

REVISITING “SPECIAL NEEDS” THEORY VIA AIRPORT SEARCHES

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INTRODUCTION

Imagine for a moment occupying your spare time by reading random appellate opinions in the Federal Reporter, and coming across the following passages in decisions addressing the Fourth Amendment limitations on airport searches:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.¹

The airport search is a direct reaction to the wave of airplane hijackings . . . , at which time popular feelings of fear and anger, and ultimately rage, called out for some program to safeguard air flights, and understandably so. Airplane hijacking is a particularly frightening crime. Many hijackers have been psychotic or political fanatics, for whom death holds no fear and little consequence Today, the general methodology of the airport search has become more or less routine.²

The danger [of airplane hijacking] is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances.³

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¹ United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, J., concurring) (link).

² United States v. Albarado, 495 F.2d 799, 803 (2d Cir. 1974) (link).

³ United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972) (link).

Surely you would be forgiven for thinking you were reading about the security measures recently put in place by the Transportation Security Administration (TSA): specifically, the TSA's installation of scanners that are capable of creating highly controversial images of random travelers as well as the "enhanced" pat frisks applied to passengers in certain circumstances. But the language quoted above is from a different era entirely—the period beginning in the late 1960s when federal appellate courts heard a slew of constitutional challenges to new security measures imposed by airlines and the Federal Aviation Administration (FAA) in the wake of a sharp increase in politically-motivated "skyjackings." My goal in this Essay is to examine the controversy surrounding the TSA's new airport search regime by reference to the Fourth Amendment jurisprudence developed in response to the first instantiation of mass airport searches.

As I suggest below, to evaluate the strength of the arguments regarding the constitutionality of the TSA's new airport search regime, it is important to look to the ways that courts resolved challenges to the earlier FAA search program. Reviewing that history demonstrates first that it is difficult to find the right doctrinal fit for searches like these. The searches affect large portions of the population, are based on no suspicion whatsoever, and are public in nature. Under traditional Fourth Amendment probable cause and warrant requirements, they would clearly not pass muster. Challenges to the FAA's search regime, however, have almost uniformly failed. Thus, courts in the 1970s—taking their cue from the Supreme Court—stretched Fourth Amendment doctrine to accommodate what were viewed as important public interests in security. Some courts held that the passengers had implicitly consented to the searches by agreeing to travel on a plane.⁴ Some found the suspicion-based searches per se "reasonable" under the Fourth Amendment when individual privacy interests are balanced against the perceived need for them to deter and detect deadly skyjacking.⁵ And some courts treated routine airport searches as justified by "special needs,"⁶ like inspections of businesses or checkpoints to prevent drunk driving,

⁴ See, e.g., *United States v. Dalpiaz*, 494 F.2d 374, 376 (6th Cir. 1974) (holding that magnetometers and inspection of hand baggage are constitutional if a person has the opportunity to avoid the search by not boarding) (link).

⁵ See, e.g., *Epperson*, 454 F.2d at 771.

⁶ The term "special needs" was introduced by Justice Blackmun in 1985. *New Jersey v. T.L.O.*, 469 U.S. 325, 351–52 (1985) (Blackmun, J., concurring in judgment) (link). The principle of permitting searches without a warrant or on less than probable cause in special circumstances developed in the late 1960s. See Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1469–75 (2010) (summarizing cases) (link).

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when the traditional requirements of warrant and probable cause can be suspended even in the absence of individualized suspicion.⁷

Second, I think we can expect that, much like the courts of the 1970s, courts today will face pressure to fit the TSA's new search regime into a workable Fourth Amendment doctrine to avoid depriving the government of an important tool in fighting terrorism.⁸ The three different Fourth Amendment approaches to the problem of airport searches in the 1970s—consent, reasonableness balancing, and “special needs” analysis—remain relevant today. Indeed, the only appellate court to opine on the matter to date concluded with little difficulty, resting in large part on precedent from the first era of airport searches, that the new search regime easily fit into the “administrative search” exception.⁹ And even though the same court found that the TSA's new search regime was promulgated in violation of the Administrative Procedure Act, it declined to vacate the procedures because doing so “would severely disrupt an essential security operation.”¹⁰

Finally, despite all this, the TSA's new search regime is more difficult to square with fundamental Fourth Amendment principles than the FAA's initial airport screening procedures. Therefore, precisely because of the pressure on courts to adjust Fourth Amendment doctrine to meet the perceived needs of the TSA and the traveling public, it is all the more important that new doctrinal limitations accompany any judicial acceptance of the TSA's new search regime. Specifically, I argue here that if courts are to give the TSA's new search regime constitutional approval, it must be limited to its justifying purpose—safe air travel—and it must be grounded in the special needs exception to warrantless and suspicionless searches. Making explicit what has been implicitly required by most of the Supreme Court's special needs jurisprudence, I propose a special exclusionary rule for searches like those conducted by the TSA that will best limit the ex post utility of such searches to their ex ante justifications. Under my proposal, the use of evidence discovered as a result of mass suspicionless searches like the TSA's screenings should be limited to prosecutions for offenses that relate to the asserted justifications for the search regime. This link between justification and permissible use is one novel way to limit the reach of a special needs justification for these airport searches. In a way, then, the TSA's new search regime offers an opportunity to revise and revisit special needs jurisprudence to minimize the risk that the exception

⁷ See, e.g., *United States v. Doe*, 61 F.3d 107, 109–10 (1st Cir. 1995) (citing cases to support the claim that “[r]outine security searches at airport checkpoints pass constitutional muster because the compelling public interest in curbing air piracy generally outweighs their limited intrusiveness”) (link).

⁸ The Supreme Court has routinely indicated in dicta that airport searches are constitutional under the special needs rationale. See *infra* notes 71–73 and accompanying text.

⁹ *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10–11 (D.C. Cir. 2011) (link).

¹⁰ *Id.* at 8.

will ultimately swallow the Fourth Amendment's traditional preference for searches based on warrants and individualized suspicion.

I. AIRPORT SEARCH REGIMES IN HISTORICAL CONTEXT

To ground this discussion, a brief history of the development of airport searches is necessary. Until the late 1960s, air travel could be idealized as a safe and fast, albeit expensive, transportation option in which the experience of flying itself was nearly as compelling as one's destination.¹¹ The sudden increase in politically-motivated hijackings of the late 1960s, a new and troubling phenomenon, brought fear into the equation.¹² At its peak, in 1969, so-called "skyjackers" successfully hijacked thirty-three planes and attempted to hijack even more.¹³ The modern "airport search" flowed directly from these incidents, during a time when "popular feelings of fear and anger, and ultimately rage, called out for some program to safeguard air flights."¹⁴ At that time, the FAA developed skyjack profiles that targeted particular passengers for enhanced screening with magnetometers, carry-on luggage searches, and frisks.¹⁵ The agency soon abandoned the profiling approach, however, in favor of expanded screening to encompass all passengers. Prior to boarding at the gate, the FAA required all passengers to pass through a magnetometer and surrender their carry-on items or their person for a more intrusive search in the event that the magnetometer was alerted.¹⁶ With some exceptions, this regime remained in place for decades, even after the tragic events of September 11.

In the past two years, however, the TSA has introduced new security measures. The most technologically innovative aspect, Advanced Imaging Technology (AIT), has been called a "full body scan" or, more pejoratively, a "virtual strip search." In contrast with an x-ray machine or walk-through metal detector, AIT machines are theoretically capable of detecting non-

¹¹ See Dwayne Day, *Aviation in Film and Television*, U.S. CENTENNIAL FLIGHT COMMISSION, http://www.centennialofflight.gov/essay/Social/aviation_TV_movies/SH5.htm (last visited Jan. 22, 2012) (link).

