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Comment: America's Anti-hijacking Campaign -- Will It Conform to Our Constitution?

*Addie S. Ries*¹

On September 11, 2001, tragedy struck the United States after nineteen hijackers slipped past security in three American airports and, wielding only knives and box cutters, successfully gained control of four United States commercial airliners. The terrorists crashed two planes into the World Trade Center, collapsing the Twin Towers and killing more than 3000 people, and rammed a third plane into the Pentagon where there were an additional 189 casualties.² The ability of hijackers to use our commercial jets as weapons of mass destruction proves that airport security is not only a concern for airline passengers, but also a threat to national security.

Recovery was underway September 27th, when President Bush proclaimed after reopening the nation's airports that the United States was once again "open for business."³ But business in the United States has been slow since the attacks. Seven weeks after the attacks, House Minority Leader Richard Gephardt said that "[t]he biggest thing that is interrupting our economy is fear,

¹ J.D. Candidate 2003, University of North Carolina School of Law.

² CNN, *Recovery: Fed Expectations Fuel Rally*, at <http://www.cnn.com/2001/US/11/05/rec.recovery.facts/index.html> (Nov. 5, 2001) (on file with the North Carolina Journal of Law & Technology).

³ Jim Burns, *Bush Outlines Airline Safety Plan*, CNSNews.com, available at <http://www.newsmax.com/archives/articles/2001/9/27/160845.shtml> (Sept. 27, 2001) (on file with the North Carolina Journal of Law & Technology).

especially fear of getting onto airplanes.”⁴ Consequently, commercial airlines have seen sharp declines in ticket sales as Americans are staying close to home or choosing alternative means of travel for fear of flying what were once dubbed the “friendly skies.” Although Congress has authorized a \$15 billion bailout package to help the airlines recover, this measure alone is unlikely to sustain the airlines unless it is accompanied by an increase in ticket sales.⁵

It is imperative to restore consumer confidence in America’s airlines in order to stimulate demand. Thus, the American people, still reeling from the September 11th attack and fearful of future attacks, need to be reassured that airport security is being improved to ensure their safety in the air and prevent other terrorists from using commercial airliners as weapons of mass destruction.

While increased airport security is necessary to protect Americans in the air and on the ground, it is vital to consider the effects of new security measures on the personal freedoms guaranteed by the Constitution. United States history, through the internment of Japanese Americans during World War II⁶ and the Palmer raids during the Cold War,⁷ proves that it is all too easy to

⁴ *House Vote on Federalizing Airport Screeners Due Today*, USA TODAY, Nov. 1, 2001, at 9A.

⁵ CNN, *Bush Signs Airline Bailout Package*, available at <http://www.cnn.com/2001/US/09/22/rec.airline.deal/index.html> (Sept. 23, 2001) (on file with the North Carolina Journal of Law & Technology).

⁶ Newsweek Web Exclusive, *Questions and Answers: The Legacy of Internment Camps*, at <http://www.msnbc.com/news/644274.asp> (Oct. 17, 2001) (on file with the North Carolina Journal of Law & Technology).

⁷ Michael Reese, *The Cold War and Red Scare in Washington State*, Center for the Study of the Pacific Northwest, available at

forget civil liberties in times of insecurity. Unfortunately, the immediate situation poses many of the same complex problems that led to the adoption of the above security measures, which have since been blemishes on our long record of commitment to democracy and human rights. Because the terrorists walk among law-abiding citizens in this country and have been able to exploit our civil rights for their evil purposes, Americans' ability to protect against additional attacks without somewhat restricting those rights is impeded. The threat of future attacks creates a sense of urgency that further increases the pressure on Congress to enact laws for the immediate protection of citizens that may later be seen as contrary to our belief in the principles of democracy and freedom.

The very nature of the current situation, however, provides even more compelling reasons why Americans should not forsake their constitutional freedoms. In the past, the United States has engaged in wars to help free nations from government oppression and human rights violations. Now we have been attacked by a group of terrorists who seek to destroy that dedication to freedom and human rights in our own country as well as in other parts of the world. These terrorists will have achieved victory if we are frightened into giving up some of our hard-earned freedoms that they so vehemently despise. Columnist Jacob Sullum writes that "[i]f [our government] rushes to adopt authoritarian measures . . . 'freedom itself' could be added to the list of casualties."⁸ Rather than helping terrorists achieve their goals, every safety measure adopted to combat terrorism should be evaluated as to its

<http://www.washington.edu/uwired/outreach/cspn/curcan/main.html> (last visited Nov. 14, 2001) (on file with the North Carolina Journal of Law & Technology).

⁸ Jacob Sullum, *Slow Down*, at

<http://www.townhall.com/columnists/jacobsullum/js20011002.shtml> (Oct. 2, 2001) (on file with the North Carolina Journal of Law & Technology).

constitutionality. We should opt for measures that will promote safety with the least effect on Americans' personal freedoms.

