

Airport Security: Over-Reaching New Heights

Cole Antolak

Abstract

The tragedy that occurred on September 11, 2001 changed airline security forever. Post 9/11, Congress gave the Department of Homeland Security vast power over passengers. This article seeks to examine whether the new airline security procedures are overly invasive, legal, or even effective. If the current system is ineffective or unconstitutional, an alternative must be sought. The Supreme Court has held that searches are required to be no more extensive or invasive than needed to protect security. This article posits that if new airline security measures are not conducted in a manner that respects the privacy and constitutional rights of passengers, they must be replaced with an alternative, such as behavioral profiling. In modern society, it is paramount that we heed the warning of Benjamin Franklin, “those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.”



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Airport Security: Over-Reaching New Heights

Cole Antolak*

I. AN INTRODUCTION TO AIRLINE SECURITY SCREENING

A. *Airline Security Pre 9/11*

At approximately 8:30 AM on Tuesday, September 11, 2001, nineteen men hijacked four transcontinental flights.¹ Loaded with passengers and jet fuel, these men transformed passenger aircrafts into guided missiles.² It has been speculated that proper security measures could have prevented this tragedy. Since 2001, airport security has since transformed the way we travel.

Before 9/11 airline security was supervised by the Federal Aviation Administration (FAA), which was responsible for all aviation-related security concerns in the United States.³ Under the FAA only 5% of baggage was screened for explosives.⁴ Passengers were searched by walking through metal detectors known as magnetometers.⁵ A magnetometer produces a signal when a passenger walks through it with metal on their person.⁶ Magnetometers originally only detected ferrous metals, metals that contain iron, but now can also detect non-ferrous metals.⁷ X-ray machines were responsible for scanning passengers' carry-on items.⁸ According to an FAA evaluation, bag and passenger screeners missed approximately 20% of

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¹ Alan Taylor, *9/11: The Day of the Attacks*, ATLANTIC (Sept. 8, 2011), <https://www.theatlantic.com/photo/2011/09/911-the-day-of-the-attacks/100143>.

² Aron Driessen, Rutget Niemeijer & Maria Nørrelund Johansen, *The effectiveness of the changes in aviation security in the United States of America after 9/11*, AVIATIONFACTS.EU (2016), http://aviationfacts.eu/uploads/thema/file_en/58f65f0b70726f5be9020000/Security_US_after_9-11_Fact_sheet.pdf.

³ *Id.*

⁴ *Id.*

⁵ *United States v. Albarado*, 495 F.2d 799, 802 n.3 (2d Cir. 1974).

⁶ *Id.*

⁷ *Id.*

⁸ Driessen, Niemeijer & Johansen, *supra* note 2.

potentially dangerous items.⁹ As a last line of defense, the FAA implemented the Federal Air Marshal Service in 1962.¹⁰ A Federal Air Marshal is a counter-terrorist agent on board a commercial aircraft to detect, deter, and defeat hostile acts targeting the United States.¹¹

B. Airline Security Post 9/11

The attack on September 11th prompted a massive overhaul of security measures then used to prevent similar attacks.¹² On November 19, 2001, President Bush signed into law the Aviation and Transportation Security Act.¹³ The Transportation Security Administration (TSA) was established under this congressional act. Congress directed the TSA to “develop policies, strategies, and plans for dealing with threats to transportation security” and to “identify and undertake research and development activities necessary to enhance transportation security.”¹⁴

Due to this overhaul, air travelers saw and experienced changes in the way they flew.¹⁵ For example, airlines instructed passengers to arrive at airports as much as two hours before takeoff for domestic flights to account for the increased security measures.¹⁶ After passing through security checkpoints, passengers were randomly selected for additional searches of their person and belongings.¹⁷

In many cases, screening procedures have been reactive as opposed to proactive. For instance, following a passenger’s December 2001 attempt to light a bomb in his shoe, TSA agents began asking passengers to remove their shoes while passing through security checkpoints.¹⁸ In addition, passengers are now only allowed to carry on three ounce containers of liquid, because terrorists in Britain attempted

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Garrick Blalock, Vrinda Kadiyali & Daniel H. Simon, *The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel*, 50 U. CHI. PRESS J.L. & ECON. 731 (Apr. 30, 2007).

¹³ *Id.*

¹⁴ 49 U.S.C. § 114(f)(8) (2016).

¹⁵ Ken Notis, *Air Travel Since 9/11*, BUREAU OF TRANSP. STAT. (Dec. 2005), https://www.bts.gov/archive/publications/special_reports_and_issue_briefs/issue_briefs/number_13/entire.

¹⁶ Blalock, Kadiyali & Simon, *supra* note 12, at 5.

