

## THE BIN LADEN EXCEPTION

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### INTRODUCTION

On the evening of May 1, 2011, the American people learned that the world's most wanted criminal—Osama bin Laden—had been killed in Pakistan during a covert operation by an elite U.S. military team.<sup>1</sup> The news triggered spontaneous gatherings and revelry across the country. For the millennium's new generation, bin Laden had been the embodiment of evil—a real-life boogeyman—and, for some, “the first person I was ever taught to hate.”<sup>2</sup> Many young Americans will not be able to recall life without a deep-seated fear of the terrorist leader and the organization he founded,<sup>3</sup> all against a national backdrop of the so-called “war on terror.” Bin Laden's death thus signaled the “end of an era” and progress “toward a safer, less violent world.”<sup>4</sup>

After emotions settled, however, thoughts turned to the ultimate impact of the operation that closed “the Bin Laden decade.”<sup>5</sup> The al Qaeda leader “really did a number on all of us,” wrote *New York Times* columnist Thomas Friedman.<sup>6</sup> “Who will tell the people how deep the hole is that Bin Laden helped each of us dig over the last decade—and who will tell the people how hard and how necessary it will be to climb out?”<sup>7</sup> The question appears ripe in light of recent statements by top officials. Defense

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<sup>1</sup> See, e.g., Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden Is Dead, Obama Says*, N.Y. TIMES, May 1, 2011, <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=1> (link).

<sup>2</sup> Ann O'Neill, *The 9/11 Generation's Boogeyman Is Gone*, CNN, May 5, 2011, <http://www.cnn.com/2011/LIVING/05/04/bin.laden.911.generation.react/index.html> (link).

<sup>3</sup> Established by bin Laden in the late 1980s, al Qaeda (“the base”) has served as an umbrella organization and virtual clearinghouse for Islamist terrorism aimed at Western nations and perceived apostate governments in the Middle East. Over the years, bin Laden and his henchmen would work with various organizations (e.g., Ansar al Islam) and direct “franchises” of al Qaeda (e.g., al Qaeda in Iraq).

<sup>4</sup> O'Neill, *supra* note 2.

<sup>5</sup> Thomas L. Friedman, *The Bin Laden Decade*, N.Y. TIMES, May 31, 2011, [http://www.nytimes.com/2011/06/01/opinion/01friedman.html?\\_r=1](http://www.nytimes.com/2011/06/01/opinion/01friedman.html?_r=1) (link); Michael Hastings, *My Decade of Bin Laden*, ROLLING STONE, May 8, 2011, <http://www.rollingstone.com/politics/news/my-decade-of-bin-laden-20110508> (link).

<sup>6</sup> Friedman, *supra* note 5.

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

Secretary Leon Panetta claimed that the United States was “within reach of strategically defeating Al Qaeda.”<sup>8</sup> Shortly thereafter, President Barack Obama announced that “Al Qaeda is under more pressure than at any time since 9/11” and that “more than half of al Qaeda’s leadership” had been taken out.<sup>9</sup>

The time has come to begin a post-mortem examination, so to speak, of the damage wrought upon the United States and its people during the decade of bin Laden. Some, like Friedman, have looked to the international consequences, including the perpetually troubled relationship among Arab states, Israel, and the United States, which was undoubtedly worsened by 9/11 and its aftershock. This colloquy contemplates an area of domestic concern that represents perhaps the most palpable effect of terrorism on the American citizenry: travel by plane. In his contribution, Professor Alexander Reinert provides thoughtful analysis of Fourth Amendment doctrine as applied to airport security.<sup>10</sup> Here, I hope to complement his piece by offering some context on terrorism, with the goal of prompting discussion as to whether bin Laden’s legacy will include yet another instance of constitutional exceptionalism.

By definition, exceptionalism is a comparative concept involving a contrast among sufficiently analogous sets of values and practices, where an apparent anomaly or special case is subject to descriptive and normative assessments.<sup>11</sup> Elsewhere, I have considered the idea of drug exceptionalism by examining the unique history and policy of prohibition and, in particular, the extraordinary treatment of drug crime by legislatures, law enforcement, and courts.<sup>12</sup> The result is a sort of “drug exception” to the Constitution, where otherwise applicable constitutional rules do not seem to apply (or are watered down) in the government’s pursuit of contraband.<sup>13</sup> Since 9/11, however, the exceptionalism in America’s “war on drugs” may have been surpassed by the new “war on terror.”

Indeed, the very use of the term “war” in this context signifies the extraordinary nature of government efforts, providing a state-sponsored metaphor to emphasize the seriousness of the threat and the virtue of

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<sup>8</sup> Elisabeth Bumiller, *Panetta Says Defeat of Al Qaeda Is ‘Within Reach’*, N.Y. TIMES, July 9, 2011, [http://www.nytimes.com/2011/07/10/world/asia/10military.html?scp=1&sq=bumiller panetta says defeat of al qaeda is within reach&st=cse](http://www.nytimes.com/2011/07/10/world/asia/10military.html?scp=1&sq=bumiller%20panetta%20says%20defeat%20of%20al%20qaeda%20is%20within%20reach&st=cse) (link).

<sup>9</sup> Press Release, White House, Office of the Press Sec’y, Remarks by the President on the Way Forward in Afghanistan (June 22, 2011), <http://m.whitehouse.gov/the-press-office/2011/06/22/remarks-president-way-forward-afghanistan> (link).

<sup>10</sup> Alexander A. Reinert, *Revisiting “Special Needs” Theory via Airport Searches*, 106 NW. U. L. REV. COLLOQUY 207 (2011) (link).

<sup>11</sup> See, e.g., Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 753–54 (2002) (link).

<sup>12</sup> See, e.g., *id.*

<sup>13</sup> See *id.* at 757–68.

official actions.<sup>14</sup> At times, the U.S. has been too heavy-handed—and occasionally ham-handed as well—in its approach to fighting terrorism, with important consequences for fundamental rights. The government has engaged in, for instance, ethnic profiling and related abuses; extended, incommunicado detention in immigration cases; “enhanced interrogation techniques” (a.k.a. torture) such as water-boarding; “extraordinary rendition” of detainees to foreign nations known as human rights violators; mass wiretapping and data-collection by the National Security Agency; the maintenance of a quasi-penal colony in Guantánamo Bay, Cuba; and the extrajudicial, targeted killing of American citizens abroad.<sup>15</sup>

The full extent of government operations in the aftermath of 9/11 may never be known, especially since America’s antiterrorism and counterterrorism<sup>16</sup> efforts have been shrouded in secrecy and only partially revealed by civil rights suits or Freedom of Information Act requests, which the government has occasionally thwarted by invoking the “state secrets” privilege.<sup>17</sup> Collectively, the government justifies the new policies on the basis of necessity; a claim the American public has largely accepted at face value.<sup>18</sup> In terms of economic costs, the past decade has occasioned a trillion dollar increase in expenditures on homeland security alone.<sup>19</sup> Bin Laden’s death thus provides an auspicious moment for level-headed assessment of these extraordinary government actions in view of the threat posed by terrorism.

