

ENHANCING SECURITY WHILE PROTECTING PRIVACY: THE RIGHTS IMPLICATED BY SUPPOSEDLY HEIGHTENED AIRPORT SECURITY

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ABSTRACT

On a daily basis, travelers face invasions of privacy from body scanners and pat-downs at airports. The Transportation Security Administration (TSA) possesses extensive discretion in determining which security measures to use. However, the Supreme Court has required that passenger screening not be more extensive or invasive than needed to protect security. Passengers, states, and scholars have objected to the TSA's current security methods of Advanced Imaging Technology (AIT), also known as body scanners, and full body pat-downs as being highly invasive. However, the TSA has continued to use these methods and has even recently issued a Notice of Proposed Rulemaking pertaining to its use of AIT as a primary screening method at airports.

While the TSA was created to enhance airport security in response to the tragic events of 9/11, Congress surely did not intend to give the TSA carte blanche in the invasiveness of its security methods. Although the Court currently balances the necessity of a search against the offensiveness of the resulting intrusion to determine its constitutionality, this test is insufficient to protect privacy. Simply because a method is justified under this test does not necessitate the conclusion that the sacrifice of privacy is worth the perhaps minimal increases in security or that Congress should permit the TSA to use that method with unbridled discretion. Since the TSA can so deeply invade the privacy of Americans on a daily basis, Congress must seriously consider the amount of leeway it gives the TSA. Overall, Congress ought not abdicate its responsibility to the American people by handing its oversight responsibilities of the TSA over to courts, which afford great deference to the TSA.

A congressional solution should involve increasing transparency, exercising more oversight, and imposing more explicit

limitations on the TSA's power. Most importantly, Congress should require that the TSA carry out its mandates without substantially infringing on privacy rights. Congress should also require the TSA to conduct a broad cost-benefit analysis for its security measures, balancing the increased security benefits of the new security measures against the monetary, privacy, and efficiency costs. Even if people then disagreed with the TSA's determination under these new requirements, the result would be greater protections to privacy and greatly increased transparency of the TSA's decisions upfront, rather than allowing the TSA to make decisions infringing on privacy and provide post hoc justifications for them when challenged in court. While some may argue that sacrifices to privacy are a necessary cost to achieve peace and safety, what is a life of security worth if that life is overrun with constant invasions of privacy by the very government created to protect American security and privacy?

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INTRODUCTION

When even Miss USA says that an airport security measure goes too far in trying to advance peace and safety, what kind of alarm bells should be ringing?¹ Are Americans running afoul of Benjamin Franklin’s warning that “[t]hose [who] would give up their liberty for security deserve neither and lose both”?² In April of 2011, former Miss USA Susie Castillo opted out of a body scan in a

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1. See Susie Castillo, *My TSA Pat Down Experience*, SUSIE CASTILLO (Apr. 25, 2011), <http://www.susiecastillo.com/blog/2011/4/25/my-tsa-pat-down-experience.html>.

2. *Id.* (paraphrasing Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), in 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963) (“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”)).

Dallas airport and was subjected to a pat-down.³ Castillo later blogged about the incident:

What bothered me most was when she ran the back of her hands down my behind, felt around my breasts, and even came in contact with my vagina! . . . The TSA employee at DFW touched my private area 4 times, going up both legs from behind and from the front, each time touching me there. Was I at my gynecologist's office? No! This was crazy! I felt completely helpless and violated during the entire process (in fact, I still do), so I became extremely upset.⁴

As opined by the president of the Electronic Privacy Information Center (EPIC), “No other country in the world subjects its air travelers to the combination of screening procedures that Americans are being asked to endure.”⁵

On a daily basis, travelers face invasions of privacy from body scanners and pat-downs at airports.⁶ The Transportation Security Administration (TSA) has a lot of discretion in determining which security measures to use.⁷ If a measure is going to be so intrusive into individual privacy, the TSA at the very least should have a strong showing that such a measure increases security more than alternative methods would.⁸ Perhaps some methods go too far and even violate constitutional rights.⁹ In evaluating different security methods, it is important to remember that “[l]iberty—the freedom from unwarranted intrusion by government—is as easily lost through insistent nibbles by government officials who seek to do their jobs

3. *Former Miss USA Feels “Violated” by TSA Pat-Down*, NBC NEWS (Apr. 28, 2011, 6:24 PM), http://www.nbcnews.com/id/42805551/ns/travel-news/t/former-miss-usa-feels-violated-tsa-pat-down/#.UkW6ohatqfQ_

4. Castillo, *supra* note 1.

5. Marc Rotenberg, *Body Scanners, Pat-Downs Violate Law and Privacy*, CNN (Nov. 19, 2010, 9:31 AM), <http://www.cnn.com/2010/OPINION/11/17/rotenberg.scanners.privacy/index.html>.

6. *Id.*

7. See 49 U.S.C. § 114(e), (f)(3), (f)(8) (2006).

8. *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973) (requiring “that the screening process [be] no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, [and] that it [be] confined in good faith to that purpose”).

9. *Id.* (explaining that a screening process goes too far if it is more extensive or intensive than necessary); Brittany R. Stancombe, Comment, *Fed Up with Being Felt Up: The Complicated Relationship Between the Fourth Amendment and TSA’s “Body Scanners” and “Pat-Downs,”* 42 CUMB. L. REV. 181, 195, 210 (2012) (arguing that advanced imaging technology (AIT) used as a primary search method may be unconstitutional).

too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.”¹⁰

When flight was not such a normal method of travel, perhaps greater invasion of privacy was permissible because people could simply choose other, more common, methods of travel.¹¹ However, now that flight is so standard and indispensable in this increasingly connected world, and as the TSA uses more intrusive security methods, a new evaluation of the rights implicated by security measures is necessary.¹² A congressional solution should involve the exercise of more oversight and imposition of more explicit limitations on the TSA’s power; when the TSA uses more intrusive security measures, Congress should require the TSA to demonstrate

10. *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1246 (9th Cir. 1989) (warning that airport security checks “are capable of great abuse,” “touch the lives of so many,” and “call[] for the greatest vigilance” by courts); Greg Star, Comment, *Airport Security Technology: Is the Use of Biometric Identification Technology Valid Under the Fourth Amendment?*, 20 TEMP. ENVTL. L. & TECH. J. 251, 265 (2002) (concluding that the government should use the “least invasive biometric measurements” in airport security).

11. *See Davis*, 482 F.2d at 913 n.59 (“The airport search program is not an absolute bar to travel. Other means of transportation are available. Moreover, for the vast majority such a search entails at most a slight delay; it does not bar their intended flight.”). *But see United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974) (“While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all.”).

12. *See Former Miss USA Feels “Violated” by TSA Pat-Down*, *supra* note 3 (explaining that former Miss USA said she would use other methods of travel instead of flying, but then she could not do her job). Clearly, not all methods of travel are equal, particularly at such distances in this interconnected world and even within the United States. *See David Bradley Olsen, Naked Body Scans and Full-Body Pat-Downs: The Controversy Surrounding the TSA’s Enhanced Airport Screening Procedures*, in ASPATORE SPECIAL REPORT: NAVIGATING THE LEGAL IMPACT OF AIRPORT SECURITY MEASURES: AN IN-DEPTH LOOK AT PASSENGER PROFILING AND ITS EFFECT ON THE PUBLIC 5, 8 (2011) (describing Alaska State Representative Sharon Cissna’s experience where she refused a full-body pat-down as “unreasonably invasive and unnecessary”). She was not allowed to get on the airplane and had to return to Alaska “by other means, including one leg of the four-day trip by boat.” *Id.* Further, the Second Circuit opined that making someone choose between flying to his destination and exercising his constitutional rights often seems like “a form of coercion, however subtle. While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all.” *Albarado*, 495 F.2d at 806-07 & n.14 (citation omitted).

greater security benefits, and Congress should not allow invasion of privacy beyond that which actually increases safety.¹³

Part I of this Note discusses the different security measures that airports have used in the past and those that the TSA presently uses to screen passengers. Part II discusses the underlying federal statutory law, regulatory law, and constitutional privacy issues involved in TSA security measures. Part III analyzes the effectiveness and invasiveness of current and alternate security methods, and public policy arguments to support less or more invasive measures. Part IV presents how states and scholars have responded to the TSA and suggests that both have missed a necessary piece to solving this puzzle: congressional action directly limiting the TSA's discretion. Part V concludes with a further emphasis on the need for the proposed reforms in this area to protect citizens' privacy rights.

I. WHAT IS ALL THE FUSS ABOUT? A LOOK AT DIFFERENT SECURITY MEASURES

Airports and the TSA have used a variety of security measures to screen passengers over the years, each met with varying levels of resistance.¹⁴ In particular, the TSA has used magnetometers,¹⁵ pat-downs,¹⁶ and body scanners.¹⁷ Before evaluating the rights that these measures implicate and the powers that the TSA has, it is helpful to understand what each security measure actually entails.

One of the older techniques for airport security is the magnetometer, also known as a walk-through metal detector (WTMD), which is activated when a passenger who walks through it has metal on his or her person.¹⁸ Magnetometers were originally only set off by ferrous metals, but the newer models also detect non-ferrous metals.¹⁹ Once someone activates a WTMD, security

13. See *infra* Part V (proposing solutions that involve more congressional guidance and restrictions on the TSA).

14. See *infra* Section II.B (giving a background of constitutional challenges to different airport security methods in case law).

15. See *infra* text accompanying notes 18-21.

16. See *infra* text accompanying notes 22-33.

17. See *infra* text accompanying notes 34-43.

18. *United States v. Albarado*, 495 F.2d 799, 802 n.3 (2d Cir. 1974).

19. *Id.* Ferrous metals are those that contain iron while non-ferrous metals do not have iron. *The Differences Between Ferrous and Non-Ferrous Scrap Metal*, ALTON MATERIALS (Mar. 12, 2013), <http://www.altonmaterials.com/the-differences-between-ferrous-and-non-ferrous-scrap-metal/> (explaining the differences between

personnel often either use a portable magnetometer to wand over the passenger and find the metal object or ask the passenger to remove metal objects and walk through the magnetometer a second time.²⁰ In some cases, activating the magnetometer once or twice could result in a frisk.²¹

Regarding frisks and pat-downs, in 1974, the Second Circuit in *United States v. Albarado* explained that “the typical airport frisk may be more in the nature of a ‘pat-down,’ involving only the patting of external clothing in the vicinity of pockets, belts or shoulders where a weapon such as a gun might be secreted.”²² In contrast, the court described a full frisk as where an officer feels ““with sensitive fingers every portion of the [person’s] body”” and makes a thorough search ““of the [person’s] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.””²³ In the past, the TSA only permitted its agents to perform pat-downs with the back of their hands as a secondary form of screening.²⁴ In 2004, the TSA implemented procedures that made pat-downs more thorough in response to female passengers in Russia who concealed explosives on their torsos when boarding a plane.²⁵ Further, since 2010, the TSA has allowed its agents conducting secondary screenings to use the front of their hands to pat-down

ferrous and non-ferrous metals in further detail); *see also The Difference Between Ferrous & Non-Ferrous Metals*, ASM METAL RECYCLING, <http://www.asm-recycling.co.uk/services/metal-recycling/ferrous-non-ferrous.html> (last visited Nov. 17, 2014) (explaining the differences between ferrous and non-ferrous metals and giving examples of both types of metal).

20. *Albarado*, 495 F.2d at 802 n.3.

21. *Id.* For a detailed explanation of what an airport frisk entails, see *infra* text accompanying notes 22-36.

22. 495 F.2d at 807.

23. *Id.* (quoting L. L. Priar & T. F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POL. SCI. 481, 481 (1954)).

24. Stancombe, *supra* note 9, at 188.

25. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,291 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540). Out of concern for similar occurrences in the United States, the TSA implemented more in depth pat-downs so that its officers would have a better opportunity to discover explosives concealed in a similar manner in the United States. *Id.*; *see also* OFFICE OF INSPECTOR GEN., DEP’T HOMELAND SEC., OIG-06-10, REVIEW OF THE TRANSPORTATION SECURITY ADMINISTRATION’S USE OF PAT-DOWNS IN SCREENING PROCEDURES (REDACTED) 1 (2005), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIGr_06-10_Nov05.pdf (providing information on the TSA’s use of pat-downs at airports and explaining why the TSA enhanced these pat-downs in 2004 after the explosion of Russian planes when women concealed the explosives under their clothing).

passengers of the same gender as the inspecting agent.²⁶ This policy changed when the TSA issued new standard operating procedures (SOPs) that included the use of body scanners and full-body pat-downs.²⁷ Explaining its change of policy, the TSA stated that pat-downs assist the TSA in detecting concealed explosives.²⁸ These enhanced pat-downs “allow an officer to feel the whole body and under clothes.”²⁹ While this is a dramatic change in policy, “[t]he TSA issued the [new] SOP without any public comment or input” and without making the SOP available to the public.³⁰ In addition to using pat-downs as a secondary form of screening, passengers opting out of body scanners must also submit to a pat-down.³¹ Although

26. Stancombe, *supra* note 9, at 188.

27. Olsen, *supra* note 12, at 6.

28. Jim Barnett, *TSA to Phase in New Pat-Down Procedures at Airports Nationwide*, CNN (Oct. 29, 2010, 11:41 AM), <http://www.cnn.com/2010/TRAVEL/10/28/airline.security.pat.down/>. When the TSA implemented its new SOP in 2010, it issued a press release, explaining that

TSA is in the process of implementing new pat-down procedures at checkpoints nationwide as one of our many layers of security to keep the traveling public safe. Pat-downs are one important tool to help TSA detect hidden and dangerous items such as explosives. Passengers should continue to expect an unpredictable mix of security layers that include explosives trace detection, advanced imaging technology, canine teams, among others.