¹⁷ *Id.*

¹⁸ *Id.*

to sneak liquid explosives on planes in August 2006.¹⁹ After running numerous tests, federal officials determined that a container of a certain size is needed for an effective explosion and three ounce bottles that will fit in a quart size bag do not have enough “critical diameter” to cause the destruction of an aircraft.²⁰

Prior to 9/11, there were about 16,200 private security screeners employed at U.S. airports.²¹ By the end of 2002, TSA increased their workforce to 56,000 screeners for passenger and baggage screening.²² TSA also drastically increased the occupational training for its screeners.²³ Prior to 9/11, X-ray machine operators averaged about twelve hours of training.²⁴ TSA currently requires over 100 hours for both passenger and baggage personnel.²⁵ TSA later reduced their workforce to 45,300 screeners by January 2004 in response to overstaffing.²⁶

Systematic baggage screening protocols were also implemented by the TSA.²⁷ Beginning on January 16, 2002, all airlines had to adopt one of the two following luggage screening methods: (1) positive bag matching, in which they matched each piece of luggage to a passenger on a flight, or; (2) screen checked baggage for explosives using one of four methods: explosion detection systems (EDS), explosion trace detection (ETD) machines, bomb-sniffing dogs, or the manual searching of baggage.²⁸ EDS machines, which are about the size of a SUV, process 150-200 bags per hour, and produce false positives for explosives in almost 30% of bags.²⁹ ETD machines are much smaller and require a screener to place a swab from each bag in the machine for analysis.³⁰ All commercial U.S. airports were required by Congress to install EDS machines by the end of 2002.³¹

¹⁹ Joe Sharkey, *Turns Out There's a Reason for Those 3-Ounce Bottles*, N.Y. TIMES (Sept. 11, 2007), <http://www.nytimes.com/2007/09/11/business/11road.html>.

²⁰ *Id.*

²¹ Blalock, Kadiyali & Simon, *supra* note 12, at 5.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Blalock, Kadiyali & Simon, *supra* note 12, at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Prior to 9/11, the doors providing access to the cockpit were left unlocked.³² After 9/11, these doors were required to be reinforced to withstand bullets and brute force.³³ Bruce Schneier is an internationally renowned security technologist.³⁴ He is a fellow at the Berkman Center for Internet and Society at Harvard University and the Chief Technology Officer of IBM Resilient.³⁵ Schneier believes that “the only useful airport security measure[s] since 9/11 were locking and reinforcing cockpit doors, so terrorists can’t break in, positive baggage matching, and teaching the passengers to fight back. The rest is security theater.”³⁶ If Schneier is right in his opinion that much of what the TSA is doing is “security theater” are the intrusions we endure worth the false sense of security?

Perhaps the most controversial and noticeable change to airport security is the use of advanced imaging technology (AIT). AIT can take two forms: backscatter and millimeter-wave.³⁷ AIT with backscatter technology “delivers a low intensity X-ray onto a passenger’s body and takes a picture of the photon pattern bouncing off of certain materials, revealing its shape on the monitor.”³⁸ Similarly, AIT with millimeter-wave technology uses “non-ionizing radiation in the radio wavelength area to bombard the body and record the bouncing of the waves from materials or objects on the body.”³⁹ At one time, both forms of AIT were used to generate detailed, passenger-specific images.⁴⁰ However, after resistance by travelers, the TSA currently utilizes only millimeter-wave AIT with automated target recognition

³² Barbara Peterson, *Could Plane Cockpits Be Too Secure?*, POPULAR MECHANICS (Mar. 19, 2014), <http://www.popularmechanics.com/flight/a10270/in-light-of-mh370-evidence-could-plane-cockpits-be-too-secure-16611747>.

³³ *Id.*

³⁴ Bruce Schneier, BERKMAN KLEIN CTR., <https://cyber.harvard.edu/people/bschneier> (last updated May 25, 2016).

³⁵ *Id.*

³⁶ Christopher Elliott, *The TSA has never kept you safe: here’s why*, FORTUNE (June 2, 2015), <http://fortune.com/2015/06/02/the-tea-airport-security-problems>.

³⁷ Victoria Sutton, *Asking the Right Questions: Body Scanners, Is Salus Populi Suprme Lex the Answer?*, 22 HEALTH MATRIX 443, 443–44 (2013).

³⁸ *Id.*

³⁹ *Id.* at 444.

⁴⁰ Carol Kuruvilla, *TSA has completely removed revealing X-ray scanners from America’s airports: rep.*, N.Y. DAILY NEWS (May 31, 2013), <http://www.nydailynews.com/news/national/tsa-completely-removed-full-body-scanners-rep-article-1.1360143>.

software, which removes passenger specific pictures and instead displays the same generic outline for all passengers.⁴¹

These images were once saved, but TSA has since disabled this capability on its units in response to pushback concerning passengers' privacy.⁴² To further protect individuals from intrusion or embarrassment, TSA agents are not allowed to bring devices with photographic capacities into the screening room.⁴³ The screening room is located away from the security checkpoint so that the agent monitoring the results does not know the subject of the scan.⁴⁴

The addition of these security measures came at a cost. In response, a "September 11th fee" was tacked onto all airline passenger tickets.⁴⁵ In the first ten years the TSA collected over \$15 billion.⁴⁶ In 2017 alone the total fee collection was \$3,882,602,000.⁴⁷ The fee is collected by air carriers from passengers at the time air transportation is purchased.⁴⁸ In 2014, the fee was increased from \$2.50 per leg of the trip to \$5.60 per leg.⁴⁹ However, under a deal negotiated by House Speaker Paul Ryan, a significant portion of the additional revenue was diverted to deficit reduction.⁵⁰ The Bipartisan Budget Act of 2013 authorizes the diversion of \$13 billion of passenger's 9/11 fee to be used for deficit reduction over 10 years.⁵¹

⁴¹ *Travel Tips: Advanced imaging technology*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait> (last visited Apr. 11, 2018).

⁴² Brittany R. Stancombe, Comment, *Fed Up with Being Felt Up: The Complicated Relationship Between the Fourth Amendment and TSA's "Body Scanners" and "Pat-Downs,"* 42 CUMB. L. REV. 181, 186 (2012).