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<sup>14</sup> Of course, the “war on terror” has involved non-metaphorical, conventional warfare in Afghanistan and Iraq which, in most ways, outstrip all other developments.

<sup>15</sup> See, e.g., WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 360–68 (2007); Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 105–09 (2009) (link); Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all> (link).

<sup>16</sup> Antiterrorism is defined as “[d]efensive measures used to reduce the vulnerability of individuals and property to terrorist acts,” while counterterrorism is defined as “[a]ctions taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks.” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 22, 81 (2011), available at [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf) (link).

<sup>17</sup> See, e.g., *El-Masri v. United States*, 479 F.3d 296, 302–13 (4th Cir. 2007) (dismissing a lawsuit regarding an “extraordinary rendition” program because of the state secrets privilege) (link); *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (denying a FOIA request from public interest groups seeking information about detainees in wake of 9/11) (link).

<sup>18</sup> See Luna, *supra* note 15, at 109–10.

<sup>19</sup> See John Mueller & Mark G. Stewart, *Terror, Security, and Money: Balancing the Risks, Benefits, and Costs of Homeland Security 2* (Mar. 20, 2011) (unpublished manuscript), available at <http://polisci.osu.edu/faculty/jmueller/MID11TSM.PDF> (link).

## I. TERRORISM AND RISK ANALYSIS

Of principal concern here is the true nature of the danger to the United States: Is the menace of terrorism *existential*, as many government officials have alleged, threatening the nation's very existence or at least jeopardizing the American way of life as we know it?<sup>20</sup> Or does it present instead an unexceptional risk to individual citizens and the country as a whole? The former might rationalize otherwise forbidden actions as a means of domestic self-preservation, consistent with the axiom that the Constitution is not a suicide pact.<sup>21</sup> The latter, however, could not justify wholesale deviations from constitutional principles and practices unless the national compact binds weakly or not at all.

One way to analyze such claims is to rely on methods of "risk assessment." Experts have created these methods to evaluate assorted dangers to human life—from industrial accidents to nuclear power—by considering the likelihood and consequences of a given threat and comparing it to standard benchmarks. Based on the regulatory guidelines in various developed nations, there seems to be some agreement that a risk is unacceptable—and therefore may necessitate government action—if the annual fatality rate is greater than 1 in 10,000 or, in some cases, 1 in 100,000.<sup>22</sup> In contrast, a risk is acceptable—requiring no further safety improvements—if the annual fatality rate is 1 in 1,000,000 (or sometimes 1 in 2,000,000).<sup>23</sup>

In a recent article, two scholars employed risk assessment techniques to determine whether the threat of terrorism is, in fact, existential. While the risk to Americans from cancer and traffic accidents falls within the lower unacceptable range (1 in 10,000), the annual fatality risk of modern terrorism is 1 in 3,500,000, making it a lesser threat than deer hunting,

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<sup>20</sup> See, e.g., Luna, *supra* note 15, at 118–21; John Mueller & Mark G. Stewart, *Hardly Existential: Thinking Rationally About Terrorism*, FOREIGN AFF., Apr. 2, 2010, <http://www.foreignaffairs.com/articles/66186/john-mueller-and-mark-g-stewart/hardly-existential?page=show> (link); Jan Freeman, *Existentially Speaking*, BOS. GLOBE, Feb. 4, 2007, [http://www.boston.com/news/globe/ideas/articles/2007/02/04/existentially\\_speaking/](http://www.boston.com/news/globe/ideas/articles/2007/02/04/existentially_speaking/) (link); William Safire, *Existential*, N.Y. TIMES, Apr. 8, 2007, <http://www.nytimes.com/2007/04/08/magazine/08wwlnsafire.t.html> (link).

<sup>21</sup> Cf. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.") (link).

<sup>22</sup> See, e.g., Mueller & Stewart, *supra* note 20.

<sup>23</sup> See, e.g., *id.* ("Between these two ranges [i.e., acceptable and unacceptable risks] is an area in which risk might be considered 'tolerable.'"). To be sure, these thresholds are not "magical" but instead are the result of policy decisions by prominent agencies (e.g., the Food and Drug Administration), as well as legislation and court opinions. See John D. Graham, *The Legacy of One in a Million*, 1 RISK IN PERSP. (Harvard Cntr. for Risk Analysis), Mar. 1993 (link).

home appliances, or drowning in a bathtub.<sup>24</sup> To be unacceptable, the number of terrorist-related fatalities would have to increase exponentially, with the United States “experiencing attacks on the scale of 9/11 once a year, or 18 Oklahoma City bombings every year.”<sup>25</sup> For these and other reasons, the authors concluded that terrorism is hardly an existential threat that would justify costly government actions to further reduce the risk.

This assessment applies with full force to the realistic threats to domestic security posed by al Qaeda (or any other terrorist organization), which largely involve bombings and shootings using conventional weapons.<sup>26</sup> Even though these acts are undoubtedly appalling, they can be classified as lethal but non-extraordinary *crimes*, not existential threats to the American homeland on par with a military invasion or an internal insurrection.<sup>27</sup> As for the presumably apocalyptic threat of a nuclear attack, the key question is one of likelihood. While it is true that al Qaeda *might* obtain a nuclear weapon (i.e., it is not impossible), several reports have concluded that the odds remain quite low due to, among other things, the difficulty of acquiring the necessary materials.<sup>28</sup> But even if the risk of nuclear attack were viable, the appropriate policy stance would be to focus government efforts on that particular threat and not on all forms of terrorism.<sup>29</sup>

The foregoing analysis can help inform an assessment of the topic of this colloquy: the impact of terrorism on commercial air travel. In the wake of 9/11, one scholar calculated the risk to individual fliers:

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<sup>24</sup> See Mueller & Stewart, *supra* note 20.

<sup>25</sup> *Id.*

<sup>26</sup> NAT’L CONSORTIUM ON THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, BACKGROUND REPORT: 9/11, TEN YEARS LATER 3 (2011), available at [http://www.start.umd.edu/start/announcements/BackgroundReport\\_10YearsSince9\\_11.pdf](http://www.start.umd.edu/start/announcements/BackgroundReport_10YearsSince9_11.pdf) (link).

<sup>27</sup> See Luna, *supra* note 15, at 134–36.