Press Release, Transp. Sec. Admin., TSA Statement on New Pat-Down Procedures (Oct. 28, 2010), *available at* <http://www.tsa.gov/press/releases/2010/10/28/tsa-statement-new-pat-down-procedures>.

29. Olsen, *supra* note 12, at 7; *see also* Hugo Martin, *New TSA Pat-Down Procedure Expands Nationwide*, LOS ANGELES TIMES (Nov. 1, 2010, 4:51 PM), http://latimesblogs.latimes.com/money_co/2010/11/new-thorough-pat-down-procedure-expands-nationwide.html (explaining that the new SOP permits TSA officers “to use their fingers and palms to feel and probe for hidden weapons and devices around sensitive body parts, such as the breast and groin areas”). The TSA first tested the enhanced pat-downs in Boston and Las Vegas airports and decided to expand the use of enhanced pat-downs to all U.S. airports in order to maintain public safety in traveling. *See id.*

30. Olsen, *supra* note 12, at 6. The TSA generally does not make its SOPs publically available. *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011). However, the TSA’s short press release stated that the goal of the new SOP was to keep the public safe. *See* Press Release, Transp. Sec. Admin., *supra* note 28. Similarly, the TSA did not use notice-and-comment rulemaking when it changed its policy to have AIT as a primary screening method for passengers at airports. *Elec. Privacy Info. Ctr.*, 653 F.3d at 2-3. However, the D.C. Circuit later required the TSA to utilize notice-and-comment rulemaking because this change from magnetometers to AIT substantially affected privacy rights and because Americans should have had input into the agency’s decision. *Id.* at 5-6.

31. Stancombe, *supra* note 9, at 188.

passengers are allowed to request a pat-down in private, many passengers are still uncomfortable with the level of intrusion and “have complained that their private areas, such as breasts and genitals, have been touched.”³² Indeed, the experience of former Miss USA Susie Castillo sounds much more like the full frisk described in *Albarado* than the light pat-down that used to be more typical in an airport.³³

In addition to more intrusive pat-downs, much of the recent controversy over the TSA’s security measures has involved body scanners, also referred to as whole body imaging (WBI) or advanced imaging technology (AIT).³⁴ The two types of technologies used in body scanners are backscatter technology and millimeter-wave technology.³⁵ AIT with backscatter technology delivers a “low intensity x-ray” onto a passenger’s body and takes a picture of the photon pattern “bouncing off of certain materials, revealing its shape” on the TSA monitor.³⁶ Similarly, AIT with millimeter-wave technology “uses non-ionizing radiation in the radio wavelength area to bombard the body and record the bouncing of the waves from

32. *Id.* at 188-89.

33. Castillo, *supra* note 1; United States v. Albarado, 495 F.2d 799, 807 (2d Cir. 1974). In describing a full frisk, the Second Circuit indicated that “the ‘officer must feel with sensitive fingers every portion of the [person’s] body. A thorough search must be made of the [person’s] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.’” *Id.* (quoting Priar & Martin, *supra* note 23, at 481). In *Terry v. Ohio*, 392 U.S. 1, 17 (1968), the Court used this description of a full frisk and then stated that such a frisk “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”

34. See Olsen, *supra* note 12, at 6-7 (explaining that whole body imaging, body scanners, and automated imaging technology are all terms used for technologies that “use either backscatter X-ray or millimeter wave technology to produce detailed, three-dimensional images of the subject’s body through and under clothing, including private and sensitive areas of the body” and noting that opponents of whole body imaging describe the technology “as naked body scanners” and “an electronic strip search”).

35. Victoria Sutton, *Asking the Right Questions: Body Scanners, Is Salus Populi Supreme Lex the Answer?*, 22 HEALTH MATRIX 443, 443-44 (2013) (questioning whether the positive effect of AIT on national security interests outweighs the potentially negative effect of AIT on public health interests). For further information on how AIT works, see Jennifer LeVine, Note, *Over-Exposed? TSA Scanners and the Fourth Amendment Right to Privacy*, 16 J. TECH. L. & POL’Y 175, 176-78 (2011), as well as Julie Solomon, Comment, *Does the TSA Have Stage Fright? Then Why Are They Picturing You Naked?*, 73 J. AIR L. & COM. 643, 652-62 (2008).

36. Sutton, *supra* note 35, at 443-44.

materials or objects on the body.”³⁷ While AIT used to generate detailed, passenger-specific pictures, the TSA presently utilizes millimeter-wave AIT with automated target recognition software (ATR),³⁸ which removes passenger-specific images and instead displays the same generic outline for all passengers, automatically highlighting possible threats on that outline.³⁹

Although the AIT at airports used to save detailed images of passengers, the TSA has since disabled this capacity in its AIT units, and the TSA agents are not allowed to bring photographic devices, including phones, with them into the screening room.⁴⁰ Under the TSA’s procedures, a passenger steps into the AIT machine and raises her hands above her head as the machine generates a generic image and points out areas for further search.⁴¹ According to current protocols, a TSA agent in a different room views the image and indicates whether there is a need to pat-down, question, or further screen the passenger.⁴² However, if a passenger refuses to go through the body scanner, she will be patted down in the manner previously described.⁴³

37. *Id.* at 444.

38. Stancombe, *supra* note 9, at 187.

39. *Advanced Imaging Technology*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait> (last modified Sept. 3, 2014).

40. Stancombe, *supra* note 9, at 186. In the past, AIT could save the images it generated. See Jennifer S. Ellison & Marc Pilcher, *Advanced Imaging Technology (AIT) Deployment: Legal Challenges and Responses*, 24 AIR & SPACE LAW., no. 4 (A.B.A., Chicago, Ill.), 2012, at 4, 6-7. However, in 2007, Congress passed a statute that required the Secretary of Homeland Security to appoint a privacy officer to “assur[e] that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information.” 6 U.S.C. § 142(a)(1) (Supp. I 2009). Because of this new mandate, the TSA privacy officer had to evaluate whether AIT with storage capacity eroded privacy by collecting or disclosing personal information. See *id.* As a result, the TSA decided to remove the storage capacity from AIT and set protocols in place to prevent the use of passenger images. See Ellison & Pilcher, *supra*, at 6-7.

41. Sutton, *supra* note 35, at 443. In contrast to a graphic image of the passenger with AIT alone, the image generated is only a generic outline when ATR is used. *Advanced Imaging Technology*, *supra* note 39.

42. Sutton, *supra* note 35, at 443. The TSA believes that it is less invasive of privacy when the TSA officer viewing the detailed body scan is not permitted to see the passenger in person, thus preserving anonymity. See *Passenger Screening Using Advanced Imaging Technology*, 78 Fed. Reg. 18,287, 18,294 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540).

43. LeVine, *supra* note 35, at 178; see also *supra* text accompanying notes 22-33.

II. WHAT CAN THE TSA DO? FEDERAL LAWS AND CONSTITUTIONAL CHALLENGES

Understanding the different methods that the TSA has used to screen passengers over the years is vital to fully comprehending the following discussion. In particular, this understanding is necessary for a proper assessment of the powers that Congress gave to the TSA over airport security and the constitutional challenges that people have brought against the TSA's use of those powers via different security methods. As a backdrop for this discussion, it is important to bear in mind the very foundation of this great country—the United States Constitution. In particular, the Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁴⁴ Because the TSA is conducting searches of passengers at airports, it is essential to remember this foundational right against unreasonable searches when examining the TSA's creation, mandates, regulations, and constitutional challenges.⁴⁵

A. The TSA's Creation, Authority, and Airport Security Regulations

The TSA was created after 9/11⁴⁶ and was placed in charge of screening operations at airports.⁴⁷ Congress directed the TSA to “develop policies, strategies, and plans for dealing with threats to transportation security”⁴⁸ and to “identify and undertake research and development activities necessary to enhance transportation security.”⁴⁹ To carry out its functions, the TSA can “issue, rescind, and revise” regulations.⁵⁰ In doing so, the TSA must consider “whether the costs of the regulation are excessive in relation to the enhancement of security the regulation will provide.”⁵¹ For purposes of this comparison, security is measured by estimating the monetary value of the number of lives that the particular security method

44. U.S. CONST. amend. IV.

45. *See id.*

46. *See* Star, *supra* note 10, at 252 (explaining that the Aviation and Transportation Security Act (ATSA) was “a direct response to the events of September 11th and call[ed] for broad based security improvements”).

47. 49 U.S.C. § 114(e), (f)(3), (f)(8) (2006).

48. *Id.* § 114(f)(3).

49. *Id.* § 114(f)(8).

50. *Id.* § 114(l)(1).

51. *Id.* § 114(l)(3).

would save.⁵² However, the Under Secretary of Transportation for Security can waive this requirement if it is not feasible to calculate the number of lives saved or the value of those lives.⁵³

Congress's mandate in a 2007 statute has become important in the TSA context due to the use of AIT and its storage capacity.⁵⁴ As per this statute, the Secretary of Homeland Security must appoint a privacy officer to "assur[e] that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information."⁵⁵ Hence, the privacy officer must evaluate the TSA's technologies that use personal information—like AIT that can store images of passengers who have gone through it—because the TSA may not erode privacy in the TSA's use of such technology.⁵⁶

In 2010, the TSA greatly increased its use of AIT and started using it for primary passenger screening after President Obama's *Presidential Memorandum Regarding 12/25/2009 Attempted Terrorist Attack*, which mandated that the Department of Homeland Security "[a]ggressively pursue enhanced screening technology, protocols, and procedures . . . consistent with privacy rights and civil liberties."⁵⁷ After the TSA's response to the President's directive,

52. *Id.*

53. *Id.*; see also Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 597 (2001) (dealing with the TSA's creation). In its Notice of Proposed Rulemaking (NPRM) on AIT, the TSA conducted a cost-benefit analysis, calculating the costs of AIT deployment from 2008 to 2011 at \$841,230,600 and estimating future costs in maintaining AIT from 2012 to 2015 at \$1,532,279,200. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,289-90 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540). The TSA also indicated that the benefits of AIT from increased security at airports are greater than the benefits from magnetometers, particularly in light of new threats from non-metallic explosives and weapons. *Id.* at 18,290.

54. See Ellison & Pilcher, *supra* note 40, at 6-7 (explaining that AIT has the capacity to generate graphical images of passengers and the ability to store those images, although the TSA removed this storage capability and has protocols to prevent the use of those images).

55. 6 U.S.C. § 142(a)(1) (Supp. I 2009).

56. See *id.*; see also Ellison & Pilcher, *supra* note 40, at 6-7.

57. Press Release, The White House, Presidential Memorandum Regarding 12/25/2009 Attempted Terrorist Attack (Jan. 7, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-12252009-attempted-terrorist-attack> (concluding that the TSA must take "immediate actions . . . to enhance the security of the American people"). President Obama stated that the TSA needed to enact changes to its security at airports because of the "inherent systemic weaknesses and human errors revealed" by the preceding events. *Id.*; see also Ellison & Pilcher, *supra* note 40, at 4; *infra* text accompanying notes

Congress, in 2012, limited the TSA's use of AIT by requiring the TSA to equip all AIT for screening passengers with ATR, which "produces a generic image of the individual being screened that is the same as the images produced for all other screened individuals."⁵⁸ This law also requires the Assistant Secretary of Homeland Security to ensure that AIT used on passengers "complies with such other requirements as the Assistant Secretary determines necessary to address privacy considerations."⁵⁹

The TSA has issued a variety of regulations in carrying out its mandate.⁶⁰ Most importantly to this discussion, the TSA issued a Notice of Proposed Rulemaking (NPRM)⁶¹ concerning airport screening of passengers with AIT.⁶² The proposed rule, which would become 49 C.F.R. § 1540.107(d), says that "[t]he screening and inspection described in (a) may include the use of advanced imaging technology. For purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened."⁶³ The TSA issued this NPRM in response to the D.C. Circuit's decision in 2011, which required the TSA to perform notice-and-comment rulemaking on its proposal to continue utilizing AIT as a primary screening method.⁶⁴ The comment period

110-12 (explaining the events surrounding the Underwear Bomber's attempted terrorist attack that prompted President Obama to issue this memorandum).