⁴³ *Id.*

⁴⁴ Sutton, *supra* note 37, at 443.

⁴⁵ Jason Villedomez, *9/11 to now: Ways we have changed*, PBS (Sept. 14, 2011, 4:55 PM), <https://www.pbs.org/newshour/world/911-to-now-ways-we-have-changed>.

⁴⁶ *Id.*

⁴⁷ *Security Fees*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/for-industry/security-fees> (last visited Apr. 9, 2018).

⁴⁸ *Id.*

⁴⁹ Katia Hetter, *TSA passenger security fee rises*, CNN (July 21, 2014, 3:37 PM), <http://www.cnn.com/2014/07/21/travel/tsa-passenger-fee-hike/index.html>.

⁵⁰ Bart Jansen, *Trump proposes to hike TSA fee on airline tickets*, USA TODAY (Mar. 16, 2017, 12:04 AM), <https://www.usatoday.com/story/news/2017/03/16/trump-hike-tsa-fee-airline-tickets/99223062>.

⁵¹ *Airlines for America Calls on Congress to Return Billions in Diverted TSA Fees to Immediately Address Excessive Security Lines*, AIRLINES FOR AM. (May 19, 2016), <http://airlines.org/news/airlines-for-america-calls-on-congress-to-return-billions-in-diverted-tsa-fees-to-immediately-address-excessive-security-lines>.

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Every day, TSA employees are conducting invasive searches ranging from patting down children as young as three years of age to inflicting harmful radiation onto traveler's across the nation.⁵² These procedures are systematically employed and yet our airports are far from secure.⁵³ *USA Today* reported in 2008 that investigators repeatedly smuggled liquid explosives and detonators past airport checkpoints.⁵⁴ An internal TSA report also said screeners in Los Angeles and Chicago missed fake bombs on agents in more than 60% of tests.⁵⁵ Normally this would beg the question, “what is a life of security worth if that life is overrun with constant invasions of privacy by the very government created to protect American security and privacy?”⁵⁶ But in this case, we should ask: is the relinquishment of an essential liberty, to purchase a little temporary safety, worth its intrusion?

C. *Statutory Basis for Airline Screening Procedures*

The rights of airline passengers are largely defined by Congress.⁵⁷ Congress, under its constitutional power to “regulate Commerce with foreign Nations, and among the several States,” is given the authority over airports and airline passengers’ rights.⁵⁸ The Federal Aviation Administration (FAA) is the congressionally appointed institution responsible for aviation safety.⁵⁹ The Department of Transportation has no authority over matters related to aviation and airport security.⁶⁰ Instead, airport security is administered only by TSA, an agency of the Department of Homeland Security.⁶¹

The federal statutory basis for airport security can be found in 49 U.S. Code § 44901-46. Section 44901 outlines the standards for screening passengers and

⁵² Robert Poole, *Airport Security, Body Scans and TSA Searches: Too Intrusive*, DAILY BEAST (Nov. 18, 2010, 8:47 PM), <https://www.thedailybeast.com/airport-security-body-scans-and-tsa-searches-too-intrusive>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Jessica Hoff, *Enhancing Security While Protecting Privacy: The Rights Implicated by Supposedly Heightened Airport Security*, 2014 MICH. ST. L. REV. 1609, 1655 (2015).

⁵⁷ RACHEL TANG, CONG. RESEARCH SERV., R43078, AIRLINE PASSENGER RIGHTS: THE FEDERAL ROLE IN AVIATION CONSUMER PROTECTION I (2016).

⁵⁸ *Id.*

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ Ehsan Zaffar, *What are your rights at airport screenings and checkpoints?*, ELSEVIER (Sept. 11, 2013), <https://www.elsevier.com/connect/what-are-your-rights-at-airport-screenings-and-checkpoints>.

property.⁶² Subsection I of § 44901 outlines the limitations on use of advanced imaging technology for screening passengers.⁶³ The act defines advanced imaging technology as

- (i) . . . a device used in the screening of passengers that creates a visual image of an individual showing the surface of the skin and revealing other objects on the body; and
- (ii) May include devices using backscatter x-rays or millimeter waves and devices referred to as whole-body imaging technology or body scanning machines.⁶⁴

Section 44901(I)(2) briefly regulates the use of advanced imaging technology. This section states, “that any advanced imaging technology used for the screening of passengers must be equipped with and employs automatic target recognition software and complies with such other requirements as the Assistant Secretary determines necessary to address privacy considerations.”⁶⁵ Automatic target recognition software is the software installed on the advanced imaging devices that produce a generic image of the individual being screened that is the same as the images being produced for all other screened individuals.⁶⁶

A variety of laws were passed in response to the events that occurred on September 11th.⁶⁷ The FISA Amendments of 2008 allowed the Foreign Intelligence Court to authorize warrantless surveillance of Americans’ international electronic communications.⁶⁸ The USA PATRIOT Act of 2001 authorized “sneak and peak” searches.⁶⁹ Sneak and peak search warrants allow the government to search your home or business without telling you until months later.⁷⁰ These warrants are issued overwhelmingly in drug cases, with less than 1% used for terrorism cases.⁷¹ The Intelligence Reform and Terrorism Prevention Act of 2004 authorized the

⁶² 49 U.S.C. § 44901(a) (2016).

⁶³ *Id.* § 44901(a)(I).

⁶⁴ *Id.* § 44901(I)(1)(A).

