University of Arkansas at Little Rock Law Review

Volume 31 | Issue 3 Article 4

2009

Criminal Law—No Right to Revoke and Avoid Search-Ninth Circuit Rules That Consent to Airport Screening Cannot be Revoked in an Administrative Search. United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

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CRIMINAL LAW—NO RIGHT TO REVOKE AND AVOID SEARCH—NINTH CIRCUIT RULES THAT CONSENT TO AIRPORT SCREENING CANNOT BE REVOKED IN AN ADMINISTRATIVE SEARCH. *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007).

I. INTRODUCTION

"[T]he safety and security of the civil air transportation system is critical to the security of the United States and its national defense."[1] Millions of people fly every day and every one of them is subject to the rigorous and time-consuming process of airport screening searches. Most people, however, are willing to comply because they understand that the search is in place to deter terrorist hijackings and bombings, especially in the aftermath of 9/11.[2] These searches pose a challenging situation for courts that must decide if the searches meet the Fourth Amendment[3] requirement of freedom from unreasonable searches and seizures. The challenge arises because the searches require the suspicionless, warrantless search of millions of people. In the past, Courts accepted several exceptions to the Fourth Amendment, but the Ninth Circuit correctly relied on administrative searches and correctly interpreted airport administrative searches to not allow passengers to revoke their consent to airport searches.

This note examines the Ninth Circuit's decision in *United States v. Aukai*[4] that held that airport screenings are justifiable under the administrative search exception to the Fourth Amendment, and that consent is not required to conduct these searches.[5] The note will explore airport security searches by first briefly discussing the Fourth Amendment and giving an overview of its requirements and exceptions to the rule.[6] This Amendment is the foundation courts use when they begin to analyze airport searches. The note then describes the history of airport searches.[7] This history demonstrates the evolution of airport security and shows how Congress has consistently responded to threats to air safety by passing new legislation.

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1. H.R. REP. NO. 107-296, at 53 (2001)(Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N 589, 590.

2. On September 11, 2001, four separate and coordinated aircraft hijackings in the United States were used as guided missiles to kill thousands of people. Deborah von Rochow-Leuschner, *CAPPS II and the Fourth Amendment: Does it Fly?*, 69 J. AIR L. & COM. 139, 139 (2004).

3. U.S. CONST. amend. IV

4. 497 F.3d 955 (9th Cir. 2007).

5. *See infra* Part III.

6. *See infra* Part II.A.

7. *See infra* Part II.B.2.

After reviewing the history of airport regulations, the note discusses the consent exception to the warrant or probable cause requirement of the Fourth Amendment, covering both express and implied consent.[8] The last topic covered in the background is that of administrative searches.[9] The note then covers the *United States v. Aukai* opinion—both the facts and reasoning of the decision.[10] The note concludes by analyzing the importance of the decision.[11]

II. BACKGROUND

This section first discusses the Fourth Amendment and explains the purpose, requirements, and various exceptions to the warrant requirement of the amendment.[12] This section then details airport security, discussing the history and rationale for security measures, and looks at the effect of terrorism on such measures.[13] It next discusses express and implied consent, and the purpose, scope, and requirements of this exception to the warrant requirement.[14] Finally, this section covers administrative searches, describing the purpose, scope, and requirements of the exception.[15]

A. The Fourth Amendment

The Fourth Amendment gives people the right to be free from unreasonable searches and seizures.[16] The Amendment states the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[17]

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8. *See infra* Part II.C.
9. *See infra* Part II.D.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part II.A.
13. *See infra* Part II.B.
14. *See infra* Part II.C.
15. *See infra* Part II.D.
16. U.S. CONST. amend. IV.
17. *Id.*

1. *Test for a Search Within the Meaning of the Fourth Amendment*

The United States Supreme Court articulated that protection under the Fourth Amendment applies when a person "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[18] The analysis, as Justice Harlan stated in his concurring opinion in *Katz v. United States*,[19] consists of two inquiries.[20] The first is whether the person had an expectation of privacy, and the second is whether the person's expectation of privacy is one society has accepted as reasonable[21]—whether the expectation is justifiable under the circumstances.[22] This analysis from *Katz* is commonly adopted as the definition for a "search."[23] Thus, *Katz* creates a threshold test for the Fourth Amendment: if there is no reasonable expectation of privacy, the Fourth Amendment is not a consideration, which would make the search or seizure presumably permissible.[24] If there is a reasonable expectation of privacy, however, the Government must show that the intrusion was justifiable under the Fourth Amendment.[25]

2. *Requirements and Exceptions Under the Fourth Amendment*

Once the Fourth Amendment is implicated, the question becomes whether the search or seizure is reasonable.[26] If the search or seizure is not reasonable, then it is prohibited.[27] A search is generally unreason-

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18. United States v. Knotts, 460 U.S. 276, 280 (1983) (quoting Katz v. United States, 389 U.S. 347, 361 (1967)).

19. 389 U.S. at 361.

20. Knotts, 460 U.S. at 280–81.

21. *Id.* at 281 (citing *Katz*, 389 U.S. at 361). The court distinguishes the two inquiries by stating that the first inquiry is based on whether the individual's conduct exhibits a subjective expectation of privacy. *Id.* In contrast, the second inquiry is based on whether the person's subjective expectation is objectively justifiable under the circumstances. *Id.*

22. *Id.* (citing Katz, 389 U.S. at 353).

23. Michael J. DeGrave, Note, *Airline Passenger Profiling and the Fourth Amendment: Will Capps II be Cleared for Takeoff?*, 10 B.U. J. SCI. & TECH. L. 125, 133 (2004).

24. *Id.*

25. United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1973) (overruled by U.S. v. Aukai, 497 F.3d 955 (9th Cir. 2007)).

26. Robert C. Power, *Changing Expectations of Privacy and the Fourth Amendment*, 16 WIDENER L.J. 43, 54 (2006).

27. *See* Davis, 482 F.2d at 910.

able if there is no warrant that is based upon probable cause or individualized suspicion of wrongdoing.[28] Reasonableness is determined by balancing the necessity of the search with the invasion the search will cause.[29]

The majority of searches and seizures must be based on probable cause, unless consent is given.[30] In addition, courts have generally held that searches conducted without a warrant supported by probable cause are per se unreasonable.[31] As the *National Treasury Employees Union v. Von Raab*[32] Court stated, however, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[33] In particular, there are four generally recognized exceptions to the warrant requirement.[34] The exceptions implicated in the remainder of this section are consent and administrative searches.[35] This note now turns to the topic of airport security.

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28. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

29. Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417, 478–79 (2001).

30. Sanford L. Dow, *Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward*, 58 J. AIR L. & COM. 1149, 1167 (1993).

31. *Id.* There is probable cause if a police officer knows facts and circumstances that would in themselves be sufficient for "a man of reasonable caution to believe an offense has been committed or is being committed." *Id.* at 1167 (citing Draper v. United States, 358 U.S. 307, 313 (1959) (quoting Carroll v. United Sates, 267 U.S. 132, 162 (1925))).
The purpose of the warrant is to ensure that a judicial officer can give a deliberate and impartial judgment to interject between the police officer and the citizen, and that the judicial officer can weigh the evidence that the police officer found to raise probable cause. Brett Andrew Skean, *The Fourth Amendment and the New Face of Terrorism: How September 11th Could Change the Way America Flies*, 22 N. ILL. U. L. REV. 567, 569 (2002).