58. 49 U.S.C. § 44901(l)(1)(C), (l)(2)(A) (2012).

59. *Id.* § 44901(l)(2)(B).

60. *See generally* 49 C.F.R. § 1500.01 et seq. (2013) (TSA Regulations).

61. A governmental agency issues an NPRM in the Federal Register in order to describe its proposed regulatory action and solicit public comments on it. *Abbreviations*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/Abbrevs.jsp> (last visited Nov. 17, 2014). As per the Administrative Procedure Act, an agency must include the following in an NPRM: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." Administrative Procedure Act, 5 U.S.C. § 553(b) (2012). Once the agency has issued this notice, it must allow for a period for the public to comment on its NPRM. *Id.* § 553(c). After this comment period, the agency must consider the comments in issuing its final ruling, including a statement of basis and purpose for the rules it chooses to adopt. *Id.*

62. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540).

63. *Id.* at 18,296.

64. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 8, 11 (D.C. Cir. 2011) (requiring the TSA to issue an NPRM on its use of AIT, but otherwise holding AIT constitutional as part of an administrative search). In this

concluded on June 24, 2013, and a final rule is anticipated in July 2015.⁶⁵

B. Case Law and Past Challenges Regarding Constitutional Rights

Before diving any deeper into what the federal government should do with the TSA's screening methods, it is first informative to get an overview of past challenges regarding constitutional rights in the airport security context and why many challenges have failed. First, in discussing searches of carry-on luggage in *United States v. Edwards*, the Second Circuit indicated that the history surrounding the Fourth Amendment's enactment indicates that the Framers would have permitted reasonable methods of preventing piracy on planes.⁶⁶ Further, "hundreds of . . . lives and millions of dollars" are at stake

case, the Electronic Privacy Information Center (EPIC) sought review of the TSA's decision to use AIT instead of magnetometers at airports. *Id.* at 2-3. EPIC argued that the TSA was violating federal statutes and the Constitution and in the alternative, that the new rule should have been promulgated through notice-and-comment rulemaking. *Id.* at 3. The court held that even with the TSA's privacy precautions, "an AIT scanner intrudes upon [a passenger's] personal privacy in a way a magnetometer does not." *Id.* at 6. Hence, the court found that this change from magnetometers to AIT for primary screening "substantially affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking" under the Administrative Procedure Act. *Id.* The purpose of this process is to allow the public to participate in the agency's decisions and to make sure the agency has all necessary information to make its decision. *Id.* at 6. Further, the court found that this change was not merely interpretive since the new "policy substantially changes the experience of airline passengers." *Id.* at 7. Therefore, the court remanded the rule to the TSA because it did not fall within an exception to the requirement for notice-and-comment rulemaking. *Id.* at 8. However, the court also found that EPIC's challenges to AIT based on federal statutes and the Constitution failed. *Id.* at 11.

65. *Passenger Screening Using Advanced Imaging Technology*, FED. REG., <https://www.federalregister.gov/articles/2013/03/26/2013-07023/passenger-screening-using-advanced-imaging-technology> (last visited Nov. 17, 2014) [hereinafter *Passenger Screening*, FED. REG.] (providing the Federal Register online, giving a summary of the NPRM, and detailing the action dates on the NPRM). To date, there have been 5,544 comments to the TSA's NPRM on the use of AIT. *Passenger Screening Using Advanced Imaging Technology*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=TSA-2013-0004> (last visited Nov. 17, 2014) [hereinafter *Passenger Screening*, REGULATIONS.GOV].

66. 498 F.2d 496, 498 (2d Cir. 1974) (determining that FAA regulations about searching carry-ons were constitutional). Specifically, the court noted 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.*

when a passenger takes over or destroys an airplane.⁶⁷ This high-stakes danger results in searches being reasonable if they are, in good faith, intended to mitigate the risk of danger and if passengers know about such searches beforehand.⁶⁸ Therefore, although the government is authorized to perform security searches in airports because of the high risk of danger, the searches must still be reasonable in order to withstand Fourth Amendment scrutiny.⁶⁹ In determining whether the search is reasonable, the court balances the search's necessity against the intrusion's offensiveness.⁷⁰

In further explaining why such searches are permissible, the Ninth Circuit in *United States v. Aukai* clarified that a passenger's consent to a search does not have any bearing on the search's reasonableness.⁷¹ Rather, these searches are administrative.⁷² Since they are performed under a "general regulatory scheme" to further "an administrative purpose" of preventing hijackings, weapons, or

67. *Id.* at 500 (quoting *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, J., concurring)).

68. *Id.* ("When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air." (quoting *Bell*, 464 F.2d at 675)).

69. *Id.*

70. *Id.*

71. 497 F.3d 955, 959 (9th Cir. 2007) (citing *United States v. Biswell*, 406 U.S. 311, 315 (1972) (stating that "the lawfulness of the search" of a house pursuant to a warrant does not "depend on consent" because "there is lawful authority independent of the will of the householder")).

72. *Id.* at 960. In contrast to typical searches meant to determine whether someone has committed a crime, an administrative search has a different purpose. See *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011). In this context with airport searches of all passengers, the purpose is "to protect the public from a terrorist attack." *Id.* While law enforcement officers typically need a warrant based on probable cause to conduct a search of a person, an administrative search is an exception to this requirement and also meets the Fourth Amendment's reasonableness requirement. *George v. Rehiel*, 738 F.3d 562, 573 (3d Cir. 2013). Further, although officers usually must have individualized suspicion that a particular person committed a crime in order to make a search reasonable, administrative searches of a passenger without any suspicion are allowed when balancing the necessity of the search for public interest against how invasive the search is. *Id.* at 573-74. In other words, an administrative search is reasonable precisely because it is "conducted as part of a general regulatory scheme in furtherance of an administrative purpose." *Aukai*, 497 F.3d at 960 (quoting *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973)).

explosives on planes, they are constitutionally reasonable under the Fourth Amendment as administrative searches.⁷³ Hence, the TSA may conduct a reasonable administrative screening once a passenger enters the secured area of an airport.⁷⁴ As argued by the court in *Aukai*, allowing passengers to back out of screening after entering the secured area would give terrorists the opportunity to decide not to fly if they are subjected to further search; this would help terrorists slowly find vulnerabilities in security while evading detection.⁷⁵ However, the Ninth Circuit also cited its earlier *United States v. Davis* decision, where it recognized that there are limits to such administrative searches.⁷⁶ In *Davis*, the court articulated that screening passengers is constitutional under the Fourth Amendment as long as the “process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, [and] that it is confined in good faith to that purpose.”⁷⁷

Supporting this proposition, the Second Circuit concluded in *United States v. Albarado* that people have a constitutional “right to expect” that the search “will be as limited as possible, consistent with meeting the threat.”⁷⁸ Specifically addressing magnetometers, the Second Circuit concluded that the technology’s use, which was warned of with signs and did not humiliate, stigmatize, bother, or scare passengers going through it, was reasonable in light of the threat that an undetected hijacker would pose to numerous passengers.⁷⁹ Similarly, a search like a frisk may be “grossly invasive,” but such invasiveness is mitigated by passengers knowing of the search ahead of time from the signs in the airport, the lack of stigma from an airport pat-down, and the ability of a passenger to refuse the frisk and choose not to travel even if the passenger already set off the magnetometer.⁸⁰ On this point, the Second Circuit differs

73. *Aukai*, 497 F.3d at 960 (quoting *Davis*, 482 F.2d at 908).

74. *Id.* at 961.

75. *Id.* at 960-61.

76. *Id.* at 962 (citing *Davis*, 482 F.2d at 913).

77. *Davis*, 482 F.2d at 913.

78. 495 F.2d 799, 806 (2d Cir. 1974) (finding that a magnetometer involves an “absolutely minimal invasion of privacy” and does not involve the same indignities found “in fingerprinting, paring of a person’s fingernails, or a frisk” (citation omitted)).

79. *Id.*

80. *Id.* at 807-08 (referring to frequent use of the procedure where a passenger setting off the machine the first time is asked “to remove all his metal items and return through the magnetometer” as “clearly preferred over the

from the Ninth Circuit in permitting passengers to back out of screening even after entering the secured area.⁸¹ However, the overall policy of both circuits in limiting the search to what is necessary is the same, as the Second Circuit also held that the government should “exhaust the other efficient and available means” to find the metal setting off the magnetometer before resorting to a frisk.⁸²

While the court in *Albarado* specifically considered magnetometers and frisks, some cases have challenged the constitutionality of AIT in particular.⁸³ At least the D.C. Circuit has held AIT to be constitutional under the Fourth Amendment as part of an administrative search,⁸⁴ just as the Second and Ninth Circuits have allowed magnetometers and frisks.⁸⁵ In response to the D.C. Circuit’s decision in *Electronic Privacy Information Center v. United States Department of Homeland Security*, the TSA issued the NPRM concerning the use of AIT.⁸⁶ In this case, the EPIC sought review of the TSA’s decision to use AIT instead of magnetometers at airports, arguing that the TSA should have used notice-and-comment

immediate frisk becau[s]e, while still a search, it entails far less invasion of the privacy or dignity of a person than to have a stranger poke and pat his body in various places”).

81. *Compare id.*, with *Aukai*, 497 F.3d at 961 (deciding that passengers cannot back out once they enter the secure area), and *supra* text accompanying notes 74-75.

82. *Albarado*, 495 F.2d at 808; see also *Davis*, 482 F.2d at 912-13.

83. *Tobey v. Napolitano*, 808 F. Supp. 2d 830, 835-36 (E.D. Va. 2011) (finding that a man who removed some of his clothes to protest AIT did not have his Fourth Amendment rights violated, but that issues of fact remained on whether his First Amendment rights had been violated), *aff’d sub nom.* *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013).

84. *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 8 (D.C. Cir. 2011) (holding that AIT in airports is an administrative search, but requiring the TSA to do notice-and-comment rulemaking about its use of AIT under the Administrative Procedure Act).

85. *Albarado*, 495 F.2d at 806-08 (preferring the use of magnetometers as less invasive than frisks, but permitting each if the search is “as limited as possible” to still achieve the security purpose); *Aukai*, 497 F.3d at 960 (holding that searches of passengers at airports are reasonable if done as part of an administrative search, rather than due to consent).

86. *Elec. Privacy Info. Ctr.*, 653 F.3d at 8 (remanding the rule to the TSA for notice-and-comment rulemaking); Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,287 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540); see also *supra* note 64 (explaining further why the D.C. Circuit required the TSA to use notice-and-comment rulemaking on its policy to utilize AIT as a primary screening method in airports).

rulemaking to promulgate the rule.⁸⁷ The court found that even with the TSA's privacy precautions, AIT intrudes on privacy more than a magnetometer does.⁸⁸ Hence, the court held that this change from magnetometers to AIT for primary screening substantially "affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking" under the Administrative Procedure Act.⁸⁹ Therefore, the D.C. Circuit remanded the rule to the TSA for notice-and-comment rulemaking,⁹⁰ and the TSA issued its NPRM on AIT.⁹¹ The TSA has received numerous comments on its NPRM;⁹² after the TSA issues its final rule, other circuits may also be asked to review constitutionality of AIT.⁹³

III. ISSUES IN CHOOSING APPROPRIATE SCREENING METHODS

In finding a solution to this ongoing debate over privacy and security in airports, it is helpful to look back on what the United States and other countries have done in the past, what has worked, and what has failed.⁹⁴ Further, in order to accommodate privacy, the TSA needs to measure and compare the increases in invasion of

87. *Elec. Privacy Info. Ctr.*, 653 F.3d at 2-3. For an explanation of how the notice-and-comment rulemaking process works, see *supra* note 61.

88. *Elec. Privacy Info. Ctr.*, 653 F.3d at 6 ("[A]n AIT scanner intrudes upon [a passenger's] personal privacy in a way a magnetometer does not.")

89. *Id.* (explaining that the purpose of the notice-and-comment rulemaking process is to allow the public to participate in the TSA's decisions and more fully inform the agency before it makes decisions). Further, the court found that was not just an interpretive change because the new "policy substantially changes the experience of airline passengers." *Id.* at 7.

90. *Id.* at 8.

91. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,287.

92. To date, there have been 5,544 comments to the TSA's NPRM on the use of AIT. See *Passenger Screening*, REGULATIONS.GOV, *supra* note 65. While asking the TSA to follow Israel's example with profiling instead of utilizing AIT, one commenter said that although he has "been treated fairly" by the TSA, he "object[s] to the fact that the program [using AIT] bypassed this public commentary in the beginning." Anonymous, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (Apr. 10, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-0466>.