This Comment addresses the security measures that are currently being used and those currently being considered for use in our nation's airports. Sections I and II will discuss the constitutional protections of passengers' civil liberties prominently involved in this analysis. The analysis of whether each of these technologies pass muster under the Fourth and Fifth Amendments of our Constitution is contained in Section III. Section IV outlines a constitutional solution.

I. The Fourth Amendment -- Freedom from Unreasonable Search

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁹

While the text of the Fourth Amendment may not appear to govern airport security measures on its face, federal courts have interpreted it to apply to the pre-boarding searches of passengers and their baggage in airports. In *Katz v. United States*, the Supreme Court held that the Fourth Amendment protects

⁹ U.S. CONST. amend. IV.

individual privacy against only unreasonable governmental intrusion.¹⁰ In order to determine which intrusions constitute “searches” and therefore are subject to the protections of the Fourth Amendment, the Supreme Court has adopted the test enunciated by Justice Harlan in his concurrence in the *Katz* case. This test includes a two-pronged analysis. First, the person being searched must have an actual, subjective expectation of privacy. Second, that expectation must be one that society accepts as a reasonable one.¹¹

Furthermore, a “search” has been held to encompass examinations made by private airline employees who are not government actors. In *United States v. Davis*, the Ninth Circuit explained that generally, any search of a passenger or her baggage conducted pursuant to a government-initiated search program will implicate the Fourth Amendment even when performed by airport personnel.¹² The outer boundary of this principle is defined in *Gold v. United States*, where the Ninth Circuit stated that an airport search would cease to constitute governmental action subject to Fourth Amendment protections when the search is “an independent investigation by the carrier for its own purposes.”¹³

However, because of the extraordinary nature of airport searches and the limited time available in which to conduct them, courts have commonly justified airport searches through analyses

¹⁰ *Katz v. United States*, 389 U.S. 347, 350 (1967).

¹¹ *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (holding that persons have a reasonable expectation of privacy in telephone and other wire communications, and therefore searches of these communications are subject to Fourth Amendment protections).

¹² *United States v. Davis*, 482 F.2d 893, 904 (9th Cir. 1973).

¹³ *Gold v. United States*, 378 F.2d 588, 591 (9th Cir. 1967).

that avoid a warrant requirement under the Fourth Amendment.¹⁴ In an opinion upholding the use of warrantless searches conducted without probable cause during roadblocks, the Supreme Court stated that “[w]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the [g]overnment’s interests to determine whether it is

¹⁴ When dealing with searches in the airport security context, courts dealing with the issue have used the following three rationales for dispensing with the warrant requirement of the Fourth Amendment:

1) Implied Consent – A person can consent to a search and by doing so waives her Fourth Amendment protection that might otherwise require the person performing the search to prove that probable cause existed to warrant the particular search. Courts often refer to the implied consent doctrine in upholding airport searches as constitutional when the persons searched had the option to either resist the search and forgo the opportunity to enter the restricted area, or to undergo the search and proceed in the boarding process. *See United States v. Miner*, 484 F.2d 1075 (9th Cir. 1973).

2) Administrative Search – This approach was carried over to searches in the airport context by the court in *United States v. Davis*. This approach allows security officers to search passengers without a warrant provided that the following three requirements are met. First, the search must be “conducted as a part of a general regulatory scheme in furtherance of an administrative purpose” (here, preventing weapons from being taken on planes). Second, the passenger must have consented in that she voluntarily advanced through the security checkpoint. Third, the search must meet the general Fourth Amendment reasonableness requirement. *Davis*, 482 F.2d at 893.

3) Critical Zone – This test, found in the *Moreno* and *Skipwith* line of cases, allows searches in airport boarding areas by analogizing these searches to the warrantless searches permitted at the nation’s borders on the theory that both are “critical zones.” *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973). *See infra* note 15 and accompanying text for the “special needs” test that the Supreme Court has stated in dicta would apply to remove the probable cause and warrant requirements for airport searches.

impractical to require a warrant or some level of individualized suspicion in the particular context.”¹⁵ Although the Supreme Court has not yet specifically applied the special needs doctrine to airport searches, in dicta it has repeatedly referred to airport security as the ideal setting for the use of this doctrine.¹⁶

Under all theories, however, courts continue to demand that the searches permitted under these theories adhere to the reasonableness requirement of the Fourth Amendment.¹⁷ The Supreme Court has held that a search may satisfy the reasonableness requirement if, after balancing the equities, the government's need to conduct the search outweighs the intrusion on the individual's rights and privacy.¹⁸ Thus, the reasonableness of airport searches must be determined by weighing the exigencies of national security (including the level of individualized suspicion aroused by the passenger) against the passenger's civil liberties guaranteed by the Constitution.

II. The Fifth Amendment -- The Right to Travel

In *Kent v. Dulles*, Justice Douglas wrote the following on behalf of the Supreme Court:

The right to travel is a part of the “liberty” of which the citizen cannot be deprived without the due process of law under the

¹⁵ *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990) (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989)).

¹⁶ *See, e.g., Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 608-13 (1989); *Sitz*, 496 U.S. at 449-50.