¹² *United States v. Albarado*, 495 F.2d 799, 803–04 (2d Cir. 1974).

¹³ *Id.* at 804.

¹⁴ *Id.* at 803.

¹⁵ *United States v. Lopez*, 328 F. Supp. 1077, 1082–85 (E.D.N.Y. 1971) (describing the development of the skyjacker profile) (link). Many appellate cases made reference to the FAA's anti-skyjack profile. See, e.g., *United States v. Skipwith*, 482 F.2d 1272, 1273–74 (5th Cir. 1973) ("Because [the defendant] met the F.A.A. anti-skyjack profile . . . the . . . boarding agent detained him . . .") (link); *United States v. Bell*, 464 F.2d 667, 670 (2d Cir. 1972) (referring to the FAA's list of criteria used to flag possible skyjackers who fit the profile).

¹⁶ *United States v. Davis*, 482 F.2d 893, 898–902 (9th Cir. 1973) (recounting the history of FAA's approach) (link), *overruled by* *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (link).

metallic contraband, such as plastic explosives or similar material.¹⁷ When the AIT scan identifies an anomaly (or when a passenger refuses to pass through an AIT machine), the TSA has introduced an enhanced pat frisk to detect its source. Passengers who opt-out of these new procedures *after* entering the security line at an airport violate federal regulations and face substantial monetary penalties.¹⁸

Both the AIT and the enhanced pat frisk have provoked significant controversy from a broad swath of society. Objectors include civil liberties groups,¹⁹ medical professionals and others concerned about the safety of the new AIT process,²⁰ and groups concerned that being subjected to AIT and enhanced pat frisks will traumatize survivors of sexual assault.²¹ Media have focused on some of the more outrageous abuses of the new technology.²² At least one state introduced a law that would criminalize the enhanced pat frisks when carried out during airport searches in the absence of probable cause.²³ For some time, it appeared that the traveling public

¹⁷ See *Terrorism and Transportation Security: Hearing Before the H. Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. 3–4 (Feb. 10, 2011) (statement of John S. Pistole, Administrator, TSA) (link).

¹⁸ See 49 C.F.R. §§ 1540.105(a)(2), 1540.107 (2010) (link); TSA, TSA SANCTION GUIDELINES 3 (2004) (summarizing monetary sanctions for failure to undergo security screening after entering sterile area), http://www.tsa.gov/assets/pdf/Sanction_Guidance_for_Individuals_7-15-2004.pdf (link); see also Max Read, *Man Threatened with \$10,000 Fine After Refusing TSA Grope*, GAWKER.COM, Nov. 15, 2010, <http://gawker.com/5689925/man-threatened-with-10000-fine-after-refusing-tsa-grope> (reporting the tale of one individual “who was sent home from the airport after refusing both the TSA . . . x-ray machine [scan] and . . . ‘pat-down’—and was threatened with a \$10,000 fine”) (link); *Security Protest May Hinder Thanksgiving Travel*, CBS NEWS, Nov. 22, 2010, <http://www.cbsnews.com/stories/2010/11/22/national/main7077350.shtml> (“Passengers cannot opt out of both the scan and the pat-down once they have been selected for the enhanced searches, according to TSA rules. If they then try to evade the measures, they could face an \$11,000 fine.”) (link).

¹⁹ See Kade Crockford, *TSA and the “Audacity of Grope”*, BOSTON GLOBE: ON LIBERTY, Sept. 15, 2010, http://boston.com/community/blogs/on_liberty/2010/09/tsa_and_the_audacity_of_grope.html (objecting to the TSA policy) (link); Nedra Pickler, *Group Says Body Scanners an ‘Unreasonable Search’*, WASH. POST, Mar. 10, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/10/AR2011031003628.html> (reporting on a lawsuit filed by the Electronic Privacy Information Center) (link).

²⁰ Susan Stellin, *Are Scanners Worth the Risk?*, N.Y. TIMES, Sept. 7, 2010, <http://travel.nytimes.com/2010/09/12/travel/12prac.html> (link).

²¹ Jessica Cavey, Press Release, *National Organization Calls For End to Invasive TSA Screening Methods*, NAT’L SEXUAL VIOLENCE RES. CTR., Nov. 24, 2010, <http://www.nsvrc.org/news/3274> (link); Tracy Cox, Press Release, *NSVRC, TSA Explore Impact of Security Procedures on Sexual Assault Survivors*, NAT’L SEXUAL VIOLENCE RES. CTR., Dec. 7, 2010, <http://www.nsvrc.org/news/3290> (link).

²² See, e.g., Crockford, *supra* note 19 (reporting on accounts of TSA agents conducting punitive pat downs on passengers who opt out of a full body scan and commenting on physical characteristics of co-workers who passed through AIT scanners); Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS, Apr. 13, 2011, <http://abcnews.go.com/GMA/parents-year-girl-pat-airport-procedures-changed/story?id=13363740> (link); *TSA Pat-Down Leaves Mich. Man Covered in Urine*, CBS NEWS, Nov. 22, 2010, <http://www.cbsnews.com/stories/2010/11/22/national/main7078699.shtml> (link).

²³ See H.B. No. 1937, 82d Leg., Reg. Sess. (Tex. 2011) (link).

was in open revolt: there was talk of a national opt-out day, in which travelers would forego screening by the AIT on the day before Thanksgiving, requiring enhanced pat downs that would cripple the ability of security personnel to promptly screen air passengers and create hours of backups and delayed flights.²⁴ In response, TSA officials sought to assure the public that the new search regimes were safe and protective of privacy, made a number of promises to reduce fears about the intrusiveness of the searches, and have explored alternatives to the AIT that would reduce the detail of the images produced by the technology.²⁵

At the same time, government officials have maintained that the intrusion on privacy occasioned by the new airport search regime is minimal compared to the risk of harm from terrorist attacks by a “determined enemy.”²⁶ This framing of the problem—as the balance between security and privacy—is often delivered in rhetorically stark terms. Consider TSA Director John Pistole’s response to a reporter questioning the invasive nature of the new TSA searches:

What it comes down to is that balance that we’ve been talking about How can we make sure that we don’t have an Abdulmutallab, an Underwear Bomber, who . . . [has a] non-metallic bomb on him that can cause catastrophic harm and kill hundreds of people in the air and perhaps people on the ground?”²⁷

Passengers, we are told, need to “readjust their expectations on what they are going to find at the airport.”²⁸

It is difficult to determine how effective these measures have been in deterring or reducing airplane hijackings. For example, between 1973 and

²⁴ See *Security Protest May Hinder Thanksgiving Travel*, *supra* note 18; *Torches & Pitchforks at Airport Security*, CBS NEWS, Nov. 21, 2010, <http://www.cbsnews.com/stories/2010/11/19/national/main7070150.shtml> (link).

²⁵ See *TSA Oversight Part I: Whole Body Imaging: Hearing Before the Subcomm. on Nat’l Sec., Homeland Def. and Foreign Operations of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 112–21 (Mar. 16, 2011) (statements of Robin E. Kane, Assistant Administrator for Security Technology, TSA, and Lee R. Kair, Assistant Administrator for Security Operations, TSA) (link); Janet Napolitano, *Scanners Are Safe, Pat-Downs Discreet*, USA TODAY, Nov. 14, 2010, http://www.usatoday.com/news/opinion/forum/2010-11-15-column15_ST1_N.htm (link); see also *Enhanced Pat-Downs*, THE TSA BLOG, Aug. 27, 2010, <http://blog.tsa.gov/2010/08/enhanced-pat-downs.html> (highlighting safety benefits of the TSA’s “layered approach to security”) (link).