93. A final rule is anticipated in July 2015. See *Passenger Screening*, FED. REG., *supra* note 65.

94. See *infra* Sections III.A-B.

privacy and increases in security from new and existing measures.⁹⁵ While some security measures may be constitutional,⁹⁶ sound public policy suggests that Congress ought to take a more active role in protecting its citizens from gross invasions of privacy.⁹⁷

A. The Effectiveness and Invasiveness of Current Security Methods

The first step in determining what measures the TSA should use is looking further into the effectiveness and invasiveness of the security measures that the TSA does use. The TSA currently utilizes millimeter-wave AIT equipped with ATR as a primary method of screening passengers.⁹⁸ Both as a secondary form of screening and for passengers opting out of body scans, the TSA conducts full-body pat-downs.⁹⁹ These passenger-screening methods are part of the TSA's "risk-based, layered security approach."¹⁰⁰ In order to accommodate concerns about child pornography with AIT, the TSA's procedure currently allows children to go through magnetometers, also known as WTMDs, unless the adult traveling with the child opts otherwise.¹⁰¹ Overall, the TSA's goal is to use a "risk-based, layered security approach" with visible checkpoints at airports, intelligence gathering on terrorist threats, the Secure Flight program,¹⁰² examinations of passenger documentation and identification, systems to detect explosives, and random security tests.¹⁰³

1. How Effective Are Current Security Methods?

In support of its use of AIT in particular, the TSA claims that AIT is the most effective method currently available for discovering potentially threatening metal and non-metal objects concealed under

95. See *infra* Sections III.A-B.

96. See *supra* Section II.B.

97. See *infra* text accompanying notes 206, 213.

98. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,294 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540).

99. *Id.*

100. *Id.* at 18,291.

101. *Id.* at 18,297.

102. Under its Secure Flight program, the TSA "check[s] passenger manifests against records from the Government known or suspected terrorist watch lists." *Id.* at 18,291.

103. *Id.* at 18,291-92 (explaining the TSA's layers of security and the need for experienced personnel as well as effective technology).

a passenger's clothing without requiring a TSA officer to touch the passenger physically.¹⁰⁴ Illustrating the benefits of AIT, the TSA cited its experience using the technology to detect concealed weapons, even if they were made out of non-metallic materials.¹⁰⁵ However, one critic, Stancombe, still questions the effectiveness of AIT, noting that experts are divided over AIT's effectiveness and are worried that terrorists will still be able to conceal weapons from AIT scanners, concluding that "'normal anatomy . . . make[s] a dangerous amount of plastic explosives with tapered edges difficult if not impossible to detect.'"¹⁰⁶

Additionally, in challenging the effectiveness of the TSA's search methods, another scholar, Olsen, argues that even the TSA's current security measures may not have detected the explosives carried by the "Shoe Bomber," Richard Reid, because the explosives were concealed in his shoe.¹⁰⁷ In 2001, Reid was on a flight from Paris to Miami when the passengers and flight crew found him trying to detonate the explosives on board.¹⁰⁸ Since the explosive materials were concealed in his shoe's heel when he went through the security checkpoint, the TSA could not have detected them with either a full-body pat-down, which would not include patting down of shoes, or with AIT, which cannot "penetrate solid materials."¹⁰⁹

Further, Olsen points out that in 2009, a whole body imaging scanner in Europe did not detect the explosives concealed by the "Underwear Bomber," Umar Farouk Abdulmutallab, who then continued on his journey from Amsterdam, Netherlands to Detroit, Michigan.¹¹⁰ Fortunately, the Underwear Bomber was unable to

104. *Id.* at 18,292.

105. *Id.* at 18,297.

106. Stancombe, *supra* note 9, at 200-01 (quoting Leon Kaufman & Joseph W. Carlson, *An Evaluation of Airport X-ray Backscatter Units Based on Image Characteristics*, 4 J. TRANSP. SECURITY 73, 73 (2011)).

107. Olsen, *supra* note 12, at 14.

108. *Id.*

109. *Id.*

110. *Id.* However, the TSA reports that the Underwear Bomber never actually passed through WBI at any of the airports though which he travelled. Mark Strassmann, *Ex-TSA Chief: Full-Body Scanners Would Have Caught New Underwear Bomb*, CBS NEWS (May 9, 2012, 2:43 PM), <http://www.cbsnews.com/news/ex-tsa-chief-full-body-scanners-would-have-caught-new-underwear-bomb/>.

Although there are conflicting reports on whether the Underwear Bomber went through some form of body imaging technology, there is still debate over whether AIT effectively detects such concealed explosives. *See supra* text accompanying notes 104-09 (debating the effectiveness of AIT). Therefore, it is unclear whether AIT would have detected the Underwear Bomber's explosives and prevented him

detonate his explosive chemicals, and the passengers and flight crew were able to detain him.¹¹¹ Although the TSA used this as an example of the need for AIT and full-body pat-downs, in reality, the WBI in place did not detect the Underwear Bomber's concealed chemicals, allowing him to board the plane with them.¹¹²

Moreover, the TSA has not released the results of its testing of AIT at airports, citing security reasons for not releasing them.¹¹³ Due to the security concerns involved in revealing weaknesses of current methods, it may be difficult to accurately assess the increased safety from AIT apart from trusting the TSA's assessment of the situation or relying on miscellaneous stories from whistleblowers and the media.¹¹⁴ Perhaps people submitting comments to the TSA's NPRM on its use of AIT further addressed the TSA's resistance to disclosing AIT test results.¹¹⁵ In that case, the TSA should more specifically respond to those comments in issuing its final ruling, considering the actual effectiveness of AIT and full-body pat-downs as opposed to prior methods.¹¹⁶

from boarding the plane. Further, even assuming that AIT is effective, the use of AIT is still a cause for concern because AIT is highly intrusive on individual privacy. *See infra* Subsection III.A.2 (detailing the invasiveness of AIT).

111. Olsen, *supra* note 12, at 14.

112. *Id.*

113. *Id.* at 19; *see also* Grant Stinchfield, *TSA Source: Armed Agent Slips Past DFW Body Scanner*, NBCDFW (Feb. 21, 2011, 7:28 PM), <http://www.nbcdfw.com/news/local/TSA-Agent-Slips-Through-DFW-Body-Scanner-With-a-Gun-116497568.html> (reporting on a test of AIT in the Dallas/Fort Worth International Airport where an undercover TSA officer made it through security with a concealed handgun and noting that the TSA cited security reasons for not publicizing its covert test results).

114. Olsen, *supra* note 12, at 19 (noting the existence of "anecdotal reports that the TSA regularly fails to detect weapons and explosives in its own security tests, although the actual test results remain classified"); Stinchfield, *supra* note 113. While the TSA is reluctant to release the weaknesses in its security methods, it could still provide information about how much more secure its new methods are in practice. *See* Olsen, *supra* note 12, at 14; Stinchfield, *supra* note 113. Courts could then use this information in conducting their reasonableness test, balancing the increased security against the invasiveness of the TSA's methods. *See United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (explaining that courts balance the need for the search against its intrusiveness to determine whether it is reasonable).

115. *See* Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,287 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540).

116. *See supra* note 61 (explaining that under 5 U.S.C. § 553(c), an agency must consider the comments received from the public on its NPRM in issuing its final rule).

2. *How Invasive Are Current Security Methods?*

Even assuming that AIT and full-body pat-downs are effective, when balanced against their invasiveness, the increased security benefits of these methods must outweigh their intrusion on privacy if the security methods are to be considered reasonable under the Fourth Amendment.¹¹⁷ The TSA argues that while AIT can generate images of people's bodies, two-thirds of Americans support its use.¹¹⁸ With this statistic and Americans choosing to continue flying, some have argued that Americans do not see AIT as all that intrusive.¹¹⁹ While the results of the poll could be indicative of the level of intrusion perceived by Americans, it could also partially be the result of Americans informally or subconsciously performing the balancing test themselves in determining whether or not they think that the security benefits of AIT outweigh the intrusions into privacy.¹²⁰ Moreover, assuming *arguendo* that the majority of Americans consent to the TSA's security measures in deciding to fly, any argument referring to the "consent" of Americans to the use of AIT or full-body pat-downs is largely irrelevant, since courts have

117. See *supra* text accompanying note 70.

118. Stancombe, *supra* note 9, at 201 (citing a poll where two-thirds of respondents supported AIT use, but over half of respondents said pat-downs go too far). For full poll results and a discussion of the poll, see Ashley Halsey III & Derek Kravitz, *Protests of TSA Airport Pat-Downs, Body Scanners Don't Delay Thanksgiving Travel*, WASH. POST (Nov. 25, 2010, 12:33 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/24/AR2010112406989.html?sid=ST2010113005385>; *Washington Post Poll*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_11222010.html (last visited Nov. 17, 2014).

119. See Halsey & Kravitz, *supra* note 118.

120. See *id.* However, not all Americans who choose to fly believe that the enhanced security measures are justified. For instance, in commenting on the TSA's NPRM on AIT, Nelson asked the TSA to "roll back airport security to pre-9/11 levels and eliminate all enhanced imaging technology from screening checkpoints. With the enhancements to airliners' cockpit doors, an actual hijacking is no longer feasible. I am willing to accept some risk in order to maintain my dignity and personal liberties." P. Nelson, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (June 5, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-3028>. Further, Mark Scheid commented, "As a regular traveler, [AIT devices] do not make me feel safer, they make me feel violated. . . . Because of this, I have opted out of this device dozens of times" Mark Scheid, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (June 5, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-3033>.

already held that airport screenings of passengers are constitutional pursuant to an administrative search rather than due to consent.¹²¹ Thus, pointing out that many Americans think that the use of AIT is justified, and would therefore consent to its use, does not automatically make it un-invasive or constitutional pursuant to the administrative search's reasonableness requirement.¹²²

Additionally, the fact that Americans still choose to fly does not necessarily mean that they find the TSA's security measures unintrusive.¹²³ Rather, they may feel like the father traveling with his child before Thanksgiving Day, who said, "The choice is to have [my daughter] microwaved or felt up, but we gotta get to Grandma's, so we'll do it."¹²⁴ Moreover, Americans may feel strongly opposed to and highly violated by both AIT and full-body pat-downs, but they may share former Miss USA Susie Castillo's view of the situation.¹²⁵ After feeling grossly violated by the TSA in a full-body pat-down, Castillo blogged, "My work requires me to travel often, and I don't want to be degraded and driven to tears . . . everytime I fly. If I could, I would boycott airline travel altogether, but that would mean that I, and MANY others, wouldn't work."¹²⁶ This is partly because flying for work, to see family, or to go on a vacation is far more time efficient, particularly over long distances, than traveling by car, bus, ship, or train.¹²⁷ Therefore, although Americans continue to fly, they may still see the security methods in place as highly invasive.¹²⁸

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

122. *See id.* For instance, although the D.C. Circuit did not find AIT unconstitutional in ordering the TSA to use notice-and-comment rulemaking, it did indicate that "it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon . . . personal privacy in a way a magnetometer does not." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011).

123. On average, nearly 1.8 million people flew within the United States each day in 2013, totaling around 646 million passengers per year. Research & Innovative Tech. Admin., *Passengers: All Carriers - Airports*, BUREAU TRANSP. STAT., http://www.transtats.bts.gov/Data_Elements.aspx (last visited Nov. 17, 2014). This is up slightly from 2012, when approximately 642 million passengers flew within the United States. *Id.* In contrast, in 2002, only about 552 million people flew domestically in the United States. *Id.*

124. Halsey & Kravitz, *supra* note 118 (internal quotation marks omitted) (explaining one passenger's view of AIT and full-body pat-downs).

125. *Former Miss USA Feels "Violated" by TSA Pat-Down*, *supra* note 3.

126. Castillo, *supra* note 1.

127. *See United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974).

128. *See Halsey & Kravitz*, *supra* note 118.

Further, in the same poll where two-thirds of Americans responding said that AIT was justified, half of the respondents also indicated that they believed full-body pat-downs went too far.¹²⁹ The TSA currently uses full-body pat-downs as a secondary form of screening, which the courts have approved in the past when all other methods have been exhausted.¹³⁰ However, the TSA also uses full-body pat-downs as a primary screening method for people opting out of AIT.¹³¹ The TSA in part justifies its use of AIT by explaining that people are not forced to use it, can choose a pat-down instead, and rarely choose to opt out.¹³² However, if people see a full-body pat-down as more intrusive than a body scan, it is no wonder that few passengers opt out of AIT in favor of a pat-down.¹³³ Again, while airport screenings do not rely on consent for their constitutionality,¹³⁴ the TSA is misguided if it justifies the use of AIT by claiming that Americans have approved of AIT.¹³⁵ In particular, the TSA is ill advised when it attempts to demonstrate this approval by the fact that most passengers do not opt out of AIT when passengers are given an alternative that they see as even more invasive, such as a full-body pat-down.¹³⁶

129. Stancombe, *supra* note 9, at 201.

130. *Albarado*, 495 F.2d at 808.

131. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,294 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540).

132. *Id.* at 18,289, 18,294.