<sup>28</sup> See NAT’L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD 61–62 (2008), available at [http://www.dni.gov/nic/PDF\\_2025/2025\\_Global\\_Trends\\_Final\\_Report.pdf](http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf) (link); U.S. DEP’T OF HOMELAND SEC., HOMELAND SECURITY THREAT ASSESSMENT: EVALUATING THREATS 2008–2013, at 5–6 (link); FOURTH ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 21 (2002); see also DANIEL GARDNER, THE SCIENCE OF FEAR 252–58 (2008) (questioning the likelihood of terrorists obtaining weapons of mass destruction); JOHN MUELLER, ATOMIC OBSESSION: NUCLEAR ALARMISM FROM HIROSHIMA TO AL-QAEDA (2010) (challenging the alleged threat of nuclear annihilation and, in particular, the prospect of terrorists obtaining nuclear weapons). *But see* ROLF MOWATT-LARSEN, AL QAEDA WEAPONS OF MASS DESTRUCTION THREAT: HYPE OR REALITY? 7 (2010), available at <http://belfercenter.ksg.harvard.edu/files/al-qaeda-wmd-threat.pdf> (link).

<sup>29</sup> See, e.g., Jeffrey Goldberg & Marc Ambinder, *The Ally from Hell*, THE ATLANTIC, Dec. 2011, <http://www.theatlantic.com/magazine/archive/2011/12/the-ally-from-hell/8730/> (reporting on questions about the safety of Pakistan’s nuclear arsenal) (link).

[L]et us assume that each week one commercial aircraft were hijacked and crashed. What are the odds that a person who goes on one trip per month would be in that plane? There are currently about 18,000 commercial flights a day, and if that person's trip has four flights associated with it, the odds against that person's being on a crashed plane are about 135,000 to 1. If there were only one hijacked plane per month, the odds would be about 540,000 to 1.<sup>30</sup>

Even under these hyperbolic conditions, the theoretical risk to the individual flier is still just a fraction of the real risk to the individual driver. The nation's failure to appreciate comparative risks can produce perverse results. One study estimated that 1500 people died in the year after 9/11 because Americans moved from the safest form of travel (flying) to the most dangerous (driving) in order to avoid the fate of those who perished during the terrorist attacks.<sup>31</sup> A later study questioned these findings, only to offer another disturbing sequence of events: instead of additional road miles, the proximate cause for increased fatalities was heightened stress among those living in the Northeast, adjacent to the site of the attacks, who used and abused drugs and alcohol at a higher rate after 9/11, affecting road safety.<sup>32</sup> Either way, Americans were acting contrary to their individual and collective interests.

Why would presumably rational actors behave in this manner? The answer is that people are not always *rational*, at least as the term is conceived in the classical microeconomic model.<sup>33</sup> Fear and other intensely negative emotions can affect public policy by distorting the perception of

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<sup>30</sup> Michael L. Rothschild, *Terrorism and You—The Real Odds*, WASH. POST, Nov. 25, 2001, at B7; see also CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 97 (2005) (“[I]f it is estimated that the United States will suffer at least one terrorist attack each year with the same number of deaths as on September 11, the risk of death from terrorism is about .001 percent . . .”).

<sup>31</sup> GARDNER, *supra* note 28, at 3; Gerd Gigerenzer, *Out of the Frying Pan into the Fire: Behavioral Reactions to Terrorist Attacks*, 26 RISK ANALYSIS 347, 350 (2006).

<sup>32</sup> See Jenny C. Su et al., *Driving Under the Influence (of Stress): Evidence of a Regional Increase in Impaired Driving and Traffic Fatalities After the September 11 Terrorist Attacks*, 20 PSYCH. SCI. 59, 64 (2009). Another example of perverse collective public behavior in response to fears of terrorism was the use of prescription antibiotics to treat anthrax (e.g., ciprofloxacin), which was unnecessary and even harmful due to adverse reactions and increased antibiotic resistance. See, e.g., U.S. Food and Drug Admin., *Information on Cipro (Ciprofloxacin Hydrochloride) for Inhalation Anthrax for Consumers: Questions and Answers*, (Nov. 14, 2001), <http://www.fda.gov/Drugs/EmergencyPreparedness/BioterrorismandDrugPreparedness/ucm130711.htm> (“Random prescribing and extensive use of Cipro could speed up the development of drug-resistant organisms, and the usefulness of Cipro as an antibiotic may be lost.”) (link).

<sup>33</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3–4 (8th ed. 2011).

risk and the evaluation of potential responses.<sup>34</sup> In particular, low-probability risks that are perceived to be catastrophic, uncontrollable, and distributively inequitable—so-called “dread risks,”<sup>35</sup> such as the supposed dangers of nuclear power—tend to engender higher levels of fear than risks that are, in truth, more likely and more lethal. And because humans often assess risks based on mental associations, with horrific images tending to be associated with greater risks, media coverage can amplify such images and the related risk perception. At times, this fosters mistaken beliefs that a consensus has been reached on the nature of a threat, the need for action, and the propriety of the chosen response. Unsurprisingly, political actors have been inclined to exploit (or at least not question) instances of public emotionalism in service of their own electoral self-interests.

The underlying risk aversion is understandable, involving a confluence of psychological, social, institutional, and even evolutionary factors.<sup>36</sup> But it hardly makes for sound public policy, understood to be decision-making based on, among other things, an informed ranking of risks and a cost-benefit analysis of possible options, all within the structural limitations of government and with respect for individual rights. This public policy approach seeks to allocate scarce resources to increase public safety *in fact*, rather than creating the illusion of greatly enhanced security at the price of diverting efforts from those risks that can be meaningfully reduced. It also recognizes that one of the core purposes of a constitution is to protect the fundamental rights of individuals and the long-term interests of society against rash, emotional decisions in the face of perceived perils.<sup>37</sup>

Today, public perception of terrorism and the post-9/11 governmental reaction are prime examples of public policy driven by fear rather than rational decisionmaking. “Terrorism” as both a word and a concept evokes intense, tragic images that tend to preclude rational risk assessments based on the available information.<sup>38</sup> The resulting fear is exacerbated by various factors, including the stochastic nature of terrorism, the terrorists’ use of indiscriminate, lethal weapons, and their willingness to target civilians who lack meaningful control over the risk of attack.<sup>39</sup> As mentioned above, the

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<sup>34</sup> See Luna, *supra* note 15, at 81–86; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 22–28, 32–34 (2010) (link); see generally PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000); SUNSTEIN, *supra* note 30, at 89–107.

<sup>35</sup> See Paul Slovic, *Perception of Risk*, 236 SCI. 280, 283 (1987) (link).

<sup>36</sup> See Gigerenzer, *supra* note 31, at 348.

<sup>37</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (link); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 54–55 (1868) (link); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 179–80 (1960).

<sup>38</sup> SUNSTEIN, *supra* note 30, at 40.

<sup>39</sup> See Ben Sheppard, *Mitigating Terror and Avoidance Behavior Through the Risk Perception Matrix to Augment Resilience*, 8 J. HOMELAND SECURITY & EMERGENCY MGMT. 1, 3–4 (2011) (link).

federal government has responded in kind with unprecedented policies and practices, in terms of the resources expended and the infringements on individual rights.