32. 489 U.S. 656 (1989).

33. *Id.* at 665.

34. Dow, *supra* note 30, at 1167–68 (listing "(1) stop-and-frisk search; (2) administrative searches; (3) the border search; and (4) searches based on express or implied consent.").

35. Dow, *supra* note 30, at 1168. A third exception is the "border search," which is premised on the idea that at borders of the country mere suspicion is the only requirement to justify a search. *Id.* at 1183 (citing Alexander v. United States, 362 F.2d 379, 382 (9th Cir. (1966)). In addition, routine searches do not require reasonable suspicion or probable cause. *Id.* (citing United States v. Montoya De Hernandez, 473 U.S. 531, 538 (1985)). Many courts have held that airports are "critical zones" because of their special character, which makes them analogous to national borders. *Id.* at 1183–84 (citing United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973)).

A fourth exception is the "stop and frisk" exception, which was established in *Terry v. Ohio*, 392 U.S. 1 (1968). Skean, *supra* note 31, at 572. In Terry, the United

B. Airport Security

Given the possibility of harm to numerous people and the fact that it would be impracticable to obtain a search warrant to investigate passengers and their luggage, courts must determine if and how airport searches fit within an exception to the Fourth Amendment for the searches to be constitutional.[36]

1. *Airport Searches and the Fourth Amendment*

Airport security searches fit under the Fourth Amendment analysis because "[i]t is well established that screening an airline passenger and his luggage constitutes a 'search' within the context of the Fourth Amendment."[37] Generally, when courts are analyzing airport security cases under the Fourth Amendment, they balance "the individual passenger's right to be free from exceedingly invasive searches with society's substantial interest in safe air travel."[38] The majority of courts have held airport security searches to be within the boundaries permitted by the Fourth Amendment.[39] Searches would then only be unconstitutional under the Fourth Amendment if they were unreasonable.[40] Although airport searches have been found to be permissible under the Fourth Amendment, courts must continue to test the constitutionality of the searches as they continue to evolve.

2. *Security Measures in Reaction to Terrorism*

Airport security measures have progressed over the years to meet the changing threats to security. In the wake of 9/11, terrorism has

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States Supreme Court determined that if police officers notice unusual conduct that causes them to believe criminal activity may be likely to occur and that the people may be armed and dangerous, the officers may make reasonable inquiries. *Id.* (citing Terry, 392 U.S. at 30). If the officers continue to have fear for themselves or others' safety, they can search the outer clothing of the person for weapons. *Id.*

36. Michael G. Lenett, *Implied Consent in Airport Searches: A Response to Terrorism,* United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir. 1986), 25 AM. CRIM. L. REV. 549, 554 (discussing the time limitations to obtain warrants). Jack H. Daniel III, *Reform in Airport Security: Panic or Precaution?*, 53 MERCER L. REV. 1623, 1639 (2002) (discussing the possibility of harm to numerous people).

37. Dow, *supra* note 30, at 1167 (citing United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972)).

38. Skean, *supra* note 31, at 570.

39. Skean, *supra* note 31, at 570–71.

40. Skean, *supra* note 31, at 571.

become the key concern for airport security.[41] The difficulty with protecting against terrorist attacks is the unpredictability of the acts.[42] Another difficulty with deterring terrorist attacks is that, with continuing advancement, the weapons used may not be detected by current search practices.[43]

a. Pre-9/11 procedures

Threats of catastrophe in mass air travel were present from the beginning of air transportation.[44] Congress consistently reacted to bombings and hijackings by passing legislation and regulations meant to prevent future attacks.[45] Due to the rise in terrorism since 1949, the federal government established the Federal Aviation Administration (FAA) in 1958 to create safety guidelines for commercial aircraft.[46] The FAA had the duty to "promot[e] safe air travel and enforc[e] security measures [that affect] aircraft and air terminals."[47] Congress then reacted to the rising threat of terrorism by making it illegal to bring a concealed weapon onto an aircraft and later by mandating that all carry-on luggage undergo screening procedures.[48] Congress contin-

41. *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, 501 (1996–1997). "Terrorism" does not have a uniform definition, "but most experts agree that the concept involves a staged performance utilizing violence as a means of promoting a politically oriented cause." *Id.* at 501–02.

42. *Id.* at 502.

43. Lenett, *supra* note 36, at 551–52. Terrorists have been known to use items not made of metal, such as plastic explosives, which may not set off the magnetometer. Lenett, *supra* note 36, at 552. This makes the use of the magnetometer outdated because it cannot detect plastic explosives or plastic guns. Daniel, *supra* note 36, at 1634.

44. Daniel, *supra* note 36, at 1624. The first noted airplane hijacking occurred in 1931 when revolutionaries in Peru seized control of an aircraft and used it to disburse pamphlets across the countryside. Daniel, *supra* note 36, at 1624–25. The first recorded commercial aircraft bombing was in 1949 when a woman had a time bomb placed on a Philippine airline in order to kill her husband, which resulted in the death of her husband and twelve other passengers. Daniel, *supra* note 36, at 1625. The first United States aircraft bombing took place in 1955 when a passenger boarded a plane unaware that there was a bomb in his luggage. Daniel, *supra* note 36, at 1625. The passenger's son planted the bomb in his father's luggage to get the father's insurance policy. Daniel, *supra* note 36, at 1625.

45. *See* Daniel, *supra* note 36, at 1629.

46. Daniel, *supra* note 36, at 1627–28.

47. Daniel, *supra* note 36, at 1628.

48. Jamie L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 852–53 (2000). The Anti-Hijacking Act of 1974 made it illegal to bring a concealed weapon onto an aircraft. *Id.* at 852–53. The Air Transportation Security Act of 1974 required the search of all carry-on lug-

ued to react with new legislation by requiring the removal of the luggage of passengers who do not board the aircraft.[49]

b. Post-9/11 procedures

The attacks on the United States on September 11, 2001, exposed the flaws with current airport security enforcement—stories of people with false identification boarding planes, people with firearms walking right through security—outraging the public.[50] The media attention pressured Congress to make new improvements in both legislation and enforcement.[51] In reaction to the attacks, Congress passed the Aviation and Transportation Security Act in November of 2001.[52] The conferees noted that the terrorist hijackings on September 11, 2001 "required a fundamental change in the way [we] approach[ ] the task of ensuring the safety and security of the civil air transportation system."[53]

Under this legislation, Congress established the Transportation Security Administration (TSA).[54] The TSA is responsible for passenger security at airports and has the added responsibility of detecting and thwarting prospective terrorists through passenger screening by training employees and by placing federal law enforcement officers at screening locations.[55] The Under Secretary, who heads the TSA, has the authority to create regulations for aircraft and passenger security.[56]

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gage, and mandated that everyone be searched. *Id.* at 853.