133. See Stancombe, *supra* note 9, at 201 (discussing the poll where many respondents saw full-body pat-downs as going too far while viewing AIT as justified); see also *The TSA and Full-Body Scanners. Be Afraid. Be Very Afraid.*, EVERYWHEREIST (Nov. 8, 2010), <http://www.everywhereist.com/the-tsa-and-full-body-scanners-be-afraid-be-very-afraid/> (“And that’s another thing—the TSA is trying to say that we have a choice, which just isn’t true. If you decide that you don’t want to be exposed to radiation and humiliation [from AIT], you can opt for a physical pat-down search (which just exposes you to the latter). The TSA claims that the machines must be great, because 79% of people chose them over a physical pat-down. But the choice is simply a lesser of two evils, and the TSA has orchestrated it to be so. The physical pat-down is incredibly intrusive—a traveler will have their hair, breasts, genitalia, and buttocks patted down, and agents can use the front of their hands (they previously had to use the backs). It takes more time, and you’ll be singled out and essentially treated like a criminal. Given the choice between being molested or being exposed to a tiny bit of ‘harmless’ radiation, it seems the choice is clear for a lot of travelers.”).

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

135. See Stancombe, *supra* note 9, at 201.

136. See *id.*

B. The Effectiveness and Invasiveness of Alternate Security Methods

In order to figure out whether the TSA currently uses appropriate security methods, it is also important to look at the context of what other countries do¹³⁷ and what the United States has done in the past.¹³⁸ Additionally, just as with the TSA's current methods, it is vital to examine how effective or invasive each alternative security method is in practice.¹³⁹ Further, it is imperative to delve into whether the TSA's changes have actually increased security.¹⁴⁰

1. *What Do Other Countries Do and How Effective and Invasive Is It?*

In order to evaluate the wisdom of the United States' chosen security measures, the TSA should also consider what other countries have done to enhance security and how invasive those methods are. For instance, Italy chose not to employ AIT units in its airport security because it found the scanners to be ineffective,¹⁴¹ and the United Kingdom delayed its use of AIT because of concerns likening the technology to child pornography when used on children.¹⁴² While this makes Italy and the United Kingdom less invasive of privacy than the United States, the TSA may argue that according to its congressional mandate, it needs to continue developing and implementing measures like AIT to make the United

137. See *infra* Subsection III.B.1.

138. See *infra* Subsection III.B.2.

139. See *infra* Subsections III.B.1-2.

140. See *infra* Subsection III.B.2.

141. Olsen, *supra* note 12, at 23 (noting that Italy abandoned whole body imaging machines "after a brief testing period"). Italy tested AIT in several international airports and determined that the scanners were "inaccurate and inconvenient." *Tests in Italy Raise New Questions About Airport Body Scanners*, ELECTRONIC PRIVACY INFO. CENTER (Sept. 17, 2010), <http://epic.org/2010/09/tests-in-italy-raise-new-quest.html>. Further, the European Commission recommended less invasive security methods, stating that AIT raised fundamental concerns about people's rights and health. *Id.*

142. *The TSA and Full-Body Scanners. Be Afraid. Be Very Afraid.*, *supra* note 133.

States' airports more secure, even if such measures infringe on privacy.¹⁴³

In stark contrast to the TSA's use of AIT and full-body pat-downs, Israel's El Al airline does not use body scanners or pat-downs at all.¹⁴⁴ Instead, El Al uses intelligence gathering, observations, and questioning of passengers individually when they check in.¹⁴⁵ While this method is extremely different than the TSA's methods, it has proven highly effective, as "El Al also has not had a single tragedy in forty years."¹⁴⁶ Further, this form of security through questioning, while perhaps causing passengers to be nervous, does not at all intrude on a person's privacy by taking a nude image of her or feeling her body up and down.¹⁴⁷ However, Israel's method would be a cumbersome process to set up in the United States and would be extremely difficult to implement due to the size differential between Israel and the United States and the greater level of flight traffic in the United States.¹⁴⁸

143. See *supra* text accompanying notes 46-49 (explaining how the TSA was created after 9/11 and was given its congressional mandates to increase security at airports).

144. Stancombe, *supra* note 9, at 211-15; see also Olsen, *supra* note 12, at 23 (pointing out that "even though Israel may be the number-one terrorist target in the world, it does not use body scanners for passenger screening," but uses intelligence gathering, observations, and questioning).

145. Stancombe, *supra* note 9, at 211-15; see also Olsen, *supra* note 12, at 23.

146. Stancombe, *supra* note 9, at 212.

147. See Olsen, *supra* note 12, at 23 (noting that Israel does not use body scanners or pat-downs).

148. See Carla Garrison, *Israel: A Brief History of the Fight over a Land the Size of New Jersey*, WASH. TIMES (Apr. 15, 2011), <http://communities.washingtontimes.com/neighborhood/truth-be-told/2011/apr/15/israel-brief-history-fight-over-land-size-new-jers/> (explaining that Israel is only 7,850 square miles, approximately the same size as New Jersey); see also Research & Innovative Tech. Admin., *T-100 International Market (All Carriers): Sum: On-Flight Market Passengers Enplaned by OriginCountry for 2012*, BUREAU TRANSP. STAT., http://www.transtats.bts.gov/Oneway.asp?Display_Flag=0&Percent_Flag=0 (last visited Nov. 17, 2014) (noting that in 2012, only 698,426 passengers originated from flights in Israel, while 86,463,518 passengers originated from flights in the United States). Since the United States is so much larger than Israel and has many more airline passengers, a security system where each passenger is interviewed prior to flying would require substantially more TSA officers to carry out the interviews and more intensive training of those officers than currently needed in the United States.

More like the policy in the United States, the Netherlands also uses AIT.¹⁴⁹ After the Underwear Bomber tried to set off an improvised explosive device on a flight from Amsterdam to Detroit, the Netherlands changed from its policy of allowing passengers to voluntarily go through a body scanner to a policy requiring that all passengers traveling from Amsterdam's Schiphol Airport to the United States go through a body scanner.¹⁵⁰ While the Netherlands uses AIT much like the TSA does, the Netherlands was ahead of the TSA in mitigating the invasiveness of AIT by using technology that only outlines the area where an object may be concealed "on a generic mannequin figure instead of on the actual image of the passenger's body."¹⁵¹ Since the *Seattle Times* reported on this in 2010, the TSA has also placed ATR on all AIT units at airports, thus bringing the United States on par with the Netherlands in regard to alleviating the invasiveness of body scanners.¹⁵²

2. *What Has the United States Done in the Past, and Have Changes Really Increased Security?*

Like other countries, the United States has used a variety of security methods at airports in the past, like magnetometers, metal detector wands, light frisks, enhanced full-body pat-downs, and various forms of WBI or AIT.¹⁵³ Magnetometers, or WTMDs, were originally used to combat hijacking by preventing passengers from carrying metal weapons onboard airplanes.¹⁵⁴ When Congress directed the Federal Aviation Administration (FAA) to require

149. Daniel Michaels, *Dutch to Use Body Scanners: New Technology Will Screen U.S.-Bound Passengers Amid Privacy Concerns*, WALL ST. J. (Dec. 31, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB12621731115510051>.

150. *Id.*; see also *supra* text accompanying notes 110-12 (explaining how the Underwear Bomber brought explosives onto an airplane even though he passed through a whole body imaging scanner in Europe).

151. Tony Pugh, *U.S. Body-Scan Technology Used by Dutch Is Better than Ours*, SEATTLE TIMES (Nov. 18, 2010, 7:10 PM), http://seattletimes.com/html/nationworld/2013470008_airportfix19.html.

152. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,294 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540). Further, in 2012, Congress passed a statute requiring the TSA to equip all AIT units with ATR. 49 U.S.C. § 44901(I)(1)(C), (I)(2)(A) (2012).

153. See *supra* Part I (discussing these security measures and how they work); see also Stancombe, *supra* note 9, at 184-89 (explaining current pre-flight screening procedures in airports, AIT, ATR, and pat-downs).

154. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,290.

passenger screening for weapons in 1974, Congress also instructed the FAA to develop new procedures and devices to increase airplane security.¹⁵⁵

Since 9/11, Congress created the TSA to further focus on regulating airport security.¹⁵⁶ The TSA continued the FAA's research to develop ways to combat the new threats from non-metallic explosives and weapons, which magnetometers were unable to detect.¹⁵⁷ For instance, after two female passengers in Russia successfully hid explosives in their torsos, the TSA revised its pat-down procedures to allow for more thorough physical searches.¹⁵⁸ Additionally, the TSA believes that its AIT would have been able to detect the non-metallic explosives concealed by the Underwear Bomber, as well as other similar explosives.¹⁵⁹ As the TSA explained that "non-metallic explosives are now one of the foremost known threats to passenger aircraft," the TSA considers AIT a vital part of its "risk-based, layered security approach" to protecting Americans.¹⁶⁰ Hence, although some disagree with the TSA on the

155. *Id.*; Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 316, 88 Stat. 409, 415-17.

156. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291; *see also supra* text accompanying notes 46-50 (discussing the TSA's creation and responsibilities).

157. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291.

158. *Id.* Additionally, in response to the Shoe Bomber, the TSA implemented procedures requiring passengers to remove their shoes for scanning. *Id.*; *see also* Press Release, Transp. Sec. Admin., Need for Removal of Shoes at Checkpoint, (Jan. 7, 2013), *available at* <http://www.tsa.gov/press/news/2013/01/07/need-removal-shoes-checkpoint> (explaining why passengers must remove their shoes for additional screening). Further, the TSA limited the quantity of liquids that passengers can bring on flights and increased liquid screening after a terrorist in the United Kingdom brought liquid explosives on board a plane. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291.

159. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291.

160. *Id.*

effectiveness of AIT,¹⁶¹ the TSA believes that AIT and full-body pat-downs have increased security over previous methods.¹⁶²

C. Public Policy and Arguments Supporting Less Invasive Security Methods

Depending on where the debate over the effectiveness of AIT and full-body pat-downs comes out, the high level of intrusion into privacy by these methods could outweigh their safety benefits and cause them to be unconstitutional because they fail the reasonableness test for an administrative search.¹⁶³ On the other hand, if these methods are highly effective, their use can be justified, as the D.C. Circuit¹⁶⁴ and at least one scholar found them to be.¹⁶⁵ However, simply because a method is justified under a balancing test that courts have used in the past does not necessitate the conclusion that the sacrifice of privacy is worth the perhaps minimal increases in security.¹⁶⁶ Furthermore, just because courts have found particular security measures to be constitutional does not necessarily mean that

161. Stancombe, *supra* note 9, at 198-201 (discussing tests of AIT and noting that “there is still debate as to whether or not these AIT units are even effective”); Olsen, *supra* note 12, at 14 (pointing out that explosives carried by the Shoe Bomber may not have been detected by whole body imaging or full-body pat-downs and that AIT in Europe did not detect the Underwear Bomber’s explosives). For a more detailed discussion on the effectiveness of the TSA’s current methods, particularly full-body pat-downs and AIT, see *supra* Subsection III.A.1.

162. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291-92. While some may support an intelligence gathering approach, which could decrease the need for highly invasive physical security methods, one scholar argues that physical-based approaches are more secure than intelligence-based approaches are. See generally Ian David Fiske, Note, *Failing to Secure the Skies: Why American Has Struggled to Protect Itself and How It Can Change*, 15 VA. J.L. & TECH. 173 (2010).

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

164. *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011).

165. See *LeVine*, *supra* note 35, at 188 (concluding that AIT is probably constitutional).

166. The Ninth Circuit warned that airport security checks require “the greatest vigilance” by courts because “they are capable of great abuse” and recognized that “[l]iberty—the freedom from unwarranted intrusion by government—is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.” *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1246 (9th Cir. 1989).

Congress should permit the TSA to use them with unbridled discretion.¹⁶⁷

If Congress is not willing to correct potential abuse in airports, what will stop agencies like the TSA from invading privacy in other ways or with other means of transportation?¹⁶⁸ What are the implications beyond planes to trains and automobiles?¹⁶⁹ While some currently argue that passengers who oppose AIT and full-body pat-downs at airports can travel by other means, is it valid to simply state that objecting passengers can take the train?¹⁷⁰ While a train could be a viable alternative for people in certain regions of the country or for shorter trips, having to travel by train, bus, or automobile across the country for business meetings every week or to visit family for the holidays could cause great hardships on some Americans or make it impossible to do their jobs.¹⁷¹ Further, although there may be viable travel alternatives for some Americans who object to AIT and full-body pat-downs, this argument would be damaged in the future if the TSA also established security checkpoints in other methods of transportation, further reducing the available alternatives.¹⁷² Therefore, Congress should seriously consider the amount of leeway

167. See *infra* text accompanying notes 204, 206, 213 (explaining the responses of a state and a scholar asking Congress to utilize greater oversight and set guidelines for the TSA).