¹⁷ *Supra* note 14.

¹⁸ *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

Fifth Amendment. . . [D]eeply engrained in our history [is] this freedom of movement . . . [a]cross frontiers in either direction, and inside frontiers . . . Freedom of movement is basic in our scheme of values.¹⁹

Air travel is not the only form of travel, and one could argue that greatly restricting the personal liberties of airline passengers does not deny them the freedom to travel. However, while airline security is the main issue at hand, the standards set for searching air passengers can and are likely to be extended to passengers on boats, buses, trains, and subways, as these means of transportation are also susceptible to terrorism. Thus, it must be acknowledged that the technologies accepted for use in airport security will affect a person's right to travel by dictating to what level of intrusion a person must submit in order to exercise her right to travel by any public means.²⁰

In balancing the competing interests of passenger privacy and airport security, the Ninth Circuit in *Davis* stated that “[a]lthough the right to travel is not absolute, and its scope and limitations remain uncertain, it is firmly settled that freedom to travel at home and abroad without unreasonable government restriction is a fundamental constitutional right of every American

¹⁹ Jamie L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL LAW REV. 847, 860 (2000) (quoting *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958), *overruled by* *Regan v. Wald*, 468 U.S. 222 (1984)).

²⁰ Many courts have considered whether the use of magnometers and baggage scanners violate a person's right to travel but have concluded in the negative due to the limited intrusion and high government interest. *See, e.g., United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

citizen.”²¹ The government’s interest in conducting the searches is concededly stronger now that it is clear that all Americans, not just those exercising the right to travel, are at risk. However, the above passage implies that there might be some particularly intrusive searches to which passengers should never be required to submit in order to exercise this right to travel.

The Supreme Court has held that “even though the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”²² This mandates that the availability of other, more narrowly tailored or less intrusive measures be considered in determining whether the search of an airline passenger exercising her constitutional right to travel is reasonable.

The Fifth Circuit Court of Appeals specified in *United States v. Skipwith* that the reasonableness equation must also “take into account the likelihood that the search procedure will be effective in averting the potential harm.”²³ Thus, the crucial question for this analysis is whether a search is a reasonable invasion of passengers’ privacy considering the perceived governmental interest and the effectiveness and availability of more narrowly tailored means.

²¹ *Davis*, 482 F.2d at 912.

²² *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247, 252 (1960).

²³ *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973).

III. Analysis

A. Existing Technology – Magnometers and Baggage Scanners

Passengers in all airports currently have to walk through a magnometer, commonly known as a metal detector, which will sound an alarm if the person is carrying a certain amount of metal. This enables security personnel to determine whether the passenger is carrying a gun, knife or other weapon on her person. Baggage scanners similarly allow the operator to see the outline and consistency of objects packed inside the passenger's baggage to ascertain whether the passenger is attempting to board with weapons or explosives.

Courts nationwide have approved the use of these devices to search all passengers seeking to enter airport boarding areas as a reasonable search in light of the limited intrusion to the privacy of passengers and the great need to prevent hijackings.²⁴ However, when baggage scanners and magnometers were integrated as a part of routine airport security in the early 1970s, passengers scoffed at the idea of having someone look into their bags and assess their personal belongings.²⁵ Where most airports had previously relied primarily on profiling, the Federal Aviation Administration required that by January 5, 1973, magnometers and baggage

²⁴ See, e.g., *United States v. Pulido-Baquerizo*, 800 F.2d 899 (9th Cir. 1986); *United States v. Slocum*, 464 F.2d 1180 (3rd Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972) (affirming the routine use of magnometers and baggage scans for airport security).

²⁵ WAYNE LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* §10.6 at 636-37 (3d ed. 1996) (in most airports prior to 1973, only passengers selected by the profiling system were subjected to a magnometer search).

scanners be installed to search all passengers and their carry-on luggage.²⁶ These technologies were successful in reducing the number of hijackings, and Americans ultimately came to see these measures as not only reasonable but also essential. Indeed, even before the September 11th hijackings, few passengers would dare to board a commercial airliner without walking through a metal detector and seeing their carry-on luggage checked for fear of their safety in the air being compromised.

B. BodySearch

BodySearch, manufactured by American Science and Engineering (AS&E), gives security personnel virtual x-ray vision; it allows the operator to see through the clothing of the passenger by producing an image of the human form so sharp that “the shape of a person’s navel is visible, along with the shapes of other, more private parts.”²⁷ The machine has a panel that the passenger stands against as the operator activates the machine, sending radiation that penetrates a few millimeters below the skin to produce an image of the passenger’s nude body and any object that may be concealed beneath her clothes.²⁸ This image is produced by a low power x-

²⁶ *Davis*, 482 F.2d at 902-03.

²⁷ Lisa Lipman, *U.S. Airport Searches Reveal More*, Associated Press, Cnews, available at http://www.baseball.ca/CNEWSFeatures0008/21_bodysearch.html (Aug. 21, 2000) (on file with the North Carolina Journal of Law & Technology).