⁶⁵ *Id.* § 44901(I)(2).

⁶⁶ *Id.* § 44901(I)(1)(C).

⁶⁷ Brennan Ctr. for Justice, *Chart: How 9/11 Changed the Law*, MOTHER JONES (Sept. 9, 2011, 10:00 AM), <https://www.motherjones.com/politics/2011/09/law-changes-from-9-11>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

Department of Homeland Security to develop a strategic plan for airport security measures.⁷² The new plan called for the TSA to improve and deploy equipment that detects weapons and other objects in airports using full body scanners that displayed an image of the passenger's body.⁷³ Despite continued outrage from passengers, the D.C. Circuit Court of Appeals ruled in July 2011 that the use of body scanners did not violate the Fourth Amendment.⁷⁴ The nature of the legislation led to a lack of thorough debate and consideration before voting to pass many of these laws.⁷⁵

II. HISTORICAL LEGAL CONCERNS

When air travel was relatively new, the expectation of privacy was reduced because of the numerous alternative methods of travel.⁷⁶ If a passenger did not want to be subjected to a search, they could travel by other means.⁷⁷ Now that flight has become the standard method of transportation for long distance travel, people depend on air transportation and therefore, passengers are forced to endure these intrusions in order to continue to their destination.⁷⁸ In 1974, the Second Circuit in *United States v. Albarado* defined what a typical airport frisk should encompass compared to a full frisk.⁷⁹ The court stated, “the typical airport frisk may be more in the nature of a pat-down, involving only the patting of external clothing in the vicinity of pockets, belts or shoulders where a weapon such as a gun might be secreted.”⁸⁰ The court went on to explain that a full frisk is when an officer feels “with sensitive fingers every portion of the person's body and makes a thorough search of the persons arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”⁸¹ Airport pat-downs have made the full transition from

⁷² Brennan Ctr. for Justice, *supra* note 67.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Paul Blumenthal, *Congress Had No Time to Read the USA PATRIOT Act*, SUNLIGHT FOUNDATION (Mar. 2, 2009, 2:03 PM), <https://sunlightfoundation.com/2009/03/02/congress-had-no-time-to-read-the-usa-patriot-act>.

⁷⁶ *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973).

⁷⁷ *Id.*

⁷⁸ *Former Miss USA Feels “Violated” by TSA Pat-Down*, NBC NEWS (Apr. 28, 2011, 6:24 PM), <http://www.nbcnews.com/id/4280551/ns/travel-news/t/former-miss-usa-feels-violated-tsa-pat-down/#.UkW6ohatqfQ>.

⁷⁹ *United States v. Albarado*, 495 F.2d 799, 802 (2d Cir. 1974).

⁸⁰ *Id.*

⁸¹ *Id.*

a “typical airport frisk” to a “full frisk.”⁸² The change is a result of the agency’s 2015 study that revealed that agents were failing to detect handguns and other weapons.⁸³ The Denver International Airport notified employees that these searches will be more rigorous, thorough, and may involve an officer making more intimate contact than before.⁸⁴

A. *Fourth Amendment Challenges*

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”⁸⁵ Courts commonly weigh three aspects of a search to determine whether the search is reasonable: the degree of intrusiveness of the search procedure; the magnitude and frequency of the threat; and the sufficiency of alternatives to conducting a search.⁸⁶ Courts also consider the effectiveness of the search in reducing the threat and whether sufficient care has been taken to limit the scope of the search as much as possible, while still maintaining this effectiveness.⁸⁷ In order to be successful on a Fourth Amendment challenge, the injured party must prove that a search or seizure has been conducted by an agent of the government.⁸⁸

Once it has been determined that the government has conducted a search, the Fourth Amendment requires that the search must either have been supported by a warrant or the search must fit into a few “specifically and well-delineated exceptions.”⁸⁹ Due to the obvious inability for TSA agents to obtain a warrant because of time limitations, airport security searches must fall under one of three established exceptions used in airport security: the administrative search exception, the stop-and-frisk exception, and the consent exception.⁹⁰

⁸² Justin Bachman, *U.S. Airport Pat-Downs Are About to Get More Invasive*, BLOOMBERG (Mar. 3, 2017, 2:25 PM), <https://www.bloomberg.com/news/articles/2017-03-03/u-s-airport-pat-downs-are-about-to-get-more-invasive>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ U.S. CONST. amend. IV.

⁸⁶ NATIONAL RESEARCH COUNCIL, *Airline Passenger Security Screening: New Technologies and Implementation Issues* 34 (1996).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁹⁰ NATIONAL RESEARCH COUNCIL, *supra* note 86, at 35.

Administrative searches are justified on the basis that they serve a societal purpose other than standard criminal law enforcement.⁹¹ In order for an administrative search to be justified the societal purpose must outweigh the privacy interests sacrificed.⁹² Once it is determined that the need outweighs the privacy concerns, it still must be proven that the special need could not be met in a less intrusive manner and that the search was truly made in pursuant to the societal need asserted.⁹³ The societal need for increased screening is higher during times of danger, but even in times of peace the interest in protecting passengers from threats to their safety has been balanced in favor of the government.⁹⁴