168. See Olsen, *supra* note 12, at 13 (explaining that the TSA performed pat-downs of passengers on disembarking trains at an Amtrak station in Georgia and wondering where the TSA's authority to conduct such searches stops).

169. *Id.*

170. Halsey & Kravitz, *supra* note 118 (quoting a passenger who was fine with the body scanners and who declared, "I believe we need to do the appropriate thing to keep the skies safe. If people have severe objections, they should take the train"); see also *supra* notes 11-12 and accompanying text.

171. See Castillo, *supra* note 1 (explaining that if former Miss USA Susie Castillo chose not to fly, she would no longer be able to do her job). Compare *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974) ("While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all."), with *United States v. Davis*, 482 F.2d 893, 913 n.59 (9th Cir. 1973) ("The airport search program is not an absolute bar to travel. Other means of transportation are available. Moreover, for the vast majority such a search entails at most a slight delay; it does not bar their intended flight.").

172. See Olsen, *supra* note 12, at 13 ("Travelers who have refused to fly in order to avoid TSA searches could also be in for a rude awakening, because the TSA may expand its search checkpoints to other modes of transportation as well.").

that it gives to the TSA because the TSA can so deeply invade the privacy of Americans on a daily basis.¹⁷³

D. Counterarguments Supporting More Invasive Security Methods

While there may be valid reasons for protecting privacy rights of Americans, the TSA has strong arguments in support of its use of more invasive methods like AIT and full-body pat-downs. Under the Department of Homeland Security, the TSA's mission is "to prevent terrorist attacks within the United States and to reduce the vulnerability of the United States to terrorism."¹⁷⁴ As such, the TSA believes that AIT, a more invasive security method than the previously used magnetometers,¹⁷⁵ is essential in carrying out its mission.¹⁷⁶ Supporting this proposition, the TSA argued in its NPRM that current threats to airport security involve non-metallic explosives and weapons, which AIT provides the best method of discovering without physically touching passengers.¹⁷⁷

As per its mandate to conduct a cost-benefit analysis, comparing the cost of the new technology to the number of lives saved,¹⁷⁸ the TSA calculated the costs of implementing AIT from 2008 to 2011 at \$841.2 million and the costs of maintaining AIT in use from 2012 to 2015 at \$1.5 billion.¹⁷⁹ While the TSA did not provide a calculation of the estimated lives saved or their value, in adopting AIT the TSA is indicating that it believes that the value of increased security outweighs the monetary cost of AIT.¹⁸⁰ Similarly,

173. For a discussion on how Congress should limit the TSA's discretion and provide greater guidance to and oversight of the TSA, see *infra* Part V.

174. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,289 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540); see also 49 U.S.C. § 114 (2006 & Supp. 2009); *supra* text accompanying notes 47-53 (laying out some of the provisions from 49 U.S.C. § 114 and explaining what the TSA was created to do).

175. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 6 (D.C. Cir. 2011).

176. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,289.

177. *Id.* at 18,289-90.

178. 49 U.S.C. § 114(l)(3); see also *supra* text accompanying notes 51-52 (laying out the details of this statute and what the TSA is required to consider in this cost-benefit analysis).

179. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,289-90; see also *supra* note 53 (discussing the TSA's cost-benefit analysis in its NPRM).

180. See 49 U.S.C. § 114(l)(3).

implementing AIT and full-body pat-downs also means that the TSA believes it has satisfied the balancing test for an administrative search, which requires the invasiveness of these measures to be outweighed by the corresponding increase in security.¹⁸¹ Additionally, the D.C. Circuit Court of Appeals in *Electronic Privacy Information Center v. United States Department of Homeland Security* agreed with the TSA that the balancing test supports the need for AIT, which the court considered more effective than WTMDs.¹⁸²

While some may still argue that the TSA is on a dangerous road,¹⁸³ others support the TSA's direction and believe that these more invasive methods are worth the added security benefits that come along with them.¹⁸⁴ One scholar has argued that intelligence-based security systems in the United States have historically failed.¹⁸⁵ For example, the United Kingdom and other sources informed the United States that the Underwear Bomber had taken a vow of jihad against the United States.¹⁸⁶ Even though the United States added his name to the terrorist suspect list, the government did not place him on the watch list or revoke his American visa.¹⁸⁷ If the government had done so, he probably would not have been able to board a plane in Europe bound for the United States, during which flight the passengers and crew stopped him from setting off explosives.¹⁸⁸ As a result, the United States has shifted back to physical-based security methods, such as AIT and full-body pat-downs, in order to enhance security.¹⁸⁹

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

182. 653 F.3d 1, 10 (D.C. Cir. 2011).

183. *See supra* Section III.C (discussing arguments in support of less invasive security measures).

184. *See Fiske, supra* note 162, at 175 (arguing that physical security systems in airports are more effective than intelligence-based systems); *see also* LeVine, *supra* note 35, at 188 (concluding that AIT is probably constitutional).

185. *See Fiske, supra* note 162, at 175 (arguing that the most effective airport security “system is one based on physical security, not intelligence measures”).

186. *Id.* at 174-75.

187. *Id.* at 175. However, another scholar argues that the physical security methods the TSA currently uses with full-body pat-downs and AIT would not have detected the explosives the Underwear Bomber had concealed. *See Olsen, supra* note 12, at 14.

188. *See Fiske, supra* note 162, at 175.

189. *See id.* at 196 (noting that the United States follows a “yo-yo effect” pattern in its airport security, “moving slowly from a strong physical security approach after an attack to an intelligence-based approach, then quickly snapping back to more physical measures after the next attack”).

Therefore, while the invasiveness of AIT and full body pat-downs is fairly clear,¹⁹⁰ the debate over the effectiveness of AIT continues.¹⁹¹ Although courts have generally accepted the TSA's use of these methods by determining that the increased security benefits outweigh the losses to privacy,¹⁹² the debate does not have to end there. Rather, Congress could step in and alter this formula by providing further guidance to the TSA or limiting its power to intrude on passengers' rights and privacy.¹⁹³ Often with this hope in mind, states and scholars have devised various strategies to strike what they believe is a more proper balance.¹⁹⁴

IV. STATES AND SCHOLARS HAVE RESPONDED, BUT SOMETHING IS MISSING

While within this debate over the effectiveness and invasiveness of different security measures¹⁹⁵ some people have challenged the TSA's actions in court,¹⁹⁶ states have focused their efforts on legislative reform,¹⁹⁷ and scholars have proposed a variety of solutions to the constitutional issues at stake.¹⁹⁸ However, the effect of such efforts and proposals is still unclear. While it seems that Americans have lost many battles to the TSA on the constitutionality front in court,¹⁹⁹ they may yet win the war in protecting their privacy if Congress specifically limits the TSA's power to invade individual privacy. Whereas some scholars and

190. See *supra* Subsection III.A.2 (providing an overview of the invasiveness of AIT and full body pat-downs).

191. See *supra* Subsections III.A.1, III.B.2 (exploring the arguments and counter-arguments on AIT's effectiveness).

192. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 10 (D.C. Cir. 2011) (holding that the use of AIT is reasonable under the Fourth Amendment as an administrative search); *United States v. Albarado*, 495 F.2d 799, 807-08 (2d Cir. 1974) (concluding that a frisk can be reasonable even though it is highly invasive because passengers know about it ahead of time and officers use less intrusive means of searching passengers before resorting to a frisk).

193. See *infra* Part V (proposing various reforms for Congress to initiate that would provide greater protections for privacy).

194. See discussion *infra* Sections IV.A-B (explaining what several states and scholars have proposed to fix this dilemma).

195. See *supra* Part III.

196. See *supra* Section II.B.

197. See *infra* Section IV.A.

198. See *infra* Section IV.B.

199. See *supra* Section II.B (discussing court cases where people challenged the constitutionality of various airport security methods).

states have called in general for greater congressional oversight of the TSA,²⁰⁰ specific congressional action to limit the TSA's invasion of privacy is needed.²⁰¹

A. State Responses

Along with citizens challenging the constitutionality of various TSA measures,²⁰² some states have reacted negatively to the TSA's move toward more invasive security measures and have sought various kinds of administrative and legislative relief.²⁰³ For instance, in a press conference, New Jersey Assembly members petitioned the TSA to rethink its screening processes because as State Senator Doherty said, Americans should not be forced "to surrender their civil liberties or basic human dignity at a TSA checkpoint," even for the sake of security.²⁰⁴ Similarly, Alaska's House and Senate directly called for congressional action after an Alaska state representative had to take a four-day trip, including traveling by boat, to return home when she refused to be patted down at an airport.²⁰⁵ After this incident, Alaska's House and Senate "passed resolutions calling on Congress to reconsider [the TSA's] use of full-body pat-downs, and to exercise greater oversight over the TSA."²⁰⁶ Taking this a step further and bypassing the United States Congress, New Hampshire even proposed legislation "that would make nude body scans and random pat-down searches a crime in that state, even if conducted by the TSA."²⁰⁷ While the actual impact of these state reactions is unclear, Congress should sincerely consider such reactions in determining how much leeway to give to the TSA in the future in areas that so deeply impact the privacy and dignity of Americans.

200. See Solomon, *supra* note 35, at 646 (supporting the use of AIT, but urging Congress to set guidelines for the TSA and require assurances that the TSA will respect passenger privacy); Olsen, *supra* note 12, at 8 (explaining that Alaska's House and Senate called for Congress to provide more oversight for the TSA and to review the TSA's policy with full-body pat-downs).

201. See *infra* Section IV.C.

202. See *supra* Section II.B.

203. See *infra* text accompanying notes 204-05.

204. *NJ Lawmakers Want to Stop TSA Full Body Scans*, NJTODAY.NET (Nov. 15, 2010), <http://njtoday.net/2010/11/15/nj-lawmakers-want-to-stop-tsa-full-body-scans/> (quoting New Jersey Senator Michael J. Doherty).

205. Olsen, *supra* note 12, at 8.

206. *Id.*

207. *Id.* at 9.

B. What Scholars Have Argued

Scholars have also used a variety of approaches to question the constitutionality of the TSA's increasingly invasive security measures.²⁰⁸ One scholar has challenged the constitutionality of airport screening methods as it relates to consent to search.²⁰⁹ However, courts have since clarified that airport screening is not based on consent, but based on a statutory right to perform an administrative search subjected to a reasonableness analysis.²¹⁰ Another scholar has argued that body scans could be considered constitutional if used as a secondary form of screening rather than as a primary search method for all passengers.²¹¹ While the TSA's new policy with AIT would permit the use of AIT in primary screening, the utilization of ATR mitigates the invasiveness of AIT to some extent.²¹²

Further, another scholar even supports the use of AIT overall while calling for Congress to set guidelines for the TSA and to obtain assurances from the TSA that it will respect passenger privacy.²¹³ Another critic warns that the TSA should balance the safety provided by new technologies against the rights to privacy and protection from unreasonable searches.²¹⁴ She argues that "in defense of American freedom," Americans should not "destroy the very freedom that [they] so ardently fight to protect."²¹⁵ In examining the

208. See, e.g., *infra* text accompanying notes 209-11.

209. See generally James L. Buchwalter, Annotation, *Validity of Airport Security Measures*, 125 A.L.R. 5th 281 (2005) (considering Fourth Amendment issues and consent searches).

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

211. See generally Tobias W. Mock, Comment, *The TSA's New X-Ray Vision: The Fourth Amendment Implications of "Body-Scan" Searches at Domestic Airport Security Checkpoints*, 49 SANTA CLARA L. REV. 213 (2009) (explaining the background of security technology in airports and concluding that body scans should be used for secondary searches instead of pat-downs).

212. *Id.* at 217-20; Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,293-94 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540).

213. See generally Solomon, *supra* note 35 (discussing the balancing of the degree of intrusion, public necessity, and efficacy).

214. See Stancombe, *supra* note 9, at 210 (arguing that it is unconstitutional to use AIT—where "passengers are virtually strip-searched"—as primary screening, but noting that it may not be unconstitutional if automated target recognition software is used).

215. *Id.* at 215. Similarly, Sean M., in his comment to the TSA's NPRM, argued that these invasive searches should be stopped because "[w]e gain so little with these additional security screenings, but collectively sacrifice so much civil

balancing test that courts use, one scholar notes that it is unclear whether AIT actually improves security, particularly as terrorists consistently adapt to security measures.²¹⁶ With this in mind, an additional scholar has asserted that trusted traveler programs could be used as a risk-based approach to screening while addressing the needs of individual travelers.²¹⁷

C. Something Is Missing

While scholars have taken a variety of approaches to resolving questions on the constitutionality of TSA measures,²¹⁸ none have suggested a satisfactory solution to protecting privacy. Indeed, one glaringly missing solution is for Congress to explicitly limit the TSA's authority.²¹⁹ Although some have suggested that Congress should set guidelines for TSA security methods so that privacy will be respected,²²⁰ any such guidelines could still provide the TSA with too much discretion, as they are extremely vague and would be

liberty. . . . [T]he only effective fight against terrorism is to refuse to be terrorized. The appropriate response is proportional to the actual frequency of these crimes, not in the perceived/sensational risk." Sean M., Comment to *Transportation Security Administration (TSA) Other: NPRM—Passenger Screening Using Advanced Imaging Technology Signed Version*, REGULATIONS.GOV (June 5, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-3046>. *But see* D. Henson, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (June 11, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-3361> ("The price of freedom is security. The price of security is privacy.").

