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RATIONAL AND CONSTITUTIONAL APPROACHES TO AIRLINE SAFETY IN THE FACE OF TERRORIST THREATS

INTRODUCTION

“They are all targets. . . . every day . . . they will receive a new corpse”

—Osama bin Laden, multimillionaire terrorist,
issuing a threat to Americans.¹

The modern threat of terrorism,² coupled with recent attacks on United States embassies, has led to levels of federal intrusion into the airline industry not seen since before airline deregulation.³ In response to the explosion of TWA Flight 800 in 1996, President Bill Clinton summoned a commission under the leadership of Vice President Al Gore⁴ to assess the current problems with safety at United States airports and on United States aircraft, and to recommend solutions to these problems. This Comment will demonstrate that the policy approach of the Gore Commission was fundamentally flawed and that the solutions recommended were both inadequate to provide real safety, and threaten Fourth Amendment privacy rights, Fifth Amend-

1. HOUS. CHRON., Nov. 8, 1998, at 4 (quoting bin Laden interview with ABC News, May 1998). Bin Laden also said that “[w]e do not differentiate between those dressed in military uniforms and civilians.” *Id.* The continuing seriousness of this terrorist threat is emphasized by the United States State Department’s pre-millennium warnings advising Americans to avoid large groups—especially overseas. Public Announcement (visited Dec. 21, 1999) <http://travel.state.gov/www_terrorist.html>. The United States Customs Service placed “an extra 300 guards on duty” and altered their border posts following two arrests of Algerians who allegedly attempted to smuggle explosives into the United States through Canada. John Donnelly, *U.S. Scrambles to Unravel Terrorist Threat*, BOSTON GLOBE, Dec. 22, 1999, at A1, available at 1999 WL 30401514.

2. Forty percent of worldwide terrorist incidents were directed toward Americans in 1992. See John Rogers, *Bombs, Borders, and Boarding: Combatting International Terrorism at United States Airports and the Fourth Amendment*, 20 SUFFOLK TRANSNAT’L L. REV. 501, 502 (1997).

3. While the aviation industry has been deregulated for more than 20 years, many airline officials, as well as others in the industry, fear that current federal intervention amounts to nothing more than re-regulation. For a deeper analysis of this subject, see BRIAN F. HAVEL, IN SEARCH OF OPEN SKIES: LAW AND POLICY FOR A NEW ERA IN INTERNATIONAL AVIATION 222-29 (1997).

4. See Exec. Order No. 13,015, 61 Fed. Reg. 43937 (1996). For the findings of this commission, see generally WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON (Feb. 12, 1997) [hereinafter FINAL REPORT].

ment travel rights, and Fourteenth Amendment Equal Protection rights of airline passengers under the United States Constitution.

The Gore Commission appears to have accepted, without examination, the commonplace notion that an increased threat to safety necessarily creates a clash between our constitutional liberties and our need for personal safety.⁵ The position taken in this Comment is that this clash is illusory. The fundamental error of the Gore Commission was the paternalistic notion that government can and should make airline passengers safe.⁶ Both the Constitution and practical realities demand that the government help airline passengers keep themselves safe, just as the government works to help drivers keep themselves safe on the highways. Paternalistic approaches to airline safety are both foolish and un-American.

It is both unwise for individual members of the public to ignore responsibility for their own safety, and unconstitutional for the government to implement security plans presuming that the public will do so. Benjamin Franklin wrote, “[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”⁷ Experience shows that such cravens in fact generally experience what Franklin observed.⁸ The danger today is too great to tolerate a cowardly and irrational response. We cannot afford to lose either safety or liberty.⁹ The danger in the skies is real and serious, but it does not

5. The assumption that there is a necessary clash between an individual's constitutional rights and safety seems to be accepted both by the political left and right. Justice Thurgood Marshall criticized the political right when he wrote: “[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.” *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). Judge Friendly, generally regarded as politically liberal, wrote: “[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness” for a search. *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, J., concurring).

6. The Gore Commission well illustrates the wisdom of Justice Brandeis, who wrote: [e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

7. Benjamin Franklin, *Historical Review of Pennsylvania*, in *BARTLETT'S FAMILIAR QUOTATIONS* 348 (Emily Morison Beck ed., 1980).

8. It was not in spite of our liberty, but because of it, that Americans in the 1930s and 1940s were far safer than were most people, such as the Germans. Heavy-handed Nazi security may have provoked, but could not prevent, the Hindenburg disaster. See *infra* notes 13-24 and accompanying text. Over the last two centuries, the prosperity and happiness enjoyed by Americans has been based, in large part, on the safety that we enjoy. The Constitution works now, and has consistently worked amazingly well, to assure our safety.

9. See generally Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993) (arguing that the Constitution is antiquated and too inflexible to deal with modern dilemmas). However,

force us to choose between bomb-toting terrorists and jack-booted security officers.

This Comment will begin in Part I with a summary of the history of violent threats to airline safety and the responses by industry and government to these threats, and the Constitutional rights associated with travel.¹⁰ Part II will present a theoretical structure for effective and constitutionally sound government involvement in airline safety and will make specific alternative recommendations for steps needed to prevent terrorist attacks on air travel.¹¹ In conclusion, Part III of this Comment will re-emphasize that an individual, not a bureaucracy, can ensure airline safety.¹²

I. BACKGROUND

A. *Factual Background: The History of Terrorism*

1. *The Hindenburg*

The first regular international air transit services were provided by Lufthansa's dirigibles ("Zeppelins") in the 1920s between Frankfurt and both New York and Rio de Janeiro.¹³ This service came to a violent end on May 6, 1937, in Lakehurst, New Jersey, with the explosion

the world of the founding fathers was not a genteel place of parlour and peace. Thomas Jefferson and his contemporaries were well aware of the threat of terrorism. One of Jefferson's first acts as President was to defy international pressure and dispatch naval vessels to destroy the "Barbary Pirates" who were based in Tripoli and under the protection of governments there, despite the fact that America was then a fledgling and weak power. See SAMUEL E. MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 363-64 (1965). Jefferson did not wait for the pirates to take sail and attack merchant ships. See *id.* Instead, he ordered the Navy to destroy the pirate fleet in their own harbors. See *id.*

The parallels between modern terrorists often linked to Libya, whose capital is Tripoli, and the Barbary Pirates are striking. Today the threat is, if anything, less severe because we have enormous military and economic power on which Jefferson could not depend. It is unfair to suggest that the founding fathers were blind to the need for strong, perhaps risky, action against terrorist threats. On the contrary, Jefferson had unusual foresight. He could see what too many moderns are afraid to see. He employed methods of protecting Americans that in no way threaten our liberties, though they did threaten our international standing and demanded heroic and forceful pre-emptive action. He risked a war, a tactic almost unthinkable to many people today. Cf. Comments of Ken Quinn, *infra* note 213.

10. See *infra* notes 13-141 and accompanying text.

11. See *infra* notes 142-256 and accompanying text.

12. See *infra* note 257 and accompanying text.

13. See MICHAEL M. MOONEY, THE HINDENBURG 54-56, 59, 63 (1972). Mooney's account is based on interviews with survivors or examination of their diaries, and of voluminous official United States and German records of the investigations after the explosion and many other sources. See *id.* at 269-73. Many dirigible experts today reject Mooney's account as sensationalized, but his was the only independent study done on the disaster when interviews with witnesses were still possible. See E-mail from John Dziadeck (Sept. 20, 1999) (on file with author) (maintaining a group of web-sites commemorating dirigibles).

of the world's largest airship, the Hindenburg, on its maiden voyage.¹⁴ A private investigation found that a bomb placed by one of the German crewman exploded,¹⁵ setting the airship on fire and killing thirteen of the thirty-six passengers and twenty-two of the sixty-one crew members, including the bomber himself.¹⁶ The disaster is still shrouded in mystery, partly because both the United States and German governments avoided public disclosure of the explosion's true cause due to the embarrassment of having failed to prevent terrorism.¹⁷ The bomber¹⁸ succeeded in destroying the airship even though German security was warned of a threat to bomb the Hindenburg when it arrived in Lakehurst¹⁹ and three German S.S. Officers were on board to ensure security.²⁰ Security efforts failed because the S.S. Officers, who were not competent to find the bomb themselves,²¹ alienated the dirigible's crew,²² who were unwilling to believe that one of their own would bomb the ship.²³ German security efforts were also misdirected because of suspicion of involvement by passengers who were Jewish or had criticized the Nazi party.²⁴ As will be discussed in this Comment, the response of the Gore Commission is hauntingly similar to that taken by the United States and Nazi Germany more than seventy years ago.

14. The Hindenburg explosion actually came seven years after the first recorded airplane hijacking, which was in 1930 in Peru. See Sanford L. Dow, Comment, *Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward*, 58 J. AIR L. & COM. 1149, 1158 (1993). Revolutionaries hijacked a plane and used it to distribute leaflets. See *id.*

15. See MOONEY, *supra* note 13, at 216-18.

16. See *id.* at 258-59.

17. The Secretaries of Commerce and Interior both wrote to the American investigator that "a finding of sabotage might be cause for an international incident . . ." *Id.* at 271. Nonetheless, "almost every dirigible man (including Captain Pruss)" who testified in the investigation "in private agreed that sabotage was the cause." *Id.* During the investigation, "the German advisors and the American commissioners and advisors held meetings at night to discuss, off-the-record," how to minimize the "inescapable evidence of sabotage . . ." *Id.* An American commissioner's diary, now in the National Archives, expressed that the recollections of the German and American advisors were similar. See *id.* at 271-72. A clearer case both for the bombing and for the governmental attempts at a cover-up could hardly be made, despite continued official insistence that the actual cause of the explosion is a mystery. See *id.* at 271.

18. It appears that the bomber, Eric Spehl, was provoked by the torture of a friend by the Gestapo. See *id.* at 217-18.

19. See *id.* at 115-18.

20. See *id.* at 110-16.

21. See MOONEY, *supra* note 13, at 258-59.

22. See *id.* at 152-56.

23. See *id.* at 11-12.

24. See *id.* at 123-26.

2. Early Airplane Hijackings

Between 1949 and 1985, there were 498 successful and 281 failed hijacking attempts worldwide²⁵ and 1539 persons killed in eighty-seven aircraft bombings.²⁶ Between 1948 and 1960 there were twenty-nine successful hijackings around the world.²⁷ Between 1961 and 1967 there were sixteen hijackings.²⁸ But the year 1960 alone saw a record thirty hijackings, seventeen of which were of United States-registered aircraft.²⁹ In 1963, the international aviation community responded to this wave of hijackings with the Tokyo Convention,³⁰ which outlawed dangerous acts on aircraft,³¹ and created the International Civil Aviation Organization (“ICAO”).³² The Tokyo Convention preserved national criminal jurisdiction over such acts and gave airline commanders quasi-police authority.³³ The United States has been an active signatory of the Tokyo Convention.³⁴

3. Establishment of the DOT and FAA

In 1967, the Department of Transportation (“DOT”) was established as the “focal point in the Federal Government for the coordinated national Transportation Policy.”³⁵ Additionally, the DOT was to oversee “transportation safety improvements and enforcement.”³⁶

25. See Michael S. Simons, *A Review of Issues Concerned With Aerial Hijacking and Terrorism: Implications for Australia's Security and the Sydney 2000 Olympics*, 63 J. AIR L. & COM. 731, 738 (1998).

26. See *id.*

27. See Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijacking*, 2 CONN. J. INT'L L. 427, 429 (1987).

28. See *id.*

29. See *id.*

30. See Convention on Offenses and Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969) [hereinafter Tokyo Convention].

31. See Haro F. Van Panhuys, *Aircraft Hijacking and International Law*, 9 COLUM. J. TRANS-NAT'L L. 1, 1-2 (1970).

32. See Simons, *supra* note 25, at 740-41 n.43 (noting that the ICAO grew from 49 signatories in its first year to 86 by 1969).