On the passenger's side, the court must consider the passenger's expectation of privacy.⁹⁵ A person's expectation of privacy is subjective and determined upon a full analysis of the circumstances.⁹⁶ Airline passengers likely have a legitimate expectation of privacy against being searched in an intrusive manner.⁹⁷ Another factor in regards to a passenger's right to be free from intrusion is the nature of the intrusion.⁹⁸ Even when the search is for good reason, the United States Court of Appeals in *Skipwith* held that "the intrusion is not insubstantial. It is inconvenient and annoying, in some cases it may be embarrassing, and at times can be incriminating."⁹⁹

To justify passenger screening technology, the screening must be such that the privacy of the individual is protected to the fullest extent possible.¹⁰⁰ Current imaging technology could be considered unlawful if the government need for ensuring air travel security can be met through less intrusive means.¹⁰¹ In an effort to increase privacy, the TSA has implemented measures to minimize the appearance of nakedness, such as the use of generic outlines for all passengers. Additionally, the number of people having access to the image, the time the image is preserved, and

⁹¹ *Id.*

⁹² *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

⁹³ NATIONAL RESEARCH COUNCIL, *supra* note 86, at 35.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁹⁷ NATIONAL RESEARCH COUNCIL, *supra* note 86, at 35–36.

⁹⁸ *Id.* at 36.

⁹⁹ *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973).

¹⁰⁰ NATIONAL RESEARCH COUNCIL, *supra* note 86, at 36.

¹⁰¹ *Id.*

the uses of the data need to be limited to effectively meet the least intrusive means standard.¹⁰²

Just as the Fourth Amendment protects individuals from unreasonable searches, it likewise protects citizens from unreasonable seizures.¹⁰³ An individual is “seized” when his or her liberty is restrained through coercion, physical force, or show of authority.¹⁰⁴ A person’s liberty is restrained when, under all of the circumstances, a reasonable person would not have felt free to ignore the presence of law enforcement officers and go about his or her business.¹⁰⁵ Tim Cushing, a journalist from Techdirt, sat down with TSA agents to clarify what he heard while waiting to board a plane.¹⁰⁶ Cushing stated, “I started watching the TSA video that was running on the monitors overhead, and I was struck when the narrator said: ‘Once you enter the screening area, you will not be permitted to leave without TSA permission.’”¹⁰⁷ In Cushing’s interview the agent told him, “that he wasn’t free to leave, but he certainly wasn’t being detained.”¹⁰⁸ So if you are not free to leave and you are not being detained, what sort of constitution-free zone are you standing in when in line to be screening by airport security? The United States Court of Appeals for the Ninth Circuit attempts to clear these murky waters with its opinion in *United States v. Aukai*.¹⁰⁹

On February 1, 2003, Daniel Kuualoha Aukai arrived at the Honolulu International Airport intending to take a Hawaiian Airlines flight from Honolulu to Kona, Hawaii.¹¹⁰ Because Aukai was traveling without an ID, he was subject to secondary screening, even though he passed the initial screening without triggering an alarm.¹¹¹ Aukai was directed to a roped off area for secondary screening but complained that his flight was scheduled to leave in five minutes, and he could not

¹⁰² *Id.*

¹⁰³ U.S. CONST. amend. IV.

¹⁰⁴ MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 9.20 (2017).

¹⁰⁵ *Id.*

¹⁰⁶ Tim Cushing, *The TSA Vs. The Fourth Amendment: You’re Free To Board A Plane, But You’re Not Free To Leave The Screening Area*, TECHDIRT (Apr. 8, 2014, 8:52 AM), <https://www.techdirt.com/articles/20140406/09365326822/tsa-vs-fourth-amendment-youre-free-to-board-plane-youre-not-free-to-leave-screening-area.shtml>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Aukai*, 497 F.3d 955, 957 (9th Cir. 2007).

¹¹⁰ *Id.*

¹¹¹ *Id.*

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wait for the additional screening.¹¹² During the additional screening, the TSA officer could see the outline of an unknown object in Aukai's pocket.¹¹³ At some point during the screening process, Aukai informed the officer that he no longer wished to board a plane and wanted to leave the airport.¹¹⁴ Eventually, Aukai removed the item from his pocket and it was discovered to be a glass pipe used to smoke methamphetamine.¹¹⁵ Aukai was placed under arrest and subsequently several bags of methamphetamine were also located on Aukai.¹¹⁶ Aukai later filed a motion to suppress the evidence, because he believed the search was unconstitutional.¹¹⁷

The court held that airport screening searches are constitutionally reasonable administrative searches, because they are “conducted as a part of a general regulatory scheme in furtherance of the administrative purpose, namely to prevent the carrying of weapons or explosives aboard aircrafts, and thereby to prevent hijackings.”¹¹⁸ Further, the court held that,

the constitutionality of an airport screening search does not depend on consent, and requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world.¹¹⁹ Such a rule would afford terrorists multiple opportunities to penetrate airport security by electing not to fly on the cusps of detection until a vulnerable portal is found.¹²⁰

The court added that given that consent is not required, it makes little sense to predicate the reasonableness of an administrative airport screening search on an irrevocable implied consent theory.¹²¹ Rather, where an airport screening search is otherwise reasonable and conducted pursuant to statutory, *all that is required is the passenger's election to attempt entry into the secured area of an airport.*¹²² The court

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 960.