To be sure, al Qaeda's threat has not disappeared, a point duly noted by President Obama and his national security team, as well as by foreign dignitaries.<sup>40</sup> Interpol still considers al Qaeda the world's biggest terrorist security threat, and it was only a year ago that London was reported as a possible target for a "dirty bomb" (i.e., a conventional explosive mixed with radioactive material).<sup>41</sup> On this side of the Atlantic, national security experts and law enforcement officials have long warned about the prospect of an attack in the United States on or around the ten-year anniversary of 9/11. Thankfully, the threats never materialized. Yet even if they had, it would still not justify perforce the suspension of individual rights and the implementation of an antiliberal program of state surveillance and control. Again, the critical issues for risk analysis are those of scale and probability.

While al Qaeda undoubtedly remains a menace, it has been weakened in recent times and does not present an existential threat to the United States.<sup>42</sup> The Obama Administration seemed to admit as much in its guidelines on commemorating the ten-year anniversary of 9/11: although terrorists "still have the ability to inflict harm, . . . Al Qaeda and its adherents have become increasingly irrelevant."<sup>43</sup> Since 9/11, the capture or killing of key figures in al Qaeda operations—including, of course, bin Laden himself—has substantially downsized the threat posed by the organization.<sup>44</sup> Al Qaeda is thus a fundamentalist organization in decline, still bent on wreaking havoc and using fear as political tools, but incapable

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<sup>40</sup> Prime Minister David Cameron, *Prime Minister: "While Bin Laden Is Gone, the Threat of Al Qaeda Remains,"* FOREIGN & COMMONWEALTH OFFICE. (May 3, 2011), <http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=591331982> (link).

<sup>41</sup> Duncan Gardham, *Nuclear Terror Risk to Britain from Al-Qaeda*, TELEGRAPH, Mar. 22, 2010, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7500719/Nuclear-terror-risk-to-Britain-from-al-Qaeda.html> (link); *Interpol Says Al Qaeda Remains Biggest Global Threat*, REUTERS, June 7, 2011, <http://ca.reuters.com/article/topNews/idCATRE7560RE20110607> (link).

<sup>42</sup> See, e.g., Gene Healy, *Al Qaeda Was Never an 'Existential Threat'*, WASH. EXAMINER, Sept. 12, 2011, <http://washingtonexaminer.com/opinion/columnists/2011/09/al-qaeda-was-never-existential-threat> (link).

<sup>43</sup> Thom Shanker & Eric Schmitt, *White House Issues Guides on Sept. 11 Observances*, N.Y. TIMES, Aug. 29, 2011, <http://www.nytimes.com/2011/08/30/us/politics/30terror.html?pagewanted=all> (link).

<sup>44</sup> See, e.g., Alison Fitzgerald, *Bin Laden Death Means Most Sept. 11 Terror Conspirators Killed or Captured*, BLOOMBERG, May 3, 2011, <http://www.bloomberg.com/news/2011-05-04/bin-laden-death-means-most-sept-11-terror-conspirators-killed-or-captured.html> (link); Agence France-Presse, *Al-Qaeda Leaders Who Have Been Killed or Captured*, ABS-CBN NEWS, May 2, 2011, <http://www.abs-cbnnews.com/global-filipino/world/05/02/11/al-qaeda-leaders-who-have-been-killed-or-captured> (link); Tom A. Peter, *Killing of Al Qaeda's No. 2 a Hammer Blow to Weakening Group*, CHRISTIAN SCI. MONITOR, Aug. 28, 2011, <http://www.csmonitor.com/World/terrorism-security/2011/0828/Killing-of-Al-Qaeda-s-No.-2-a-hammer-blow-to-weakening-group-VIDEO> (link).

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of achieving its goals,<sup>45</sup> at least directly. Instead, the real “existential” threat to the United States—the one that endangers the American way of life and the nation’s particular form of constitutional governance—is not al Qaeda itself, but political reactions to al Qaeda that trade fundamental liberties for the pretense of greater security.

### II. THE TSA REGIME AND THE FOURTH AMENDMENT

Turning again to the topic of this colloquy, the airport search regime adopted by the Transportation Security Administration (TSA) provides a poignant example of irrational policy responses to improbable future terrorist attacks. As an initial matter, many experts anticipate that the next organized plot against America will involve something other than commercial aircraft, such as coordinated bombings in public places.<sup>46</sup> For the sake of argument, however, let’s assume that al Qaeda still seeks to use its single most successful *modus operandi*, keeping in mind that 9/11 could and should have been prevented by government officials (i.e., it was not inevitable under the then-existing legal regime),<sup>47</sup> and that the TSA’s actions could, at best, merely decrease the likelihood of an already minute chance of another 9/11-type event.

The question, then, is whether the threat of aircraft terrorism and the presumed risk reduction of the TSA regime<sup>48</sup> justify the infringement upon

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<sup>45</sup> See, e.g., BRIAN MICHAEL JENKINS, STRAY DOGS AND VIRTUAL ARMIES: RADICALIZATION AND RECRUITMENT TO JIHADIST TERRORISM IN THE UNITED STATES SINCE 9/11, at 1 (2011), available at [http://www.rand.org/pubs/occasional\\_papers/2011/RAND\\_OP343.pdf](http://www.rand.org/pubs/occasional_papers/2011/RAND_OP343.pdf) (“[D]espite al Qaeda’s intensive online recruiting campaign [for homegrown jihadists], their numbers remain small, their determination limp, and their competence poor.”) (link); HUMAN SECURITY REPORT PROJECT, HUMAN SECURITY BRIEF 2007, at 5 (2008), available at <http://www.hsrgroup.org/docs/Publications/HSB2007/2007HumanSecurityBrief-FullText.pdf> (link); NAT’L INTELLIGENCE COUNCIL, *supra* note 28, at 69–70 (concluding that al Qaeda may “decay sooner than many people think” and “support for terrorist networks in the Muslim world appears to be declining”); Scott Shane, *Rethinking Our Terrorist Fears*, N.Y. TIMES, Sept. 26, 2009, <http://www.nytimes.com/2009/09/27/weekinreview/27shane.html?pagewanted=all> (noting that terrorism experts believe al Qaeda and its jihadist agenda are in decline in the Muslim world) (link).

<sup>46</sup> Cf. John Arquilla, Op-Ed., *The Coming Swarm*, N.Y. TIMES, Feb. 14, 2009, <http://www.nytimes.com/2009/02/15/opinion/15arquilla.html?scp=1&sq=John Arquilla The Coming Swarm&st=cse> (“[A] new ‘Mumbai model’ of swarming, smaller-scale terrorist violence is emerging.”) (link).

<sup>47</sup> See Luna, *supra* note 15, at 115.