²⁶ Napolitano, *supra* note 25.

²⁷ *TSA: We’re Trying to Balance Safety, Dignity*, CBS NEWS, Nov. 23, 2010 (internal quotation marks omitted), <http://www.cbsnews.com/stories/2010/11/22/earlyshow/main7078173.shtml> (link).

²⁸ Diane Macedo, *TSA: New Scanners Kept Many Illegal or Dangerous Items Off Planes This Year*, FOXNEWS.COM, Nov. 18, 2010 (quoting International Air Transport Association spokesman Steve Lott) (internal quotation marks omitted), <http://www.foxnews.com/us/2010/11/18/tsa-enhanced-imaging-kept-illegal-dangerous-items-plans-year/> (link).

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1988, under the FAA's old search regime, security personnel subjected over 9.5 billion people to security screenings and inspected over 10 billion carry-on items.²⁹ Out of these screenings, screening agents detected more than 41,000 firearms and arrested approximately 19,000 people.³⁰ But it is unclear how many, if any at all, of those arrested or prosecuted as a result of the FAA's airport searches were planning a terrorist attack. Similarly, after one year of operation, the TSA reported that the new AIT measures had "detected more than 130 prohibited, illegal or dangerous items" but declined to specify whether any were in the nature of hijacking threats, offering as examples ceramic knives and various drugs.³¹ The TSA declined to state whether the new screening measures (or even behavioral detection) had identified any terrorists, citing national security concerns.³² Moreover, the Governmental Accountability Office has cast doubt on whether the AIT would have detected the incident involving Abdulmutallab referred to by Director Pistole.³³

The measures' effectiveness, however, is only minimally relevant to whether the measures are constitutional, which is an issue that has yet to be resolved.³⁴ At least two different lawsuits have been filed challenging the constitutionality of the new screening measures. The Electronic Privacy Information Center (EPIC) has (unsuccessfully to date) argued that the new rules violate the Administrative Procedure Act and the Fourth Amendment.³⁵ Two airline pilots have also filed suit in federal district court, arguing, *inter alia*, that the new procedures violate their Fourth Amendment rights.³⁶ It is to these constitutional questions that I now turn.

²⁹ See FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., REPORT NO. DOT/FAA-ACS-88-1(28), SEMI-ANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM Exhibit 6 (1988) (link).

³⁰ *Id.*

³¹ Macedo, *supra* note 28.

³² Juliet Lapidus, *Does the TSA Ever Catch Terrorists?*, SLATE, Nov. 18, 2010, <http://www.slate.com/id/2275448/> (link).

³³ Spencer S. Hsu, *GAO Says Airport Body Scanners May Not Have Thwarted Christmas Day Bombing*, WASH. POST, Mar. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031700649.html> (link).

³⁴ Jeffrey Rosen, for one, has maintained that the AIT body scans may be unconstitutional, based on the fact that they reveal highly private information without any proven effectiveness. Jeffrey Rosen, *Why the TSA Pat-Downs and Body Scans are Unconstitutional*, WASH. POST, Nov. 28, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/24/AR2010112404510_pf.html (link). However, the Supreme Court has never required that particular searches be the most effective way of meeting a particular security problem, so it is unclear that most courts would adopt Rosen's view. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002) (link).

³⁵ See *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).

³⁶ See *Roberts v. Napolitano*, 798 F. Supp. 2d 7, 9 (D.D.C. 2011) (link). The district court recently held that jurisdiction over the complaint lies exclusively with the D.C. Circuit because the plaintiffs sought to challenge a final agency rule. See *id.* at 10–11. Given the D.C. Circuit's decision in *Electronic Privacy Information Center v. United States Department of Homeland Security*, 653 F.3d at 1, the *Roberts* plaintiffs would appear to have a hard row to hoe.

II. AIRPORT SEARCH REGIMES IN THE FOURTH AMENDMENT CONTEXT

The late 1960s were marked by changes not only in the nature of air travel, described above, but also by changes in the direction of Fourth Amendment doctrine. The FAA's new policies regarding airport searches emerged just as lower courts were grappling with the implications of the Supreme Court's decisions in *Camara v. Municipal Court of San Francisco*³⁷ and *Terry v. Ohio*.³⁸ *Camara* and *Terry* were game-changers when compared to traditional Fourth Amendment jurisprudence. As numerous commentators have observed, the history of Fourth Amendment jurisprudence reflects a struggle between the more general Reasonableness Clause of the Fourth Amendment and the more specific Warrant Clause, which requires that warrants to support searches or seizures be issued on probable cause.³⁹ For most of the history of Fourth Amendment interpretation, the Warrant Clause and the Reasonableness Clause worked together simply: searches or seizures that did not comply with the Warrant Clause's mandates—probable cause and magistrate screening of warrants—were by definition unreasonable and therefore unconstitutional.⁴⁰ *Terry* and *Camara*, however, signaled the beginning of the end for the centrality of the Warrant Clause to Fourth Amendment inquiries, announcing an overall reasonableness inquiry based on the “totality of the circumstances” and the balance between public and private interests.⁴¹

In *Camara*, the Court held that neither a specific warrant nor traditional probable cause was necessary to support a search by city housing inspectors⁴² because the private homeowner's interest in privacy was

³⁷ 387 U.S. 523 (1967) (link).

³⁸ 392 U.S. 1 (1968) (link).

³⁹ See U.S. CONST. amend. IV (link). The tension in the Supreme Court's Fourth Amendment analysis that has received the most attention is its attempt to resolve the Warrant Clause—which requires that judicial warrants be particular as to their scope and supported by probable cause—with the Reasonableness Clause—which “secure[s] . . . against unreasonable searches and seizures.” *Id.* Judges and scholars have long disputed whether the two clauses should be read conjunctively or disjunctively; i.e., whether an intrusion can be reasonable if it is not supported by probable cause and a specific warrant. See, e.g., Reinert, *supra* note 6, at 1464 n.8 (summarizing literature and jurisprudence).

⁴⁰ See Reinert, *supra* note 6, at 1467–69 (discussing the general rule and limited exceptions).

⁴¹ See, e.g., *Samson v. California*, 547 U.S. 843, 848 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118–19) (2001) (internal quotation marks omitted) (“Under our general Fourth Amendment approach we examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment.” (alterations omitted) (quoting *Knights*, 534 U.S. at 118) (internal quotation marks omitted)) (link).

⁴² The suspicion required in *Camara* was not “individualized” in the traditional Fourth Amendment sense because it did not require “specific knowledge of the condition of the particular dwelling.” 387 U.S. at 538. As a result, warrants could be issued for searches of particular areas, so long as an inspection of the general area was justified by “the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area.” *Id.*

outweighed by the public's interest in health and safety.⁴³ The Court accepted a departure from the traditional probable cause requirement to accommodate the balance between public need and individual rights implicated by the searches.⁴⁴ *Terry* considered a different variation of the trend to reasonableness instituted by *Camara*—the stop and frisk of two suspicious men on the street without a warrant and without probable cause.⁴⁵ Relying on *Camara*'s reasonableness analysis—balancing the need to search against the invasion entailed by the search⁴⁶—the *Terry* Court determined that neither a warrant nor probable cause was necessary for the stop and frisk. The Court identified solving crimes and assuring an officer's safety as public interests of such importance that requiring probable cause was inappropriate.⁴⁷ The Court nonetheless insisted that there be some degree of individualized suspicion, some reason to single out an individual for a “stop” and “frisk,” because of the significance of the intrusion on individual rights.⁴⁸

As I have written elsewhere, *Camara* and *Terry* laid the groundwork for modern Fourth Amendment inquiries, in which courts apply an ad hoc balancing test between public interests and private intrusions to determine the reasonableness of a search or seizure.⁴⁹ In the traditional framework in which the Warrant Clause had primacy, courts did not consider competing “public” or “private” interests—an intrusion either was consistent with the Warrant Clause, in which case it was constitutional, or it was not.⁵⁰ The airport searches adopted in the late 1960s, then, occupied an uncertain Fourth Amendment space. Judged under the traditional standard requiring a warrant and probable cause, it was clear that the new airport searches would not pass muster. The intrusions were clearly governed by the Fourth Amendment.⁵¹ Yet airport searches were mass searches based on no

⁴³ *Id.* at 534–36.