¹¹⁹ *Aukai*, 497 F.3d at 961.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* (emphasis added).

held that once you intend to enter a secured area of an airport you will no longer be allowed to leave unless granted permission by the proper authority.¹²³

The *Aukai* case begs a line of questioning: Where do we draw the line? At what point does a passenger intend to enter a secured area of the airport? Is it upon entering the parking lot? After dropping off your checked bags? Or while standing in line to be screened? The court in *Aukai* said that the line is drawn when the passenger places their items on the conveyor belt of the X-ray machine.¹²⁴ However, the government contended during oral arguments that it would be constitutional for the demarcation to be drawn at an earlier point in time such as entering the screening line or the presentation of a boarding pass to a TSA officer.¹²⁵ The court declined to answer that question, because it was not an issue before them in that case.¹²⁶ Fourth Amendment challenges will continue to arise so long as searches and seizures occur in U.S. airports.

B. Tort Law Challenges

Tort rights are rights that individuals have against a wide variety of entities, such as private persons, business entities, and the government.¹²⁷ Thus, privacy torts protect an individual's privacy from other individuals, including government officials.¹²⁸ A standard invasion of privacy statute is worded as such: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."¹²⁹ However, ordinary inconveniences and annoyances facing modern society are not actionable.¹³⁰ Passenger screening technologies that reveal personal details may allow individuals to sue for damages if they believe the information was used "improperly" or the search was conducted without sufficient justification or in an excessive manner or scope.¹³¹

¹²³ *Id.*

¹²⁴ *United States v. Aukai*, 497 F.3d 955, 961 (9th Cir. 2007).

¹²⁵ *Id.* at n.9.

¹²⁶ *Id.*

¹²⁷ NATIONAL RESEARCH COUNCIL, *supra* note 86, at 40.

¹²⁸ *Id.*

¹²⁹ RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

¹³⁰ NATIONAL RESEARCH COUNCIL, *supra* note 86, at 40.

¹³¹ John F. Banzhaf III, *A New Weapon Against TSA Gropings—Torts*, PRLOG (June 2, 2011), <https://www.prlog.org/11522713-new-weapon-against-tsa-gropings-torts.html>.

A woman in Texas was inappropriately and embarrassingly searched by TSA employees and she succeeded in forcing the government to compensate her, based upon common law tort claims of negligence and intentional infliction of emotional distress.¹³² John Banzhaf, a public interest law professor at George Washington University, says, “this settlement strongly suggests that the TSA can’t avoid such law suits by broad claims that federal law authorizing TSA searches completely overrides state law.”¹³³ TSA employees in a position to operate the equipment and conduct the searches need to be aware of the necessity to protect individual privacy during airline security screening to minimize these types of claims.

III. DEVELOPING TECHNOLOGY

The TSA is attempting to introduce two new technologies intended to significantly speed up the screening process.¹³⁴ At Phoenix Sky Harbor International Airport and Logan International Airport in Boston, computer tomography three-dimensional (CT3D) bag screeners are being tested.¹³⁵ These scanners create a clear picture of the contents of a bag and can automatically detect explosives.¹³⁶ This scanner is similar to technology used in CT scanners used for medical testing.¹³⁷ Larry Studdiford, a security consultant for airports and the founder of Studdiford Technical Solutions, said, “[n]othing is 100 percent, but CT3D scanners give a much greater level of detail of what’s inside a bag than the current X-ray machines.”¹³⁸ Meanwhile, biometric fingerprint screeners are being tested at Hartfield-Jackson Atlanta International Airport and Denver International Airport.¹³⁹ The fingerprint screeners compare passengers’ fingerprints with the ones they provide when they enroll in TSA PreCheck, and can pull up boarding pass information.¹⁴⁰ Studdiford

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Shivani Vora, *T.S.A. Testing 2 Technologies to Speed Airport Screening*, N.Y. TIMES (June 28, 2017), <https://www.nytimes.com/2017/06/28/travel/tsa-testing-2-technologies-to-speed-airport-screening.html>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Vora, *supra* note 134.

¹⁴⁰ *Id.*

has stated that fingerprint identification would someday eliminate the need for fliers to show their boarding passes or photo IDs.¹⁴¹

A. *Legal Concerns*

In 2011, the Electronic Privacy Information Center sponsored a conference on the screening techniques used by the TSA.¹⁴² The opening speaker was Representative Rush Holt, a democrat from the 12th District of New Jersey.¹⁴³ Holt's theme was that by subjecting passengers to intrusive screening the TSA is violating fliers' privacy, hindering airline security, and subjecting travelers to unknown health risks.¹⁴⁴ Holt is no longer a member of Congress, but at the time, was a senior member of the House Intelligence Committee and currently serves as the chief executive officer of the American Association for the Advancement of Science.¹⁴⁵ In a letter Congressman Holt wrote to the TSA Administrator, John Pistole, Holt said:

[w]hen Americans witness three-year-old children being aggressively patted down by TSA screeners, as was the case this month, our airline security screening system is broken. As a scientist and the chairman of the Select Intelligence Oversight Panel, I appreciate the challenges we face in trying to prevent terrorists from boarding American airliners. That same background also gives me an understanding of why TSA's current obsession with fielding body imaging technology is misguided, counterproductive, and potentially dangerous.¹⁴⁶

Within the letter, Holt urges Pistole to consider the potential health effects of back scatter X-ray devices.¹⁴⁷ He quoted Dr. David Brenner of Columbia University who has stated that the devices currently in use deliver to the scalp "20 times the average dose [of radiation] that is typically quoted by TSA and throughout the

¹⁴¹ *Id.*

¹⁴² Steve Strunsky, *U.S. Rep. Rush Holt criticizes federal approach to airline security, full-body scanners*, NJ.COM (Jan. 6, 2011, 6:29 PM), http://www.nj.com/news/index.ssf/2011/01/nj_rep_rush_holt_criticizes_fe.html.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Ginger Pinholster, *Retiring U.S. Congressman Rush D. Holt, Ph.D., a Scientist and Teacher, to Lead AAAS, the World's Largest General Scientific Society-Publisher of the Science Family of Journals*, AM. ASS'N FOR ADVANCEMENT OF SCI. (Nov. 18, 2014), <https://www.aaas.org/news/stpf/AAASCEO>.