<sup>48</sup> One can debate whether TSA efforts have reduced the threat of terrorism to passenger flights at all. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-484T, AVIATION SECURITY: TSA IS INCREASING PROCUREMENT AND DEPLOYMENT OF THE ADVANCED IMAGING TECHNOLOGY, BUT CHALLENGES TO THIS EFFORT AND OTHER AREAS OF AVIATION SECURITY REMAIN 8–10 (2010), available at <http://www.gao.gov/new.items/d10484t.pdf> (link); Reinert, *supra* note 10, at 212–13; Grant Stinchfield, *TSA Source: Armed Agent Slips Past DFW Body Scanner*, NBC DALLAS-FORT WORTH, Feb. 21, 2011, <http://www.nbcdfw.com/news/local/TSA-Agent-Slips-Through-DFW-Body-Scanner-With-a-Gun-116497568.html> (link).

individual rights. The most controversial development has been described by one policy expert as a “strip/grope” procedure.<sup>49</sup> It begins with the TSA’s use of “Advanced Imaging Technology” (AIT), which is supposed to screen for both metallic and nonmetallic threats such as explosives and other weapons. But as passengers pass through a booth that uses either millimeter wave or backscatter technology, far more is revealed than guns and bombs.<sup>50</sup> These “porno scans” or “strip-search machines,” as some critics have labeled them, create full body images of passengers.<sup>51</sup>

Some travelers may have no problem with their bodies being exposed in this manner (might exhibitionists and flashers even enjoy it?).<sup>52</sup> Heavy criticism from across society, however, suggests that many people object to these created outlines of their naked physique, which detail breasts, buttocks, genitals, and other curves and crevices.<sup>53</sup> These are the precise body parts one intentionally covers for reasons of personal privacy, social etiquette, and, not least of all, criminal liability for indecent exposure. In an earlier era, these types of pictures might have been held obscene under First Amendment doctrine; today, the images are part of the TSA’s imposition on travelers, giving a new meaning to the term “federal mandate.” The technology is coupled with enhanced frisks that might be hard to differentiate from an assaultive grope. Professor Reinert notes several reported abuses, like a sixty-one-year-old bladder cancer survivor who was subjected to such a violent frisk that his urostomy bag broke, leaving him covered in his own urine.<sup>54</sup> Other outrageous stories include an eight-

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<sup>49</sup> Jim Harper, *Legislation to Protect the Rights of Travelers*, CATO INST., Mar. 30, 2011, [http://www.cato.org/pub\\_display.php?pub\\_id=12924](http://www.cato.org/pub_display.php?pub_id=12924) (link).

<sup>50</sup> For what it is worth, here are pictures provided by the government as to “what TSA sees”: [http://www.tsa.gov/graphics/images/approach/mmw\\_large.jpg](http://www.tsa.gov/graphics/images/approach/mmw_large.jpg) (millimeter wave technology) (link); [http://www.tsa.gov/graphics/images/approach/backscatter\\_large.jpg](http://www.tsa.gov/graphics/images/approach/backscatter_large.jpg) (backscatter technology) (link). Far racier images are available on the Internet.

<sup>51</sup> See Reinert, *supra* note 10, at 210–11; Harper, *supra* note 49.

<sup>52</sup> On the lighter side, one passenger had written the text of the Fourth Amendment across his chest, which he revealed to TSA agents when he was subjected to an enhanced secondary screening. Apparently, the TSA agents did not find this funny; they radioed the police and had the passenger arrested. *Tobey v. Napolitano*, No. 3:11CV154–HEH, 2011 WL 3841929, at \*1–2 (E.D. Va. Aug. 30, 2011).

<sup>53</sup> Apparently, the imaging technology can also detect a woman’s sanitary napkin. Joe Sharkey, *Screening Protests Grow as Holiday Crunch Looms*, N.Y. TIMES, Nov. 15, 2010, <http://www.nytimes.com/2010/11/16/business/16road.html?sq=sharkey> screen protests&st=cse&adxnll=1&scp=3&adxnllx=1326996096-SAbPsavC5aJLq86a+OLDDw (link).

<sup>54</sup> Reinert, *supra* note 10, at 211. Similar stories involve mistreatment of breast cancer survivors. See, e.g., Brad Hyatt & Molly Grantham, *After Removing Prosthetic Breast, Flight Attendant Says TSA Goes “Too Far”*, WBTW NEWS, Nov. 18, 2010, <http://www.wbtv.com/Global/story.asp?S=13534628> (link); *Breast Cancer Survivor Lori Dorn Says She Endured ‘Humiliating’ Pat-Down at JFK*, CBS NEW YORK, Oct. 4, 2011, <http://newyork.cbslocal.com/2011/10/04/breast-cancer-survivor-lori-dorn-says-she-endured-humiliating-patdown-at-jfk/> (link).

month-old baby frisked by TSA agents and a ninety-five-year-old woman who was forced to remove her adult diaper.<sup>55</sup>

In addition, some have claimed that TSA agents employ enhanced frisks in a punitive or retaliatory fashion, reserving them for those who object to being scanned by the new imaging machines.<sup>56</sup> Indeed, the TSA appears to license heavier scrutiny of those who dispute the agency's authority. Pursuant to the "Screening Passengers by Observation Technique," or "SPOT," TSA agents are instructed to look for "behavioral indicators" of stress, fear, or deception.<sup>57</sup> Of the seventy indicators, perhaps the most vexing and legally questionable basis for enhanced scrutiny is when the passenger is "[v]ery arrogant and expresses contempt against airport passenger procedures."<sup>58</sup> If nothing else, this encourages

<sup>55</sup> Joy Jernigan, *Baby Receives Pat-Down at Kansas City Airport*, MSNBC, May 11, 2011, <http://www.msnbc.msn.com/id/42978267/ns/travel-news/t/baby-receives-pat-down-kansas-city-airport/> (link); *TSA Stands by Officers After Pat-Down of Elderly Woman in Florida*, CNN, June 26, 2011, [http://articles.cnn.com/2011-06-26/us/florida.tsa.incident\\_1\\_pat-down-tsa-pat-downs-tsa-officer?s=PM:US](http://articles.cnn.com/2011-06-26/us/florida.tsa.incident_1_pat-down-tsa-pat-downs-tsa-officer?s=PM:US) (link). After initially claiming that "screening procedures were followed," TSA officials recently apologized for strip searches of two ailing elderly women at JFK International Airport. Rich Schapiro, *TSA Admits Strip Search Screwup*, N.Y. DAILY NEWS, Jan. 18, 2012, [http://articles.nydailynews.com/2012-01-18/news/30641168\\_1\\_tsa-agent-screener-markey](http://articles.nydailynews.com/2012-01-18/news/30641168_1_tsa-agent-screener-markey) (link).