33. See Tokyo Convention, *supra* note 30, at arts. 3, 6.

34. Earlier conventions chiefly gave international approval to actions already being taken by signatories. See generally Dionigi (Dan) M. Fiorita, *Aviation Security: International Response*, 3 ALB. L.J. SCI. & TECH. 267 (1993) (describing the Tokyo Convention and other conventions dealing with aviation security). Later conventions strengthened sanctions against nations that did not take strong measures against terrorists. See *id.*; see also Simons, *supra* note 25, at 739-50; Heather E. Reser, Comment, *Airline Terrorism: The Effect of Tightened Security on the Right to Travel*, 63 J. AIR L. & COM. 819, 823-28 (1998). The United States is also a signatory of the conventions that have continued the work of Tokyo Convention. See Fiorita, *supra* at 285-93.

35. *About the Department of Transportation* (visited Sept. 28, 1998)
<<http://www.dot.gov/general/aboutdot.html>>.

36. *Id.*

Other areas currently under DOT's control are international transportation agreements and the continuity of transportation services in the public interest.³⁷

The Federal Aviation Administration ("FAA"), an operating administration of the DOT, is responsible for "promoting safe air travel and enforcing security measures affecting aircraft and air terminals."³⁸ Traditionally, the FAA has placed emphasis on promoting air travel, but recently there has been a "paradigm shift" to focus on safety, and especially counterterrorism.³⁹ Along with the independent National Transportation Safety Board ("NTSB"), the FAA conducts safety studies and investigations, usually after serious accidents.⁴⁰ While the ultimate control over policies and regulations lies with the United States government, airlines, airport owners and operators play an integral part in the aviation industry. Moreover, the airlines are typically charged with funding security.⁴¹

4. *Early United States Responses to Terrorism in the Air*

In the late 1960s, the United States government reacted to the increasing number of terrorist attacks by creating a special FAA task force to implement strategies for detecting and deterring possible terrorists.⁴² The initial procedures called for heightened security measures against certain individuals by using profiling to try to identify terrorists.⁴³ A "profile" is a list of personal attributes that, though when pinpointed individually may be legal and non-threatening, cumulatively suggests a person is statistically more likely to hijack an airplane.⁴⁴ Unfortunately, despite implementation of this profiling system, the number of attacks continued to increase.⁴⁵

Congress responded to the increasing threat of hijacking with a statutory scheme that included the Anti-Hijacking Act of 1974⁴⁶ and the

37. *See id.*

38. Reser, *supra* note 34, at 829 n.54 (citing 49 U.S.C. § 472(i)-(m), (o) (1994)).

39. *See* Anthony Fainberg, *Aviation Security in the United States: Current and Future Trends*, 25 *TRANSP. L.J.* 195, 196 (1998).

40. *See* Rudolf Kapustin, *How to Prevent Major Accidents Effectively*, 10 *AIR & SPACE LAW*. 1, 12 (1996).

41. *See* Fainberg, *supra* note 39, at 197; *see also* Diane Westwood Wilson, *The Federal Aviation Reauthorization Act of 1996*, 11 *AIR & SPACE LAW*. 1, 10 (1997).

42. *See* Rogers, *supra* note 2, at 506.

43. *See id.*

44. *See* JIN TAI CHOI, *AVIATION TERRORISM: REGIONAL VARIATIONS AND RESPONSES* 30 (1994) (discussing the passenger profiling system).

45. *See id.* at 24 (noting that between 1968 and 1973 there were 125 hijackings of American aircraft).

46. *See* H.R. REP. NO. 93-885, at 9 (1974).

Air Transportation Security Act of 1974.⁴⁷ The Anti-Hijacking Act made it illegal to carry a concealed weapon aboard an aircraft.⁴⁸ The Air Transportation Security Act called for a uniform mandate that all carry-on luggage undergo screening procedures.⁴⁹ Instead of searching a handful of passengers targeted for suspicion, the new system would search everybody. These measures seem to have been effective because air terrorism in the United States almost came to a halt. In 1972, the last year in which the United States only used profiling to ensure safety, twenty-eight American airliners were hijacked.⁵⁰ Between 1975 and 1986 only two such aircraft were so threatened, and only one of those, a TWA flight near Athens in 1986, originated in the United States.⁵¹ The other was Pan Am Flight 103, which exploded over Lockerbie, Scotland in 1988.⁵² The bomb that destroyed Pan Am Flight 103 seems to have been put on board the plane during a stop-over in Frankfurt, Germany.⁵³ Thus, it appears that not a single bomb has evaded airline security on American aircraft at United States airports since all airports began screening passengers.⁵⁴

5. *Reaction to Pan Am Flight 103*

On December 21, 1988, somebody in Frankfurt, Germany loaded a portable radio packed with explosives into his checked baggage on Pan Am Flight 103.⁵⁵ He did not board the plane himself.⁵⁶ The plane exploded a few hours later over Lockerbie, Scotland, killing all 259 people on board and eleven residents of Lockerbie.⁵⁷ As a result

47. See 49 U.S.C. §§ 1356-1358 (1988) (repealed 1994).

48. H.R. REP. NO. 93-885, at 1-5.

49. 49 U.S.C. §§ 1356-1358. See also Shirleyce Manning, Comment, *The United States' Response to International Safety*, 61 J. AIR L. & COM. 505, 510 (1996).

50. See ACLU Freedom Network, *Profiling Endangers Privacy* (visited Sept. 4, 1998) <<http://www.aclu.org/news/w100996b.html>> [hereinafter *Profiling Endangers*].

51. See Gregory T. Nojeim, *Aviation Security Profiling and Passengers' Civil Liberties*, 13 AIR & SPACE LAW. 3, 6 (1998).

52. See *In re Air Disaster at Lockerbie Scotland* on Dec. 21, 1988, 37 F.3d 804, 810 (2d Cir. 1994).

53. See *id.* at 811.

54. The moral of this experience is clear—low-level screening of everybody is effective. However, targeting a few people for intense heightened scrutiny is pointless. Those who are determined enough to construct an effective bomb are also almost inevitably also serious enough to avoid behavior likely to single themselves out for special scrutiny.

55. See PRESIDENT'S COMMISSION ON AVIATION SECURITY AND TERRORISM, REPORT TO THE PRESIDENT 13 [hereinafter REPORT TO THE PRESIDENT] (discussing the bombing of Pan Am Flight 103); see also Rogers, *supra* note 2, at 509.

56. See REPORT TO THE PRESIDENT, *supra* note 55, at 13-14.

57. See *id.* at 14; see also Garret Hodes, *Terrorist Threats: The Friendly Skies Aren't Too Friendly About Notification*, 46 U. KAN. L. REV. 365, 366 (1998); Steven Mirmina, *Aviation Safety And Security—Legal Developments*, 63 J. AIR L. & COM. 547, 547-48 (1998).

of this incident, President George Bush created the President's Commission on Aviation Security and Terrorism.⁵⁸ In response to the findings of this commission, Congress implemented the Aviation Security Improvement Act of 1990,⁵⁹ requiring the FAA Administrator to counteract terrorism by adopting new security technology.⁶⁰ United States air carriers instituted a strict bag matching policy to remove the baggage of any passenger who failed to actually board the flight. Currently, however, the policy applies only to international flights.⁶¹

While an important step towards thwarting the efforts of the terrorist using "drop and run" tactics,⁶² the positive bag identification system provides no assistance in preventing those determined to give up their own lives for their causes.⁶³ Bag matching also provides no protection against those who place explosives in bags belonging to other innocent passengers.⁶⁴

6. *TWA Flight 800 and the Gore Commission*

The debate over aircraft and airport security became most intense in the aftermath of the TWA Flight 800 disaster. The mid-air explosion over Long Island, New York that killed everyone on board was initially blamed on terrorists.⁶⁵ On July 17, 1996, a major change occurred in the aviation industry because the disaster forged a consensus regarding the need for drastic measures to stop terrorist activity.⁶⁶ President Clinton promptly established the White House Commission on Aviation Safety and Security on August 22, 1996, led by Vice President Gore.⁶⁷ The Commission's focus was to assess and recommend security measures to airlines and airports.⁶⁸ The Commission's work reflected its "vision for the future," namely, "[t]o ensure greater safety and security for passengers, to restructure the relationships between government and industry into partnerships for progress, and to main-

58. See Exec. Order No. 12,686, 54 Fed. Reg. 32,629 (1989).

59. Pub. L. No. 101-604, 104 Stat. 3066 (1990) (codified as amended in scattered sections of 49 U.S.C. and 22 U.S.C.).

60. See *id.*

61. See Robert W. Hahn, *The Economics of Airline Safety and Security: An Analysis of the White House Commission's Recommendations*, 20 HARV. J.L. & PUB. POL'Y 791, 799 (1997).

62. A "drop and run" occurs when a terrorist checks luggage onto an airplane, but the terrorist does not board the plane. *Id.* at 793.

63. See *id.* at 798-99.

64. See *id.* at 798.

65. See Fainberg, *supra* note 39, at 195-96.

66. See *id.*

67. See Exec. Order No. 13,015.

68. See FINAL REPORT, *supra* note 4, at 3.

tain global leadership in the aviation industry.”⁶⁹ Some of the recommendations focused on new technology to be utilized for surveillance and screening.⁷⁰ Recommendations also included training additional bomb sniffing dogs, creating an automated passenger profiling system, and dramatically increasing the FBI’s workforce on counterintelligence.⁷¹

President Clinton hastily signed the proposal into law with a total budget of \$1.097 billion, of which the Commission was allocated \$429.4 million.⁷² The Commission’s initial report was issued just forty-

69. *Id.* at 24. Notably lacking from this vision is the active and informed participation of the general public and of passengers and crew. *See id.*

70. *See id.* at 31-47.

71. *See id.*

72. *See The President’s Counterterrorism Proposal* (visited Jan. 29, 2000)

<http://www.epic.org/privacy/terrorism/WH_fact_sheet_10_96.html> [hereinafter *President’s Proposal*]. The proposal allocated (dollars in millions):

- Screen Checked Baggage, \$91.1
- Screen Carry-on Baggage, \$37.8
- Canine Teams, \$8.9
- Augment FAA Security Research, \$20
- Security Workforce, \$18
- Vulnerability Assessments, \$5.5
- Passenger Profiling, \$10
- Screener Training, \$5.3
- Screen Passengers (Portals) and Document Scanners, \$1
- Anti-terrorism Assistance to Foreign Governments, \$2
- Deploying Existing Technology to Inspect International Air Cargo, \$31.4
- Provide Additional Air/Counterterrorism Security, \$26.6
- Taggants Study, \$21.3
- Explosives Detection Training, \$1.8
- Capacity to Collect and Assemble Explosives Data, \$2.1
- Improve Domestic Intelligence, \$38.9
- Improve Forensic/Crisis Management Capabilities, \$16
- Increased Staffing, \$91.7
- Persian Gulf Force Protection, \$122.6
- Overseas Physical Security Upgrades, \$138.5
- Upgrade Overseas Security for the International Trade Administration, \$9.4
- Enhance Security of Infectious Disease Laboratories, \$23
- Department of Interior Facility Security and Training, \$15.9
- Courts of Appeals, District Courts, and Other Judicial Services, \$10
- FBI: Building Security, \$7
- United States Attorneys, \$15.6
- Drug Enforcement Administration, \$7
- Diplomatic Security, \$23.7
- ATF: Critical Incident Response Teams for Post Blast Deployment, \$7.2

five days after the Commission was formed.⁷³ However, the Commission allocation of dollars was misguided because much of the information needed to effectively counter terrorism simply does not exist.⁷⁴ The profound lack of hard data that the Commission had to contend

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- ATF: Additional Security for Federal Facilities, \$6.7
 - United States Secret Service (“USSS”): Additional Security Equipment, \$1.1
 - USSS: Equipment Replacement Related to Airplane Crash, \$1.4
 - Customs Service: Explosives and Radiation Detection Equipment, \$2.2
 - Overseas Building Security, \$0.6
 - Personnel and Protective Measures, \$3.3
 - Firefighter/Emergency Services Financial Assistance, \$2.7
 - Headquarters Building Security, \$0.2
 - Public Building and Museum Security, \$7.3
 - Facility Security, \$2.5
 - Other Treasury Department: Building Security, \$14.7
 - Expanding the Bureau of Export Administration’s Efforts to Detect Illegal Exports, \$3.9
 - Improve Technology to Prevent Nuclear Smuggling, \$8
 - FBI: Critical Incident Response Facility, \$2
 - Immigration and Naturalization Service (“INS”), \$15
 - Other Justice Department Activities, \$14.2
 - Counterterrorism Fund, \$35
 - ATF: Inspecting Explosives Licensees and Permittees, \$1.8
 - Federal Law Enforcement Training Center, \$4.1
 - Salaries and Expenses, \$6
 - Emergency Fund, \$1
 - Enhance Nest Nuclear Counterterrorism Program, \$15
 - Research and Special Projects Administration (“RSPA”), \$2.5
 - RSPA: Advisory Committee on Surface Transportation Security, \$0.5
 - ATF: Expand Canine Training and Certification Program, \$7.5
 - ATF: Car Bomb Studies, \$3
 - ATF: Emergency Contingency Funding, \$15
 - ATF: Explosives Intelligence and Support Systems, \$14.2
 - Departmental Offices: Office of Foreign Assets Control: Seize Foreign Assets of Terrorists and Terrorist-Sponsoring Organization, \$0.3
 - Office of Emergency Preparedness, \$5.8
 - Training, Awareness, and Information Programs, \$93.1
 - Consequence Management Planning and Coordination, \$9.3
 - Federal/State/Local Assessment, Training, and Exercises, \$8.4
 - National Foreign Intelligence
 - Creation of a National-Level Foreign Terrorism Warning Group Within the Counterterrorism Center

Id.