¹⁴⁶ Letter from Rush Holt, Congressman, to John Pistole, TSA Administrator (Nov. 19, 2010), http://library.intellectualtakeout.org/library/primary-sources/letter-congressman-rush-holt-tsa-administrator-john-pistole?library_node=77936.

¹⁴⁷ *Id.*

industry.”¹⁴⁸ According to Dr. Brenner, the majority of the radiation from X-ray back scatter machines strikes the top of the head, which is where 85% of the 800,000 cases of basal cell carcinoma diagnosed in the United States each year develop.¹⁴⁹ Additionally, a World Health Organization report revealed that millimeter waves not only heat the skin, but also damage eyesight and cause cancer, particularly cancer of the skin.¹⁵⁰ The organization, The Truth About Cancer, suggests that to minimize your risk of developing cancer you should skip the full body scanner and opt for a pat down instead.¹⁵¹ The possibility of injuries to a traveler’s health by this sort of technology opens up the TSA to serious liability.¹⁵²

B. Privacy Concerns

Increased security measures often directly correlate to a decreased lack of privacy.¹⁵³ Adam Schwartz, a lawyer with the Electronic Frontier Foundation, a nonprofit digital rights group, says that biometric recognition is a uniquely invasive form of surveillance.¹⁵⁴ Schwartz says, “We can change our bank account numbers, we even can change our names, but we cannot change our faces or fingerprints. Once the information is out there, it could be misused.”¹⁵⁵ Kade Crockford, the director of the Technology for Liberty Program at the ACLU, says that, “the biometric databases that the government is amassing are simply another tool, and a very powerful tool of government control.”¹⁵⁶ The American Civil Liberties Union received over 900 privacy complaints from airport travelers in just one month in 2010.¹⁵⁷

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Ty Bollinger, *How Safe is an Airport Full Body Scanner?*, TRUTH ABOUT CANCER, <https://thetruthaboutcancer.com/airport-full-body-scanner> (last visited Apr. 2, 2018).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Lee Raine & Shiva Maniam, *Americans feel the tensions between privacy and security concerns*, FACT TANK (Feb. 19, 2016), <http://www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns>.

¹⁵⁴ Asma Khalid, *Facial Recognition May Boost Airport Security But Raises Privacy Worries*, NPR (June 26, 2017), <https://www.npr.org/sections/alltechconsidered/2017/06/26/534131967/facial-recognition-may-boost-airport-security-but-raises-privacy-worries>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Jayshree Bajoria, *The Debate Over Airport Security*, COUNCIL ON FOREIGN REL. (Dec. 22, 2010), <https://www.cfr.org/backgrounder/debate-over-airport-security#chapter-title-0-2>.

IV. PITTSBURGH INTERNATIONAL AIRPORT'S NEW POLICY

Locally, Pittsburgh International Airport has received attention recently for the implementation of its new policy allowing the public to bypass airport security.¹⁵⁸ As of September 5, 2017 non-fliers are allowed to roam beyond security at Pittsburgh International as part of a test the airport developed with the TSA's sign-off.¹⁵⁹ Visitors who check in at a dedicated counter on the airport's third-floor ticketing level and show a driver's license or passport can receive a complimentary "myPITpass."¹⁶⁰ Individuals under 18 will not be required to produce identification so long as they are accompanied by an adult.¹⁶¹ Anyone on the no-fly list will not be allowed, and everyone will still be required to go through TSA's standard security procedures.¹⁶²

Pittsburgh is the first airport in the country to allow the public past airport security since September 11, 2001.¹⁶³ The purpose of the change is to allow non-flyers to accompany minors, the elderly, or those needing additional assistance to the boarding area and provide access to the restaurants and shops without buying a ticket.¹⁶⁴ The chief executive of the Allegheny County Airport Authority, Christina Cassotis, sees the move as "a return to the good old days."¹⁶⁵ TSA spokesperson Michael England says, "the public will be extremely vetted and screened as if they were boarding a plane. All rules for carry-on luggage will also apply to those receiving the myPITpass."¹⁶⁶ Airport officials promise that this policy will not affect security line wait times for traveling passengers.¹⁶⁷

¹⁵⁸ Nikki Ekstein, *This Airport Is Letting You Get Past Security Without a Plane Ticket*, BLOOMBERG (Aug. 29, 2017, 6:39 PM), <https://www.bloomberg.com/news/articles/2017-08-29/at-pittsburgh-airport-you-won-t-need-a-ticket-to-get-past-security>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Natalie Gontcharova, *This Airport is the First Since 9/11 to Allow Non-Passengers Through Security*, REFINERY 29 (Aug. 30, 2017, 2:20 PM), <http://www.refinery29.com/2017/08/170325/pittsburgh-airport-non-passengers-security>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Gontcharova, *supra* note 161.