⁴⁴ *Id.* at 534.

⁴⁵ *Terry v. Ohio*, 392 U.S. 1, 7–8 (1968).

⁴⁶ *Id.* at 21.

⁴⁷ *Id.* at 23–24.

⁴⁸ *Id.* at 24–25 (“Even a limited search . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”); *id.* at 27 (“The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger” Additionally, “in determining whether the officer acted reasonably . . . due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”). The standard of individualized suspicion adopted by the *Terry* Court has come to be known as “reasonable suspicion.” *See, e.g., Illinois v. Caballes*, 543 U.S. 405, 415 (2005) (link).

⁴⁹ *See Reinert, supra* note 6, at 1468–75.

⁵⁰ *See id.* at 1467–69.

⁵¹ Although the appellate courts reviewing airport searches were in disagreement about the rationale by which they should be upheld against challenge, all courts agreed on one preliminary point: namely, that airport searches, whether via magnetometer, searches of luggage, or frisks, were relevant Fourth Amendment intrusions. *See, e.g., United States v. Albarado*, 495 F.2d 799, 803 (2d Cir. 1974) (agreeing

particularized suspicion whatsoever, and there was no procedure by which a warrant could be obtained for each passenger subjected to search. Under traditional standards, there seemed to be little question of their unconstitutionality. Under the theories that won the day in *Camara* and *Terry*, however, the constitutionality of the new searches was more tenable.

It was not obvious at first that *Camara* and *Terry*'s overall reasonableness formulation would displace the traditional focus on the presence of a warrant and probable cause. But the courts that considered the constitutionality of airport searches in the 1970s certainly saw the connection. This should be no surprise. First, as discussed above, it was difficult, if not impossible, to see how the airport searches could be found constitutional under the traditional approach to the Fourth Amendment. Second, like *Camara* and *Terry*, airport searches were different than traditional searches for evidence of a crime. *Camara* and *Terry* involved searches that were responsive to problems perceived to be both distinct and urban—in *Camara*, the need to maintain public health and welfare in urban communities,⁵² and in *Terry*, the need to act preventatively in the face of rising street crime.⁵³ Similarly, most perceived the new airport search regime to be responsive to the distinct problem of airplane hijacking, which had created widespread fear and panic. Finally, the airport searches resembled *Camara* and *Terry* in that they were less intrusive than traditional searches and seizures.

As one would expect, then, both *Camara* and *Terry* were significant factors in the appellate court decisions rejecting Fourth Amendment challenges to airport searches. Even with the advent of these decisions, however, appellate courts could not agree on an underlying rationale, reflecting the confusion in Fourth Amendment doctrine at the time. Courts ultimately rested their conclusions on three sometimes-overlapping principles to find that airport searches were constitutional.

First, a minority of courts considered the question through the lens of consent. It has long been established that a search or seizure is by definition reasonable, and therefore constitutional, when it is the product of consent.⁵⁴ And although consent implies the right to refuse without sanction, the Supreme Court has made it clear that consent may be voluntary and valid even where the consenting party subjectively believes

that the use of a magnetometer is no different than a frisk for Fourth Amendment purposes); *United States v. Epperson*, 454 F.2d 769, 770 (4th Cir. 1972) (same). In other words, the searches invaded some reasonable expectation of privacy. The courts generally rejected the occasional argument by the federal government that airplane passengers experienced a diminished expectation of privacy such that the Fourth Amendment played no role. *See, e.g., Albarado*, 495 F.2d at 806; *Epperson*, 454 F.2d at 770.

⁵² *See* 387 U.S. 523, 537 (1967).

⁵³ *See* 392 U.S. at 10–11.

⁵⁴ *See, e.g.,* *Schneekloth v. Bustamonte*, 412 U.S. 218, 222–23 (1973) (link); *Zap v. United States*, 328 U.S. 624, 628–30 (1946) (link).

that she has no choice in the matter.⁵⁵ Working with this theory in some cases, the government successfully argued that an airline passenger implicitly consented to the anti-hijacking screening simply by entering the pre-boarding area in which the screening was to take place.⁵⁶ When a court relied on consent, what became critical was the ability (whether known or not) of the passenger to avoid search by either not boarding the aircraft or not entering the pre-boarding line.⁵⁷ For instance, the Colorado Supreme Court has more recently approved of an airport search based on a consent rationale.⁵⁸ The court acknowledged that a passenger may avoid an airport search by leaving the checkpoint area prior to the commencement of the search without fear that the departure will itself provide a justification for a suspicion-based search.⁵⁹ But once the screening process begins, the passenger was deemed to have consented to the full course, including searches more invasive than a magnetometer, so long as the search “is no more intrusive than necessary to achieve the objective of air safety.”⁶⁰

Second, most courts, perhaps recognizing the limitations of the consent theory, rested more generally on a “reasonableness” balancing approach to find airport searches constitutional. Often this involved reliance on traditional, suspicion-based justifications for searches, but it sometimes led courts to permit even suspicionless searches. Thus, where a passenger was subjected to a more intrusive search of his person and luggage after alerting a magnetometer, some courts analogized to the “reasonable suspicion” standard from *Terry*.⁶¹ Others relied on the reasonableness framework from *Camara* to conclude that warrantless and suspicionless searches were appropriate because of the degree of harm that plane hijackings could cause.⁶² Whether relying on *Terry* or *Camara*, however, the logic of the

⁵⁵ See, e.g., *Schneekloth*, 412 U.S. at 224–25.

⁵⁶ See, e.g., *United States v. Freeland*, 562 F.2d 383, 385–86 (6th Cir. 1977) (holding that a luggage search is valid even though the defendant was not advised that he could ask to have his luggage returned rather than have it searched) (link).

⁵⁷ See *id.*; *United States v. Dalpiaz*, 494 F.2d 374, 376 (6th Cir. 1974) (holding that magnetometers and inspections of hand baggage are constitutional if a person has the opportunity to avoid the search by not boarding). Knowledge seemed to matter somewhat, however, in *United States v. Freeland* because the court based its decision in part on a sign at the ticket desk that made it clear that passengers could refuse to board and withdraw their baggage. See 562 F.2d at 385–86. New York’s Court of Appeals came to a similar conclusion, making critical the ability of a passenger to withdraw baggage from a flight and thereby avoid the search. *People v. Kuhn*, 306 N.E.2d 777, 779–80 (N.Y. 1973) (link).

⁵⁸ *People v. Heimel*, 812 P.2d 1177, 1181–82 (Colo. 1991) (link).

⁵⁹ *Id.* at 1181 (citing *Florida v. Bostick*, 501 U.S. 429 (1991)).

⁶⁰ *Id.* at 1181–82.