73. See Hahn, *supra* note 61, at 792.

74. See Nojeim, *supra* note 51, at 6.

with is illustrated by the fact that the TWA Flight 800 explosion, which had provoked the Commission's formation, was not actually the result of terrorism at all. Closer investigation showed that defects in the design of the central fuel tank appeared to be the probable cause of the TWA Flight 800 tragedy.⁷⁵

The Commission had invited the participation of the American Civil Liberties Union,⁷⁶ airport safety representatives,⁷⁷ and other aviation officials.⁷⁸ President Clinton proclaimed that as a result of the new measures, "[n]ot only will the American people feel safer, they will be safer."⁷⁹ The President announced that he endorsed "zero tolerance" for airline terrorism.⁸⁰ However, as will be argued later in this Comment, the President's "zero tolerance" policy extends to a countenance of massive invasions of individual privacy and to huge monetary expenditures, but not to measures which would disrupt foreign policy or risk war.⁸¹

a. High-Technology Security Equipment

The FAA Act of 1996 authorized the purchase of fifty-four CTX-5000 luggage scanners.⁸² These devices cost more than a million dollars each to be installed⁸³ and are able to screen only 120 bags per hour.⁸⁴ The proposed plan is to use these luggage scanners in tandem.⁸⁵ However, even if two scanners are used, a rate of 240 bags per hour (under 3000 per twelve-hour daytime shift) is inadequate for the number of passengers that pass through any major airport every day. For example, in 1997, over 70 million passengers passed through Chi-

75. See Michael Grunwald, *FBI Sought to Suppress Report on TWA Crash*, WASH. POST, May 9, 1999, at A01, available at 1999 WL 17002020.

76. See ACLU Freedom Network, *Individual Rights Have 'Low Profile' at Aviation Security Conference* (visited Jan. 15, 1997) <<http://www.aclu.org/news/n122597a.html>>.

77. Interview with Richard Kunicki, Deputy Commissioner of Airport Security at Chicago O'Hare International Airport (Dec. 11, 1998).

78. A commentator has noted that "[t]he White House has neither given a clear indication of the effectiveness of these measures in preventing terrorist acts nor acknowledged the true cost of implementation," including flight delays, constitutional violations, and establishing a precedent for using taxpayer money to pay for airline security rather than requiring the airlines (who pass the cost along to passengers) to bear this responsibility. Hahn, *supra* note 61, at 793.

79. The White House Office of the Press Secretary, *Remarks By The President During White House Commission on Aviation Safety Announcement: The Oval Office* (visited Sept. 8, 1998) <<http://www.nitea.or.kr/www.whitehouse.gov/WH/New/html/aviation.html>>.

80. See *id.*

81. See *infra* notes 191-202 and accompanying text.

82. See Nojeim, *supra* note 51, at 5.

83. See Hahn, *supra* note 61, at 797.

84. See Nojeim, *supra* note 51, at 5.

85. See *id.*

cago O'Hare International Airport,⁸⁶ which translates into an average of 192,000 passengers each day. If each passenger averaged one or two checked bags, a pair of CTX-5000 scanners could screen fewer than one bag in a hundred. InVision, the company that manufactures the CTX-5000,⁸⁷ has plans to produce faster models, but even if the machines were ten times as fast, a pair of machines would still be overwhelmed by the traffic at an airport such as O'Hare. Moreover, the estimated cost to supply seventy-five of the United States' busiest airports is \$2.2 billion.⁸⁸ Critics argue that CTX-5000 scanners have the potential to cause false alarms and to scan a lower number of bags than the FAA's intended amount.⁸⁹

Technology beyond the use of X-ray vision, such as machines that detect trace particles of explosives are currently being developed.⁹⁰ With the introduction of the CTX-5000s into airports, the marketplace has experienced an increase in the number of companies interested in design, production, and manufacture of new technology. For example, BodySearch, developed by American Science and Engineering, and largely funded by the FAA,⁹¹ is an X-ray device capable of seeing through a person's clothing.⁹² One commentator aptly analogized the BodySearch to Superman's X-ray vision.⁹³ It is conceivable that such devices would be highly effective in preventing contraband from boarding the aircraft.⁹⁴ The Commission did call for the purchase of "upgraded X-rays, and other innovative systems."⁹⁵ Since November of 1999, United States Customs has introduced the use of BodySearch

86. See CHICAGO DEPARTMENT OF AVIATION, *THE CHICAGO AIRPORT SYSTEM: ANNUAL REPORT* 6-7 (1997).

87. See Fainberg, *supra* note 39, at 197.

88. See Hahn, *supra* note 61, at 798.

89. See *id.*; Fainberg, *supra* note 39, at 198-99.

90. See Fainberg, *supra* note 39, at 197. "[A]t least two other corporations, L3 Communications and Vivid Technologies, are seriously engaged in developing certifiable explosives detection systems." *Id.*

91. See Robyn E. Blumner, *Welcome to the Unfriendly Skies* (visited Sept. 8, 1998) <<http://www.aclufl.org/r-sky.htm>>.

92. See *id.*

93. See *id.* Whether this type of search could withstand constitutional challenge remains to be seen. Current plans do not call for the purchase of such devices in the United States for use on passengers. See *id.*

94. However,

improved technology on the governments' part only encourages the same on the part of terrorist groups, and they have kept up thus far. Therefore, it leads one to wonder whether such provisions are merely means by which the government is trying to soothe Americans citizens' fears, instead of being a . . . solution.

Reser, *supra* note 34, at 832.

95. Blumner, *supra* note 91.

for selected international passengers at many major American airports.⁹⁶

b. Computer Assisted Passenger Screening

The Gore Commission also called for the creation of a national database on passenger travel habits and history entitled the Computer Assisted Profiling System (“CAPS”), for which funding to begin work on this database has already been approved.⁹⁷ A test program has been under development at Northwest Airlines for several years.⁹⁸ The FAA, commenting on CAPS, revealed that “[s]oon, if not already, airline agents who enter a passenger’s name at check-in will get either a red light or a green light” depending on whether the passenger fits targeted profiles.⁹⁹ Safety officials concede that profiling is necessary because the existing technology is “inadequate in scanning 100% of the baggage.”¹⁰⁰

Though the current proposed database includes only travel information, it could later be cross-indexed with FBI, CIA, or criminal records—or with vital statistics, family names, or credit histories.¹⁰¹ Civil libertarians fear the existence of a nationwide computer system filled with details about personal backgrounds and behavior.¹⁰² Such

96. See *Scanning Equipment for Customs Searches is Set for Six Airports*, WALL ST. J., Aug. 3, 1999, at B11E, available at 1999 WL-WSJ 5463051.

97. See Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (1996).

98. See FINAL REPORT, *supra* note 4, at 37.

99. Interview with FAA Officer James Paget, a participant in the Gore Commission hearings (Nov. 6, 1998).

The use of criminal records is especially troubling, since such records include arrests for which no conviction followed and for situations in which the person involved is entitled to a presumption of innocence. The constitutional right to due process requires that the state prove guilt “beyond a reasonable doubt.” *In re Winship*, 397 U.S. 358, 364 (1970). But if a person was subject to heightened security on the basis of profiles including arrests, he would be punished for having been arrested—even if the arrests themselves were completely illegal. See Gil Klein, *FAA Steps up Airport Security*, RICHMOND TIMES DISPATCH, Aug. 24, 1997, at A11, available at 1997 WL 7627160.

100. Interview with Richard Kunicki, Chicago Department of Aviation Deputy Commissioner for Safety (Nov. 18, 1998). See Fiorita, *supra* note 34, at 312.

101. See ACLU Freedom Network, *Executive Summary of the House Terrorism Bill H.R. 2768* (visited Feb. 9, 1996) <<http://www.aclu.org/congress/hr2768.html>>.

102. See generally ACLU Freedom Network <<http://www.aclu.org/>> (chronicling cyberspace’s affect on privacy interests). This fear is not confined to the ACLU.

Employing a combination of psychological, sociological, and physical sciences to screen, inspect and categorize unsuspecting citizens raises visions of abuse in our increasingly technological society. Proposals based upon statistical research designed to predict who might commit crimes and giving them the special attention of law enforcement agencies is particularly disturbing.

United States v. Lopez, 328 F. Supp. 1077, 1100 (E.D.N.Y. 1971).

a system could eventually form the basis of a coordinated data system allowing officials to track almost every aspect of an individual's personal life and activities.¹⁰³

B. *Constitutional Background*

Airport security risks running afoul of the constitutional rights to travel, to privacy, to protection from search and seizure, and to equal protection. The possibility that airport security measures may have already crossed these constitutional lines is demonstrated by class action suits brought by minority passengers against United States Customs and airlines.¹⁰⁴

1. *The Right to Travel*

The right to travel under the Fourth Amendment is the most obvious right challenged by security measures that delay or potentially prevent a person's air travel plans. Generally, the right to intrastate or interstate travel has been regarded as fundamental and subject to very few restrictions, whereas the right to international travel is subject to a somewhat greater level of interference.¹⁰⁵ For example, passports may be required for international but not for domestic travel.¹⁰⁶

Justice William Douglas, writing for the majority of the Supreme Court in *Kent v. Dulles*,¹⁰⁷ stated that:

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the 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.¹⁰⁸

However, the tone of the Supreme Court opinion in *Haig v. Agee*,¹⁰⁹ which allowed the Secretary of State to withhold a passport from a renegade CIA agent, seems to suggest that the exceptions to the "right" to travel may be so broad as to almost consume the right at

103. Abuse of such information would be almost inevitable, and the system itself could propel us further into a situation in which our "virtual" identities overshadow our real existences and behavior. See generally Michael Higgins, *Looking the Part*, A.B.A. J., Nov. 1997, at 48, 52 (stating that neutral criteria processed by automated security systems will affect minority travelers disproportionately).

104. See *Anderson v. Cornejo*, No. 97-C7556 (N.D. Ill. 1998).

105. See *United States v. Laub*, 385 U.S. 475, 481, 482 (1967); see also *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

106. See *Laub*, 385 U.S. at 481; *Kent*, 357 U.S. at 121-22.

107. 357 U.S. 116 (1958).

108. *Id.* at 125-26.

109. 453 U.S. 280 (1981).

least for international travel.¹¹⁰ The Court wrote, “[t]he history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports.”¹¹¹ Authentic threats to national security justify restrictions on international travel,¹¹² but even international travel rights cannot be restricted based on spurious national security risks, such as a bare claim that the traveler is a Communist.¹¹³ International travel to and from the United States is so common that it is impractical to closely scrutinize every traveler.