<sup>56</sup> Charlie Leocha, *TSA Admits to Punishing Travelers*, CONSUMER TRAVELER, Aug. 24, 2010, <http://www.consumertraveler.com/today/tsa-admits-to-punishing-travelers/> (link). As an aside, the TSA recently detained U.S. Senator Rand Paul for two hours after he set off a scanner alarm and refused a full body pat-down. See, e.g., Matthew Boyle, *Rand Paul on TSA Detainment*, DAILY CALLER, Jan. 24, 2012, <http://dailycaller.com/2012/01/23/rand-paul-on-tsa-detainment-i-was-barked-at-do-not-leave-the-cubicle/> (link). In theory, at least, Senator Paul's detention could have violated the Speech or Debate Clause of the Constitution. See U.S. CONST. art. I, § 6, cl. 1.

<sup>57</sup> Mike M. Ahlers & Jeanne Meserve, *TSA Security Looks at People Who Complain About . . . TSA Security*, CNN, Apr. 15, 2011, <http://www.cnn.com/2011/TRAVEL/04/15/tsa.screener.complain/index.html?iref=allsearch> (link).

<sup>58</sup> *Id.* For all the flying public knows, criticism of TSA agents could result in one's inclusion on the federal government's "no-fly list," which would lead to delays and even detention during subsequent journeys through airport security. As outlandish as this seems, it must be remembered that the no-fly list doubled in size over the past year, with about one thousand changes made to the government's watch list each day. Eileen Sullivan, *U.S. No-Fly List Doubles in One Year*, TIME, Feb. 2, 2012, <http://www.time.com/time/nation/article/0,8599,2105958,00.html> (link). Compare Peter Eisler, *Terrorist Watch List Hits 1 Million*, USA TODAY, Mar. 10, 2009, [http://www.usatoday.com/news/washington/2009-03-10-watchlist\\_N.htm](http://www.usatoday.com/news/washington/2009-03-10-watchlist_N.htm) (reporting that watch list had grown to one million names) (link), with *Myth Buster: TSA's Watch List is More than One Million People Strong*, TRANSP. SEC. ADMIN., [http://www.tsa.gov/approach/mythbusters/tsa\\_watch\\_list.shtm](http://www.tsa.gov/approach/mythbusters/tsa_watch_list.shtm) (disputing report) (link). Among others, Senator Ted Kennedy was on the list, as well as Nelson Mandela, whose name was only removed by an Act of Congress. Jon Hilkevitch, *New Airport Security Rules to Require More Personal Information*, CHI. TRIB., Mar. 9, 2009, [http://articles.chicagotribune.com/2009-03-09/news/0903080245\\_1\\_no-fly-lists-personal-data-passengers](http://articles.chicagotribune.com/2009-03-09/news/0903080245_1_no-fly-lists-personal-data-passengers) (link); *Mandela Off U.S. Terrorism Watch List*, CNN, July 1, 2008, [http://articles.cnn.com/2008-07-01/world/mandela.watch\\_1\\_president-mandela-apartheid-anc?s=PM:WORLD](http://articles.cnn.com/2008-07-01/world/mandela.watch_1_president-mandela-apartheid-anc?s=PM:WORLD) (link). It might also be noted that the SPOT program has been dogged by allegations of ethnic profiling. See Joe Davidson, *Lawmaker Challenges TSA on Claims of Ethnic*

complaisance among passengers, who may submit when faced with questionable TSA conduct in hopes of avoiding more intense inspections or just to get the whole thing over with.

Given the aforementioned risk analysis, an authoritarian strip/grope procedure seems hard to justify. The current regime strikes at core constitutional values, including the protection of bodily autonomy and privacy. In a very real sense, law-abiding citizens are treated like inmates.<sup>59</sup> The abuses also undermine a basic component of the rule of law—freedom from government caprice and vindictiveness. The “right to defy submissiveness”<sup>60</sup> lays low in the hushed silence of travelers hoping to avoid the ire of a TSA agent, who appears as the spitting image of the petty tyrant to which the Bill of Rights is addressed. To the diminution of individual rights, add the billions of dollars spent on new technology and government personnel (and don’t forget the consumption of the travelling public’s valuable time).<sup>61</sup> The cost side of the liberty/security ledger looks staggering when set against the minimal benefit (if any) provided by the TSA regime, keeping in mind that the appropriate baseline is not a security-less, walk-straight-on-the-plane approach, but instead the pre-9/11 status quo<sup>62</sup> or some other less intrusive, less expensive arrangement.<sup>63</sup>

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*Profiling*, WASH. POST, Nov. 28, 2011, [http://www.washingtonpost.com/politics/lawmaker-challenges-tsa-on-claims-of-ethnic-profiling/2011/11/28/gIQAtOiO6N\\_story.html](http://www.washingtonpost.com/politics/lawmaker-challenges-tsa-on-claims-of-ethnic-profiling/2011/11/28/gIQAtOiO6N_story.html) (link).

<sup>59</sup> See, e.g., Harper, *supra* note 49 (“The search that American travelers undergo at the airport is as intimate as what prisoners in American jail cells get.”).

<sup>60</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (link).

<sup>61</sup> Harper, *supra* note 49. Balancing in this context can raise issues of commensurability and comparability, which are beyond the limited scope of this article. See generally Virgílio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEGAL STUD. 273 (2011) (link); Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

<sup>62</sup> The pre-9/11 techniques employed by the TSA’s predecessor, the Federal Aviation Administration (FAA), included requiring passengers to pass through a magnetometer, x-raying their baggage, and, if necessary, subjecting them to a sweep by a hand-held metal detector or even a light pat-down. See, e.g., *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1242–43 (9th Cir. 1989) (describing the history and public expectations of standard airport screening, as well as an unconstitutional expansion of that process) (link).

<sup>63</sup> To its credit, the TSA recently unveiled new software for AIT machines that does not produce detailed images of an individual passenger’s body. Press Release, Transp. Sec. Admin., *TSA Takes Next Steps to Further Enhance Passenger Privacy* (July 20, 2011), available at <http://www.tsa.gov/press/releases/2011/0720.shtm> (link).

The new software automatically detects potential threats and indicates their location on a generic, computer-generated outline of a person that appears on a monitor attached to the AIT unit. As with the current version of AIT, if a potential threat is detected, the area will require additional screening. If no potential threats are detected, an “OK” appears on the monitor with no outline, and the passenger is cleared.

