.
> 4) Air marshals should be on all U.S. commercial flights and be trained the same as other law enforcement officers across the states.

As Justice Damon Keith of the Sixth Circuit Court of Appeals noted in *Taylor*, just because the government interest is compelling does not mean that the Constitution becomes subservient to that interest.[234] The Constitution has survived many extraordinary events, such as the Civil War and Great Depression, in its over 200 years of existence. The events of September 11 are another extraordinary event to add to that list, and when history looks back, people will say that the Constitution is still the supreme law of the land.

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234. *See Taylor*, 956 F.2d at 583 (reducing the impact of the Fourth Amendment).

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