2. *Fourth Amendment Administrative Search Doctrine*

It has been established that passengers have a Fourth Amendment privacy interest in their carry-ons and luggage.¹¹⁴ However, partly to accommodate the existing airport searches, an entire body of law has evolved which allows administrative searches¹¹⁵ with little or no individualized probable cause that the person being searched is dangerous or has committed a crime.¹¹⁶ Though common today, such administrative searches would have clearly clashed with the understanding of searches outside the authority of written warrants that existed at the time the Constitution was written.¹¹⁷ At that time, all searches required written judicial authorization except those directly incident to a felony arrest.¹¹⁸

“[S]earches conducted as part of a general regulatory scheme, done in furtherance of administrative goals rather than to secure evidence of a crime, may be permissible under the Fourth Amendment without a particularized showing of probable cause.”¹¹⁹ The government must establish three elements. First, a compelling need for the intrusion

110. *See id.*

111. *Id.* at 293.

112. *See id.* at 302.

113. *See Kent*, 357 U.S. at 118, 130.

114. *See United States v. Chadwick*, 433 U.S. 1, 11-13 (1977) (holding that individuals have a Fourth Amendment privacy interest in containers and bags).

115. *See COMMITTEE ON COMMERCIAL AVIATION SECURITY ET AL., AIRLINE PASSENGER SECURITY SCREENING: NEW TECHNOLOGIES AND IMPLEMENTATION ISSUES* 35 (1996).

116. *See, e.g., Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (providing for random sobriety stops of auto drivers). *See also Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 633 (1989) (providing for routine drug testing of railway workers).

117. “[O]n its face, [the Fourth Amendment] states seizures of persons or their property require the issuance of a judicial warrant” JOHN F. DECKER, *REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA* 35 (1992) (citing U.S. CONST. amend. IV). “[W]arrantless searches and seizures are ‘per se’ unreasonable” *Id.* (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

118. *See United States v. Edwards*, 498 F.2d 496, 503 (2d Cir. 1974) (Oakes, J., concurring).

119. *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998).

must be established.¹²⁰ Second, it must be shown that the intrusion will be strictly limited to fulfilling that need.¹²¹ Third, it must be demonstrated that the decision to search a particular person is not subject to the discretion of the official in the field.¹²²

The power to conduct a search of another is a tremendous power that carries with it a vast potential for abuse.¹²³ Thus, the courts must determine whether an administrative search has expanded into an unlawful one.¹²⁴ Courts have stressed the importance of keeping administrative searches from becoming “infected by general law enforcement objectives, and the concomitant need for the courts to maintain vigilance.”¹²⁵ If the government is allowed to freely conduct discriminatory searches under the guise of an administrative search, then “officials [will] routinely invade the privacy and property of countless millions; hardly anyone [will escape] their clammy grasp.”¹²⁶

3. *Equal Protection*

The Equal Protection Clauses of the Fifth and Fourteenth Amendments provide that the government shall not “make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the Laws.”¹²⁷ The courts have identified race, religion, and national origin as suspect classifications that trigger equal protection analysis.¹²⁸ According to the FAA, the criteria used in profiling do not involve such classifications.¹²⁹ However, equal protection analysis is proper regardless of whether the discrimination is directly apparent from the words of a challenged law, from its administration,¹³⁰ or from its effect.¹³¹ Where a law has a discriminatory effect on per-

120. See *United States v. \$124,570 United States Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989).

121. See *id.* at 1244-45.

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

123. See *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting).

124. See *United States v. Davis*, 482 F.2d 893, 909 (9th Cir. 1973).

125. *Soyland*, 3 F.3d at 1316 (Kozinski, J., dissenting) (citing *\$124,570 U.S. Currency*, 873 F.2d at 1244).

126. *Id.*

127. U.S. CONST. amends. V, XIV.

128. See *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

129. See Higgins, *supra* note 103, at 50 (reporting statement by FAA Spokeswoman Rebecca Trexler).

130. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

131. See *Rogers v. Lodge*, 458 U.S. 613, 625 (1982). Under current procedures, profiled passengers are not themselves publicly searched. Instead, their baggage is subject to heightened inspection. Kunicki Interview, *supra* note 100. Profiled passengers often have their luggage tagged with a colored sticker, indicating to fellow passengers that they are marked individuals.

sons belonging to a suspect classification, the law is subject to strict scrutiny¹³² and can be upheld only if it is closely tailored¹³³ to fulfill a compelling governmental purpose.¹³⁴

4. State Action

Most security procedures at airports are carried out by employees of the airlines. This presents two dangers. First, persons who are not trained in law enforcement, and thus are not familiar with constitutional rights of individual citizens, carry out activities that the courts often disfavor even when performed by those who do have proper training.¹³⁵ Second, airlines are private companies not directly bound by due process requirements, even when acting on information provided by the government.¹³⁶ However, the courts have ruled that private airline employees are no different from public officials when conducting a search.¹³⁷ Constitutional restraints upon government would be "severely undercut if the government were allowed to actively encourage conduct [prohibited by the government] by 'private' persons or entities"¹³⁸ In *United States v. Davis*,¹³⁹ a passenger's briefcase was searched prior to boarding the aircraft by a ticket agent.¹⁴⁰ The court noted, "[t]he search was part of the overall, nationwide anti-hijacking effort, and constituted 'state action' for the purposes of the Fourth Amendment."¹⁴¹

Id. If the same group is consistently subject to public scrutiny, it may reinforce negative public opinion about that group. Moreover, the group would suffer increased risk of prosecution for crimes other people could commit without fear of detection. In both of these ways, profiling can have a discriminatory effect.

132. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

133. See *id.*

134. See *id.*

135. For example, private security personnel perform personal searches on persons who fail metal-detector tests at airport security. Kunicki Interview, *supra* note 100. West German authorities so severely questioned the qualifications of private American security officers that in the airport in Frankfurt, searches by American security were conducted out of sight of German officials. See REPORT TO THE PRESIDENT, *supra* note 55, at 32. French officials threatened to limit the number of American security firms at Charles de Gaulle Airport on grounds that personnel "could themselves present a security risk." *Id.* at 33.

136. See *Williams v. Trans World Airlines*, 509 F.2d 942, 948-49 (2d Cir. 1975).

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

138. *Id.* See *Reitman v. Mulky*, 387 U.S. 369, 380 (1967); *Lustig v. United States*, 338 U.S. 74, 79 (1949).

139. 482 F.2d 893 (9th Cir. 1973).

140. See *id.* at 896.

141. *Id.* at 904.

II. ANALYSIS

A. *Profiling and Limits on the Administrative Search Doctrine*

Given the strict limits on the administrative search doctrine, it seems unlikely that the courts would approve of CAPS or the use of profiling, even though the doctrine was developed partly for airline searches. As to the first requirement of the administrative search doctrine—a compelling administrative need—profiling and follow-up searches resemble existing, constitutional, security searches because they serve the same administrative function as part of essentially the same regulatory scheme to keep dangerous people and items off of aircraft.¹⁴² This function, of course, has a very high priority and will justify far more intrusive behavior than would most administrative purposes.¹⁴³

However, by limiting the searches to only certain individuals, profiling approaches the forbidden line between administrative and criminal searches. Thus, it fails to satisfy either of the second two elements of the administrative search doctrine—strict limitation to non-criminal purposes and freedom from discretion of officers in the field. Profile-based searches are likely to be used to attempt to track down and provide evidence against suspected terrorists (and perhaps other criminals as well), so that heightened security against certain individuals almost inevitably infects the regulatory scheme with criminal investigative purposes which cannot be supported by the administrative search doctrine.

The profiling system was designed to remove some human subjectivity by eliminating the choices of the personnel who identify persons targeted for heightened security.¹⁴⁴ After each passenger's name is entered into a computer, the system makes a determination and flashes a green or red light.¹⁴⁵ The passenger is not told of this event, and is subjected only to the same search as are all other passengers.¹⁴⁶ The process focuses on checked baggage rather than individuals. The CTX-5000 is used on the bags, and if the bags are suspicious, they are set aside for further scrutiny. For example, equipment able to detect trace of explosives might be employed. In some cases, the bags would

142. *See id.* at 908.

143. *See id.*

144. Paget Interview, *supra* note 99.

145. *See InVision Receives FAA Contract for Minimum of 54 and Up to 100 InVision CTX 5000 SP Explosives Detection Systems*, BUS. WIRE, Dec. 26, 1996, available in LEXIS-NEXIS Academic Universe, Wire Service Reports [hereinafter *InVision Receives FAA Contract*].

146. Paget Interview, *supra* note 99.

be opened. The intensity of the search would be based on the level of suspicion.

Though workers in the field appear to have no choice in initiating the process, because the computer makes this determination, field officers must decide whether to halt or continue the search at each of the additional steps. They examine the CTX-5000 images and decide whether what they see looks like a gun or another suspicious item. Thus, field officers have almost complete discretion to choose the intensity of heightened security, and nothing would prevent them from using such discretion to satisfy human curiosity or to look for contraband not dangerous to a flight, such as drugs or ivory. Moreover, the computer itself is analogous to a field officer. Even though it is not human, it poses a similar threat as does a human agent and its actions are not readily subject to judicial scrutiny.

Profiling is inherently impossible to monitor by the public or by either legislative or judicial authorities. The same information that the public or Congress would need to engage in an informed debate about profiling, and that courts would need in order to determine whether the profile used legal or illegal criteria, could be used by terrorists to evade the profiles. Making profiles public is necessary to make them legal, however, doing so would also destroy their usefulness.

It is impossible to determine whether the profiles now in use involve illegal criteria because the FAA has declined to publicize the nature of the criteria.¹⁴⁷ The FAA has emphatically denied that race, ethnicity, religion, or gender play a role in the profiles.¹⁴⁸ The FAA has merely noted that “it has to do with people’s travel patterns and how well they’re known in the system.”¹⁴⁹ Such information is not helpful in determining whether constitutional claims arise. Allowing such profiling forces the American people and courts to take the FAA at its word.¹⁵⁰ Government action with no opportunity for review is entirely outside our basic constitutional framework of independent checks and balances upon all government power.¹⁵¹

147. FAA spokeswoman Rebecca Trexler noted that making the profiles public “would be telling the terrorist what we’re looking for.” Higgins, *supra* note 103, at 50.

148. *See id.*

149. *Id.* at 52.

150. The Gore Commission submitted its criteria for profiles to the Attorney General’s Office, which determined that they are constitutional. Paget Interview, *supra* note 99. However, such a review cannot facilitate public debate or judicial review of their constitutionality.

151. The “separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty” THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

The Fourth Amendment is notoriously confusing,¹⁵² and it is unreasonable to expect security officers who are untrained as police officers to exhibit the kind of sensitivity to individual privacy rights that the Constitution demands. Courts and police alike have been accused of inconsistently applying the doctrines underlying the Fourth Amendment.¹⁵³ Courts have carved out so many exceptions that the exceptions have virtually swallowed the rule.¹⁵⁴ Limited administrative searches have been authorized for borders¹⁵⁵ and airports.¹⁵⁶

Professor Wayne R. LaFave, in analyzing the Fourth Amendment, attempted to untangle the nine search and seizure decisions issued during the Supreme Court's 1982-83 term. He proclaimed these cases as a group, to be "illogical, inconsistent with prior holdings and generally, hopelessly confusing."¹⁵⁷ Such decisions offer poor guidance to those responsible for conducting administrative searches. Without understanding the individual Fourth Amendment protections at issue, how can society meaningfully participate in debates about the future of such protections in airline security?

While the Fourth Amendment does allow reasonable administrative searches, there are limitations. "To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it."¹⁵⁸ Due to long term ramifications of their decisions,¹⁵⁹ courts must not merely consider just the facts of the case before them but must consider all "searches permissible under the scheme."¹⁶⁰

One of the greatest dangers of profiling is that it will expose certain persons to an unusually high risk of exposure to seizures unrelated to the purpose of keeping explosives off aircraft, for example under the plain view doctrine. "The interests protected by the Fourth Amendment are diminished when an object is found in plain view."¹⁶¹ The owner loses his expectation of privacy and "the owner's remaining in-

152. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472 (1985).