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

The current regime also clashes with decent understandings of the Fourth Amendment. By this, I mean interpretations that take seriously the presumptive requirements of judicial authorization and individualized suspicion for government searches and seizures,<sup>64</sup> and therefore do not reduce the constitutional provision to a paper right. As mentioned in the introduction, Professor Reinert's contribution provides an excellent review of this legal doctrine. In particular, I agree with much of his analysis regarding three rubrics for evaluating the TSA regime: consent, reasonableness balancing, and "special needs." Although any number of thoughts and suggestions might be added to the mix, here are just a few points of emphasis for further discussion:

- Today, commercial air travel is ubiquitous in the United States, with over 600 million passengers taking more than 9 million flights each year.<sup>65</sup> Flying by plane is not merely a luxury, and it certainly is not some type of government privilege. Instead, commercial flight is a major (and literal) vehicle of business, and at times it is a necessity of modern life. Unless society is willing to tolerate Constitution-free zones, or a Fourth Amendment interpretation sealed in pre-twentieth-century amber, a passenger cannot be said to shed his rights simply by choosing to travel by plane.<sup>66</sup>

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*Id.* The TSA has also espoused "a more risk-based approach to secure our nation's transportation systems," implemented through a series of new airport security programs. *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). However, the new software does not address concerns about abusive pat-downs, the effectiveness and rights implications of new schemes such as TSA's "chat down" program, or the expansion of TSA checkpoints and searches to other forms of mass transportation. See, e.g., Brian Bennett, *TSA Screenings Aren't Just for Airports Anymore*, L.A. TIMES, Dec. 20, 2011, <http://articles.latimes.com/2011/dec/20/nation/la-na-terror-checkpoints-20111220> (link); Bart Jansen, *Next Layer of Air Security: Chat-Downs on Top of Pat-Downs?*, USA TODAY, Oct. 14, 2011, <http://travel.usatoday.com/flights/post/2011/10/next-layer-of-air-security-chat-downs-on-top-of-pat-downs/553721/1> (link). Moreover, the constitutional damage may already have been done by judicial acceptance of the TSA's post-9/11 regime. See *infra* notes 75–76, 81–86 and accompanying text.

<sup>64</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (link); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (link); *Katz v. United States*, 389 U.S. 347, 357 (1967) (link); *Jones v. United States*, 357 U.S. 493, 499 (1958) (link).

<sup>65</sup> *TranStats*, RES. & INNOVATIVE TECH. ADMIN., U.S. DEPT. OF TRANSP., <http://www.transtats.bts.gov/> (last visited Jan. 18, 2012) (link).

<sup>66</sup> Cf. *Katz*, 389 U.S. at 351–52 (rejecting the notion of "constitutionally protected areas" as a talismanic solution to Fourth Amendment issues, noting that the defendant did not "shed his right to [exclude the uninvited ear] simply because he made his calls from a place where he might be seen," and

- The notion that a passenger implicitly consents to *any* TSA search by entering the security queue is no truer than the idea that a person implicitly consents to government eavesdropping by using his cell phone, for example, or that he implicitly consents to police rummaging through his car and its contents simply by getting behind the wheel.<sup>67</sup> The scope of consent obviously matters a great deal in the analysis. It is one thing to x-ray a handbag or backpack, a routine process in various contexts beyond airport security (e.g., entering government buildings). But it is quite another matter to create images of a passenger's nude body, which would seem to be the kind of intrusive search that requires individualized suspicion and possibly judicial approval.<sup>68</sup> In this analysis, public knowledge of the TSA program and the concomitant conditioning of the traveler's expectations should be largely irrelevant. To hold otherwise would mean that the government need only announce a search regime in order for it to be constitutional.<sup>69</sup>
- In theory, airport security measures might be checked by the type of balancing approach adopted in *Terry v. Ohio*<sup>70</sup> or by the "special needs" doctrine that *Terry* helped inspire. In criminal procedure, however, the results of an all-things-considered weighing process tend to be preordained by a heavy thumb on the government side of the scale. As I have written

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holding that a narrower interpretation would "ignore the vital role that the public telephone has come to play in private communication").

<sup>67</sup> Cf. *United States v. Albarado*, 495 F.2d 799, 806–07 (1974) ("To make one choose between flying to one's destination and exercising one's constitutional right [to waive consent] appears to us . . . in many situations a form of coercion, however subtle.") (link); *id.* at 807 n.14 ("[I]f the government were to announce that hereafter all telephones would be tapped, perhaps to counter an outbreak of political kidnappings [sic], it would not justify, even after public knowledge of the wiretapping plan, the proposition that anyone using a telephone consented to being tapped."); *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973) ("Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent to the search when to do otherwise would have meant foregoing the constitutional right to travel.") (link).

<sup>68</sup> See Reinert, *supra* note 10, at 223–224.

<sup>69</sup> See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) (link).

<sup>70</sup> 392 U.S. 1, 20–21 (1968) (link).

elsewhere, the constant pressure of law enforcement has largely eviscerated whatever safeguards *Terry* might have provided, to the point that it effectively stands for the proposition that officers may stop any person at any time for any reason, or for no reason at all.<sup>71</sup> In turn, the special needs test is so malleable as to be little more than license for judicial adhocery, evidenced by the hodgepodge of court decisions that often point in different directions.<sup>72</sup> To this day, the line between “special” and “normal” needs of law enforcement remains obscure. Moreover, it has always been curious (to me, at least) that a state actor’s inability to otherwise meet the requirements of the Fourth Amendment is used as an argument *in favor of* dispensing with those requirements.<sup>73</sup>

Professor Reinert is spot-on when he says that the TSA’s new regime is “difficult to square with fundamental Fourth Amendment principles,” while the argument for finding it unconstitutional is “relatively straightforward.”<sup>74</sup> He is also correct that the courts will feel obliged to uphold the regime—maybe out of deference to the post-9/11 executive branch or simply to avoid the appearance of impeding efforts to prevent terrorism—while distorting search and seizure doctrine as needed along the way. This past July, the D.C. Circuit held that the use of AIT scanners did not violate the Fourth Amendment.<sup>75</sup> The court labeled passenger screening as an administrative search, which only requires that the governmental interest in safety outweighs the passenger’s interest in privacy. “That balance clearly favors the Government here,” the panel concluded, noting that the AIT scanners can detect non-metallic explosives, the images produced are “distort[ed]” and immediately deleted, and passengers may

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<sup>71</sup> Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2009 CATO S. CT. REV. 133, 140 (link); see also Report of Jeffrey Fagan, Ph.D., at 2, *Floyd v. City of New York*, No. 08 Civ. 01034 (SAS) (S.D.N.Y. Oct. 15, 2010), available at [http://ccrjustice.org/files/Expert\\_Report\\_JeffreyFagan.pdf](http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf) (finding that the New York City Police Department employs *Terry* stops in a racially discriminatory manner) (link).

<sup>72</sup> See, e.g., Erik Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 876–88 (1999) (link); cf. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting) (arguing that the special needs doctrine turns search and seizure law into a “patchwork quilt”) (link).

<sup>73</sup> See, e.g., *O’Connor v. Ortega*, 480 U.S. 709, 724–25 (1987) (link); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (link).

<sup>74</sup> Reinert, *supra* note 10, at 209.

<sup>75</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (link). Several challenges to the use of AIT scanners (as well as aggressive pat-downs) have been dismissed pursuant to 49 U.S.C. § 46110, which provides federal appellate courts exclusive jurisdiction to review TSA orders. See *Roberts v. Napolitano*, 798 F. Supp. 2d 7, 10–11 (D.D.C. 2011) (link).

choose to be frisked instead.<sup>76</sup> The opinion's terse analysis of a highly contentious issue in a high-profile case speaks volumes about the level of deference that the TSA will receive from the courts.

