

## NOTE

### AIRLINE PASSENGER PROFILING AND THE FOURTH AMENDMENT: WILL CAPPS II BE CLEARED FOR TAKEOFF?

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#### I. INTRODUCTION

On September 11, the President of the United States proclaimed,  
The menace of air piracy must be met – immediately and effectively. I  
am therefore announcing the following actions to deal with this  
problem: . . . I have directed the Departments of Transportation, Treasury,  
and Defense, the Central Intelligence Agency, the Federal Bureau of  
Investigation, the Office of Science and Technology, and other agencies  
to accelerate their present efforts to develop security measures, including

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new methods of detecting weapons and explosive devices.<sup>1</sup>

What may surprise many people is that the President was Richard Nixon and the year was 1970.<sup>2</sup>

Thirty-one years to the day after President Nixon announced his response to the problem of air piracy, nineteen hijackers overtook four commercial airliners in a coordinated terrorist attack on the Pentagon and the World Trade Center.<sup>3</sup> Airport security efforts in place on September 11, 2001, failed to detect the box cutters used by the hijackers.<sup>4</sup> In the immediate aftermath of these terrorist attacks, Federal Aviation Administration (“FAA”) officials reviewed and modified airport security measures to reduce the risk of future hijackings.<sup>5</sup> Today, airport screeners work as federal employees of the newly created Transportation Security Administration (“TSA”),<sup>6</sup> cockpit doors are reinforced,<sup>7</sup> passengers (and sometimes their shoes) undergo thorough screening for contraband, and 100% of checked bags are screened for explosives<sup>8</sup> and matched to a passenger on the plane.

In addition to these security measures visible to the traveling public, other security enhancements less visible to the public are beginning to help protect the air transportation system. Thousands of undercover, armed air marshals protect tens of thousands of flights per month<sup>9</sup> and their numbers may increase with the addition of federal immigration officers during times of heightened terrorist alerts.<sup>10</sup> Some pilots have begun to carry firearms.<sup>11</sup> Another proposed security measure is slowly becoming a reality, despite the protests of

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<sup>1</sup> United States v. Davis, 482 F.2d 893, 899 n. 17 (9th Cir. 1973).

<sup>2</sup> *Id.*

<sup>3</sup> For a series of photographs and articles related to the terrorist attacks of September 11, 2001, see <http://www.september11news.com> (last visited Mar. 25, 2003).

<sup>4</sup> CNN, Hijackers Conducted Surveillance Flights Ahead of 9/11 (Sept. 27, 2002), available at <http://www.cnn.com/2002/US/09/27/hijackers/index.html>.

<sup>5</sup> Press Release, Federal Aviation Administration, Airports to Remain Closed, Mineta Says (Sept. 12, 2001) available at <http://www1.faa.gov/apa/PR/pr.cfm?id=1406>.

<sup>6</sup> Press Release, Transportation Security Administration, THEN and NOW Charts (Oct. 16, 2003) available at [http://www.tsa.gov/public/interweb/assetlibrary/System\\_of\\_Systems\\_web.pdf](http://www.tsa.gov/public/interweb/assetlibrary/System_of_Systems_web.pdf) (hereinafter System of Systems).

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

<sup>8</sup> See Transportation Security Administration, TSA Has Implemented New Security Procedures in U.S. Airports, at <http://www.tsa.gov/public/display?theme=10>, and subordinate pages (last visited Mar. 25, 2003).

<sup>9</sup> See, e.g., System of Systems, *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> See Press Release, U.S. Department of Homeland Security, Secretary Ridge Announces Official Transfer of Federal Air Marshal Service to ICE (Nov. 25, 2003), available at <http://www.dhs.gov/dhspublic/display?content=2388> (last visited Dec. 8, 2003).