153. See *id.* at 1468.

154. See *id.* at 1473-74.

155. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976).

156. See *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

157. Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1171 (1983).

158. *Davis*, 482 F.2d at 910.

159. See, e.g., *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998).

160. *Id.*

161. *Id.* at 968.

terests in the object are merely those of possession and ownership.”¹⁶² “The problem with the ‘plain view’ doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal”¹⁶³ The officer seizing objects in plain view must have a legal right to be in that location and have a “lawful right of access to the object itself.”¹⁶⁴ Since profiles provide such “lawful right of access,” certain persons are at an unfair risk of detection of criminal activity in which others may engage with more impunity.

One federal court has noted a more serious problem with expanding the administrative search doctrine in that it gives those favoring more intensive searches leverage over the development of constitutional law.¹⁶⁵ As the government increases the intensity and frequency of searches, the public’s reasonable expectation of privacy diminishes—and with it diminishes the concomitant constitutional privacy right.¹⁶⁶ Thus, in effect, investigators can use the administrative search doctrine to justify ever-greater intrusions into the privacy of individual citizens in areas totally unrelated to the original purpose of the doctrine. For example, it is at least arguable that twenty years ago a citizen had a reasonable expectation of privacy in closed luggage.¹⁶⁷

162. *Texas v. Brown*, 460 U.S. 730, 739 (1983) (citation omitted).

163. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

164. *Horton v. California*, 496 U.S. 128, 137 (1990).

165. *See United States v. Lopez*, 328 F. Supp 1077, 1089 (E.D.N.Y. 1971).

166. In the end, “hardly anyone escapes [the] clammy grasp” of “government officials [who] routinely invade . . . privacy.” *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting).

167. *See, e.g., United States v. Place*, 462 U.S. 696, 703 (1983) (holding that the seizure of luggage for even 90 minutes outweighed law enforcement concerns). Judge Oakes’ concurrence in *United States v. Edwards* implicitly assumes that there is such a reasonable expectation that would trigger Fourth-Amendment protections. 498 F.2d 496, 501 (2d Cir. 1974) (Oakes, J., concurring). That airport searches have already begun to erode such reasonable expectations is shown by the fact that Judge Friendly’s majority decision completely avoided the discussion of such privacy expectations, and instead regarded the enormity of the danger implicit in air piracy as making a search implicitly reasonable, stating that “[n]othing in the history of the [Fourth] Amendment remotely suggests that the framers would have wished to prohibit reasonable measures to prevent the boarding of vessels by passengers intent on piracy.” *Id.* at 498. This Comment suggests that this observation evades the issue of the privacy of passengers who are not pirates.

In *Edwards*, the defendant had been convicted of possession of heroin which could never have endangered the flight or have been used as an instrument of air piracy. *See id.* at 497. The real question, then, is whether the framers would have been troubled by the use of the danger of piracy to excuse enforcement of laws having no logical relation to that piracy in ways which would be otherwise impermissibly intrusive. One wonders whether Jefferson or Adams would have objected to a warrantless search of baggage he carried to Liberty Hall in Philadelphia by British officers intent on reducing the enormous Eighteenth century dangers of highway robbery and sea piracy. Judge Oakes’ concurrence in *Edwards* suggested the obvious answer is that the

If, however, searches of such baggage can today be justified by the administrative search doctrine, any such expectation would be unreasonable. Thus, any search of luggage, whether or not related to the administrative purpose, would face far less constitutional restraint than such searches would have faced ten years ago. Widespread searches already seem to have intimidated even citizens with good reason to resist them. The United States Court of Appeals for the Fifth Circuit has noted that, “[w]e think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs.”¹⁶⁸ Eventually, the administrative search doctrine could make any expectation of privacy in any place unreasonable and, thus, completely obliterate the purpose of the Fourth Amendment.¹⁶⁹

B. *Practical Critique of Profiles*

Only twice in the past twelve years has an American airliner faced a terrorist attack and only one of those incidents led to an arrest.¹⁷⁰ This leaves officials with one known airline bomber from which to make a profile.¹⁷¹ Profiles used in the test program at Northwest are not based on data about actual terrorists. The FAA developed the criteria based on “consultations with a large number of security and terrorism experts, who gave their assessments of the likely patterns of behavior of individuals intending to attack civil aviation.”¹⁷² In other words, the criteria are based on the opinions of experts rather than on actual data.

Though failure to use real data might seem irresponsible, there is a very good reason why no data was used—because none exists, and it would be almost impossible to obtain such data even if a concerted effort was made to do so. Most evidence of terrorist attacks is destroyed in an airline crash, so that officials do not have enough information to form a profile even if such a methodology could ever succeed.¹⁷³ Moreover, there have been no terrorist attacks on Ameri-

framers would have objected on grounds that at the time warrantless searches were severely limited to searches incident to a felony arrest. *See id.* at 502-03.

168. *United States v. Berry*, 670 F.2d 583, 598 n.16 (5th Cir. 1982).

169. It would effect a “systematic wrenching of the administrative search from its constitutional roots.” *Soyland*, 3 F.3d at 1318 (Kozinski, J., dissenting).

170. *See Nojeim*, *supra* note 51, at 6.

171. *See id.*

172. Fainberg, *supra* note 39, at 200.

173. Even if circumstances did permit information-gathering, there is little assurance that “experts” would utilize it rationally. For example, the FBI gathered information about feminist groups from 1969 to 1979. The FBI amassed a file of nearly 3,000 pages, including an account of a meeting at which, according to the agents assigned, “[t]he Women, in general, appeared to be hippies, lesbians or from far-out groups. Most of them were colorfully dressed, but the majority

can flights for more than twenty years.¹⁷⁴ Even if data on terrorists from the 1960s or from overseas were collected, such data would tell little about behavior patterns in the United States today. Data about non-aviation terrorists might be extrapolated for airline-terrorist profiles, but a profile developed in this way would ultimately depend on the reasonable but unverifiable assumption that air terrorists are like other terrorists. Furthermore, such a profile would logically be two steps removed from the person against whom it is directed. Not only would the information used to justify searching a person not be particularized to him or her as an individual, it would not even be particularized to any group to which he or she actually belongs. Rather, it would be particularized only to a different group assumed to be similar to the one to which he or she belongs.

Profiling has been tried several times, always without success.¹⁷⁵ The German S.S. profile for a potential bomber of the Hindenburg made Jewish and dissident passengers suspects, but the actual bomber proved to be a German patriot.¹⁷⁶ Before the 1974 anti-terrorist legislation provided for screening of all passengers, the airlines used a manual profiling system similar to the automated system proposed by the Gore Commission, but despite this profiling, hijackings continued to increase in frequency.¹⁷⁷

Both of these profiling schemes, like that proposed by the Gore Commission, were based on poor information. Profiling has failed even when security officers had accumulated excellent information. Prior to the Pan Am Flight 103 bombing, Pan Am knew that an anonymous caller to the United States Embassy in Helsinki had claimed that a Finnish woman would bomb a Pan Am flight from Frankfurt during December of 1988.¹⁷⁸ Pan Am merely used a profile identifying Finnish women for heightened security and took no other special security measures despite a number of other known similar threats.¹⁷⁹

wore faded blue jeans. Most seemed to be making a real attempt to be unattractive." NATALIE ROBBINS, *ALIEN INK: THE FBI'S WAR ON FREEDOM OF EXPRESSION* 327 (1992). Perhaps the FBI might create a profile on this basis and search women who try to make themselves ugly or who wear colorful clothing with faded blue jeans. Without judicial review of profiles, there is no way to tell who or what will be targeted.

174. See Nojeim, *supra* note 51, at 6 (illustrating that in 1972, when profiling was used exclusively, there were 28 hijackings on American aircraft, but since 1972, when all luggage began to be X-rayed, there have been none).

175. See *supra* notes 42-54 and accompanying text.

176. See *supra* notes 15-24 and accompanying text.

177. See *supra* notes 42-54 and accompanying text.

178. See REPORT TO THE PRESIDENT, *supra* note 55, at 8-9.

179. See *id.*

The murderous failure of these procedures is well known.¹⁸⁰ Perhaps knowing that plans to use a female Finnish bomber had been revealed, the terrorists employed a man of Arabic descent as a bomber instead.¹⁸¹ Thus, even under ideal circumstances, with inside information about the terrorists and their plans, profiling failed.

Common sense suggests that profiling will likely fail. Profiling has a deplorable record in attempts to halt drug traffic into the United States.¹⁸² In order for profiling to work, terrorists must be unaware of its use. Simply by planting a bomb on an unsuspecting passenger, a terrorist can use that passenger who does not meet the profile to circumvent the airport security system. Terrorists will continue to seek innovative ways to place bombs on an aircraft without having to take it on themselves. The FAA has tacitly conceded the ineffectiveness of its profiles by providing for some passengers to be subjected to heightened security by random selection.¹⁸³ It is likely that the random checks will provide more deterrence than would profiles, since random checks cannot be evaded. However, the existence of profiling shows that the FAA is not content to rely on random checks alone, since doing so reduces security to mere chance.

One group that has been noticeably affected by enhanced airport security is the Arab-American population.¹⁸⁴ Though there has never been evidence tying the Middle East to the bombing of the Oklahoma City Federal Building in 1996, public sources voiced suspicion of Middle Easterners immediately and Arab Americans faced increased detentions and suspicion.¹⁸⁵ The Council on American Islamic Relations

180. See *supra* notes 55-64 and accompanying text.

181. See REPORT TO THE PRESIDENT, *supra* note 55, at 8-9.

182. "Profiling techniques used by the Customs Service do not stop the drug trade. If they actually worked, drugs would not be coming into the United States." *Profiling Endangers*, *supra* note 50. This does not reflect poorly on the personnel who are committed to protecting the citizens of the United States from overseas dangers. This author had the pleasure to work closely with immigration and customs officers for several years in O'Hare's International Terminal, and can confirm that they are highly trained and experienced professionals. "Our inspectors constantly strive to show courtesy and respect to all those whom they encounter." Interview with Patrick Noonan, O'Hare International Airport Port Inspector, United States Customs Service (Aug. 17, 1998). The problem inherent in profiling is not with the people who implement it. It might be argued that profiling has helped fill American prisons with drug offenders. However, it has not deterred the drug trade. Likewise, filling prisons with air terrorists caught by profiles might be emotionally satisfying, but it will not keep airlines safe.

183. See *InVision Receives FAA Contract*, *supra* note 145.

184. See ACLU Freedom Network, *Profiling of Fliers Raises Racial Issue* (visited Sept. 26, 1998) <<http://www.aclu.org/news/w092697d.html>> [hereinafter *Profiling of Fliers*].

185. For example, Mr. Abraham Ahmad, an American of Jordanian descent, left Oklahoma City at the time of the bombing. See Nojeim, *supra* note 51, at 8. In three United States cities he was strip searched and interrogated, and then, after he reached London, he was forced to return to the United States. See *id.* According to the ACLU account, other than the timing of his

("CAIR"), which assists profiled Islamic Americans who feel their constitutional rights have been violated, contends that profiling essentially boils down to stereotyping.¹⁸⁶ CAIR reported a 1000% increase in complaints in one year by Islamic Americans who were detained, searched, and questioned in American airports.¹⁸⁷ Even if the FAA does not use religion itself as a criterion, among the factors that seem to increase a person's likelihood of heightened security are place of birth and the number of trips to Middle Eastern countries.¹⁸⁸ Naturally, such factors indirectly single out Arab-Americans more often than other Americans.

As discussed above, such discrimination could only be defensible if it serves a compelling governmental purpose.¹⁸⁹ Though airline safety is arguably a compelling purpose, the only purpose served by profiling is cost-cutting, not airline safety. If the public purpose is zero-tolerance for terrorism,¹⁹⁰ then everyone should be searched. This would inevitably curb potential terrorism better than the use of profiles. Targeting only certain individuals reflects a refusal to accept the monetary and political cost of universal searches—and such a refusal is not even an honest governmental purpose, let alone a compelling one.