49. *Id.* at 852. The Aviation Security Improvement Act of 1990 was passed in response to the Pan Am flight 103 bombing. *Id.* at 853–54. Under this regulation, if passengers do not board the plane, their luggage is removed from the aircraft. *Id.* at 854. Then, as a reaction to the TWA Flight 800 explosion in 1996, the White House Commission on Aviation Safety and Security was created to assess and offer solutions to the problems with United States airport safety. *See* Daniel, *supra* note 36, at 1630. The Commission recommended an increase in spending on technology for screening and surveillance, establishing computerized passenger profiling, and increasing counterintelligence resources. Daniel, *supra* note 36, at 1630.

50. Andrew Hessick, *The Federalization of Airport Security: Privacy Implications*, 24 WHITTIER L. REV. 43, 47 (2002).

51. *Id.* at 48.

52. H.R. REP. NO. 107-296, at 590 (2001) (Conf. Rep.) *reprinted in* 2002 U.S.C.C.A.N. 589, 590.

53. *Id.*

54. Eric P. Haas, *Back to the Future? The Use of Biometrics, its Impact on Airport Security, and How This Technology Should be Governed*, 69 J. AIR L. & COM. 459, 459 (2004).

55. Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79, 80 (2007).

56. Daniel, *supra* note 36, at 1632. Under the new regulations, commercial pilots are allowed to carry handguns, and federal marshals have become standard on domes-

In addition, under 49 U.S.C. §44902, the Under Secretary requires airports to refuse to transport passengers who are not subject to a search to discern if they are carrying "a dangerous weapon, explosive, or other destructive substance . . . ."[57] The new legislation required an increase in security regulations; with this increase, courts must determine whether the new search measures conform with constitutional standards for a reasonable search.

C. Express and Implied Consent

In order to implement the security measures at airports, the searches must conform to an exception to the Fourth Amendment's warrant requirement, and one of the recognized exceptions to the requirement is "consent."[58] Neither a warrant nor probable cause is required under this exception.[59] In addressing these issues, this section first discusses express and implied consent, and then delves into the requirement that the consent must be freely given.

1. *Express Consent*

Courts have held that officials can search without a warrant by obtaining the individual's consent.[60] People can waive their Fourth Amendment rights by consent if the "consent is freely and voluntarily given, and not the result of coercion or duress, actual or implied."[61] The *Schneckloth v. Bustamonte*[62] court held that to determine if consent is freely and voluntarily given, the totality of the situation must be considered.[63] To determine whether the consent was voluntary there must be a legitimate need for the search, as well as an absence of coercion.[64] Acquiescence alone is not enough to establish consent.[65] Nevertheless, courts understand that the public is cognizant of the security

tic flights. Haas, *supra* note 54, at 459.

57. 49 U.S.C.A. § 44902(a)(1) (West 2001).

58. Simcha Herzog, *Constitutional Problems Posed by Aviation Security Post September Eleventh*, 6 FLA. COASTAL L. REV. 361, 378–80 (2005).

59. *Id.* (citing Vale v. Louisiana, 399 U.S. 30, 35 (1970); Bumper v. North Carolina, 391 U.S. 543 (1968); Davis v. United States, 328 U.S. 582, 593 (1946); Zap v. United States, 328 U.S. 624, 630 (1946)).

60. Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 58 (1995).

61. Dow, *supra* note 30, at 1188.

62. 412 U.S. 218 (1973).

63. Dow, *supra* note 30, at 1188 (citing *Schneckloth*, 412 U.S. at 227).

64. Dow, *supra* note 30, at 1188.

65. Herzog, *supra* note 58, at 379 (citing Montana v. Tomich, 332 F.2d 987, 989 (9th Cir. 1964); Judd v. United States, 190 F.2d 649, 650–51 (D.C. Cir. 1951)).

measures at airports; thus making the decision to buy a ticket at the counter shows a willingness to be subjected to a reasonable search.[66] The vague nature of consent in these cases has led courts to the doctrine of implied consent.

2. *Implied Consent*

Searches have also been upheld on the rationale of implied consent.[67] The first case to discuss implied consent for airport screenings was *United States v. Davis*.[68] The *Davis* court held that passengers could choose to submit to the search, which meant they would give up their Fourth Amendment right or elect not to fly.[69] The consent occurred when the passenger chose to proceed to the boarding gate.[70] At this point, passengers know or should know that they will be subject to a search.[71]

United States v. Miner[72] considered the implied consent theory more directly by applying *Davis*.[73] *Miner* held that when the passengers approached the counter with the intent to board the aircraft, they impliedly consented to a search.[74] These courts, however, did not address at what point in the airport screening process the passengers could no longer avoid the search by opting to not fly.[75]

The Ninth Circuit answered that question in *United States v. Pulido-Baquerizo*[76] by stating that once passengers put their baggage on the x-ray conveyer belt, they could no longer avoid being searched by electing not to fly.[77] The court reasoned that to allow passengers to

66. Herzog, *supra* note 58, at 380 (citing United States v. Henry, 615 F.2d 1223, 1228–29 (9th Cir. 1980)).

67. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 23 (1991).

68. Skean, *supra* note 31, at 579 (citing United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973). The *Davis* court recognized "consent" as a factor to determine if a passenger's privacy rights had been violated; however, the court analyzed the facts of the case using the "administrative search" theory. *Id.*

69. Skean, *supra* note 31, at 579.

70. Dow, *supra* note 30, at 1189.

71. Skean, *supra* note 31, at 579 (citing United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973)).

72. 484 F.2d 107 (9th Cir. 2007).

73. Skean, *supra* note 31, at 579 (citing *Miner*, 484 F.2d at 1076).

74. Skean, *supra* note 31, at 579 (citing *Miner*, 484 F.2d at 1076).

75. Skean, *supra* note 31, at 581–82.

76. 800 F.2d 899 (9th Cir. 1986) (overruled by United States v. Aukai, 497 F.3d 955 (9th Cir. 2007)).

77. United States v. Pulido-Baquerizo, 800 F.2d 899, 901 (9th Cir. 1986)). In Puli-

choose not to fly once they were in danger of detection would encourage terrorist attacks by allowing terrorist to have a secure exit once in danger of being caught.[78] In another case, *United States v. Hartwell*,[79] the court also addressed the issue of when or if a passenger can elect not to fly and avoid being searched, and it held that a person no longer had the option of choosing not to fly in order to avoid a search once that person has triggered an alarm.[80] If this were not the policy, a terrorist would have "the equivalent of a get-out-of-jail-free card."[81]

D. Administrative Searches

Another recognized exception to the Fourth Amendment warrant requirement is the administrative search.[82] The essence of an administrative search is that the search must be conducted as part of the general regulatory scheme to further an administrative purpose.[83] The Supreme Court of the United States established the constitutionality of administrative searches in 1967 in *Camara v. Municipal Court of City and County of San Francisco*[84] and *See v. City of Seattle*.[85] In *Camara*, the Court balanced the need to search against the intrusiveness of the search.[86] The administrative search shifted the focus of the probable cause standard from an individualized suspicion to reasonableness in the form of a balancing test.[87] Thus, probable cause was replaced by the reasonableness standard.