⁶¹ *Dalpiaz*, 494 F.2d at 376–77. A number of different courts of appeals took this position, at least as it respected searches of the person. E.g., *United States v. Moreno*, 475 F.2d 44, 47 (5th Cir. 1973) (link); *United States v. Riggs*, 474 F.2d 699, 702–04 (2d Cir. 1973) (link); *United States v. Bell*, 464 F.2d 667, 672–73 (2d Cir. 1972); *United States v. Epperson*, 454 F.2d 769, 770–72 (4th Cir. 1972).

⁶² See, e.g., *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973), *overruled by United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007); *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1971) (link).

opinions was simple: the governmental interest in preventing hijacking was “overwhelming,” the intrusion on privacy was “minimal,” and therefore the need for a warrant and suspicion was “excused by exigent national circumstances.”⁶³ These balancing approaches to the problem often emphasized the unique problem of hijacking—it was difficult to detect before it began and effective deterrence must be balanced against the need to minimize disruption of air travel.⁶⁴

Aside from consent and general balancing, there was a third approach, also informed by *Camara*: the “administrative search” or “special needs” justification.⁶⁵ Under the administrative search regime, warrants and probable cause are still presumptively required by the Fourth Amendment, but an exception is made where the “direct and primary purpose” of a governmental regime is pursuing ends that are not “normal” law enforcement goals.⁶⁶ Courts that adopted this approach recognized that airport searches could not be justified based on traditional requirements of probable cause and a warrant; resting on *Terry* was unsatisfactory because in *Terry* there was *some* individualized suspicion that justified the intrusion.⁶⁷ Thus, unlike *Terry*, a suspicionless search regime like that used

⁶³ *Epperson*, 454 F.2d at 771; *see also Slocum*, 464 F.2d at 1182 (citing *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 539 (1967)) (“[W]e conclude that within the context of a potential hijacking the necessarily limited ‘search’ accomplished by use of the magnetometer *per se* is justified by a reasonable governmental interest in protecting national air commerce.”).

⁶⁴ *Dalpiax*, 494 F.2d at 378 (citing *Moreno*, 475 F.2d at 49). The Fifth Circuit went so far as to hold that “the standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations.” *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973). The court reasoned as follows:

In the critical pre-boarding area where this search started, reasonableness does not require that officers search only those passengers who meet a profile or who manifest signs of nervousness or who otherwise appear suspicious. Such a requirement would have to assume that hijackers are readily identifiable or that they invariably possess certain traits. The number of lives placed at hazard by this criminal paranoia forbid taking such deadly chances.

Id.

⁶⁵ *See, e.g., United States v. Doe*, 61 F.3d 107, 109–10 (1st Cir. 1995). The special needs exception is the modern iteration of the administrative search exception. *See Eve Brensike Primus, Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 275–76 (2011) (summarizing and criticizing the Court’s use of the administrative search rationale in special needs cases involving both mass and individual intrusions) (link).

⁶⁶ *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 78–84 (2001) (rejecting a program that had the immediate purpose of collecting evidence for ordinary law enforcement objectives even though the ultimate purpose of the program may have been motivated by a non-law enforcement goal) (link); *id.* at 86 (Kennedy, J., concurring in the judgment); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (link).

⁶⁷ *See, e.g., Davis*, 482 F.2d at 906–09, *overruled by Aukai*, 497 F.3d at 955.

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in airports fits more comfortably within the administrative search or special needs rubric.

Reflecting the confusing and diffused nature of Fourth Amendment analysis, however, many opinions blended all three approaches. Thus, a Fifth Circuit decision relied on elements of consent, general balancing, and special needs.⁶⁸ Similarly, the Third Circuit found pre-boarding pat frisks for all passengers reasonable (the magnetometer had not yet been installed) based on traditional balancing and consent.⁶⁹ The Fourth Circuit applied a related analysis, although with a broader consent rationale.⁷⁰

Although numerous appellate courts have considered the constitutionality of suspicionless airport searches from the 1970s, the Supreme Court has never directly considered the issue. The Court has only suggested multiple times, in dicta, that these searches pass muster.⁷¹ Thus, in 1989, the Court appeared to accept the administrative search rationale for such intrusions, citing extensively to Judge Friendly's decision in *United*

⁶⁸ *United States v. Wehrli*, 637 F.2d 408 (5th Cir. 1981) (considering the constitutionality of a security checkpoint search of a passenger's carry-on luggage that led to the discovery of cocaine) (link). As to consent, the court emphasized the voluntariness of the encounter. *Id.* at 409. As to general balancing, the intrusion on the passenger was limited because the search was not stigmatic and because airlines had an incentive to minimize passenger discomfort that could result from "air piracy." *Id.* The governmental interests included the vulnerability of airplanes to piracy and hijacking and the unusual detection problems because a hijacker has no interest in secrecy once the decision to act has been made. *Id.* at 409–10. Finally, emphasizing the special needs analysis, the court found that the reasonableness of the search was enhanced because "it did not range beyond an area reasonably calculated to discover dangers to air safety." *Id.* at 410.

⁶⁹ *Singleton v. Comm'r of Internal Revenue*, 606 F.2d 50 (3d Cir. 1979) (considering the constitutionality of a pre-boarding search of a passenger's suit jacket that led to the discovery of incriminating cash) (link). Using a reasonableness analysis, the court held that without a search "there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane, and [courts] have therefore held that some pre-boarding screening search of each passenger sufficient in scope to detect the presence of weapons and explosives is reasonable under the fourth amendment." *Id.* at 52. The court's emphasis on consent was apparent from its recognition that passengers could elect not to be searched by declining not to board the airplane. *Id.*

⁷⁰ *United States v. DeAngelo*, 584 F.2d 46 (4th Cir. 1978) (link). In *DeAngelo*, when a passenger's carry-on luggage "appeared black on the x-ray screen," he was informed that a physical examination of the bag would be necessary. The passenger stated that he would prefer not to fly than to have the bag inspected, but the officer opened the case and discovered marijuana and hashish. *Id.* at 47. Applying *Terry*, the court held that "circumstances were sufficiently suspicious to cause a reasonably prudent man to conclude that DeAngelo might endanger the security officers and the other passengers in the airport." *Id.* Although the passenger attempted to withdraw consent, there was a sign that stated that a physical examination of luggage "may be requested," which the court held constituted consent to a full search once the passenger entered the screening process. *Id.* at 47–48.

⁷¹ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674–675 & n.3 (1989) (link); see also *Edmond*, 531 U.S. at 47–48 ("Our holding also does not affect the validity of . . . searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings.") (link).

States v. Edwards, which focused on notice to the passenger and the opportunity to withdraw.⁷² And although the Court recognized that the searches were originally justified by an existing crisis of skyjacking, the Court seemed willing to tolerate such searches even when that exigency had dissipated.⁷³ In any event, since the 1970s, nothing about the Fourth Amendment landscape has changed to call into question the constitutionality of mass airport searches along the lines that were originally introduced by the FAA.⁷⁴

III. THE FOURTH AMENDMENT AND TSA'S CURRENT AIRPORT SEARCH REGIME

There are solid doctrinal bases for arguing that the TSA's search regime violates the Fourth Amendment, but this section will not rehearse these arguments.⁷⁵ In my view, they are unlikely to succeed because of the

⁷² *Von Raab*, 489 U.S. at 674-675 & n.3 (citing *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974); *United States v. Skipwith*, 482 F.2d 1272, 1275-76 (5th Cir. 1973); *Davis*, 482 F.2d at 907-12)).