C. *Constitutional Alternatives to Ends Sought by the Gore Commission*

1. *Theoretical Standpoint*

To discourage terrorism, society must take steps to prevent terrorists from achieving their objectives. Their long term goal, of course, is not to kill Americans but to intimidate and alter behavior by restricting freedom. Terrorists seek a world in which fear, not free-

departure from Oklahoma City there was no connection between Mr. Ahmad and the bombing, and there was no credible evidence of his involvement. *See id.* He was subjected to humiliation and gross inconvenience for no crime other than being an Arab-American man who left Oklahoma City on an inauspicious day. *See id.*

One wonders what sort of profile would have identified the actual bomber. Timothy McVey was a high school athlete and a decorated Desert Storm veteran with no criminal record. *See* Dale Russakoff & Serge F. Kovaleski, *An Ordinary Boy's Extraordinary Rage*, WASH. POST, July 2, 1995, at A1. "Many acquaintances had to struggle to think of something—anything—to relate about him." *Id.* He was a survivalist who had assembled an arsenal to fight an apocalyptic battle, but these activities were unknown to authorities and may not have even been illegal. *See id.*

186. *See* Council of American-Islamic Relations (visited Sept. 8, 1998) <<http://www.cair-net.org>>.

187. *See id.*

188. *See* Higgins, *supra* note 103, at 52.

189. *See supra* notes 105-141 and accompanying text.

190. *See* Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990) (codified as amended in scattered sections of 49 U.S.C. and 29 U.S.C.).

dom, is the rule. When government restricts freedom to fight terrorism, it actually carries out the objectives of the terrorists. Such appeasement *encourages* terrorism.¹⁹¹

A Chinese proverb recalls that the purpose of terror is “[t]o kill one and frighten 10,000 others.”¹⁹² The objective of terrorism is to create fear. To overcome terrorism, society simply must not become frightened. Terrorists crave fear, and it is this that we must always refuse to allow them. Thus, stopping terrorism is not chiefly a matter of security measures, but of social courage and education. It cannot be done by government, but must be done in the hearts and minds of American people who say to themselves “we will never fear that” and say it to the world loud enough for the terrorists to hear.

Real security measures can enhance our fearlessness,¹⁹³ but measures such as those proposed by the Gore Commission are obviously motivated by fear, and as such they feed the craving of terrorists. If we are so fearful that we allow our government to restrict our freedom and carelessly spend our billions, we tell the world how frightened we are and we tell the terrorists that for every one they kill, they can frighten and intimidate ten thousand. A government band-aid presenting a façade of safety cannot be a substitute for individual Americans taking responsibility for our own safety and demonstrating our unwillingness to be intimidated. Such band-aid measures, when they impinge on individual freedoms, send the wrong message to terrorists and actually repress the exact kinds of personal courage which spark the only realistic hope of stopping terrorism at its roots.

World tensions and the increasing availability of weapons of mass destruction¹⁹⁴ make terrorism as great a threat today as it has ever been in the United States. Current political sentiment suggests that drastic action is called for to address security concerns. Rather than

191. One commentator has said:

It is wrong to allow yourself to be intimidated, because if you do so you encourage intimidation. If somebody is pointing a gun at your head, it is essential to consider the fact that death is perhaps unavoidable and that therefore avoiding death is no longer a rational objective, but that other objectives (especially the preservation of freedom and self-respect) may still be attainable. The only moral response to such violent threats is to say, “go ahead and shoot. I will never do what you want.”

Interview with Eirik Marr Johnson, Parliamentarian, self-confessed “freedom extremist,” and an attorney member of the Illinois ACLU (Aug. 12, 1998).

192. Dow, *supra* note 14, at 1152 n.12.

193. Fear is not the same thing as an apprehension of danger and steps taken to reduce it. The law is careful to distinguish between fright, an emotion having no legal significance, and apprehension, which gives rise to the tort of assault and may justify self-defense. RESTATEMENT (SECOND) OF TORTS § 24 cmt. b. Fear encourages terrorism, whereas rational action based on apprehension can reduce terrorism.

194. See Dow, *supra* note 14, at 1049-51.

exploiting such sentiment as an excuse to erode constitutional rights and fatten existing bureaucratic budgets, this sentiment must be harnessed to create a truly safe airline system.

Heavy-handed security measures provoked but could not prevent the most famous airline disaster in history—the destruction of the Hindenburg—and the consequent destruction of pre-war international air travel.¹⁹⁵ The Gestapo was not concerned with American-style privacy rights.¹⁹⁶ It was the paternalistic insensitivity of German security measures, not individual rights, which prevented the German S.S. from making the Hindenburg safe.¹⁹⁷ Twenty-First Century America cannot afford to make the security mistakes of Depression-era Nazi Germany.¹⁹⁸

The Constitution is a blueprint for effective strategies whereby Americans may secure our personal safety, rather than a barrier to such strategies. There is no need to make a trade-off between safety and constitutional freedom. An unconstitutional reaction to terrorism is, by its nature, an ineffective reaction, both because it ignores the accumulated wisdom of the Constitution and because such an approach will face constant, inevitable, and rightful opposition.

The most powerful tool America has against terrorism is the willing assistance of American individuals. Heavy-handed government intrusion into the travel lives of Americans will serve chiefly to create a hostile relationship between travelers and the officials responsible for protecting them,¹⁹⁹ and thus would squander our most powerful anti-terrorist asset—the goodwill and intelligence of American travelers.

195. See MOONEY, *supra* note 13, at 11-12.

196. See *id.*

197. See *id.*

198. See *id.*

199. Even existing security procedures have created an adversarial relationship between passengers and officials. Following the filing of a class action lawsuit by nearly 50 African American females against United States Customs at O'Hare International Airport in Chicago, both Senators from Illinois took notice. Letter from Sens. Carol Moseley-Braun and Richard Durbin to Acting Comptroller General James F. Hinchman, General Accounting Office (June 9, 1998). In that letter to the General Accounting Office ("GAO"), the Senators requested "review of the United States Customs Service search seizure procedures at O'Hare Airport." *Id.* According to the letter, the Senators were concerned "about the consequences of using profiles that have the potential to invade the privacy of innocent Americans." *Id.* Further, the letter asked that the strip search techniques also be "reviewed for their efficiency in relation to other means of finding contraband." *Id.* The following day the Senators jointly released a press statement to voice their concern with the current practices. Press Release, Sens. Carol Moseley-Braun and Richard J. Durbin (June 10, 1998). When questioned about criteria used by airlines, the DOT reported that "no airline has been . . . cited for discriminating in its searches . . ." Higgins, *supra* note 103, at 52. The FAA denies "emphatically" that criteria such as ethnicity, gender, or religion are included in its profiles. See *id.* at 50. However, an American Airlines' document advised its em-

The personal rights in the Constitution can and should serve to advance the cause of safety. Constitutional safeguards prohibit only paternalistic safety strategies based on the premise that individuals must be important pawns in a game played between terrorists and safety officers. The Constitution prohibits the government from using such a game-playing model in constructing safety strategies. Whatever the details of constitutional doctrine, the essence of the Constitution is individualistic. Americans cannot be deprived of an effective individual role in securing their own safety. Such an individual involvement in safety is both constitutionally required and the only sound basis for effective security measures. Unfortunately, the recommendations of the Gore Commission on aviation security and safety reflect an unquestioning acceptance of the game-playing model and largely ignore not only individual constitutional rights, but also the wiser strategies enjoined by the Constitution. The Commission has both failed to make us safe and to make acceptable inroads into our constitutional rights.

The Gore Commission's acceptance of profiling betrays its lack of concern for public involvement in safety. The profile can only be effective if it is kept secret from the very people whom it is supposed to protect. There is no way for travelers to take any role in implementing a profile-based security structure. The Gore Commission's reactionism is remarkably similar to that of officials during early hijacking days. As discussed above, in 1972, the FAA mandated air carriers create (within seventy-two hours) an "acceptable" screening system "to prevent . . . devices or weapons in carry-on baggage or on . . . the persons of passengers."²⁰⁰ In 1972, passengers were subjected to a behavioral profile, a magnetometer, identification check, and physical search.²⁰¹ Likewise in reaction to what was believed to be a terrorist attack, the Gore Commission hastily acted on legislation to take immediate measures to secure safety. In the 1970s, real safety—both from terrorists and from threats to the Constitution—was achieved only when profiling was abandoned and everybody was searched. Likewise, real security today requires evenhanded searches of everybody.

Real security procedures directed at real threats are both constitutionally more sound and practically more effective than are the steps proposed by the Clinton Administration and now enacted into law as

ployees to give closer scrutiny to "those with Arab-sounding names who don't carry U.S. passports." *Profiling of Fliers*, *supra* note 184.

200. *United States v. Davis*, 482 F.2d 893, 900 (9th Cir. 1973) (quoting 37 Fed. Reg. 2500-01).

201. *See* FAA Press Release No. 72-26 (Feb. 6, 1972).

the 1996 FAA Reauthorization Act. Flying is still one of the safest forms of travel, but terrorist threats are likely to increase in the near future.²⁰² Due to the recent terrorist threats and bombings of United States embassies, the need to improve existing security at airports is at an all time high. It is possible that a combination of the steps outlined below are likely to realistically improve airline security. Some of these proposals may seem utopian, but since large outlays of money have been authorized, it ought to be spent constitutionally and effectively.

2. *Specific Safety Recommendations*

a. Improve Existing Safeguards

Existing airline security measures have proven to be amazingly effective.²⁰³ Before gaining computer capabilities, airlines relied on manual screening procedures. In fact, El Al wages the most aggressive visual screening campaign in the industry. One of the most tragic aviation stories told is that of an Irish national who attempted to board an El Al flight at Heathrow airport on April 16, 1986.²⁰⁴ After repeated questioning by the ticket agent, the passenger was pulled to the side so a search could be conducted of her baggage.²⁰⁵ Inside the lining, her Palestinian fiancé had inserted a bomb, presumably to explode mid-air and kill his fiancée and unborn child.²⁰⁶ It is unlikely that any automated system would have identified this passenger, but an alert airline employee did. Alert passengers might be able to do the same if they were empowered and informed. The use of suspicious, even if innocent, behavior is less paternalistic than is profiling when used to intensify investigation because it is particularized to the individual who is then investigated, and the investigation is thus partly under his control.

Hence, the most reasonable step in improving security is to see what has worked and do it even better. One potential weakness in the existing system is that most security personnel are poorly paid and

202. See Nadine Strossen, *Check Your Luggage and Liberties at the Gate* (visited Feb. 8, 2000) <<http://www.intellectualcapital.com/issues/issue100/item4464.asp>>.

203. See *supra* note 54 and accompanying text.

204. See Faye Bowers, *Ground Personnel: Gap in Airport Security System*, CHRISTIAN SCI. MON., Aug. 7, 1996, at 1.

205. See *id.*

206. See REPORT TO THE PRESIDENT, *supra* note 55, at 169 (repeating testimony given by Billie H. Vincent before the Commission on November 17, 1989, and the subsequent letter of April 19, 1990).

trained,²⁰⁷ which increases the risk that they could be bribed, fooled, or infiltrated by determined terrorists.²⁰⁸ Thus, the most important thing we can do to make airports more secure is to improve the professionalism, training, and screening of security personnel. The Gore Commission recommended seven times as much funding to protect the FBI and DEA buildings as it allotted for training security workers in detecting explosives.²⁰⁹ Profiling received five times as much funding as did training for the whole country.²¹⁰ In all, training airport security officers accounts for only 2% of the total package signed into law by President Clinton, and little of the other funds will likely to be devoted directly to improving the skills and circumstances of the front-line officers charged with airline security.²¹¹

A second potential weakness of the existing system concerns the "secure" areas of many airports. These areas that can only be entered after submitting to security checks are very large, making them impossible to monitor and allowing non-passengers to enter. For example, it is not possible to enter many of the restaurants and other attractions at many airports without passing security. This means much of the security effort is devoted to people who never board airplanes. Either the secure areas should be made much smaller and access to them should be limited to passengers and those assisting them, or else small heightened security enclaves limited in these ways should be created within the existing larger secure areas of airports.²¹² Perhaps final se-

207. This problem presents danger not only to civil liberties, which may be ignored by unknowledgeable guards, but also to safety itself. This is an illustration of the central contention of this Comment—that proper respect for civil liberties often enhances rather than weakens security. Properly-trained guards demanded by the Constitution would also provide better security. The inability of existing guards to do their jobs is demonstrated by numerous breaches of airport security, such as the August 26, 1999 incident at the United Terminal at Chicago O'Hare International Airport, in which "[a] man carrying a tan canvas bag ran past an unarmed security guard . . . prompting evacuation of 6,000 people . . . during one of the busiest times of the day . . ." Gilbert Jimenez & Frank Main, *Chaos at O'Hare*, CHI. SUN-TIMES, Aug. 27, 1999, at 1.