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do-Baquerizo, the passenger attempted to board an aircraft, and as he entered the pre-boarding area he placed two briefcases on the x-ray conveyer belt. *Id.* at 900. While looking at the x-ray screen, the security officer noticed a dark lined object and suspected a bomb. *Id.* He questioned the passenger about the object, then searched the luggage and found 2,138 grams of cocaine. *Id.* at 900–01. The Ninth Circuit concluded that when passengers put luggage on an x-ray conveyer belt they "impliedly consent[ ] to a visual inspection and limited hand search if 'the x-ray is inconclusive in determining whether the luggage contains weapons or other dangerous objects.'" *Id.* at 902.

78. *Id.* at 902.

79. 296 F. Supp. 2d 596 (E.D. Pa. 2003).

80. Haas, *supra* note 54, at 471 (citing United States v. Hartwell, 296 F. Supp. 2d 596 (E.D. Pa. 2003)).

81. Haas, *supra* note 54, at 471.

82. *See* Herzog, *supra* note 58, at 375.

83. Rogers, *supra* note 41, at 524.

84. 387 U.S. 523 (1967).

85. 387 U.S. 541 (1967); Dow, *supra* note 30, at 1176.

86. *Camara*, 387 U.S. at 536–37.

87. Dow, *supra* note 30, at 1176.

Furthermore, the administrative search does not usually require a warrant or probable cause.[88] When there is a compelling governmental interest, the warrant requirement may be deemed unnecessary if the intrusion is characterized as a reasonable administrative search.[89] If a warrant were required, the deterrent element would be lost because the inspections need to be unannounced and frequent in order to be effective against terroristic acts.[90] Because the purpose of the search is to find terroristic activities, not criminal evidence, the nature of the investigation will be less intrusive, making the search more likely to pass the reasonableness standard under the Constitution.[91] Furthermore, a person who engages in activity that is part of a "pervasively regulated business" is assumed to be subject to an inspection.[92]

United States v. Davis was the first to apply administrative search analysis to airport security screenings.[93] The Ninth Circuit reasoned that all the elements of an airport screening fit the description of an administrative search.[94] As the *Davis* court noted, airport security screenings are part of a general regulatory scheme to further the administrative purpose of preventing people from carrying weapons or explosives onto aircrafts.[95] Such screenings are not conducted to find evidence of a person carrying weapons onto an aircraft, but are meant to deter passengers from attempting to do so.[96]

Airport screenings also fit within the administrative search definition because the requirement of a warrant or individualized suspicion would simply "frustrate the purpose of the search."[97] Although airport screenings may be properly categorized as administrative searches, the searches must be reasonable and limited to an administrative purpose in order to be constitutional.[98] The following section will cover the role

88. Herzog, *supra* note 58, at 376.

89. Haas, *supra* note 54, at 463.

90. Herzog, *supra* note 58, at 375.

91. Dow, *supra* note 30, at 1176.

92. Herzog, *supra* note 58, at 375. For example, in *New York v. Burger*, the United States Supreme Court held that a junkyard owner was in a "closely regulated" industry, and because of that, he would have a lessened expectation of privacy. The Court held that the warrant and probable cause requirements under the Fourth Amendment would have a reduced application. New York v. Burger, 482 U.S. 691, 702 (1987).

93. *Davis*, 482 F.2d at 908.

94. *Id.*

95. *Id.*

96. *Id.*

97. Herzog, *supra* note 58, at 377 (citing United States v. Schafer, 461 F.2d 856, 858 (9th Cir. 1972)).

98. Herzog, *supra* note 58, at 377.

of consent,[99] reasonableness of the search,[100] and scope of the administrative search.[101]

1. *Consent*

Prior case law established that consent is revocable in an administrative search.[102] The *Davis* court held that an important factor under the administrative search doctrine in the airport setting is that the passenger be allowed to elect not to board the plane and avoid the search.[103] The *United States v. Homberg*[104] court upheld *Davis* and ruled that a person may revoke consent at any time prior to boarding.[105] These courts reasoned that searching a passenger who elected not to fly would no longer serve the purpose of deterring that passenger from taking a weapon onto the plane.[106] The logic is that a search at this point would only serve the purpose of a criminal investigation, and therefore, would not be within the boundaries of an administrative search.[107]

Although courts continued to require the right to revoke consent as a requirement for an airport administrative search, the United States Supreme Court held that consent is not required for an administrative search to be constitutional.[108] In *United States v. Biswell*,[109] the Court ruled that the lawfulness of a search does not depend on consent.[110] The Court reasoned that when there is a regulatory inspection system of a business that is specifically restricted in time, place, and scope, the lawfulness of the search then depends on a valid statute's authority, which depends on reasonableness.[111]

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99. *See infra* Part III.D.1

100. *See infra* Part III.D.2.

101. *See infra* Part III.D.3.

102. *See* Stephen P. Halbrook, *Firearms, the Fourth Amendment, and the Air Carrier Security*, 52 J. AIR L. & COM. 585, 647 (1987).

103. Skean, *supra* note 31, at 576–77.

104. 546 F.2d 1350, 1352 (9th Cir. 1977) (overruled by United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

105. *Id.* at 1352. The court affirmed *Davis* and held that the Government's power to search in the boarding area was too sweeping. *Id.*

106. *See* Rogers, *supra* note 41, at 525.

107. Rogers, *supra* note 41, at 525.

108. *See* United States v. Biswell, 406 U.S. 311, 315 (1972).

109. 406 U.S. 311 (1972).

110. *Id.* at 315.

111. *Id.*

2. *Reasonableness*

For an administrative search to be constitutional, it must meet the basic standard of reasonableness.[112] To elaborate on how airport screenings must meet the reasonableness standard, the Supreme Court of the United States in *Chandler v. Miller*[113] explained: "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."[114]

In *National Treasury Employees Union v.Von Raab*,[115] the Court detailed how to determine if the search is reasonable by laying out the following test: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[116] Thus, reasonableness is determined by balancing the need for the search against the invasion to a person's Fourth Amendment rights that would occur from the search.[117]

As an example of applying this balancing test, the Court in *Michigan Department of State Police v. Sitz*[118] determined that suspicionless sobriety checkpoints on highways were constitutional.[119] The Court held that the state's interest in preventing drunken driving, balanced with the minimal intrusion to drivers, weighed in favor of finding the checkpoints constitutionally reasonable.[120]

3. *Scope*

An important limitation on administrative search theory is that the search must be for a stated administrative purpose, and if it turns into a criminal investigation, it is no longer justified as an administra-