²⁸ Deepti Hajela, *The Naked Truth*, Associated Press, available at <http://www.abcnews.go.com/Sections/travel/DailyNews/scanner991230.html> (Dec. 30, 1999) (on file with the North Carolina Journal of Law & Technology).

ray that uses the same backscatter technology used to scan carry-on luggage.²⁹ Each machine costs approximately \$140,000.³⁰

A BodySearch scan would unquestionably be considered a search for the purposes of the Fourth Amendment under the *Katz* test.³¹ People wearing clothes do so because they have an expectation of privacy in what lies beneath – an expectation that society not only finds reasonable, but demands as a matter of course. Furthermore, the Supreme Court recently held that the use of a thermal imaging device capable of gathering information about the inside of a home that could not otherwise be obtained without a physical search of the premises constitutes an unreasonable search.³² It follows that the use of a similar device allowing security to see portions of a person's body that cannot otherwise be viewed without conducting a physical search, would also be held to be a search for the purposes of the Fourth Amendment.

Privacy advocates oppose the use of this technology as a pre-boarding search mandatory for all passengers. One such group, Privacy International, a Washington-based organization, found American Science and Engineering worthy of its annual "Big Brother" award due to its marketing of this product. However, most Americans are not likely to be offended by the current use of these machines by the United States Customs Service to detect contraband at international airports in Atlanta,

²⁹ American International Group, Inc., *Airport Report*, available at <http://www.airportnet.org/depts/publications/arnews/8-15-99.htm> (Aug. 15, 1999) (on file with the North Carolina Journal of Law & Technology).

³⁰ Lipanl, *supra* note 27.

³¹ See *supra* note 11 and accompanying text.

³² See *Kyllo v. United States*, 533 U.S. 27 (2001).

Chicago, Houston, Los Angeles, Miami, and New York.³³ Proponents assert that the current use of BodySearch actually enhances passengers' privacy because it allows those who have aroused a minimum level of suspicion among customs officers a less intrusive alternative to a frisk or strip search – one that does not require the passenger to be touched or viewed openly by the investigating agent.³⁴

In *United States v. Skipwith*, the court analogized that since only “mere suspicion” is required to search a person's body at the borders, this low level of suspicion should also apply to searches of persons at the boarding areas of airports, as these places are also critical zones.³⁵ The *Skipwith* court also noted that, while the scope of the search may encompass anything reasonably necessary to assure the agent that the passenger has no weapons, “due process demands that the imposition on the citizen be no greater than the situation requires.”³⁶ Thus, the use of BodySearch as an alternative for suspicious passengers transgressing American borders is likely to be justified since courts have found its more intrusive counterparts (traditional frisks and strip searches) to be reasonably necessary in preventing weapons from being carried aboard planes.³⁷

Even the use of BodySearch on domestic passengers who arouse a minimal level of suspicion would likely be deemed

³³ Gerry Volgenau, *Smugglers Left Bare by New Customs' X-ray*, DALLAS MORNING NEWS, Apr. 9, 2000, at 3G.

³⁴ *Id.*

³⁵ *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

³⁶ *Id.* at 1277 (quoting dissent of Aldrich, J., *id.* at 1280).

³⁷ *See generally* *United States v. Rodriguez*, 592 F.2d 553 (9th Cir. 1979); *United States v. Singh*, No. 98-1265, 1998 U.S. App. LEXIS 28999 (8th Cir. Nov. 18, 1998) (per curiam).

reasonable in light of both the national security crisis at hand and the fact that these searches would be replacing either frisks or strip searches, at the passenger's option. Also, the national security interest in checking for nonmetallic weapons is now greater than ever before due to the recent anthrax breakouts and threat of biological warfare. Thus, the ability of BodySearch to detect nonmetallic substances would make it a relatively quick and accurate tool for law enforcement in conducting searches of suspicious passengers.

Airports were reluctant to consider the widespread use of this technology before September 11th, but Ralph Sheridan, CEO of American Science and Engineering, "found himself speaking to a newly receptive government audience in Washington" in the days after the attack.³⁸ Still, the use of this technology on all passengers poses serious problems for American travelers, as it would require every passenger to submit to a "virtual" strip search absent any suspicion of wrongdoing whatsoever. No longer simply an alternative, this would force the innocent majority of passengers to subject their bodies to unnecessary radiation just to exercise the right to travel. The United States Customs Service claims that the radiation experienced from BodySearch is not harmful and has indicated that "the radiation is less than what [one receives] in an hour of daily life from natural background radiation."³⁹ However, Robert Peters, vice president of sales and marketing for AS&E, admits that "whether to exempt pregnant women and children from

³⁸ Steven Levy, *A High-Tech Home Front*, NEWSWEEK, Oct. 8, 2001, at 43, 44.