208. The vulnerability of security personnel to security lapse is highlighted by the recent scandal at American Airlines involving a massive conspiracy to bring guns and drugs into the country from Latin America on American Airlines planes by 58 airline employees and Department of Agriculture employees, and officers of both the INS and local Sheriff's Department. See *Editorial, Airline security lax*, CHI. SUN-TIMES, Aug. 27, 1999, at N49.

209. See *President's Proposal*, *supra* note 72.

210. See *id.* Each bureaucracy received seven million dollars to defend its headquarters. Approximately two million was earmarked for training. See *id.* Ten million dollars was invested in profiling. See *id.*

211. See *id.* Training accounts for approximately two million dollars of a budget of about a billion dollars. See *id.*

212. The cases that authorized administrative searches date to the 1970s when searches were made only of passengers and only almost immediately before boarding. See *United States v. Davis*, 482 F.2d 893, 899 (9th Cir. 1973). These factors were considered by the courts that allowed such searches. "Near the entrance to the boarding gate were two large signs, plainly

curity checks could be made on the aircraft themselves after all passengers have boarded. Existing security equipment has been effective,²¹³ but improved explosives technology could enable well-financed terrorists to evade the equipment, and therefore the technology of detection equipment must keep pace.

b. Resolve Problems With Tracking Checked Baggage

The age-old problem of lost or delayed checked baggage must also be solved. Fearing delays and lost baggage, many passengers chose to carry-on their bags.²¹⁴ Such bags are not only security risks, but they can endanger the plane itself or the passengers in a crash.²¹⁵ Bag matching to assure that passengers board the same flight as their baggage would both improve baggage service and prevent the tactics that led to the Lockerbie disaster.²¹⁶ However, imposing bag matching on the current muddle of domestic bag handling would dramatically slow flights.²¹⁷ Therefore, the current system must be improved, both to insure the safety of the checked baggage through bag matching as well as encourage passengers to use the checking system and reduce their

warning, among other things, 'PASSENGERS AND BAGGAGE SUBJECT TO SEARCH.' " *United States v. Edwards*, 498 F.2d 496, 499 (2d Cir. 1974). In addition, "an employee announced over a loudspeaker that . . . all carry-on baggage would be searched." *Id.* The court regarded this as important since it allowed those objecting to the search to turn away and not take the flight. *See id.* However, today many airports do not search passengers immediately before they board the planes. Instead, large areas of the terminals are designated as security areas. This drastically expands the physical area over which a citizen cannot avoid a search compared to that allowed in cases such as *Edwards*. Current practice is both potentially less effective and more constitutionally objectionable than that which was originally approved. The chief advantage is probably financial.

213. American security efforts have been intensive and largely effective. An attorney and former FAA employee who has strong concerns for both security and the Constitution has expressed intense respect for the system currently in place to protect American air travelers. Interview with Ken Quinn, Attorney and Former FAA employee (Dec. 13, 1998). Mr. Quinn points out that the heavy hand of American power should descend upon those who threaten us, not upon American citizens. *See id.* In many cases, we know who threatens us and how, but fail to take action against them owing to other national agendas. *See id.* A true policy of zero tolerance for terrorism demands that we strike hard and fast when we know who threatens us, even at the cost of other important foreign-policy objectives. *See id.* Part of the price we must pay for security is not our own individual freedoms, but perhaps in a reduced flexibility in foreign policy. *See id.*; *see also supra* note 9 (discussing Jefferson's forceful response to the terrorism of his day, namely piracy).

214. This concern has led to strict controls on the size, number, and weight of carry-on bags.

215. *See Kapustin, supra* note 40, at 1-2.

216. *See* N.J. Strantz, *From Technology to Teamwork: Aviation Security Reform Since Pan Am Flight 103*, 3 ALB. L.J. SCI. & TECH. 235, 251 (1993).

217. One hundred percent bag matching using the current technology would "cripple the system." Kunicki Interview, *supra* note 77.

dependence on unsafe carry-on bags.²¹⁸ Perhaps the computer resources that the Gore Commission would utilize to profile passengers could instead be employed to track checked baggage.

c. Reduce the Adversarial Nature of Security Procedures

Almost all passengers are deeply concerned about safety and would be anxious to actively assist in preventative measures. Systems which force passengers to submit against their will and which humiliate or otherwise offend them transform willing and able potential assets in a safety system into enemies.²¹⁹ Actions which alienate passengers by violating their rights are, by nature, bad for security, because they prevent passengers from using their abilities to enhance security.

There is a famous story alleging that a group of terrorists caught before they had done any damage, said to their captors, "today, we were unlucky. But remember, we only have to be lucky once. You will have to be lucky always."²²⁰ This story is used to justify extreme security measures, since being lucky every time is not an easy task.²²¹ But conversely, consider if the story involved a victim who had just failed to prevent a terrorist from foiling his violent plot. The victim, too, could say, "we only have to be lucky once." Part of the danger of terrorism is that there are always more potential terrorists than there are security officers. But it is equally true that there are always more passengers than there are hijackers. Relying on a handful of outnumbered "experts" for security is as hopeless as the famous story above suggests. However, were such experts to marshal the eyes, ears, and intelligence of every passenger against terrorism, the odds would be reversed in safety's favor.²²² There are many things passengers can and would do to enhance security if only they knew how. The most

218. It appears that some of the money already allocated for implementation of the Gore Commission recommendations could be earmarked for these purposes. See *President's Proposal*, *supra* note 72. It ought to be.

219. For example, hundreds of young Japanese-American men who escaped relocation camps during World War II proved their American loyalty by joining the armed forces and becoming war heroes. Yet, authorities had found the task of individually assessing the threat posed by individual Japanese-Americans overwhelming and had lumped them all into a single "profile." See FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* 143-81 (1976).

220. Thomas Strentz, *A Terrorist Psychological Profile Past and Present*, 57 *FBI L. ENFORCEMENT BULL.* 13, 16 (1988) (quoting *WASH. POST*, Oct. 12, 1984, at A1) (reporting the comments of an Irish Republican Army member).

221. See *id.*

222. This author does not propose arming passengers and having them shoot it out with hijackers. Keeping guns out of passengers' hands was part of the 1974 legislative anti-terrorist program. See *supra* notes 46-49 and accompanying text.

important step would be to require airlines and the FAA to inform passengers and crew about known terrorist threats.²²³

Just as public awareness of seat belt use and drunk driving has made auto travel safer²²⁴ in the United States and has allowed individuals to assume a greater degree of responsibility and control for their own safety and that of others. Similar programs could enhance airline safety. For example, most passengers are unaware that the chief danger of leaving baggage unattended is that the baggage could be tampered with by terrorists. Passengers fear only that it will be stolen, a risk which they feel it is their own right to take. Thus, law-abiding and conscientious citizens sometimes leave bags alone for a few moments and trigger an expensive and ultimately pointless utilization of security resources because airport personnel must report the bag, and both local police and federal officials must respond.²²⁵ Most airports already have television monitors installed that passengers watch while waiting or collecting baggage. Such monitors ought to provide practical information which passengers could use to help make themselves and their fellow passengers safer. Few of us would recognize what was happening even if we were watching a terrorist opening a suitcase and activating a bomb. We have a right, and a need, to know what to look for.

There is no convenient, standardized system whereby passengers can become proactively involved in their own safety, such as a mechanism for reporting behavior that seems dangerous or suspicious. Standard questions asked of passengers should be expanded to help them know what to look for, not only in their own baggage, but in their surroundings. If passengers were advised to be observant and believed that their observations would be valued and acted upon, people would take care to watch baggage and would report those who do not. This would both increase security and reduce the burden on security resources that could be more effectively used otherwise.

Part of the problem stems from the FAA's attempt to make people feel safe about air travel, which has resulted a rather paternalistic approach to air safety. The FAA has avoided public education as a means of enhancing travel safety since public discussion could make people feel that air travel is unsafe.²²⁶ Unfortunately, the Gore Com-

223. Such a proposal is outlined in greater detail by Hodes, *supra* note 57.

224. See generally National Highway Transportation Safety (visited Feb. 29, 2000) <<http://www.nhtsa.dot.gov.html>> (announcing results and additional grant funding for greater auto safety).

225. Kunicki Interview, *supra* note 77.

226. The FAA received several warnings about threats to Pan Am Flight 103 up to two weeks before the bombing took place, but Pan Am allegedly refused to tell the pilots for fear the pilots

mission has uncritically adopted rather than challenged this approach.²²⁷

The FAA's paternalistic attitude sometimes extends beyond the passengers even to air crew. For example, in November of 1974, TWA Flight 514 crashed into Mt. Weather as it approached Dulles International Airport, killing all ninety-two people on board.²²⁸ Just six weeks earlier, a United Airlines DC-8 had been cleared to land on the same flight path.²²⁹ It cleared the peak by approximately thirty feet.²³⁰ The FAA showed little interest, but the pilot and copilot were concerned when they discovered how close they had come to disaster.²³¹ The FAA assured the pilots that air traffic controllers could and would prevent such an event from happening again.²³² Nevertheless, the FAA did not distribute information about the danger.²³³ Had the FAA made a priority of informing the airlines and flight crews of the danger, it is likely that the pilots on Flight 514 would have known to avoid the danger and could have protected themselves and their

might become "jittery." See *Pagnucco v. Pan Am. World Airways, Inc.*, 37 F.3d 804, 820 (2d Cir. 1994). Though Pan Am's failure violated FAA rules, the FAA created a climate in which such a failure was normal. See *id.* The United States Ambassador and Embassy staff in Moscow received warnings about the attempted Pan Am bombing, in order to make the information public through the FAA, but because of a procedural error, the FAA completely failed to respond to the Embassy. See REPORT TO THE PRESIDENT, *supra* note 55, at 9-10. The 1990 Presidential Commission on Aviation Security and Terrorism concluded that the agency "failed to facilitate the timely exchange of information and guidance from headquarters to the field and from the field to headquarters." *Id.* at 58. It appears that Pan Am's security official intentionally buried the FAA warning under other papers on his desk and then attempted to falsify some of the dates on them to cover his tracks. See Hodes, *supra* note 57, at 367. It appears that neither the FAA nor Pan Am ever considered telling the public. See *id.* Had this threat become public, it is likely that no pilots would have been willing to fly the plane, and few if any passengers would have been willing to board it. There could have been no disaster because the plane would have never taken off. The cost in terms of disrupted travel plans and in embarrassment to Pan Am and to the American industry would have been enormous, but would have been counted in dollars, not innocent lives. This—not limits on our freedom—is the true kind of cost which must be accepted to attain zero tolerance for air terrorism. It is interesting to note that known threats to the Hindenberg were also kept secret for many of the same reasons that operated in the Pan Am disaster. See *supra* notes 13-24, 55-64 and accompanying text. Little, if anything, seems to have been learned between 1937 and 1988. In both cases, the disasters could have been avoided by public disclosure of known threats but were used to justify increasingly heavy-handed security measures instead.

227. See generally FINAL REPORT, *supra* note 4 (neglecting to recommend public education as a means of improving security).