112. *Davis*, 482 F.2d at 910.
113. 520 U.S. 305 (1997).
114. *Id.* at 323 (citing Nat'l Treasury Employees Union v.Von Raab, 489 U.S. 656, 674–676, & n. 3 (1989)).
115. 489 U.S. 656 (1989).
116. *Id.* at 665–66.
117. Rogers, *supra* note 41, at 524.
118. 496 U.S. 444 (1990).
119. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 447–48 (1990).
120. *Id.* at 451–52.

tive search.[121] The *Davis* court explained this issue by stating that there is a danger in the screening of passengers and their luggage for weapons that the search will turn into a "general search for evidence of crime."[122] A security search is constitutionally reasonable if it "is no more extensive nor [more] intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [ ] [and that is] confined in good faith to that purpose."[123]

An example of when an administrative search turned into a criminal investigation is found in *United States v. $124,570 U.S. Currency*.[124] In this case, the law enforcement officer and the Flight Terminal Security were working together, and if criminal activity was found, then the officer would get a reward.[125] The court concluded that this search was outside the scope of an administrative search because the search was a tool of a criminal investigation.[126]

Additionally, the *Hartwell* court held that for a search to be within the scope of a lawful administrative search it must be minimally intrusive.[127] Search procedures are minimally intrusive if they are "well-tailored to protect personal privacy, escalating in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search."[128] The importance of an administrative search having the requirement of staying within the permissible scope is that there is a great danger of screenings going too far without probable cause or a search warrant.[129] As the *United States v. Schafer*[130] court stated, however, if the search is properly conducted under proper authority and criminal evidence is inadvertently found, reporting that evidence to the police is not an unlawful action.[131]

The history of airport security demonstrates that Congress reacts to terrorist attacks by passing new legislation, and post-9/11 was no exception.[132] These new regulations had to fit within a Fourth Amendment warrant or probable cause exception to be constitution-

121. Dow, *supra* note 30, at 1178.
122. Davis, 482 F.2d at 909.
123. *Id.* at 913.
124. 873 F.2d 1240, 1245 (9th Cir. 1989).
125. *Id.*
126. *Id.*
127. United States v. Hartwell, 436 F.3d 174, 180 (2006).
128. *Id.*
129. Dow, *supra* note 30, at 1180.
130. 461 F.2d 856 (9th Cir. 1972).
131. *Id.* at 859.
132. *See* Daniel, *supra* note 36, at 1629.

al.[133] Consent and administrative searches are two recognized exceptions.[134] Law prior to *Aukai* held that consent for an implied consent search could not be revoked once the passenger was in the preboarding area.[135] In contrast, the courts concluded that for an administrative search to be constitutional the passenger must have the option of choosing not to fly and avoid being searched.[136] The next section of the note describes the *Aukai* opinion and details the facts in the case and how the court ultimately came to its conclusion.

III. THE CASE

A. Facts

Daniel Kuualoha Aukai arrived at the Honolulu International Airport on February 1, 2003, with the intent to fly from Honolulu, Hawaii to Kona, Hawaii.[137] Upon arriving at the airport, he went to the ticket counter to check in but did not present a government-issued picture identification.[138] Because he had no identification, the ticket agent wrote "No ID" on his boarding pass.[139] Mr. Aukai next stopped at the airport security checkpoint at approximately 9:00 A.M.[140] Signs posted there stated that prospective passengers and their baggage were subject to search.[141] At the checkpoint, Mr. Aukai laid his shoes and other items into a plastic bin and walked through the magnetometer.[142] The magnetometer did not signal the presence of any metal.[143] Likewise, his shoes raised no suspicion.[144]

After the magnetometer screening, Mr. Aukai handed his boarding pass to TSA Officer Corrine Motonago (Officer Motonago).[145] Due to the fact that the boarding pass stated "No ID," Officer Motonago directed Mr. Aukai to a roped off area for a second screening.[146]

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133. Herzog, *supra* note 58, at 378–80.
134. Dow, *supra* note 30, at 1167–68.
135. Haas, *supra* note 54, at 470–71.
136. Haas, *supra* note 54, at 471.
137. United States v. Aukai, 497 F.3d 955, 957 (9th Cir. 2007).
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* A magnetometer is a metal detector. *Id.*
143. United States v. Aukai, 497 F.3d 955, 957 (9th Cir. 2007).
144. *Id.*
145. *Id.*
146. *Id.* A second screening is a TSA procedure for passengers who have "No ID" written on their boarding pass, even if a passenger did not raise suspicion in the first

Mr. Aukai initially went to the designated area, but stated that he was in a hurry because his flight was leaving soon.[147] Mr. Aukai subsequently left the area and went to gather his items from the bin.[148] Upon seeing this, Officer Motonago informed him that he was not allowed to obtain his belongings and instructed him to stay in the designated area.[149]

Mr. Aukai tried to explain to TSA Officer Andrew Misajon (Officer Misajon), who performed the second screening, that he was in a hurry because his flight was leaving soon.[150] Officer Misajon instructed Mr. Aukai to sit in a chair.[151] Mr. Aukai sat down, but before the screening began, Mr. Aukai asked if he could leave.[152] Officer Misajon did not respond and began to screen Mr. Aukai with the hand magnetometer to detect if any metal was present.[153] Officer Misajon instructed Mr. Aukai to stand.[154] As the wand passed across the front of Mr. Aukai's body, the alarm sounded around the area of his front right pants pocket.[155] Officer Misajon then asked Mr. Aukai if he had anything in his pocket, to which Mr. Aukai responded that he did not.[156] Officer Misajon passed the magnetometer around the pocket area a second time and the alarm sounded again.[157] Officer Misajon asked again if there was anything in Mr. Aukai's pocket, and again Mr. Aukai replied there was not.[158] Officer Misajon saw the outline of an object in Mr. Aukai's pocket and felt the outside of Mr. Aukai's pants with the back of his hand and determined that there was some-

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screening. *Id.* A second screening involves a TSA officer moving a handheld magnetometer close to and around the passenger's body. *Id.* If metal is detected, an alarm sounds. *Id.* The TSA officer next attempts to determine the cause of the alarm, which may involve feeling the outside of the passenger's clothing where the alarm sounded. *Id.* If the area is close to a pocket, the passenger may be directed to empty the pocket. *Id.*

147. *Id.* His flight was scheduled for a 9:05 A.M. departure, just five minutes after he arrived at the checkpoint. *Id.*

148. *Id.*

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

150. *Id.* Mr. Misajon's duties included screening passengers for weapons, knives, or anything else not allowed so that the passengers could enter the sterile area. Brief of Appellant at 4, United States v. Aukai, No. 04-10226 (9th Cir. July 19, 2004).

151. *Aukai,* 497 F.3d at 957.