216. Stancombe, *supra* note 9, at 200-01; *see also supra* text accompanying note 70 (explaining that in determining whether a search is reasonable, the court balances the intrusiveness of the search against its necessity).

217. Olsen, *supra* note 12, at 23-24.

218. *See supra* Section IV.B.

219. *See infra* Section V.D (proposing specific limitations for Congress to impose on the TSA).

220. Solomon, *supra* note 35, at 665 (asking Congress to set guidelines for the TSA and require promises that the TSA will respect privacy, but failing to provide examples of what guidelines Congress could specifically set to limit the TSA's invasion of privacy or what an assurance that the TSA will respect privacy actually looks like in practice). For instance, the privacy officer must make sure that the TSA's "use of technologies sustain, and do not erode, privacy protections relating to the use . . . of personal information." 6 U.S.C. § 142 (2006); *see also supra* text accompanying notes 54-56 (explaining this requirement and how it impacts the TSA). While this is an admirable goal, it does not provide the TSA with specific guidance on how to protect privacy and leaves the privacy officer with a great deal of discretion. *See* 6 U.S.C. § 142.

practically impervious to challenges by citizens due to the high degree of deference that the TSA would continue to receive from courts in carrying out its mandates.²²¹ While Congress should indeed set guidelines, like requiring the TSA to explicitly consider the invasiveness of its measures,²²² such vague guidelines are simply insufficient to protect privacy and need to be supplemented by other, more clear directions to the TSA. The problem remains that the TSA has too little oversight for the vast amount of authority it has to invade individual privacy. Even though some of the TSA's measures have been held constitutional,²²³ Congress should still play a more active role in limiting the TSA's discretion in areas that so heavily invade personal privacy and dignity.

Although Congress cannot foresee every potential abuse of privacy in new technological developments, when threats are clear, Congress should be ready and willing to do what it is able to do: protect Americans from gross invasions of privacy by the agencies it creates.²²⁴ While Congress cannot protect Americans from every threat, foreign or domestic, it ought not to stand idly by while the privacy of Americans is daily infringed upon without significantly enhancing safety.²²⁵ Although Benjamin Franklin's warning that "[t]hose [who] would give up their liberty for security deserve neither and lose both"²²⁶ is rather strong, at a certain point, the sacrifice of privacy and liberty for the sake of security becomes too great as the "benefits" of increased invasiveness hit levels of diminishing returns on the amount of safety gained. While the TSA was charged with increasing security at airports,²²⁷ surely Congress did not intend that security come at any cost.²²⁸ However, since

221. Olsen, *supra* note 12, at 22 (noting that under the wide deference given to agencies, the TSA's findings of fact, if supported by substantial evidence, would not be overturned by the court, and the TSA's actions would only be set aside if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (quoting 49 U.S.C. § 46301(d)(5)(C) (2006)).

222. See *infra* Section V.B (proposing that Congress require the TSA to explicitly balance the privacy costs of security measures against the security benefits of those measures).

223. See *supra* Section II.B (discussing past cases where courts have found various airport security measures constitutional).

224. See *infra* text accompanying note 235.

225. See *infra* text accompanying note 235.

226. Castillo, *supra* note 1 (paraphrasing Franklin, *supra* note 2).

227. 49 U.S.C. § 114(e), (f)(3), (f)(8) (2006).

228. For instance, Congress requires the TSA to make sure the costs of new security measures are not excessive in relation to the added security benefits they provide. *Id.* § 114(l)(3).

security is still vitally important, some type of system must be worked out to both provide for security and protect privacy.

V. PROPOSED REFORMS AND THEIR IMPLICATIONS

With all that past states,²²⁹ scholars,²³⁰ and the TSA have argued,²³¹ a more satisfactory resolution to this debate is still needed. Although the TSA has properly responded in some areas, like using ATR on its AIT units,²³² Congress should set more guidelines for the TSA to follow²³³ and also establish specific rules that are more clear-cut.²³⁴ Overall, Congress should not abdicate its responsibility to the American people by handing its oversight responsibilities of the TSA over to courts, which afford great deference to the TSA.²³⁵

A. Prohibit Substantial Infringement on Privacy Rights

One possible solution to this dilemma is for Congress to amend the statute giving power to the TSA.²³⁶ Congress should add as a preface to the statute or within its more detailed provisions that the TSA must carry out its mandates “without substantially infringing on privacy rights.”²³⁷ Although “substantially” would be a term that the TSA and courts would have to interpret in the future, that qualifier is necessary to avoid stripping the TSA of all power, since all airport searches of passengers infringe on privacy at least minimally.²³⁸ For

229. See *supra* Section IV.A (explaining the responses of several states to the TSA’s security measures).

230. See *supra* Section IV.B (providing examples of what different scholars have argued for and against the TSA’s security measures).

231. See *supra* Section III.D (explaining what the TSA has argued in support of its security measures).

232. See *supra* note 152 and accompanying text (explaining when the TSA implemented ATR and when Congress required the use of ATR on all AIT units).

233. See *supra* text accompanying notes 206, 213 (giving examples of a state and scholar asking Congress to provide more guidance and oversight to the TSA).

234. See *infra* Section V.D (suggesting various specific actions that Congress could take to limit the TSA’s discretion and protect privacy).

235. See *supra* note 221 and accompanying text (explaining the deference that courts generally give to agencies).

236. That is, Congress could amend 49 U.S.C. § 114(f) by adding a subsection requiring that “the TSA must carry out its functions without substantially infringing on privacy rights.” Alternatively, Congress could add that clause as a preface to the whole statute.

237. See 49 U.S.C. § 114(f)(3) (2006) (requiring the TSA to “develop policies, strategies, and plans for dealing with threats to transportation security”).

238. See *United States v. Albarado*, 495 F.2d 799, 806-08 (2d Cir. 1974).

instance, in *United States v. Albarado*, the Second Circuit found that a magnetometer involves a “minimal invasion of privacy” while a frisk may be considered grossly invasive.²³⁹ Thus, under this standard, the TSA could use a magnetometer, but may not be able to use frisks, unless their invasiveness was limited in some way.

While courts currently apply a reasonableness test to these searches under the Fourth Amendment,²⁴⁰ adding this language to the statute does more than simply require the TSA to make sure that the security interests outweigh the privacy interests under the current reasonableness test. Such language would also limit the TSA’s ability to infringe on privacy in situations where the TSA believes the security interests might outweigh the privacy interests. Hence, it would afford greater protections to privacy than are currently in place.²⁴¹ Although this language would merely give guidance to the TSA that could potentially be argued away as vaguely complied with, it would also give challengers to the TSA’s security measures more teeth to their arguments that the TSA has gone too far and that Congress did not intend to give the TSA carte blanche in choosing methods to increase security.²⁴² Further, this would enhance transparency and help the TSA explicitly analyze whether or not it is adopting measures that are “no more extensive nor intensive than necessary,” as currently required by courts.²⁴³

B. Balance Privacy Invasions Against Security Benefits

Secondly, also within the statute creating the TSA, Congress should add to 49 U.S.C. § 114(l)(3), which currently requires the TSA to weigh the costs of its new security methods monetarily against the benefits in increased security, measured by the number of lives saved.²⁴⁴ Congress should add to the factors to consider in that statute by including an analysis of privacy versus increased security, measured by lives saved, similar to the analysis done when considering the costs of new regulations.²⁴⁵ Overall, this could be implemented as a broader cost-benefit analysis. On one hand would

239. *Id.* at 806-07.

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

241. *See supra* note 240 and accompanying text.

242. *See supra* notes 227-28 and accompanying text.

243. *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (quoting *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973)).

244. *See* 49 U.S.C. § 114(l)(3) (2006).

245. *See id.*

be the monetary costs of implementing the new security measures, the privacy costs from the invasiveness of those measures, and the efficiency costs of those measures, while on the other hand would be the increased security benefits, measured by the value of the number of lives saved.

Since the TSA must already attempt to calculate the number of lives saved as a proxy for the security benefits of new measures, Congress could simply add to this provision and require that the TSA balance that security metric against the increased intrusion into privacy by new security methods.²⁴⁶ While it may be difficult for the TSA to calculate how invasive a measure is, it could conduct polls and surveys to help in this determination.²⁴⁷ Further, although it is difficult to measure the number of lives saved and their value, Congress has already required the TSA, and other agencies, to use this as the metric for increased security.²⁴⁸

Moreover, although the TSA argues that it cannot reveal the weaknesses in its security measures, it could still provide an estimate for the number of lives that it believes are saved by its measures, as opposed to prior, less intrusive methods.²⁴⁹ With this number, the

246. *Id.* (requiring that in considering new regulations, the TSA use as a factor “whether the costs of the regulation are excessive in relation to the enhancement of security the regulation will provide” and that the TSA measure the security of regulations by estimating “the number of lives that will be saved by the regulation and the monetary value of such lives”).

247. *See* Stancombe, *supra* note 9, at 201 (discussing how invasive Americans believe the TSA’s security measures are by citing a poll where two-thirds of respondents supported AIT use while over half of respondents said pat-downs go too far); *see also* Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,296 n.62 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540) (noting that various sources have conducted polls on acceptance of AIT); *AIT: More Information*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/ait-more-information> (last modified May 20, 2013) (providing links to and summaries of polls on AIT acceptance).

248. 49 U.S.C. § 114(I)(3) (requiring the TSA to calculate the security benefits of its security methods, measured by the value of the number of lives saved); *see also* *How to Value Life? EPA Devalues Its Estimate*, NBC NEWS (July 10, 2008, 4:34 PM), <http://www.nbcnews.com/id/25626294/#.UwYNWKXRIfM> (explaining that agencies “weigh the costs versus the lifesaving benefits of a proposed rule”). Since agencies like the Environmental Protection Agency (EPA) have placed a value on lives, this shows that it is feasible to calculate a value. *See id.* For instance, the EPA valued a life at approximately \$6,900,000 in 2008. *Id.* To calculate this amount, the EPA looked at “what people are willing to pay to avoid certain risks” and also “how much extra employers pay their workers to take on additional risks.” *Id.* Although the EPA reduced the value it placed on a life in 2008, it is still the agency with the highest value for a life. *Id.*

249. *See supra* note 114 and accompanying text.

TSA could then choose an estimated value of a life and multiply the two figures. If this came out to be a value of \$1 billion, then the TSA would weigh that against the monetary costs,²⁵⁰ privacy costs, and efficiency costs of the proposed measures. Even if people then disagreed with the TSA's determination on this balance, the result would be greatly increased transparency on how the TSA made its decision. This would likely instill a greater feeling of trust that the TSA's decision was not wholly arbitrary or without any consideration for privacy.

Although this balancing test is very similar to that used by courts in determining whether the administrative search is reasonable, this proposal would codify that test for the TSA.²⁵¹ While this will still be an imprecise test, as most balancing tests are, it would provide another layer of protection for Americans²⁵² by requiring the TSA to explicitly consider privacy when it implements new security measures and to clearly document its analysis. This would provide a better record for the court to review and again arm those challenging the TSA's actions. Overall, this would enhance the transparency of the TSA's decisions upfront, rather than allowing the TSA to make decisions infringing on privacy and provide *post hoc* justifications for them when challenged in court.²⁵³ Moreover, it would also provide a greater incentive for the TSA to consider privacy rather than just security.²⁵⁴

250. See *supra* notes 178-79 and accompanying text (explaining the TSA's estimated monetary costs of AIT in its NPRM).

251. *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (balancing the necessity of a search in an airport against the offensiveness of the search method's intrusion into privacy of passengers).

252. See *infra* Section V.E (advocating a risk-based layered privacy protection approach).

253. Similar to this proposal to increase transparency on how invasive security measures are, Mark Scheid's comment to the TSA's NPRM on AIT called for the government to "be more vigorous before investing in new technology or procedures that may or may not effect the safety of our airports" and also "to support research to prove the efficacy of existing techniques and regulations, [so] that we can remove as much waste from the TSA as possible, in both capital and time." Scheid, *supra* note 120. He stated that although he "understand[s] the desire to make air travel more secure, there needs to be greater scientific backing before one invades the privacy and restricts the freedom of the average citizen." *Id.* Therefore, the TSA should enhance transparency of the benefits of its security measures, the invasiveness of those measures, and its overall decisions on which measures to use.