⁷³ As the court explained:

It is true, as counsel for petitioners pointed out at oral argument, that these air piracy precautions were adopted in response to an observable national and international hijacking crisis. Yet we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline.

Von Raab, 489 U.S. at 675 n.3 (citation omitted).

⁷⁴ If anything, the Fourth Amendment has become even friendlier to law enforcement and national security interests, given the rise of ad hoc balancing and the minimization of the warrant and probable cause requirements.

⁷⁵ The use of the AIT machine, after all, is far different from the magnetometer approved in prior cases. Unlike the magnetometer, the AIT is capable of producing an image of the passenger that some critics have likened to pornography. See Editorial, *Government Pornography Ring*, WASH. TIMES, July 22, 2011, <http://www.washingtontimes.com/news/2011/jul/22/government-pornography-ring/> (link). When the Supreme Court considered the constitutionality of thermal imaging devices, arguably less intrusive than AIT scanners, it concluded that “[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (link). Applying this analysis to the TSA's use of an AIT machine, one could argue that the AIT scanner, like the thermal imaging device, explores the details of passengers' bodies in a way that is most analogous to a strip search. Using this conceptualization, it is hard to imagine a court finding that subjecting passengers to an AIT scan, in the absence of any individualized suspicion, is permissible. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 & n.4 (1985) (holding that reasonable suspicion is required to engage in extended detention of a traveler at a border, but refusing to consider what level of suspicion “is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches”) (link); *United States v. Seljan*, 547 F.3d 993, 1002-03 (9th Cir. 2008) (distinguishing “highly intrusive searches of the person” from the substantially less intrusive search of a person's package or vehicle (internal quotation marks omitted)) (link); *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (“Routine searches

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long precedent in favor of airport searches, the perceived need to validate even intrusive searches where fears of terrorism loom in the background, and the general trend in the Supreme Court's Fourth Amendment jurisprudence.⁷⁶ But precisely because there are good doctrinal grounds for finding the new search regime unconstitutional, any holding validating the TSA's new search regime will likely create tension in Fourth Amendment doctrine. My goal here is to examine the different grounds that are available for finding the TSA's new practice constitutional, with an eye towards identifying the ground that will least disrupt existing Fourth Amendment principles. As I elaborate below, a special needs-type analysis is ultimately the best candidate, provided certain conditions are imposed on its use.

Recall that lower courts in the 1970s looked to three justifications to uphold airport searches: consent, general balancing, and special needs. Just as in the 1970s, these three grounds are the most likely candidates on which to rest the constitutionality of the TSA's new search regime. I will start with consent theory, which has one distinct advantage: simplicity. It does not require any balancing. At most, it may require some consideration of the scope of consent. For instance, if a screening proceeds from a magnetometer to a pat frisk to a body cavity search, one might need to find consent for each degree of intrusion.⁷⁷ But arguably, any reasonable person would feel "free to leave" rather than enter the screening area of an airport, and therefore could be found to have implicitly consented to the TSA's new search regime, at least insofar as the traveling public is informed in advance of the contemplated scope of the intrusion.⁷⁸

Although consent as a matter of theory is simple, it also is quite difficult to cabin. If indeed there is consent to Fourth Amendment intrusions every time one chooses to travel by air, there is no principled reason why there should not be consent every time one chooses to travel by car, foot, or mass transportation. One could imagine screening checkpoints imposed at every street corner, on the theory that passersby "consented" to the intrusion. And, hypothetically, there is no natural stopping point with regard to the scope of intrusion. Presumably, if everyone were informed

include those searches of outer clothing, luggage, a purse, wallet, pockets, or shoes which, unlike strip searches, do not substantially infringe on a traveler's privacy rights.") (link). Even in contexts in which the Supreme Court has generally tolerated greater intrusion on privacy—say, public schools—it has drawn the line at strip searches. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643–45 (2009) (link).

⁷⁶ I do not wish to overstate the latter factor. *Kyllo*, *Ferguson*, and *Edmond*, among other cases, stand as relatively recent examples of the Court's willingness to limit law enforcement power via the Fourth Amendment.

⁷⁷ Although *People v. Heimel* suggests, to the contrary, that prior consent to the procedures by which a search is to take place is consent to all it entails. See 812 P.2d 1177, 1181–82 (Colo. 1991).

⁷⁸ Cf. *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991) (holding that a bus passenger was "free to leave" a bus to avoid a search and seizure—his confinement on the bus "was [merely] the natural result of his decision to take the bus") (link).

that they would be strip searched prior to entering, say, a building, they could be deemed to have consented.⁷⁹ In theory, the only limitation on the use of such consent-based searches would be the resources of the State, not the Fourth Amendment.

The Second Circuit recognized this argument in *United States v. Albarado*, rejecting a consent-based rationale for airport searches.⁸⁰ For the court, making one choose between exercising one's constitutional right and flying to one's destination, "however subtle," is coercion.⁸¹ Drawing an analogy to the use of telephones, the court noted that if the government announced that it would tap all telephones, the use of a telephone would not constitute meaningful consent to the search, even if other means of communication—"carrier pigeons, two cans and a length of string"—existed.⁸² Consent theory is, in short, a weak and potentially far-reaching ground for finding airport searches constitutional.

Like the consent rationale, an ad hoc balancing approach has some appeal, but it also is difficult to constrain. When courts engage in reasonableness balancing under the Fourth Amendment, they attempt to weigh public interests (such as law enforcement and national security) against individual interests (such as privacy and autonomy). Moreover, courts view these interests as always in tension with each other—the public only benefits when security or law enforcement is vindicated and is only harmed when individual interests are upheld. Striking down a particular Fourth Amendment intrusion in this context is therefore always viewed as imposing some social cost. As I have argued before, there is no space in the Court's balancing analysis for public interests—what I have called collective values—that are tied to individual interests in privacy and autonomy and also in tension with the public interests in law enforcement and national security.⁸³ For some, an expansion of suspicionless searches will create fear and apprehension in public spaces, thereby decreasing full participation in civic life. In other words, some collective values are actually enhanced by individual privacy and autonomy.⁸⁴

How does this apply in the airport search context? First, when courts have looked at the individual interests at stake, they have minimized the intrusion occasioned by airport searches for three principal reasons: (1) the technology only searches for the presence of prohibited items on a

⁷⁹ Exceptions might be made where the restriction on entry infringed some other important right.

⁸⁰ 495 F.2d 799 (2d Cir. 1974).

⁸¹ *Id.* at 806–07.

⁸² *Id.* at 807 n.14 (“[I]t is often a necessity of modern living to use a telephone. So also is it often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense.”).

⁸³ See generally Reinert, *supra* note 6, at 1475–83 (contrasting the Court's Fourth Amendment jurisprudence with free speech and due process principles).

⁸⁴ See *id.* at 1485–91.

passenger; (2) every passenger is subjected to the same initial security screening, thus minimizing any stigma; and (3) the traveling public is well aware of the kinds of screenings that take place prior to boarding an airplane, so there is no possibility that the searches will take an individual by surprise. On the public interest side of the balance, courts emphasized the massive harm that could occur if a hijacker were able to pass through the boarding process unimpeded.