228. See Kapustin, *supra* note 40, at 12.

229. See *id.* at 13.

230. See *id.* at 12-13.

231. See *id.* at 13.

232. See *id.*

233. See *id.*

passengers. Rather than lose control of the situation or admit that danger existed, the FAA chose to keep everybody ignorant.²³⁴

That is the same approach taken by the Gore Commission, and it will not work. Nobody would crash into a mountain known to be there, and nobody would fly on a plane known to be unsafe. Knowledge is the best security. The true balance that must be struck in airline security is not between danger and personal liberties, but it is between the risk of danger and costs to the airline industry of making threats known so that passengers and crew can avoid them.

d. Ombudsmen

One of the major obstacles a passenger faces in traveling is where to get information on how to log a complaint or report suspicious activity. With all of the different local, state, and federal agencies at work, it is often difficult to determine which office is the right office to handle the matter. Thus, a twenty-four hour central office, providing ombudsmen between the passengers and airport operators, federal agencies and airlines, would ease the flow of disseminating information and expedite the process of making a report.

The ACLU maintains an on-line complaint form that is accessible through its web-site.²³⁵ Using this form, the ACLU has attempted to remove some of the bureaucratic complexity of registering a complaint against an official. The ACLU uses the data from the complaints to determine whether discriminatory or abusive patterns exist.²³⁶ The web-site, however, is not intended for reporting suspicious behavior or for obtaining safety information, and so functions only to report unconstitutional behavior—not dangerous activity.

e. Enforceable Passenger Bill of Rights

Airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.²³⁷ Many passengers traveling through the airport do not understand their rights as passengers.²³⁸ Furthermore, even most lawyers today would not guess that complaints about security abuses should be filed

234. See Kapustin, *supra* note 40, at 13.

235. ACLU Freedom Network, *Passenger Profiling Complaint Form* (visited Feb. 7, 2000) <<http://www.aclu.org/forms/complaint.aviation.html>>.

236. See ACLU Freedom Network, *As Airlines Debut Profiling System, ACLU Launches Web Complaint Form* (visited Sept. 4, 1998) <<http://www.aclu.org/news/n123197a.html>>.

237. See *United States v. Meulener*, 351 F. Supp. 1284, 1289-1290 (C.D. Cal. 1972); *United States v. Allen*, 349 F. Supp. 749, 752 (N.D. Cal. 1972).

238. The Gore Commission apparently put low priority on passenger rights by completely neglecting the issue in the Commission's report. The Commission's report spoke in terms of

with an obscure branch of the FAA. Therefore, next to signs explaining prohibited activity in airports,²³⁹ there should be a comparable sign detailing your rights in an airport. For example, administrative searches in an airport should be publicly defined so that passengers can know if the searches to which they are subjected exceed legal bounds. Since X-ray security devices have been in place for twenty years, as travelers, we expect to place all carry-ons on the X-ray machine and to empty change from pockets and remove watches, but it is unclear where such actions cross the line and become a search.²⁴⁰ Such rights must be enforced by an independent agency similar to the United States Equal Opportunity Commission, whose agents should include the on-site ombudsmen described above,²⁴¹ available to assist passengers in protecting themselves, to inform passengers of both their rights and duties, and to reduce friction by creating a safe travel environment.

f. Bifurcated Airline System

The essential constitutional objection to security procedures is the passenger's lack of choice and the basic practical objection is cost. Yet, given a choice most travelers would willingly submit to security procedures and would also be willing to pay for them. Thus, one security solution would be to create a bifurcated airline system giving passengers a constitutionally and economically meaningful choice. Some flights would have full security while remaining flights would not. This would allow passengers a choice of taking the cheaper flight and risk security, and asserting their constitutional rights, or taking a pricier flight, surrendering such rights, and obtaining greater security. Though such a system would solve almost all constitutional and practical security problems, at least on the secure part of the system, it would be expensive to create and maintain, and administratively difficult to double all flight opportunities as the system would require.

zero tolerance for terrorism rather than in terms of passengers' rights to a safe flight. See FINAL REPORT, *supra* note 4, at 25.

239. Airports are known for abundant and often confusing signs. In recent years, many airports have posted signs reading "No laughing matter," and threatening arrest if passengers so much as mention bombs, pirates, or any other threatening words.

240. The administrative search doctrine evolved partly from concerns that searches under *Terry v. Ohio*, 392 U.S. 1 (1967), might not suffice to allow effective airline searches. See Rogers, *supra* note 2, at 512-13. Under *Terry*, a peace officer who has a "reasonable suspicion" of the commission of a crime, supported by "articulable facts," may stop and briefly detain a person and search for weapons and contraband. 392 U.S. at 21.

241. See *supra* notes 235-236 and accompanying text.

g. Bureaucratic Reform

It is difficult to regulate the aviation industry given that it requires an interface of local and federal authorities with private industry. Each airport is unique in management, funding, and ownership. Many airports are run by municipalities and most are both enmeshed in political controversy and caught between competitive administrative systems. The proposal for a new Chicagoland airport in Peotone, Illinois caused friction between state officials who favored the proposal, and local and federal officials (and the airlines) who opposed it.²⁴²

To implement any effective proposals for improved security, what the nation needs is a new, professional, and independent body insulated from political pressure and existing bureaucratic interests at all levels. Both the FAA and DOT have been in existence so long that they are the victims of entrenched interest groups both in the industry and within their own administration. Most local agencies also face the same issues. Society cannot afford to sustain the existing bureaucratic status quo. An examination of the distribution of funds under Gore Commission recommendations suggests that existing agencies with strong political clout, especially the Pentagon and the FBI, used the public panic about terrorism to justify massive increases in their budgets.²⁴³ By dismantling the existing administrative structures, we can free talented professionals in the field to utilize their skills, just as FAA and National Aeronautics and Space Administration did in the early days of their existence. Creation of this new body would allow representatives from all areas of aviation to assess and recommend guidelines and procedures for airports to follow. While there are organizations, such as Airports Council International and American Association Airport Executives, membership is voluntary.²⁴⁴ These organizations are special interest groups. Membership dues from the airport owners and operators fund these organizations.²⁴⁵ Therefore, the main interest represented is for themselves, not those of the public.

242. See Dennis Byrne, *Area's future still up in air*, CHI. SUN-TIMES, Aug. 14, 1997, at 33.

243. See *supra* notes 65-103 and accompanying text (discussing the Gore Commission).

244. For membership information about these organizations, see Airports Council International-North America, *Membership and Benefits* (visited Feb. 7, 2000)

<http://www.aci-na.org/new_website/membership/airport_membership/html>; American Association of Airport Executives, *About AAAE* (visited Feb. 7, 2000)

<<http://www.airportnet.org/depts/membership/info.htm>>.

245. See *supra* note 244.

h. Reporting Immunity

Another obstacle in discovering potential safety hazards at airports is the threat of punitive measures being taken against the officials or the airport when reported. In order to encourage employees, employers, and officials to report security recommendations or complaints, immunity should be granted to both those people reporting and to those against whom the complaint is directed. A review board could initially assess the situation and direct officials to make the necessary changes without taking punitive measures. Currently, this type of program is offered to pilots, encouraging them to report unsafe equipment on airplanes and to encourage pilots to do preliminary investigations prior to boarding the aircraft.²⁴⁶

i. Increased Control of Access to Airfields

Access to airfields must be controlled at all levels. Stricter standards are needed to toughen the regulations on access to all areas airside and landside of the airport. At O'Hare, a revolutionary program is being implemented in the cargo area.²⁴⁷ The first system of its kind to be introduced into American airports, drivers bringing cargo to the airport will have to undergo a special fingerprint analysis to gain entrance.²⁴⁸ When the thumb is placed in a holder, information about that person will appear at a command center.²⁴⁹ This is a very high safety precaution, with only minor intrusion to the person, and places a security emphasis on employees rather than passengers. In addition to personal information (name, employer, etc.), a freight order would also appear so that in the event of an airline accident, the airport officials could verify all deliveries of cargo, as well as, the name of the driver and supplier.²⁵⁰

All employees in the airport should have to undergo this process for gaining access to restricted areas. Currently, O'Hare uses a badging system, that, while effective, does not ensure whether the badge has been stolen and the individual's PIN number memorized. The fingerprint detector measures not only the fingerprint but also measures the width of the finger and the temperature, making it nearly impossible for a terrorist to gain entry with a detached finger. While not without

246. See Chicago O'Hare International Airport Noise Office, Fly Quiet Program (June 17, 1997) (on file with author).

247. Videotape: Universal Air Cargo Security Access System (SecurCom, Inc. 1999) (on file with SecurCom, Inc. (888) 826-8401).

248. See *id.*

249. See *id.*

250. See *id.*

high costs, this type of employee information would limit the access of individuals to restricted areas and keep detailed computer records of people on the airfield at all times.

j. Passenger Security Charge ("PSC")

Under current law, each airline passenger pays a three-dollar Passenger Facility Charge ("PFC") for the use of the airport facilities²⁵¹ and the costs associated with airport maintenance and development.²⁵² This surcharge is collected by the airlines at the time the ticket is sold.²⁵³ Some industry professionals contend that the PFC current use should be expanded to include a portion for safety.²⁵⁴ Airline security measures, both those proposed by the Gore Commission and in this Comment, are expensive, but this cost could be manageably funded through a program similar to the PFC.²⁵⁵ An analogous surcharge placed on a ticket for security improvements could also be collected by the airlines.²⁵⁶ The surcharge would be paid by the very people whose safety it helps secure and should be mandated for use for research and technology needed for airport security.

III. CONCLUSION

[N]ew technology becomes available with increasing speed. However, as technology is not the only answer, human effort must be afforded the proper focus. Therefore, the bottom line is that until some of the new technology is available and in place, tightened security must continue with a watchful eye toward protection of the right to travel.²⁵⁷

251. See 14 C.F.R. § 158 (1998).

252. See *id.*

253. See *id.*

254. FAA Reauthorization Bill, S. 82, 106th Cong. § 201 (1999). Currently, there are talks in Congress to raise the PFC charge from \$3 to \$5, however, the intended use for the increase is for airline competition and not security. PFCs are authorized for use for safety improvements, but not so mandated. This author contends that the increase of \$2 should be used only for safety and security enhancements.

255. Chicago O'Hare International Airport has currently committed \$20 million of its PFC funds for enhanced security. See Robert C. Herguth, *O'Hare to boost security against terrorists, thieves*, CHI. DAILY HERALD, Nov. 1, 1998, § 1, at 10.

256. Such a move would require federal authorization. "[S]uch charges were prohibited in the early 1970s . . . [and since they were restored in 1990] . . . have been subject to federal restriction." ACI HIGHLIGHTS (Airports Council International-North America, Washington, D.C.), Vol. 36, Jan. 1999, at 3. At \$2, a PSC would raise almost 900 million dollars annually, almost 90% of the total Gore Commission recommended expenditures. See *President's Proposal, supra* note 72 (tabulating the Gore Commission total of \$1.097 billion). PFCs currently generate more than \$1.3 billion dollars a year (at \$3). See *id.*

257. Reser, *supra* note 34, at 823.

Current political sentiment—fear of terrorism—has been used to justify massive budget expansions of the Pentagon, the FBI, and other agencies, and to justify actions which challenge constitutional rights to travel, privacy, and equal protection. Something surely should be done, but big-budget big-brother responses based on ignorance are no substitute for considered action. Profiling has already been tried, and has been shown to be ineffective. Profiling, and the personal data-gathering and management that it calls for, is the worst aspect of the new proposed security measures, the least likely to be effective, and the most likely to threaten the liberties upon which our nation is founded.

If drastic action is called for to address security concerns, the action should be taken to reorganize the bloated and ineffective bureaucracy. Such creative solutions would inevitably provoke intense resistance within the existing system. Only strong pressure could overcome such resistance. It is in the nation's interest to harness our increasing concern for airline safety to break down bureaucratic obstacles to safety, not to justify massive uninformed expenditures and limits on personal freedom as the Gore Commission did.

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