³⁹ Volgenau, *supra* note 33.

exposure to the low level radiation” is a consideration before BodySearch can be more widely used.⁴⁰

The Ninth Circuit wrote in *Davis* that “governmental restrictions upon freedom to travel are to be weighed against the necessity advanced to justify them, and a restriction that burdens the right to travel ‘too broadly and indiscriminately’ cannot be sustained.”⁴¹ If ever a search could meet these criteria and be rejected in the face of a most urgent need, it would seem that a search requiring every passenger to submit her body to observation and radiation before being permitted to travel on a plane must qualify. This supposition is enhanced by the fact that other, more narrowly tailored means are available and could be highly effective. Moreover, while the governmental interest in protecting the public from hijackings may be extraordinarily great on domestic (as compared to international) flights in light of recent events, Americans’ constitutional right to travel is assumed to be susceptible to fewer restrictions in the case of domestic travel as opposed to foreign travel.⁴² Therefore, it is not at all clear that the use of BodySearch as part of the regular pre-flight screening process would pass the reasonableness requirement of searches under the Fourth Amendment.

The intrusion of a BodySearch scan would be effective to show the presence of contraband such as drugs and weapons. However, this intrusion would seem unnecessary to disclose

⁴⁰ Sheila R. Cherry, *Are the Friendly Skies the Safest Skies?*, available at <http://www.insightmag.com/archive/200101015.shtml> (Jan. 1, 2001) (on file with the North Carolina Journal of Law & Technology).

⁴¹ *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973) (quoting *Apetheker v. Secretary of State*, 378 U.S. 500, 505 (1964)).

⁴² *See United States v. Laub*, 385 U.S. 475, 481-82 (1967); *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958).

hidden weapons, as magnometers that are carefully monitored are already capable of alerting security to the presence of any significant amount of metal. Thus, it follows that the addition of BodySearch to mandatory airport security measures would primarily serve to reveal drugs and other nonmetallic substances that could not be otherwise identified. While the prevention of drug trafficking should not justify the use of radiation to view passengers' naked bodies, the possibility of discovering biological agents may justify the increased use of this technology in some instances.

Furthermore, security failures have been attributed not to the malfunction or inadequacy of the magnometers, but to poor monitoring of the machines. This is the true problem that, if not corrected, would surely carry over into the monitoring of BodySearch and limit any added effectiveness the machines could offer. Security lapses due to improper monitoring are well documented; in fact, many airlines had received fines from the FAA in the months prior to the September 11th attacks for failure to detect test objects at security checkpoints.⁴³ Airport personnel in charge of monitoring current security measures have been accused of inadequacies ranging from simple inattentiveness to poor hearing that limit their ability to hear the alarm sound among the clatter of crowds of passengers.⁴⁴ Indeed, improved training of

⁴³ MSNBC, *Reagan National to Open Thursday*, at <http://www.msnbc.com/news/631075.asp> (Oct. 2, 2001) (on file with the North Carolina Journal of Law & Technology).

⁴⁴ Blake Morrison and Gary Stoller, *Weapons Still Elude Airport Security Monitors*, available at <http://www.usatoday.com/hphoto.htm> (Oct. 2, 2001) (on file with the North Carolina Journal of Law & Technology). One security screener at Daytona Beach International Airport in Florida, age 72, complains that at least 3 screeners are hard of hearing and frequently do not respond when

security personnel is the more narrowly tailored means that could produce the desired result without unnecessary intrusion into passengers' desire to avoid overly intrusive searches.

It is highly probable that the September 11th hijackers chose knives and box cutters because these items are far more likely to escape security detection than other, more efficient weapons such as guns or bombs. Even if detected, these items were not very likely to arouse the suspicion of a hijacking. Thus, the presence of BodySearch would not likely have prevented the September 11th hijackings and may not prevent future attacks by terrorists who are aware they will be subjected to BodySearch and will have the opportunity to alter their behavior accordingly. Instead, the consistent use of BodySearch on all passengers would only make innocent travelers feel violated and ensure that terrorists carry their weapons in carry-on luggage as opposed to on their person.

In order for surveillance to be effective, it is vital that airport security be increased in ways that foster legitimate consumer confidence without causing potential passengers to turn to alternative methods of travel. The long waits, the embarrassment, and the demoralizing effect of treating innocent Americans like common criminals would likely encourage passengers to opt for other methods of transportation, thus undermining the objective of getting Americans back on planes. Because BodySearch is so intrusive, and because more effective and more narrowly tailored means are available, it is doubtful that the use of this technology pursuant to a government mandate

the alarm on the metal detectors is triggered. One 75-year-old screener has glaucoma and is unable to see clearly objects that appear on the baggage monitoring screen. *Id.*

would meet the reasonableness requirement of the Fourth Amendment.