Even jurists in the 1970s recognized the difficulty of using a balancing analysis. Judge James Oakes, concurring in the result in a Second Circuit case that upheld a search on a balancing theory, objected to the majority's suggestion that the immense danger of skyjacking made any search reasonable.⁸⁵ He expressed worry over how easy it was to permit step-wise marginal encroachments on privacy in the face of a threat of substantial danger, particularly when the basis for finding the search reasonable rested on the fact that it applied universally to all passengers.⁸⁶ When the harm that is at stake is terrorism or threats to national security, using balancing analysis will be even more fraught with difficulty because of the presence of cognitive biases that tend to overstate both the level and risk of harm.⁸⁷

Applying balancing analysis in the context of the TSA's new search regime makes the difficulty with the framework even more apparent. Like the screening programs that were challenged and upheld in the 1970s, the new measures, at least on their face, apply to everyone. And while more intrusive than the prior regimes, there is nothing in Fourth Amendment jurisprudence to tell us how much this additional intrusiveness matters. In some ways the intrusiveness is marginally no more than that which was occasioned by the initial screenings. That is, when compared to what was extant at the time, the additional intrusion is arguably just as marginal. On the other side of the balancing regime is the terrifying prospect of another terrorist attack, the risk of success of which is unknown although the likelihood of an attempt is commonly thought to be inevitable. In this world, where privacy intrusions are minimized, degree of harm is high, and likelihood that someone will attempt an attack (even if unsuccessfully) also is high, courts will have little trouble finding the new screening regime constitutional. But balancing may also lead to the conclusion that any marginal enhancement of the TSA's search regime—e.g., pat frisks of all passengers—is constitutional. Balancing analysis will tell us that we must weigh these considerations against each other, but it gives us no way to weigh them.

⁸⁵ *United States v. Edwards*, 482 F.2d 496, 501–02 (2d Cir. 1974) (Oakes, J., concurring in the result).

⁸⁶ *Id.* at 502 (“Today airports, tomorrow some other forms of search, which may be ‘applied to everyone’ in the words of Judge Friendly’s majority opinion.”).

⁸⁷ See generally Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 205–20 (2010) (summarizing the role of cognitive biases in national security decisionmaking) (link).

Nor does balancing analysis admit of the possibility that there are multiple dimensions of public interest. With balancing analysis, an individual's interest in avoiding unwanted government intrusion is adverse to society's interest in safety or security.⁸⁸ This is both an analytical and a rhetorical bias and it reflects the Supreme Court's failure to view Fourth Amendment protections as vindicating a valuable social interest. The balancing test—and the “balancing” language itself—assume that the interests of “the people” and “the individual” will always be in tension with each other. It fails to imagine the possibility that society's interests could themselves be in conflict. In combination with the shift in understanding of the meaning of individualized suspicion, the result is a Fourth Amendment doctrine which systematically underenforces the substantive values in privacy and autonomy served by the warrant and particularized suspicion requirements.⁸⁹ Thus, the Court has come to rely on its balancing test to express “a powerful and undeniable preference for collective security over individual privacy.”⁹⁰

If consent and ad hoc balancing leave something to be desired, what about special needs? As described above, many lower courts relied on special needs analysis to find airport searches constitutional in the 1970s. The Supreme Court itself has suggested in dicta that airport searches fall within the special needs rubric. And more recent cases that have considered airport searches and analogous programs have generally looked to the special needs exception to find such searches constitutional. Thus, the Third Circuit, in an opinion by then-Judge Samuel Alito, relied on special needs to uphold an airport search by the TSA.⁹¹

Outside of the airport search context, courts have relied on the special needs rubric to uphold suspicionless search programs initiated as a response to fears of terrorism against mass transit. In a challenge to suspicionless searches of ferry commuters' luggage, the Second Circuit relied on the special needs analysis rather than the general reasonableness approach that carried the day in its prior airport cases.⁹² In *MacWade v. Kelly*, the same court took up a related question: the permissibility of random suspicionless container searches on New York City subways.⁹³ Holding that the searches were justified under the special needs doctrine, the court treated its prior airport search cases as being founded primarily on a special needs theory.⁹⁴

⁸⁸ See Reinert, *supra* note 6, at 1473–75.

⁸⁹ See *id.* at 1475 & n.75.

⁹⁰ John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1121 (1989).

⁹¹ *United States v. Hartwell*, 436 F.3d 174, 177–79 (3d Cir. 2006) (link).

⁹² *Cassidy v. Chertoff*, 471 F.3d 67, 74–75, (2d Cir. 2006) (link).

⁹³ 460 F.3d 260, 263 (2d Cir. 2006) (link).

⁹⁴ *Id.* at 268–69 (citing with approval *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) and *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974)).

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The court found that the random and unpredictable nature of the searches was the key to deterrence⁹⁵ and that the special need of “preventing a terrorist attack on the subway” justified the suspicionless nature of the search.⁹⁶

One of the reasons that special needs analysis is a compelling choice is that the Supreme Court has subjected almost every suspicionless search regime to the special needs test.⁹⁷ And recently, the Court has made clear that the analysis is generally used only where law enforcement is not the primary and immediate purpose of the search.⁹⁸ Thus, whereas both consent and ad hoc balancing pay no heed to the goals of the challenged search regime, in special needs jurisprudence, the goals must be strictly scrutinized to ensure that the State is not evading the traditional warrant and individualized suspicion requirements through the back door of special needs. This limitation—that the suspicionless search regime be geared to something other than “ordinary” law enforcement needs—is a difficult requirement to satisfy and airport searches would seem to be a tough case. The basic question that must be answered is whether preventing terrorist attacks on air travel vindicates “ordinary law enforcement” needs or something different and hence “special.”

I am sympathetic to the argument that preventing terrorism is primarily a law enforcement goal, perhaps of a different degree than preventing drug trafficking, but not of a different kind. This sympathy circles back to how I began this Part—there are substantial arguments for finding the TSA’s airport searches unconstitutional. But if forced to choose the justification that best accords with finding the TSA’s searches constitutional, special needs would appear to be it. Unlike drug trafficking, drug use, or other justifications for mass suspicionless searches that the Supreme Court has rejected on special needs grounds, the terrorism-based justification for airport searches is founded on a threat to life and limb that is direct and contemporaneous with the search. In this way, they could be analogized to the sobriety checkpoints upheld in *Michigan Department of State Police v. Sitz*.⁹⁹ Would-be terrorists pose a threat the instant they board an airplane, and airport searches are calibrated to reduce that threat.

IV. LIMITING SPECIAL NEEDS ANALYSIS

If special needs is the chosen frame of analysis, the question remains how best to cabin the category. The concern in special needs jurisprudence

⁹⁵ *Id.* at 273–75.

⁹⁶ *Id.* at 270–71.

⁹⁷ *See* *Ferguson v. City of Charleston*, 532 U.S. 67, 77–78 (2001) (reviewing the case law and distinguishing the case at issue from the facts of prior cases).

⁹⁸ *See, e.g., id.* at 78–84; *id.* at 86 (Kennedy, J., concurring in the judgment); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

⁹⁹ 496 U.S. 444 (1990) (link).

has always been how to find a way to limit the application of the doctrine so that the general preference for a warrant and probable cause is not swallowed whole by the special needs exception. This is the basis for the one limitation already discussed: general law enforcement goals and that the needs must not be the primary motivation for development of a mass suspicionless search-and-seizure regime.¹⁰⁰ This limitation reflects the wisdom that the special needs exception must be limited if the Fourth Amendment is to impose any meaningful check on the spread of suspicionless search regimes.

But there is another principle that should supplement this definitional limitation. The goal behind limiting the special needs doctrine is the fear that law enforcement will seek to use the special needs exception to carry out run-of-the-mill criminal investigations despite lacking individualized suspicion or a warrant. Here, I propose that in addition to the front-end limitation on special needs exceptions—the non-law-enforcement justification—we add a back-end limitation on the uses for the evidence uncovered by special needs searches. In particular, I propose an exclusionary rule in cases in which evidence is seized during a special needs search or seizure. The rule would prohibit the use of such evidence for prosecuting any crime except for that which is closely related to the special needs purpose. In the context of airport searches, for instance, evidence discovered during such searches would only be admissible for crimes related to hijacking or terrorism, but not for drug-related charges.