As such, Professor Reinert's instinct—preventing gratuitous damage to the Fourth Amendment—is laudable. Moreover, his proposed doctrinal limitation is quite attractive, calling for the suppression of evidence found during special needs searches in ensuing prosecutions unrelated to the special need itself.<sup>77</sup> For instance, a bag of marijuana uncovered during the TSA screening process would be excluded from a subsequent drug case. Actually, I would like to apply this doctrinal move more generally as a (partial) solution to the most troubling forms of pretextual investigations, such as police detentions ostensibly for minor infractions (e.g., most traffic stops) used as an excuse to search for more serious but unrelated offenses (e.g., scouring a vehicle to find drugs).

Unfortunately, these types of proposals face significant hurdles in existing caselaw.<sup>78</sup> Professor Reinert notes that the Supreme Court has not decided the question of “whether an administrative search regime that routinely generated evidence for prosecution could be upheld under ‘special needs.’”<sup>79</sup> In order to avert evidentiary suppression, a negative answer might simply force the judiciary to rely upon a different doctrine, including those grounds that Reinert believes to be more disruptive of search and seizure principles (i.e., consent and reasonableness balancing). This is not just idle speculation, however. Far from broadening the Fourth Amendment exclusionary rule, the Roberts Court has chipped away at this rule with the apparent goal of eliminating it altogether.<sup>80</sup>

Given post-9/11 terrorism anxieties, it is unsurprising that anti-exclusionary rule sentiments are particularly powerful in the context of airport security. For example, two recent appellate court decisions—one federal and the other state—upheld TSA searches that uncovered evidence of child pornography in checked baggage.<sup>81</sup> In each case, agents opened the

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<sup>76</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>77</sup> See Reinert, *supra* note 10, at 220–25.

<sup>78</sup> See, e.g., *Whren v. United States*, 517 U.S. 806, 811–12 (1996) (refusing to invalidate a traffic stop as a pretextual investigation) (link); *United States v. McCarty*, 648 F.3d 820, 830–31 (9th Cir. 2011) (link); *United States v. Marquez*, 410 F.3d 612, 617 (9th Cir. 2005) (“The mere fact that a screening procedure ultimately reveals contraband other than weapons or explosives does not render it unreasonable, *post facto*.”) (link); 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.6(h) 5 (4th ed. 2004).

<sup>79</sup> Reinert, *supra* note 10, at 228 n.109.

<sup>80</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2427–29 (2011) (link); *Herring v. United States*, 555 U.S. 135, 139–48 (2009) (link); *Hudson v. Michigan*, 547 U.S. 586, 590–94 (2006) (link).

<sup>81</sup> See *McCarty*, 648 F.3d at 823–24; *Higerd v. State*, 54 So. 3d 513, 515 (Fla. Dist. Ct. App. 2010), *reh'g denied* (Feb. 4, 2011), *review denied* 64 So. 3d 1260 (Fla. 2011) and *cert. denied*, 132 S. Ct. 521 (2011) (link).

baggage and removed a folder containing documents, which they then inspected, supposedly looking for thin, flat charges known as “sheet explosives.” Photographs found in the respective folders served as the basis for subsequent criminal prosecutions. Both appellate decisions agreed that the agents had conducted an administrative search that requires neither a warrant nor individualized suspicion, because it was “no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives” and was “confined in good faith to that purpose.”<sup>82</sup>

This federal decision is troubling on a number of fronts. In effect, TSA agents may now search any and all items in one’s baggage, given the sweeping claim that explosives “may be disguised as a simple piece of paper or cardboard, and may be hidden in just about anything, including a laptop, book, magazine, deck of cards, or packet of photographs.”<sup>83</sup> Moreover, evidence of an agent’s impermissible motive—for instance, searching a bag for contraband wholly unrelated to terrorist threats—will be ignored so long as the TSA’s “programmatic motive” is airline safety.<sup>84</sup> The appellate panel also engaged in a very un-appellate-like parsing of the record, scrutinizing the district court’s assessments of witness credibility, refusing to afford the usual deference to a trial judge’s factual findings, and even (lightly) reprimanding their lower court colleague.<sup>85</sup>

The federal case may foreshadow judicial acquiescence to the entire TSA search regime, including the type of intrusive searches discussed above and all the figurative baggage they carry. To my mind, however, it was the state court decision that was most telling. After accepting the predictable arguments in favor of the search in question, the court offered an alternative rationale to deny the suppression motion: the damning evidence was admissible pursuant to the “good faith exception” to the warrant requirement, based on the assumption that a reasonably well-trained TSA agent would not have known that the search was illegal.<sup>86</sup> At a minimum, this claim fits uncomfortably with the federal appellate court’s refusal to inquire into an agent’s actual motives for conducting a search.

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<sup>82</sup> *McCarty*, 648 F.3d at 831 (quoting *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (en banc)); *accord Higerd*, 54 So. 3d at 517.

<sup>83</sup> *McCarty*, 648 F.3d at 825. As an aside, several TSA employees have been caught stealing money and property from luggage, with one supervisor receiving kickbacks from his subordinate’s crimes. Logan Burruss, *TSA Officers Arrested After Allegedly Stealing \$40,000*, CNN, Feb. 17, 2011, <http://edition.cnn.com/2011/CRIME/02/16/new.york.tsa.arrests/> (link); *Newark TSA Officer Pleads Guilty to Theft from Passengers*, REUTERS, Feb. 14, 2011, <http://www.reuters.com/article/2011/02/14/us-airport-bribes-idUSTRE71D72V20110214> (link); *TSA Agents Arrested in Case of Missing Cash at Airport*, REUTERS, Feb. 16, 2011, <http://www.reuters.com/article/2011/02/17/us-airport-theft-idUSTRE71G08I20110217> (link).

<sup>84</sup> *See McCarty*, 648 F.3d at 832.

<sup>85</sup> *See id.* at 832–38.

<sup>86</sup> *Higerd*, 54 So. 3d at 519 (citing *Herring v. United States*, 555 U.S. 135 (2009)).

But it does demonstrate a readiness to find a constitutional exception for post-9/11 airport security and, more generally, antiterrorism measures designed to prevent another attack.

#### CONCLUSION

In the end, I just wish everyone would be a bit more honest. What is at play here is not a previously recognized exception to the Fourth Amendment—consent, good faith, special needs, and so on—but instead an entirely new exemption from otherwise applicable requirements, driven by an abiding fear of al Qaeda and its now-deceased kingpin rather than a reasoned assessment of terrorism-related risks. Let's call it what it is: *The Bin Laden Exception to the Constitution*. If nothing else, putting a name to the systematic evasion of the nation's most hallowed legal text might force some to face their own irrationality and question the wisdom of bending the Constitution, as well as spilling vast amounts of blood and treasure, all for the sake of one evil man and his outlaw organization.