If, however, private airlines were to institute BodySearch on their own initiative in order to increase safety in excess of that provided pursuant to the government's standards, passengers may view such use of the technology as an acceptable alternative to an otherwise-objectionable governmental search. Such a scheme would offer those that are willing to accept such intrusion based on the belief that BodySearch will increase their chances of a safe flight the option to choose airlines that employed the machines at their own expense without limiting the rights of others. This would likely survive judicial review insofar as it would be truly independent and not merely a sham for the government to have private companies do what they themselves cannot under the Fourth Amendment.⁴⁵

This technique would likely have far greater support among passengers, because it would not carry the same negative stigma as a search conducted by all airlines pursuant to a government mandate. American consumers do not hesitate to shop in department stores that employ video cameras in dressing rooms to protect customers from the economic consequences of shoplifting. Similarly, consumers who would choose an airline on the basis of whether the airline did or did not use BodySearch would feel as if they had exercised an economic option -- not that they had been deprived of a civil liberty. While neither a department-store camera nor BodySearch is capable of eradicating shoplifting or hijacking by itself, if instituting BodySearch helps increase consumer confidence, then we should not prevent airlines from

⁴⁵ See *Davis*, 482 F.2d at 904.

protecting their revenues in much the same way that department stores do.

C. Facial Structure Recognition

The biometrics industry has developed a security camera that can scan ten to fifteen faces per second and match them against a database of a selected category of people, such as suspected terrorists whose profiles are already on file.⁴⁶ When the system discovers a potential match of a captured image with a pre-selected image in the database, security would be notified immediately through an Internet alert.⁴⁷ As with BodySearch, this technology faced broad opposition before the September 11th attacks but is now hailed with wide support.⁴⁸ The United States Department of Transportation has recently inquired about the possibility of using a Visionics Corp. product named FaceIt for airport security.⁴⁹ The stock of companies manufacturing face-scanning technologies has also skyrocketed since the attacks, and the first facial recognition system was scheduled to be in place in

⁴⁶ Barnaby J. Feder, *Exploring Technology to Protect Passengers with Fingerprint or Retina Scans*, N.Y. TIMES, Sept. 19, 2001, at B3. For a more detailed look at this technology, see Kanya Bennett, Comment, *Can Facial Recognition Technology Be Used To Fight the New War Against Terrorism: Examining the Constitutionality of Facial Recognition Surveillance Systems*, 3 N.C. J.L. & TECH. 151 (2001), elsewhere in this issue.

⁴⁷ Robert O'Harrow Jr., *Facial Recognition System Considered For U.S. Airports*, WASHINGTON POST, Sept. 24, 2001, at A14.

⁴⁸ *Id.*

⁴⁹ *Id.*

an unnamed American airport by early November 2001.⁵⁰ However, several concerns need to be addressed before this technology can be used effectively and in compliance with the Fourth Amendment.

The debut of facial scanners into public security use within the United States sparked bitter controversy between those in the security industry and privacy advocates. Facial scanners manufactured by Viisage were placed at the entrances to Raymond James Stadium to scan the faces of unsuspecting football fans attending the 2001 Super Bowl in Tampa, Florida.⁵¹ The fans were later outraged to find that their faces had been encoded by this machine without their knowledge or permission.⁵² Thomas Colatosti, CEO of Viisage, defends his product by arguing that facial scanning is not an invasion of privacy, since faces are not private and can be captured on film any time someone appears in public.⁵³

In this sense, facial scans might escape the Fourth Amendment reasonableness requirement altogether, as it is doubtful that people have a reasonable expectation of privacy in

⁵⁰ Reuters, *Airport to Install Face-Scan System*, available at <http://www.msnbc.com/news/638161.asp?0si> (Oct. 4, 2001) (on file with the North Carolina Journal of Law & Technology).

⁵¹ ACLU, *Firm Defends "Snooper Bowl" Technology*, at <http://www.aclu.org/news/2001/w030901a.html> (Mar. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

⁵² *Id.* Thomas Colatosti, CEO of Viisage, the company who made the devices used at the Super Bowl, braved a crowd of angry spectators trying to defend his product as a useful security device and assured fans that any image that did not match a criminal record was discarded. However, the product's controversial foray into public security at the Super Bowl led to the arrest of only a few scalpers and pick-pockets. *Id.*

⁵³ *Id.*

the appearance of their faces under the plain view doctrine set forth by the Supreme Court in *Harris v. United States*.⁵⁴ This doctrine provides that anything discovered by officers who have the right to be in the position to view the object or activity is not a search within the meaning of the Fourth Amendment.⁵⁵ The Court has applied this doctrine to find that a search did not occur for the purposes of the Fourth Amendment simply because the view of the officer was enhanced by various technologies.⁵⁶

However, it is not simply the unauthorized photographs that have privacy advocates “all shook up” – it is the personal information that will be attached to these images and the tracking ability that the databases for these machines offer.⁵⁷ The traditional understanding of the freedom of movement to which all Americans are entitled does not include the monitoring and documentation of those movements. Citizens who are not attempting to elude law enforcement expect to come and go when, where, and with whom they want without government surveillance. Thus, facial scans may be deemed searches under the *Katz* test discussed earlier insofar as innocent Americans arguably have a reasonable expectation of privacy as to their behavioral patterns.