152. Brief of Appellant, *supra* note 150, at 5.

153. *Id.*

154. *Aukai,* 497 F.3d at 957.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

thing inside the pocket.[159] Mr. Aukai then told Officer Misajon that he missed his flight and wanted to leave the airport.[160]

TSA supervisor Vizcarra (Mr. Vizcarra) came to Officer Misajon and asked if he needed assistance.[161] After Officer Misajon told him the facts, Mr. Vizcarra asked Officer Misajon to screen Mr. Aukai again.[162] The alarm sounded again in the pocket area, and Mr. Vizcarra told Mr. Aukai to empty his pocket.[163] Mr. Aukai again denied that there was anything in his pocket. Mr. Vizcarra then touched the outside of Mr. Aukai's pocket area with the back of his hand and felt something.[164] Mr. Vizcarra again instructed Mr. Aukai to empty his pocket.[165] Mr. Aukai then removed keys or change, but there was still a visible bulge.[166] He was told again to empty his pocket, and after first denying there was anything, he removed an object wrapped in tissue paper.[167] Mr. Aukai then placed the object on a tray.[168]

Mr. Vizcarra suspected that the object may be a weapon and summoned over a law enforcement officer.[169] Mr. Vizcarra proceeded to unwrap the object and found a glass pipe used to smoke methamphetamine.[170] Mr. Aukai was then taken to an office near the security checkpoint.[171] He was placed under arrest and searched.[172] The police found several transparent bags of a white crystal substance in Mr. Aukai's front pants pockets.[173] Mr. Aukai was taken into federal custody and advised of his *Miranda* rights, which he waived.[174] Mr. Aukai then gave a statement and inculpated himself for possession of methamphetamine.[175]

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159. *Id.*
160. Brief of Appellant, *supra* note 150, at 5.
161. United States v. Aukai, 497 F.3d 955, 958 (9th Cir. 2007).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. United States v. Aukai, 497 F.3d 955, 958 (9th Cir. 2007).
168. *Id.*
169. *Id.*
170. *Id.* Mr. Vizcarro testified that TSA training does not include drug detection. Brief of Appellant, *supra* note 150, at 5. He also testified that the duty of a TSA screener is "to protect the public from potential hijackers, and bombers and to keep weapons off the plane." Brief of Appellant, *supra* note 150, at 5.
171. *Id.*
172. *Id.*
173. United States v. Aukai, 497 F.3d 955, 958 (9th Cir. 2007).
174. *Id.*
175. *Id.*

Mr. Aukai "was indicted for knowingly and intentionally possessing, with the intent to distribute, [fifty] grams or more of methamphetamine in violation of 21 U.S.C. § 841(a) and 841(b)(1)(A)(viii)."[176] On May 23, 2003,[177] Mr. Aukai "filed a motion to suppress the evidence found incident to his arrest at the airport and the statement he later made."[178] The district court denied his motion.[179] Then, on October 8, 2003, Mr. Aukai pled guilty in a written plea agreement in order to preserve the right to appeal the court's denial of his motion to suppress evidence.[180] The district court sentenced Mr. Aukai to a seventy-month term of imprisonment and five years of supervised release.[181] Mr. Aukai appealed the judgment.[182]

B. Reasoning

In *United States v. Aukai*,[183] the court determined whether consent is required under the Fourth Amendment for an airport screening search.[184] The United States Court of Appeals for the Ninth Circuit held that an airport screening search was a constitutionally reasonable administrative search, and therefore, consent was not required.[185] The concurring opinion agreed with the majority's decision but stated that the court's analysis placed excessive emphasis on terrorism.[186]

The majority began its analysis by stating portions of the Fourth Amendment of the United States Constitution with a focus on an individual's right to be secure against unreasonable searches and seizures.[187] The court elaborated on the "unreasonable" standard and stated that, absent suspicion, a search or seizure is generally unreasonable.[188] From this point, the court described exceptions to the general

176. *Id.*
177. Brief of Appellant, *supra* note 150, at 2.
178. United States v. Aukai, 497 F.3d 955, 958 (9th Cir. 2007).
179. *Id.*
180. Brief of Plaintiff-Appellee at 2, United States v. Aukai, No. 04-10226 (9th Cir. Aug. 15, 2004). Mr. Aukai contended that the district court erred in denying his motion to suppress. *Id.* Mr. Aukai alleged that the search was conducted after he requested to leave. *Id.* He argued that the search did not serve a legitimate purpose and was illegal. *Id.*
181. *Aukai*, 497 F.3d at 958.
182. *Id.*
183. 497 F.3d 955, 958 (9th Cir. 2007).
184. *Id.* at 960.
185. *Id.* at 963.
186. *Id.* (Graber, J., concurring).
187. *Id.* at 958.
188. *Id.*

rule.[189] This section of the note will detail the court's reasoning of how airport screening fits into an exception to the general warrant requirement, and how the court determines that airport screening is not dependent on consent.[190] The court's analysis fits into the categories of administrative searches,[191] consent,[192] and limits on airport searches.[193]

1. *Administrative Searches*

After noting exceptions to the general requirements of Fourth Amendment searches, the court gave a description of how administrative searches fit into this exception.[194] The court first described circumstances when suspicion is not required to conduct a search.[195] Those instances include situations where there is a substantial risk to public safety.[196] The court reasoned that a "blanket suspicionless" search attuned to that situation may be reasonable.[197]

The court further explained that if there has been an infringement of a Fourth Amendment right that serves a special governmental need that is beyond what is needed for normal law enforcement, then it is necessary to conduct a balancing test to determine if the search is reasonable.[198] The court elaborated that if there is a real and substantial risk to public safety, a blanket suspicionless search may be reasonable.[199] When this happens, there needs to be a balancing between the individual's privacy expectations and the government's interests.[200] The result of the balancing test will tell the court whether it is impractical to require a warrant or some articulable suspicion to conduct the search.[201]

The court noted that the Supreme Court of the United States has upheld administrative searches.[202] The first case discussed was *New*

189. United States v. Aukai, 497 F.3d 955, 958 (9th Cir. 2007).
190. *See infra* Parts III.B.1–3.
191. *See infra* Part III.B.1.
192. *See infra* Part III.B.2.
193. *See infra* Part III.B.3.
194. United States v. Aukai, 497 F.3d 955, 958–60 (9th Cir. 2007).
195. *Id.* at 958–59, & n.2.
196. *Id.* at 958.
197. *Id.*
198. *Id.* at 959.
199. *Id.* at 958–59.
200. United States v. Aukai, 497 F.3d 955, 959 (9th Cir. 2007).
201. *Id.* at 959.
202. *Id.* The court stated in footnote two that although the Supreme Court of the United States has not held that airport screening searches are administrative searches, the Court has suggested in three cases that they are. *Id. Aukai* referred to the follow-

York v. Burger,[203] where the Court reasoned that because a junkyard owner was in a "'closely regulated' industry" and there was a lower expectation of privacy, the requirements for a warrant and probable cause were less applicable.[204] The *Burger* Court concluded that the state's interest in regulating the junkyard business served a "special need," which allowed an inspection without a warrant.[205]

The court also discussed *Michigan Dept. of State Police v. Sitz*,[206] in which the Supreme Court of the United States upheld suspicionless sobriety checkpoints.[207] The *Sitz* Court held that the balance between the state's interest in preventing drunken driving and the amount of intrusion on individual motorists leaned more heavily toward finding the checkpoints constitutionally reasonable.[208]

Following this analysis, the court held airport screenings to be constitutionally reasonable administrative searches.[209] The court found that the searches, including Aukai's, are reasonable because they are part of a regulatory scheme that furthers an administrative purpose; in particular, the prevention of carrying weapons or explosives onto planes, which prevents hijackings.[210] The Court then described the role that consent plays in the reasonableness of the searches.[211]

2. *Consent*

The court next endeavored to explain why consent was not necessary for a constitutionally reasonable administrative search.[212] The court began its explanation by stating that the United States Supreme Court previously concluded that the constitutionality of administrative searches did not depend on consent of the person searched.[213] The

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ing cases: City of Indianapolis v. Edmond, 531 U.S. 32, 47–48 (2000); Chandler v. Miller, 520 U.S. 305, 323 (1997); and Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 & n. 3 (1989). *Id.*

203. 482 U.S. 691 (1987).