¹⁶⁷ *Id.*

This is not the only change being made to Pittsburgh International Airport. Cassotis has also proposed a new \$1.1 billion airport terminal.¹⁶⁸ Cassotis reasons that, “we want to make sure that we have the most efficient airport that we can for this community, and we’re meeting the needs of the future.”¹⁶⁹ The new terminal will utilize biometric screening.¹⁷⁰ Cassotis explains, “[t]hink of it like you’re walking down a hallway and there are ways that biometrics will measure whether or not you are a security threat, after you have turned over a whole lot of biometric information of course.”¹⁷¹ If all goes as planned, the new terminal is set to open in 2023.¹⁷²

If you were not skeptical of either of these policies in their isolation, perhaps the idea of the new technology and new policy being utilized together will make you uneasy. Now, even those who are not able to board a plane are searched, seized, and, in the future, required to submit “a whole lot” of biometric data in order to access the airside terminal of Pittsburgh International.¹⁷³ Is having dinner at the TGI Fridays in Concourse D or browsing the fragrances at Hugo Boss in the Center Concourse worth the government’s seizure of the data produced by an iris or facial recognition scan? If and when Pittsburgh deploys these procedures together, the government will no longer be able to justify its invasive measures by showing that there is a significant need to prevent non-ticketed passengers from hijacking planes.

Not everyone is onboard with Pittsburgh Airport’s new policy.¹⁷⁴ A union of flight attendants have come out against the decision to allow non-ticketed passengers through TSA checkpoints, calling it a “bad idea” that sets a “terrible precedent.”¹⁷⁵ Bob Ross, the president of the Association of Professional Flight Attendants wrote, “[a]llowing the non-flying public to go through security for the sole purpose of shopping is a terrible precedent and an ill-conceived decision.”¹⁷⁶ It could be

¹⁶⁸ Jon Delano, *Airport CEO Updates Progress On Plans For New Terminal At Pittsburgh International*, CBS PITTSBURGH (Oct. 24, 2017, 7:48 PM), <http://pittsburgh.cbslocal.com/2017/10/24/pittsburgh-airport-new-terminal-local-contractors>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Delano, *supra* note 168.

¹⁷⁴ Ted Reed, *American Airlines Flight Attendants Blast Pittsburgh Airport Plan to Allow Non-Passengers Entry*, FORBES (Sept. 1, 2017, 11:38 AM), <https://www.forbes.com/sites/tedreed/2017/09/01/american-airlines-flight-attendants-blast-pittsburgh-airport-plan-to-allow-non-passengers-entry/#1875b29a634a>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

construed by some that, as evidenced by the new policies, Pittsburgh International Airport is setting a poor example by prioritizing profitability over safety. Others, like Cassotis, could find the new policies a refreshing return to less intrusive measures used in “the good old days.”

V. WHAT SHOULD BE DONE?

The United States can look to other countries for inspiration in how to manage airport security. In Israel, security agents rely heavily on “behavioral profiling” in which officers at airports ask questions to scrutinize people to see how they behave.¹⁷⁷ Passengers exhibiting suspicious behavior are then pulled aside for targeted interrogation and search.¹⁷⁸ Profiling techniques are used at airports by every other security agency with great success.¹⁷⁹ It can help determine, intelligently, which technology to use on which passenger.¹⁸⁰

Most experts advocate for use of full-body scanners or pat-downs as a secondary screening tools for passengers that arouse suspicion.¹⁸¹ The profiling must be conducted in a neutral manner that focuses on data such as how a passenger bought their ticket, their past travels, recent actions, and behaviors.¹⁸² These procedures have been successful despite the fact that no country in the world faces more terrorist threats than Israel and no airport in the world faces more terrorist threats than Tel Aviv’s Ben Gurion Airport.¹⁸³ Raphael Ron, a former director of security at Ben Gurion calls the passenger-oriented security system more focused on the human factor, based on the assumption that terrorist attacks are carried out by people who can be stopped by the use of this simple but effected security methodology.¹⁸⁴ Ben Gurion’s airport security is staffed by highly trained army graduates who have specialist skills in detection and interrogation.¹⁸⁵ A method such as this, which focuses on human impulses and behavioral characteristics, could

¹⁷⁷ Bajoria, *supra* note 157.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Bajoria, *supra* note 157.

¹⁸³ Daniel Wagner, *What Israeli Airport Security Can Teach the World*, WORLD POST, https://www.huffingtonpost.com/daniel-wagner/what-israeli-airport-secu_b_4978149.html (last visited Apr. 9, 2018).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

improve security and dramatically reduce concerns over privacy if utilized in the United States.

VI. CONCLUSION

If the TSA cannot demonstrate the necessity for AIT technology, then the use of this technology should be restricted to such an extent as to limit intrusion.¹⁸⁶ Every day, TSA employees are conducting invasive searches ranging from patting down children as young as three-years of age to inflicting harmful radiation onto traveler's across the nation.¹⁸⁷ These procedures are systematically employed and yet our airports are far from secure.¹⁸⁸ Normally this would beg the question, "what is a life of security worth if that life is overrun with constant invasions of privacy by the very government created to protect American security and privacy?"¹⁸⁹ But in this case, we should ask: is the relinquishment of an essential liberty, to purchase a little temporary safety, worth its intrusion? If the price all Americans pay is not worth the collective reward a delicate balance must be achieved through other avenues.

¹⁸⁶ *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974).

¹⁸⁷ Poole, *supra* note 52.

¹⁸⁸ *Id.*

¹⁸⁹ Hoff, *supra* note 56, at 1655.