Thus, the software databases created for facial recognition systems should be closely regulated to prohibit the inclusion of

⁵⁴ *United States v. Harris*, 403 U.S. 573 (1971). See also Kanya Bennett, Comment, *Can Facial Recognition Technology Be Used To Fight the New War Against Terrorism: Examining the Constitutionality of Facial Recognition Surveillance Systems*, 3 N.C. J.L. & TECH. 151 (2001).

⁵⁵ *Id.*

⁵⁶ See generally *Texas v. Brown*, 460 U.S. 730 (1983); *United States v. Knotts*, 460 U.S. 276 (1983).

⁵⁷ John D. Woodward Jr., *And Now, the Good Side of Facial Profiling*, WASHINGTON POST, Feb. 4, 2001, at B4.

profiles and personal data of innocent Americans.⁵⁸ Civil libertarians dismiss the argument that “if you have nothing to hide, you have nothing to fear” by reminding us that this was the slogan of the Stasi, the German secret police force responsible for arguably the most hideous infringement on human rights in the modern world.⁵⁹ Our forefathers also recognized this possibility of government abuse when they enacted the Fourth Amendment reserving for all citizens, guilty and innocent, a minimum level of protection against government invasions. John Woodward, a senior policy analyst at Rand, points out that there could be other concerns in that people who may have “paid their debt[s] to society” might be subjected to intense scrutiny,⁶⁰ which would be most embarrassing and discouraging for someone who has truly turned over a new leaf.

However, federal laws could be enacted to ensure that this technology is not used improperly. If the databases used in facial recognition systems were governed by strict federal legislation requiring that all images not matched to a print of a certain class of criminals and terrorists be promptly discarded, this technology could actually promote privacy by providing security without great intrusion to the individual. The profiles that may be selected for inclusion in the database should be limited to only known and suspected terrorists and possibly dangerous criminals, as opposed to all citizens with criminal records. This would reintroduce the probable cause element of the Fourth Amendment and assuage the

⁵⁸ See Feder, *supra* note 46.

⁵⁹ SchNews, *Pubic Enemy No. One*, available at

<http://www.schnews.org.uk/archive/news118.htm> (May 2, 1997) (on file with the North Carolina Journal of Law & Technology). This website also offers a picture of an image collected from a BodySearch scan.

⁶⁰ Woodward, *supra* note 57.

fears of those concerned with the maintenance of a large database used to track individuals' movements.

In the meantime, however, the inaccuracy of this technology presents another obstacle to the immediate use of this technology in airports. Recall that the *Skipwith* court held that the effectiveness of a search is a major consideration in determining whether it will meet the reasonableness requirement.⁶¹ Visionics markets its product FaceIt as being superior to the downfalls of human visual identification of a terrorist profile because it is "resistant to changes in lighting, skin tone, eyeglasses, facial expression and hair and is robust with respect to pose variations, up to 35 degrees in all directions."⁶² However, these capabilities may be insufficient as a government study "showed a 43 percent error rate of false negatives - a failure to properly identify posed photographs of the same person taken 18 months apart. In other words, persons who should have been caught were not. Put another way: if Osama bin Laden were to stare in the camera at one of our airports, the technology would have no more chance than a coin toss of properly identifying him."⁶³

Thus, the limitations of this technology might present even bigger problems when the photographs are not posed, because while mugshots of American criminals are readily available, suspected terrorists are unlikely to willingly pose for the camera.

⁶¹ See *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973).

⁶² See *The Underlying Algorithm*, Visionics Corp., available at <http://www.visionics.com/faceit/tech/lfa.html> (last visited Oct. 12, 2001) (on file with the North Carolina Journal of Law & Technology).

⁶³ ACLU, *Airport Security: Increased Safety Need Not Come at the Expense of Civil Liberties*, available at [http://www.aclu.org/difficult days/facts-airport.html](http://www.aclu.org/difficult%20days/facts-airport.html) (last visited Sept. 21, 2001) (on file with the North Carolina Journal of Law & Technology).

This would make facial recognition technology primarily useful for tracking only recently photographed domestic criminals, who may be relatively harmless. In expending security resources and manpower to monitor and maintain the scanners and their databases, many unphotographed terrorists could remain anonymous and be able to board planes with less scrutiny. The effectiveness of this technology could increase over time, however, as more photographs of each suspected terrorist could be added to the database, thus increasing the probability of an accurate match. Although the government interest in conducting these searches is high and the intrusion is relatively slight if properly regulated, the limited effectiveness and availability of other means may weigh against facial scans being found reasonable until the accuracy of the technology can be improved.

For the immediate future, more adept airport employees would arguably be capable of providing better security at lower costs to passengers' privacy and pocketbooks. Airport employees are already available to man the security checkpoints. These employees should be trained to recognize profiles and other physical traits of suspected terrorists along with any noticeable behavioral or personal characteristics. Accurate facial scanning could, however, provide law enforcement with a distinct advantage by supplementing human attempts to identify suspicious passengers with an electronic analysis that cannot be fooled by a different style of dress, makeup, or change in hair or eye color. Until these improvements are made and the necessary laws enacted, there are better alternatives to add to our security arsenal.