204. *Aukai*, 497 F.3d at 959. (quoting Burger, 482 U.S. at 702).

205. *Id.* (citing Burger, 482 U.S. at 708–09).

206. 496 U.S. 444 (1990).

207. *Aukai*, 497 F.3d at 959 (citing *Sitz*, 496 U.S. at 455).

208. *Id.*

209. *Aukai*, 497 F.3d at 960. The court cited United States v. Hartwell, 436 F.3d 174, 178 (3d Cir. 2006); United States v. Marquez, 410 F.3d, 612, 616 (9th Cir. 2005); and United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973); *Id.*

210. *Aukai*, 497 F.3d at 960.

211. *Id.*

212. *Id.* at 960–61.

213. *Id.*

court cited *United States Biswell*,[214] where the Supreme Court held that a warrantless search of a pawnshop gun showroom was authorized because the federal gun control statute authorized the search.[215] The Supreme Court reasoned that when there is a regulatory inspection limited in time, place, and scope, the constitutionality depended on the authority of a valid statute, and not on consent.[216]

The court next stated its belief that its case law had incorrectly suggested that consent was required for a reasonable airport security search through "either ongoing consent or irrevocable implied consent."[217] The court concluded that an airport screening search is not dependent on consent to be constitutional because such a search is reasonable.[218]

The court explained the consequences of requiring consent in this context.[219] The court emphasized terrorism in the "post-9/11 world," and reasoned that if consent were not required, it would make it much easier for a terrorist to plan and carry out attacks.[220] The court reasoned that if terrorists were allowed to elect to leave when subject to search, they could make repeated attempts to get on a plane until they were successful.[221] The terrorists could use the knowledge of weaknesses in certain airports to plan an attack.[222]

After the court established that consent was not necessary, it discussed the requirements of a reasonable airport screening search.[223] The court stated that if the search was otherwise reasonable and performed pursuant to statutory authority—in this instance 49 U.S.C. § 44901—the only requirement for a reasonable search was the passenger's election to attempt to enter the secured area of an airport.[224] Un-

214. 406 U.S. 311 (1972).
215. Aukai, 497 F.3d at 959–60 (citing Biswell, 406 U.S. at 317).
216. *Id.* at 960 (citing Biswell, 406 at 315).
217. United States v. Aukai, 497 F.3d 955, 960–61 (9th Cir. 2007).
218. *Id.* at 960–61.
219. *Id.*
220. *Id.* at 960–61. The concurring opinion stated that the majority's references to terrorists and 9/11 were "irrelevant and distracting." *Id.* at 963. The opinion stated that the reference was not necessary because Mr. Aukai's search was reasonable as an administrative search, and that the references to post-9/11 did not enhance the court's analysis. *Id.* The concurring opinion further explained that whether or not a person is a terrorist is not legally significant. *Id.* The concurring opinion concluded that the majority's rationale would allow future litigation to challenge the viability of that holding. *Id.* at 964.
221. *Id.* at 960–61
222. *Id.* at 961.
223. United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).
224. *Id.*

der TSA regulations, the election takes place "when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine."[225] The facts showed that Mr. Aukai chose to attempt to enter into the secured area of the airport when he walked through the magnetometer.[226] By taking these actions, he subjected himself to the airport screening process.[227]

The court concluded its discussion on consent by stating that this decision would overrule any cases that held that the reasonableness of an airport security search was predicated on "either ongoing consent or irrevocable implied consent . . . ."[228] After the court concluded that consent was not required for an airport screening process, it proceeded to explain the limits of permissible screening.[229]

3. *Limits on Airport Searches*

The court tied the limits of an airport screening to the general principles used to ensure that a search was constitutionally reasonable.[230] Ordinarily, a search must not be more extensive or intensive than necessary, considering the technology available, to detect weapons or explosives, and it must be conducted in good faith for that purpose.[231] The court then concluded that the screening of Mr. Aukai in the airport satisfied those requirements.[232] The search procedures used with Mr. Aukai were not more extensive or intensive than necessary, under those circumstances, to rule out whether explosives or guns were present.[233] The court analyzed the facts of the *Aukai* case and reiterated that after Mr. Aukai passed through the magnetometer, he was directed to a second screening.[234] The court stated that it was only after the wand sounded again during this screening and Mr. Aukai continued to deny there was anything in his pocket that Officer Misajon employed a more intrusive search.[235]

225. *Id.*
226. *Id.* at 962.
227. *Id.* at 962.
228. *Id.* at 960.
229. United States v. Aukai, 497 F.3d 955, 960–61 (9th Cir. 2007).
230. *Id.* at 962.
231. *Id.* (quoting *Davis*, 482 F.2d at 913).
232. *Id.*
233. *Id.* at 962.
234. *Id.* at 962.
235. United States v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007).

Next, the court focused on the fact that after the item was detected, Mr. Vizcarra became involved.[236] The court then concluded that these search procedures were "minimally intrusive."[237] In addition, the court held that the duration of Mr. Aukai's detention at the airport was also reasonable.[238] The approximate time of detainment was eighteen minutes.[239] The court reasoned that while Mr. Aukai's detainment lasted longer than detentions that were approved in other cases,[240] the time of his detention was reasonable for a search for weapons or explosives.[241] In addition, the court noted that Mr. Aukai's time of detention was prolonged due to his own conduct.[242] The court concluded that the airport screening search was a constitutionally reasonable administrative search.[243]

After detailing the law in the area of airport security and administrative searches, the court held that the search of Mr. Aukai was lawful.[244] The court held that because there was a substantial risk to public safety through the threat of people bringing weapons onto planes, an administrative search could be used to screen Mr. Aukai for weapons.[245] Next, the court concluded that administrative searches were constitutional and that Mr. Aukai's search was not dependent on his consent.[246] The court concluded by stating that Mr. Aukai's search was within the scope of an administrative search because at the time the

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236. *Id.* It was after the alarm sounded that Mr. Vizcarra instructed Mr. Aukai to empty his pocket. *Id.* After Mr. Aukai again denied there was anything in his pocket, Mr. Vizcarra touched the outside of Mr. Aukai's pants and felt something. *Id.* Mr. Aukai was again instructed to empty his pocket and after he said there was nothing there, he removed an object wrapped in tissue paper. *Id.* Mr. Vizcarra unwrapped it because he suspected the item might be a weapon and discovered that it was drug paraphernalia. *Id.*

237. *Id.* The court used the definition of "minimally intrusive" as "procedures [that] are 'well-tailored to protect personal privacy, escalating in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search.'" *Id.* (quoting *Hartwell,* 436 F.3d 174,180 (3d Cir. 2006)).