254. However, whether or not Congress implements this proposal, it should seriously consider removing the last part of 49 U.S.C. § 114(l)(3). Under this provision, "[t]he Under Secretary may waive requirements for an analysis that

C. Congressional or Presidential Approval of Body Scans and Pat-Downs

Thirdly, Congress should amend the statute giving the TSA its power and mandates to require the TSA to submit new agency measures permitting the use of body scans or pat-downs to congressional approval.²⁵⁵ While the congressional process is rather cumbersome,²⁵⁶ this would centralize any public criticism of highly invasive methods on Congress.²⁵⁷ Moving the responsibility more

estimates the number of lives that will be saved by the regulation and the monetary value of such lives if the Under Secretary determines that it is not feasible to make such an estimate.” 49 U.S.C. § 114(l)(3) (2006). Hence, the TSA can currently avoid the analysis of lives saved by determining that the estimates are not feasible. *See id.* Since other agencies are able to estimate the value of a life, and since transparency should be enhanced in this area, Congress should remove this discretion in order to protect the integrity of this cost-benefit analysis. *Id.*; *see also How to Value Life? EPA Devalues Its Estimate, supra* note 248 (noting that the EPA has valued lives and also projected the number of lives saved by its regulations).

255. 49 U.S.C. § 114 (creating the TSA and establishing its mandates and powers).

256. In order to enact a law, a bill must be passed by a majority of the House and Senate and also signed by the President. *The Legislative Process*, U.S. HOUSE REPRESENTATIVES, http://www.house.gov/content/learn/legislative_process/ (last visited Nov. 17, 2014). In this process, there are many veto-gates where a bill can die and never become a law. *See id.* For instance, the committee could decide not to release the bill for a vote, one or both of the houses of Congress could vote against passing the bill, the conference committee may not be able to agree on a version of the bill for both houses to pass, the President may veto the bill, and the House and Senate may not have enough votes to override the veto. *See id.* Partly because this process is so long and arduous, Congress gives great power to agencies, which can act more quickly and with more public input. *See Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5-6 (D.C. Cir. 2011) (explaining that the notice-and-comment rulemaking process helps citizens have input into agency decisions). Further, although the notice-and-comment process is intended to bring the public’s voice into the discussion of new regulations, the TSA deliberately chose not to use this process with AIT. *Id.* at 5-6, 8 (requiring the TSA to issue an NPRM on its use of AIT, but otherwise holding AIT constitutional as part of an administrative search). It was only when the D.C. Circuit ordered the TSA to utilize notice-and-comment rulemaking, well after AIT had been implemented nationwide, that the TSA issued its NPRM and sought comments on it from the public. *Id.* at 8; *Passenger Screening Using Advanced Imaging Technology*, 78 Fed. Reg. 18,287 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540). Hence, the TSA itself tried to avoid part of the purpose for its existence as an agency with the notice-and-comment process. *See Elec. Privacy Info. Ctr.*, 653 F.3d at 5-6.

257. Even though Congress gives power to the TSA, the agency is still part of the executive branch under the Department of Homeland Security. 49 U.S.C. § 114 (creating the TSA and establishing its mandates and powers); *Department Components*, DEP’T HOMELAND SECURITY, <http://www.dhs.gov/department->

directly onto Congress in the minds of Americans would make Congress more thoughtful of the measures that it approves and ultimately would make the TSA's security measures more responsive to the will of the people.²⁵⁸

Alternatively, Congress could require the President to make a finding that a given security measure's benefits, measured in the value of lives saved,²⁵⁹ outweigh its costs, measured both in monetary expenses and privacy costs.²⁶⁰ Congress could condition funds for the TSA's security measures or condition permission for the TSA to use certain security measures on the President making this finding. Imposing such requirements would be easier than having Congress pass laws on specific methods the TSA wants to use.²⁶¹ Further, this could be undone much more easily than passing another law through Congress, as the President could make another finding that the condition is no longer satisfied.²⁶² Overall, this alternative would allow for the benefit of increasing the TSA's political accountability by centering attention for these decisions on the President. However, it could also have a danger of being too micromanaging over the agency, just as could be the problem with Congress making rules that are too specific.²⁶³ Even considering the potential disadvantages of the President or Congress taking a more active role, the advantages of increased accountability and greater protections for privacy are worth it.

components (last visited Nov. 17, 2014). Although citizens should blame Congress if they believe agencies have been given too much power, shifting the decision-making back to Congress in a more direct manner would also result in people more directly understanding that Congress is responsible.

258. See *supra* note 257 (explaining that Congress gives power to executive agencies).

259. See 49 U.S.C. § 114(l)(3).

260. Congress has done this in the past. HAROLD C. RELYEA, CONG. RESEARCH SERV., CRS-98-611, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 12-13 (2007), available at <http://www.fas.org/irp/crs/98-611.pdf>. For instance, Congress conditioned the continued sales of agricultural products based on the President finding that the Agricultural Trade Development and Assistance Act of 1954 had been satisfied. *Id.* at 12. Similarly, under a 1974 amendment to the Foreign Assistance Act, Congress forbade expenditures of Central Intelligence Agency funds until the President found that the intelligence activities were essential for national security and described the scope of these activities to the intelligence committees in Congress. *Id.* at 12-13.

261. See *supra* note 256 (discussing the process for Congress to pass a law).

262. See *supra* note 256 and accompanying text (explaining that the congressional process for enacting a law is rather cumbersome and therefore, hard to undo).

263. See *supra* note 256.

D. Specific Congressional Actions to Limit Privacy Invasions

Fourth, Congress should take specific actions to explicitly limit the TSA's ability to invade privacy. For instance, Congress should take more actions like its statute requiring the TSA to use ATR on all AIT.²⁶⁴ This statute was very responsive to privacy interests and has taken away the TSA's discretion in this area.²⁶⁵ It has explicitly removed a highly invasive option from the table for the TSA and greatly enhanced privacy protections, since ATR reduces the invasiveness of AIT by only generating a generic outline rather than a detailed image of a passenger.²⁶⁶ However, Congress should ensure that this new statute is being carried out by requiring the TSA to report back to Congress on its progress in complying with this statute.²⁶⁷

Along this same line, Congress should also require the TSA to remove all AIT units that have storage capacity.²⁶⁸ Although the TSA claims that it has disabled this capability on all AIT units currently in place, it is an unnecessary risk that someone could secretly re-enable this capacity and record passenger images.²⁶⁹ Further, as of now, the TSA is free to change its policy and use AIT with that storage capacity enabled, so long as it can justify the use and promise

264. 49 U.S.C. § 44901(l)(1)(C), (l)(2)(A) (2012).

265. *See id.*

266. *See id.*

267. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,294 (proposed Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540) (stating that the TSA was supposed to be in compliance with this by June 1, 2013).

268. *See* Ellison & Pilcher, *supra* note 40, at 6-7 (explaining that AIT has the capacity to generate and store images of passengers); *see also* Norma Ballhorn, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (June 28, 2013), <http://www.regulations.gov/#documentDetail;D=TSA-2013-0004-4758> ("To the extent [the] TSA continues the use of body scanners and pat-downs, the final rule should codify minimum protections, including guaranteeing individual passenger image data is not retained; that all physical searches are conducted by officers of the same self-identified gender; that secondary screening will be conducted in private at passenger's election; that no passenger is required to expose sensitive areas under clothing to display any item; that searches to resolve an anomaly are no more intrusive than necessary to resolve the anomaly; that screeners receive training on working with diverse populations; and that no traveler will be subject to discrimination on the basis of gender identity.").

269. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,294 (explaining the storage capability of AIT and the limits the TSA has placed on it).

sufficient safeguards to protect this private information.²⁷⁰ While the TSA currently restricts itself in this area, Congress should act now to prevent the use of this storage capacity in the future rather than waiting to react to new TSA security policies that Congress finds too invasive of privacy.²⁷¹

Similarly, the TSA currently does not require children twelve years of age or under to pass through AIT.²⁷² Rather, these children must go through a WTMD, unless their accompanying adult chooses otherwise.²⁷³ While the TSA currently uses this procedure, Congress should explicitly limit the TSA's authority in this area so that it cannot change its policy with regard to children in the future without congressional approval. This would mitigate concerns about AIT becoming similar to child pornography.²⁷⁴

E. Risk-Based Layered Privacy Protection Approach

Overall, Congress should use a combination of these specific solutions and give more guidance to the TSA.²⁷⁵ Just as the TSA utilizes “a risk-based, layered security approach” to protecting Americans from security invasions by terrorists,²⁷⁶ Congress also ought to utilize a risk-based layered approach to protecting Americans from privacy invasions by the TSA. While one approach alone may not be sufficient to curb potential abuses, a combination of approaches could provide Americans with both necessary security and essential privacy.

270. 6 U.S.C. § 142 (2006) (requiring that “the use of technologies sustain, and do not erode, privacy protection relating to the use, collection, and disclosure of personal information”); *see also supra* text accompanying notes 54-56 (explaining this requirement and how it impacts the TSA).

271. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,294.

272. *Id.* at 18,297.

273. *Id.*

274. *See The TSA and Full-Body Scanners. Be Afraid. Be Very Afraid.*, *supra* note 133 (explaining that the United Kingdom struggled with using AIT on children because many likened it to child pornography).

275. *See supra* Sections V.A-D.

276. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291; *see also supra* text accompanying notes 102-03 (explaining what is included in the TSA's layers of security).

CONCLUSION

Congress needs to exercise more thorough oversight and provide further limitations on the regulations imposed by the TSA. Congress should require greater security benefits from greater invasions of privacy and should not allow invasion of privacy beyond that which actually increases safety.²⁷⁷ Now that the TSA has issued its NPRM on AIT,²⁷⁸ it has been interesting to see the public's response on issues such as privacy concerns, health implications, and security effectiveness.²⁷⁹ If the TSA does not consider comments

277. See Olsen, *supra* note 12, at 10 (arguing that many travelers currently must choose between not flying or undergoing screening that they “consider illegal, demeaning, and degrading” and commenting that the TSA believes any increased security from its new measures outweighs “the loss of individual liberty and privacy”).

278. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,287. This NPRM was more about using AIT, which the TSA has already been doing, than about proposing the use of a new technology not yet in place. See *id.* Whether or not the TSA issues a final ruling consistent with its proposed rule, all the analysis in this Note will still apply with the same force because Congress should still act in accordance with the proposed reforms to limit the TSA's discretion in the future.

279. See, e.g., Anonymous, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (July 15, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-5532> (“The removal of the back scatter machines has reduced my concerns about health issues. Incorporation of target recognition software has alleviated some of my privacy concerns so thank you. What I would like to address is the issue of efficacy. The current system has, to date, caught no terrorists. The most recent public tests show a 70% failure rate. This is old data but congressional testimony leads me to believe that current figures are not much different. The European Union is not using them citing 54% false positives. Even though your website lists a significant number of prohibited items confiscated, it is clear that a significant and larger number [of prohibited items] are flying with passengers regularly with no apparent affect. These are not comforting numbers and lead me to believe that this technology is not mature.”); David Nittler, Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (July 16, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-5544> (“The high-resolution scanners are an invasion of privacy, are ineffective at finding dangerous items, and have unknown long-term health risks.”); Elec. Privacy Info. Ctr., Comment to *Transportation Security Administration (TSA) Proposed Rule: NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)*, REGULATIONS.GOV (June 27, 2013), <http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-4479> (commenting on the detrimental effect that AIT has on privacy, the TSA's failure to sufficiently assess the health risks of AIT, and the TSA's inadequate exploration of alternative security methods).

raising these factors in issuing its final rule, the TSA's use of AIT could be subjected to further challenges in court.²⁸⁰

Most importantly, if the TSA does not demonstrate that AIT or full-body pat-downs actually increase security, then it would be hard for a court to find that the TSA is using measures that are "as limited as possible" to meet the purposes of security.²⁸¹ Under this standard, when less intrusive measures are available that are no less effective than more invasive measures, it would not be constitutionally acceptable to choose the more invasive measures.²⁸² While the TSA must follow the new statute requiring all AIT to be equipped with ATR, which decreases the invasion into privacy,²⁸³ Congress should continue this method of explicitly limiting the TSA's discretion and also giving guidelines to the TSA²⁸⁴ in areas where the TSA could otherwise widely infringe on privacy rights without much accountability and with continued deference from the courts.²⁸⁵ After all, what is a life of security worth if that life is overrun with constant invasions of privacy by the very government created to protect American security and privacy? In light of this consideration, Benjamin Franklin's admonition that "[t]hose [who] would give up their liberty for security deserve neither and lose both" is a fitting call for further congressional action.²⁸⁶

280. See *supra* note 61 (explaining that under Administrative Procedure Act, an agency issuing its final rule must consider the comments received on its NPRM).

281. *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) (emphasis omitted).

282. *Id.*

283. 49 U.S.C. § 44901(l)(1)(C), (l)(2)(A) (2012).

284. See *supra* Part V.

285. See *supra* note 221 and accompanying text (explaining the vast deference that courts typically give to administrative agencies).

286. Castillo, *supra* note 1 (paraphrasing Franklin, *supra* note 2).