D. Eye Scans

Many advocate using iris or retina scans as an alternative. These methods of biometric identification are highly reliable since the inside of an eye does not change with time. Retina scans would identify passengers by the distinctive patterns of blood vessels that mark each person's retina.⁶⁴ Iris scans rely on the unique features of each person's iris, the colored part of the eye, for identification.⁶⁵ Unlike facial recognition, this technology cannot operate from afar. Passengers would be required to have their eyes scanned well in advance of boarding in order for security personnel to ascertain the identity of each passenger and whether the scan matches that of a known terrorist. This scan would unquestionably be a search within the meaning of the Fourth Amendment, as one has the ultimate expectation of privacy as to the intricate details of the inside of her body, in addition to the reasonable expectation that an innocent passenger has as to her movement patterns. The image obtained from the mandatory scan would have to be encoded in some sort of "smart card," similar to a domestic passport.

Paul Beverly, VP of smart cards at SchlumbergerSema, reports that the smart card movement was already on the fast track before the September 11th attacks.⁶⁶ Civil liberties groups vehemently oppose the mandatory use of this technology for public security. These groups fear that the use of eye scans would require

⁶⁴ Feder, *supra* note 46.

⁶⁵ *Id.*

⁶⁶ Levy, *supra* note 38. Policymakers have toyed with the idea of implementing a mandatory national ID card system for years which would be the ultimate use of such smart cards; this debate, while important, is beyond the scope of this Comment.

everyone to submit to an eye scan that could be used to track the movements of innocent citizens and pave the way for a national ID card - an idea already opposed on many privacy grounds.⁶⁷ Barry Steinhardt of the ACLU compares biometric security to the techniques employed by “Big Brother” in George Orwell’s *1984* and says, “We are now approaching a time when we will live in a surveillance society where all our movements and actions will be monitored.”⁶⁸ Indeed, while a database maintained for the purposes of facial recognition could be edited to include only criminals’ and terrorists’ “face prints,” the databases contemplated for use with eye scans would include the identifying image and personal data of all innocent people.⁶⁹

Moreover, this database is seriously ineffective if it does not include the scanned images of the eyes of terrorists - who are unlikely to attend their mandatory eye scan appointments. Even if eyes scans were done at birth, such a coordinated international effort as would be necessary to be effective in prohibiting terrorists from boarding our planes is unlikely. Thus, this measure would be hard-pressed to pass the reasonableness test of the Fourth Amendment, because this type of search does not provide safety against the immediate terrorist threat nor any threat in the near future due to the large number of years it would take to collect all the identifying information and compile the massive database. The extremely intrusive nature of this surveillance system when compared to the non-intrusive alternatives currently available weigh against the likelihood that this type of search can be held constitutional.

⁶⁷ See *id.* See also Laurent Belsie, *Slide Toward Surveillance Society*, THE CHRISTIAN SCIENCE MONITOR, Feb. 26, 1999, at 1.

⁶⁸ Belsie, *supra* note 67.

⁶⁹ See Levy, *supra* note 38.

IV. Solution

AS&E's Ralph Sheridan was correct when he said, "There is no single perfect technology We have to throw up a gantlet."⁷⁰ Instead of buying into a false sense of security and allocating our resources in a way that diverts attention from the true cause of the problem, it is necessary to identify measures that we can take to produce an effective and constitutional solution.

Airport security legislation signed by President Bush on November 19, 2001, does just that.⁷¹ The act mandates that all airport screeners will become federal employees for the next three years and will be subject to increased training and background checks.⁷² These employees will also receive better salaries and benefits to ensure that airport security positions attract competent employees and have low turnover rates.⁷³ The act also requires fortified cockpit doors and an increased presence of air marshals.⁷⁴ These measures will be beneficial both to airport security and to the protection of constitutional freedoms.

Significantly, the September 11th security failures have been widely attributed to failures of human intelligence and security personnel, not failure of our existing technologies. As previously stated, even if the box cutters had been identified, they

⁷⁰ Feder, *supra* note 46.

⁷¹ Major Garrett and Kelly Wallace, *Bush Signs Aviation Security Bill*, at <http://www.cnn.com/2001/TRAVEL/NEWS/11/19/rec.bush.aviation.advance/index.html> (Nov. 19, 2001) (on file with the North Carolina Journal of Law & Technology). See Aviation Security Act, Pub. L. No. 107-71, 115 Stat. 597.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

would have likely aroused little suspicion among security personnel. This points to the conclusion that the technologies presently used to search passengers are sufficient if operated in a competent manner. Indeed, too much reliance on technology diverts attention from the human components necessary for an effective security program. Increasing the quality of security personnel can adequately protect our safety while avoiding the slippery slope of trading civil liberties for security. Americans fear future hijackings right now, but once the immediate threat has been eradicated, it is likely that society will no longer be willing to accept such unreasonably intrusive security measures. At that point, it will be too late to heed the admonitions of civil rights advocates such as Benjamin Franklin, who once warned, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."⁷⁵

⁷⁵ Sullum, *supra* note 8.