238. *Id.* at 962–63.

239. United States v. Aukai, 497 F.3d 955, 963 (9th Cir. 2007).

240. *Id.* The court referred to *Sitz*, 496 U.S. at 448, where the average detention was twenty-five seconds and United States v. Martinez-Fuerte, 428 U.S. 543, 546–47 (1976), where the average detention was three to five minutes. *Id.*

241. *Id.*

242. *Id.* at 963 n. 10.

243. *Id.* at 963.

244. *Id.* at 962–63.

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

246. *Id.* at 960.

TSA found drugs on Mr. Aukai, they were searching for weapons.[247] The next section of the note will give an analysis of this decision.

IV. ANALYSIS

The *Aukai* case gave a cohesive standard for analyzing airport security searches. Before this case there were several attempts at describing the constitutionality of airport searches, but there was no cohesive standard. The two most recognized exceptions to having a warrant or probable cause are consent and administrative searches.[248]

There is much overlap between the implied consent and administrative search theories. The implied consent theory, like the administrative search theory, held that a warrant supported by probable cause is not required.[249] Under this theory, unlike prior administrative search analyses, consent could no longer be revoked once a person entered the secured area of an airport.[250] The irrevocable consent element was correctly decided; however, the administrative search theory set out a more concise rationale for why searches are permissible and correctly limited the scope of the search. This section of the note will analyze the role of consent in airport searches,[251] the rationale for airport searches,[252] and the permissible scope of the searches.[253]

A. Consent

The administrative search theory, prior to *Aukai*, was based on the sound reasoning that an administrative search was appropriate because an airport search was a regulatory search for the purpose of deterring people from bringing weapons onto planes, and not to detect crime.[254] Cases held, however, that for an administrative search to be constitutional, passengers needed to have the option of not boarding the plane and avoiding the search.[255] These cases stated that once the

247. *Id.* at 962.
248. Dow, *supra* note 30, at 1168.
249. Herzog, *supra* note 58, at 378–80.
250. Skean, *supra* note 31, at 581–82.
251. *See infra* Part IV.A.
252. *See infra* Part IV.B.
253. *See infra* Part IV.C.
254. *See* United States v. Davis, 482 F.2d 898, 908 (9th Cir. 1976).
255. *See e.g. Homburg*, 546 F.2d 1350, 1352 (9th Cir. 1976) (discussing the rationale of *Davis* as support for the idea that consent is revocable as long as the passenger remains free to leave the boarding area); *see also Davis*, 482 F.2d at 908.

passenger leaves the boarding area there is no need for a deterrent to bringing weapons onto the plane.[256]

As the legislative history shows, when there are new attacks and threats to airport security, there needs to be new regulations to react to those threats and to try to prevent future attacks.[257] This was the action *Aukai* took by adopting the administrative search theory to respond to the 9/11 attacks. Before these attacks took place it may have been sufficient for the search to end once the passenger left the secured area, but these attacks showed the need to prohibit a passenger from avoiding being searched by opting out of flying.

Aukai correctly concluded that administrative searches of passengers are constitutional, and correctly concluded that consent is not required for these searches to be constitutional. The court based this on the fact that administrative searches were found to be constitutional in *Burger* and *Sitz*.[258] The *Aukai* court also reasoned that consent is not required in administrative searches based on the United States Supreme Court case of *Biswell*.[259] Unlike the previous cases, *Aukai* applies this reasoning to airport security.

B. Rationale for Searches

The administrative search theory lays out the correct rationale for why airport searches fit within an exception to the Fourth Amendment warrant requirement. Airport searches are conducted in a heavily regulated area for the governmental purpose of protecting the lives of millions of people.[260] This rationale captures the essence of why airport searches are conducted. Thus, the balance of the intrusion of the search against deterring terrorist activity, weighs in favor of allowing the search.[261] In addition, the search fits into this theory because if a warrant were required, the effectiveness of the search would be lost.[262]

C. Scope

The scope of administrative searches is that they are only conducted with the intent to deter people from bringing weapons onto

256. *See Homburg*, 546 F.2d at 1352; *see also Davis*, 482 F.2d at 908.
257. *See* Daniel, *supra* note 36, at 1629–630. *See supra* Part II.B.
258. United States v. Aukai, 497 F.3d 955, 959 (9th Cir. 2007).
259. *Id.* at 959–60.
260. *Davis*, 482 F.2d at 908.
261. United States v. Aukai, 497 F.3d 955, 961 (9th Cir. 2007).
262. Herzog, *supra* note 58, at 375.

planes.[263] Because they are no longer justifiable once the search is for criminal activity, the searches are more likely to be reasonable because they are less intrusive.[264] If criminal evidence is found inadvertently during the course of a lawful administrative search, however, that evidence is allowable at trial against the accused.[265] Based on this reasoning, the *Aukai* court correctly allowed in the evidence of methamphetamine found on Mr. Aukai. This theory protects society by not protecting those who are breaking the law or who are a possible danger to others simply because the evidence was found incident to an administrative search. The administrative search theory provides a deterrent for terrorist and is also as minimally intrusive as possible to effectively conduct the search.

V. CONCLUSION

Airport searches are necessary to ensure the safety and security of air travel.[266] These searches must not infringe upon the right to be free from unreasonable searches and seizures, which is secured by the Fourth Amendment to the United States Constitution.[267] Administrative searches comply with this amendment despite the lack of a warrant supported by probable cause. They are reasonable if they are conducted with the sole purpose of deterring crime. The administrative search theory, not requiring consent, was correctly applied to airport searches in the *United States v. Aukai* decision.

The *Aukai* decision should be adopted in other jurisdictions because it sets out an applicable standard that is limited and also effectively deters terrorist hijackings. The standard is limited because the search must be for an administrative purpose, and once the search goes outside those limits, a warrant would be required to continue the search.[268] The administrative search helps assure that the government is not abusing its power because it limits the searches conducted only for the purpose of deterring people from carrying weapons onto planes. The administrative search that limits the right to revoke consent will deter terrorist attacks and also help limit the invasiveness of the searches.

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263. *Davis*, 482 F.2d at 908.

264. Dow, *supra* note 30, at 1176.

265. *Schafer*, 461 F.2d 856, 859 (9th Cir. 1972).

266. H.R. REP. NO. 107-296, at 53 (2001)(Conf. Rep.) *reprinted in* 2002 U.S.C.C.A.N. 589, 590.

267. U.S. CONST. amend. IV.

268. Dow, *supra* note 30, at 1178.

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