Although the vast majority of air travelers who carry no contraband whatsoever may find little comfort in this proposal, the limitation would reduce the likelihood that the special needs exception will be used as an end-run around traditional Fourth Amendment requirements. Recall that the special needs justification is supposed to be sufficient, on its own, to justify the significant expense and intrusion on the public associated with a mass suspicionless search-and-seizure regime. This is what is meant by “ordinary law enforcement” goals not being the principal purpose for the regime. If this is correct, then special needs searches should still be desirable and feasible even if law enforcement is denied the collateral benefit of using evidence to prosecute crimes unrelated to the special needs justification.

This approach to special needs searches was hinted at in some of the cases from the 1970s that reviewed the earlier FAA airport searches. Thus, while the First Circuit held that routine searches at airports are constitutional “because the compelling public interest in curbing air piracy generally outweighs their limited intrusiveness,”¹⁰¹ the court also distinguished between the permissibility of such searches and the

¹⁰⁰ See *Ferguson*, 532 U.S. at 77–83; *id.* at 86 (Kennedy, J., concurring in the judgment); *Edmond*, 531 U.S. at 37.

¹⁰¹ *United States v. Doe*, 61 F.3d 107, 109–10 (1st Cir. 1995).

introduction of evidence seized during them.¹⁰² Similarly, in a Fifth Circuit case, two judges expressed hesitation about the introduction of drug evidence obtained through airport searches, and one explicitly adopted a rule of exclusion for evidence unrelated to the original purpose of the FAA's search.¹⁰³ The Second Circuit also adverted to these proposals for exclusion when it upheld a conviction for heroin trafficking that was the product of an airport search.¹⁰⁴ The court agreed that the search of the defendant's beach bag (after the magnetometer had been alerted) was reasonable because of the government's high interest in preventing hijackings, the minimal stigma of the search, and the limited intrusion.¹⁰⁵ But the court recognized that the government might abuse the faith placed in it and rely on airport searches "not for the purpose intended but as a general means for enforcing the criminal laws."¹⁰⁶ In those circumstances, the court proposed limiting abuse by permitting the introduction of evidence at trial only where it related to the security purpose of the search.¹⁰⁷ Tellingly, it was this Second Circuit case that the Supreme Court explicitly referenced when it suggested in dicta that airport searches were undoubtedly constitutional.¹⁰⁸

Adopting this kind of exclusionary rule is also consistent with the Supreme Court's articulation of the special needs doctrine. In almost every special needs case, one of the principal indications that law enforcement was not the primary purpose of the special needs search was that *none* of the evidence—even that which was related to the special needs

¹⁰² *Id.* at 110 (concluding that the *subsequent* warrantless search of blocks of drugs once they had been removed from the security checkpoint was unconstitutional); *see also* *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1245–48 (9th Cir. 1989) (concluding that the discovery and suppression of contraband for the primary purpose of enforcing criminal laws and encouraged by rewarding airport law enforcement personnel was unconstitutional) (link).

¹⁰³ *United States v. Skipwith*, 482 F.2d 1272, 1275–76 (5th Cir. 1973) (upholding the use of evidence in drug prosecution that had been seized as a result of the search of a passenger who fit the FAA's anti-skyjack profile). In *Skipwith*, Judge Bailey Aldrich would have excluded the evidence from trial but also would have rejected the rule proposed by the defendant that he should have been permitted to leave the airport rather than submit to the search. *Id.* at 1280–81 (Aldrich, J., dissenting). Judge John Simpson suggested that he would be inclined not to permit the introduction of drug evidence obtained through airport searches but, unlike Judge Aldrich, did not think circuit precedent permitted it. *Id.* at 1279–80 (Simpson, J., concurring specially).

¹⁰⁴ *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing *Skipwith*, 482 F.2d at 1280–81 (Aldrich, J., dissenting)). For some time, the Ninth Circuit adopted a more muscular version of this exclusionary rule. *See United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), *overruled by United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007). The Ninth Circuit reasoned that, to deter the expansion of airport searches into a "general search for evidence of crime," it would exclude evidence obtained as a result of such general searches. *Id.* at 908–09.

¹⁰⁸ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 & n.3 (1989).

justification—was used or even disclosed to law enforcement agencies.¹⁰⁹ My proposal here is to formalize the deterrence principle implicit in the special needs exception and accepted to a limited degree in some early airport search cases. In my view, it is the best way to permit the use of suspicionless airport searches without undermining important Fourth Amendment protections.

CONCLUSION

The purpose of this Essay is to generate debate regarding the best way to conceptualize and apply Fourth Amendment doctrine to the TSA's new airport search regime. As I have indicated above, in some ways, the simplest approach is to find the new search regime to be unconstitutional. At least until new technology is developed that minimizes the intrusion occasioned by AIT scanners, it is hard to fit the TSA's program into existing precedent. But, assuming that most courts will feel compelled to find some constitutional nook in which to fit the new search regime, the special needs justification—modified by the exclusionary rule I propose here—will best cabin it.

There are complexities that I do not have the space to address here. For instance, where do searches that uncover prohibited weapons fall into my proposed framework? Surely there is a strong argument for holding that evidence of the possession of handguns and other weapons is close enough to the security justification for the TSA's searches that such evidence should not be excluded from a subsequent prosecution. On the other hand, if special needs searches are really the kinds of searches that should take

¹⁰⁹ Thus, the Court in *Ferguson v. City of Charleston* emphasized the fact that, in prior cases involving suspicionless searches of railroad employees, customs officers, and public schoolchildren, a key component in each search regime was that none of the test results were turned over to law enforcement for use in prosecution. See 532 U.S. 67, 79–80 & n.16 (2001) (summarizing cases in which the “‘special need’ that was advanced . . . was one divorced from the State’s general interest in law enforcement”). Prior to *Ferguson*, the only special needs case in which evidence was gathered and used in a criminal prosecution was one in which the search was carried out based on individualized suspicion. See *Griffin v. Wisconsin*, 483 U.S. 868, 872–73, 879 & n.6 (1987) (upholding the warrantless search of a probationer’s home) (link). After this case, the Court reserved the question of whether an administrative scheme that routinely provided evidence for use in criminal prosecutions would satisfy the special needs doctrine. See *Ferguson*, 532 U.S. at 79 n.15 (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 621 n.5 (1989)). Since *Ferguson*, the Court has decided an additional special needs case in which no evidence was disclosed to law enforcement. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 833–34 (2002) (rejecting a challenge to drug testing middle and high school student participants in extracurricular activities) (link). In two cases, the Court upheld the use of evidence seized during a suspicionless intrusion, without resting on special needs analysis. See *Samson v. California*, 547 U.S. 843, 851–56 (2006) (permitting suspicionless search of parolee); *Illinois v. Lidster*, 540 U.S. 419, 424–26 (2004) (permitting suspicionless “information-seeking highway stops”). But the Court has yet to resolve the question it posed in the *Ferguson* footnote: namely, whether an administrative search regime that routinely generated evidence for prosecution could be upheld under “special needs.”

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place regardless of whether they vindicate ordinary law enforcement goals, why permit prosecutors to use any evidence discovered through such searches, even evidence of terrorism? Perhaps such evidence should be introduced in civil detention proceedings instead. These are difficult questions that I cannot answer in the space I have here, but that I hope will be the subject of a future conversation.