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some privacy advocates. It aims to identify potential terrorists by comparing flight reservation data with information in government and commercial databases.<sup>12</sup> Using data analysis technology under development by Lockheed Martin Management and Data Systems,<sup>13</sup> the computerized system known as the Computer Assisted Passenger Pre-Screening II (“CAPPS II”) system will develop a risk assessment score for each passenger, alerting authorities of passengers that may pose an increased security risk to the transportation system.<sup>14</sup> Described as a “narrowly focused threat assessment tool,” CAPPS II “is being designed with the utmost concern for the individual privacy rights of American citizens.”<sup>15</sup> Nevertheless, some critics fear that the system will peer too deeply into the private lives of Americans.<sup>16</sup> The TSA has responded to this criticism, announcing that “[s]ome critics have erroneously contended that a parking ticket or late credit card payment would keep someone from flying. This is simply inaccurate. Indeed, credit ratings – bad or good – will not lead to enhanced scrutiny at the airport.”<sup>17</sup> Work on the system is progressing slowly. The TSA has revised its plans for implementing CAPPS II based on delays encountered in testing the system.<sup>18</sup> The TSA’s delays have left the testing of CAPPS II behind schedule and its implementation date has been delayed indefinitely<sup>19</sup> until the developmental, operational, and privacy issues identified by Congress have been adequately addressed.<sup>20</sup> Any security system adopted by the TSA to ensure the safety of the flying public must pass constitutional muster, operate efficiently, and most importantly, correctly

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<sup>12</sup> Robert O’Harrow Jr., *Intricate Screening of Fliers In Works*, WASH. POST, Feb. 1, 2002, at A1.

<sup>13</sup> Press Release, Transportation Security Administration, TSA Selects Lockheed Martin Management and Data Systems to build TSA Passenger Pre-Screening System (Feb. 28, 2003), available at <http://www.tsa.gov/public/display?theme=44&content=248> [hereinafter TSA Selects Lockheed].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Editorial, *Plan to Snoop on Fliers Takes Intrusion to New Heights*, USA TODAY, Mar. 11, 2003, available at [http://www.usatoday.com/news/opinion/editorials/2003-03-11-our-view1\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2003-03-11-our-view1_x.htm).

<sup>17</sup> Press Release, Transportation Security Administration, TSA’s CAPPS II Gives Equal Weight to Privacy, Security (Mar. 11, 2003), available at <http://www.tsa.gov/public/display?theme=44&content=250> [hereinafter CAPPS II Gives Equal Weight].

<sup>18</sup> Report to Congressional Committees, General Accounting Office, Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges, (Feb. 2004), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-385> [hereinafter GAO Report].

<sup>19</sup> *Id.* at 10.

<sup>20</sup> *Id.* at 13.

separate potential terrorists from the rest of us.

Fears concerning the anti-terrorism measures and civil liberties are on Americans' minds. A CBS News/*New York Times* poll conducted November 20-24, 2002 of 996 adults nationwide indicated that people are slightly more concerned that new anti-terrorism laws will overly restrict personal liberties, than they are that the new laws will not go far enough to prevent terrorism.<sup>21</sup> A segment of the public believes that the recent advances in security technology, if brought to fruition, threaten to erode the Fourth Amendment's protections.<sup>22</sup> The public has come to tolerate the changes to airport security measures swiftly enacted after September 11, 2001.<sup>23</sup> However, the constitutional principles protecting an individual's right to avoid unreasonable government searches are much more stable and should not respond to short-

<sup>21</sup> A copy of the data, as well as other public opinion questions related to terrorism, is available at <http://www.pollingreport.com/terror2.htm> (last visited Jan. 30, 2003). The question referenced in the text of this Note appears below:

CBS News/*New York Times* Poll. Latest: Nov. 20-24, 2002. N=996 adults nationwide. MoE  $\pm$  3 (total sample).

"Which concerns you more right now—that the government will fail to enact strong anti-terrorism laws, or that the government will enact new anti-terrorism laws which excessively restrict the average person's civil liberties?"

	ALL	REPUBLICANS	DEMOCRATS	INDEPENDENTS
	%	%	%	%
Fail to enact strong laws	40	53	29	40
Excessively restrict liberties	44	29	59	43
Both (vol.)	2	3	1	2
Neither (vol.)	3	5	1	3
Don't know	11	10	10	12

<sup>22</sup> See, e.g., O'Harrow, *supra* note 12, at A18.

<sup>23</sup> In fact, as of January, 2002, a majority of Americans polled believed that the government had not done enough to improve airport security. See <http://www.pollingreport.com/transpor.htm>.

CBS News Poll. Latest: Jan. 5-6, 2002. N=1,060 adults nationwide. MoE  $\pm$  3.

"Do you think the federal government has done enough to improve airport security since September 11th, or not? . . . Do you think the airlines have done enough to improve airport security since September 11th, or not?"

	FEDERAL GOV'T	AIRLINES
	%	%
Done enough	41	35
Not done enough	54	59
Don't know	5	6

term fluctuations in public opinion.<sup>24</sup> The question this Note addresses is whether the Fourth Amendment of the U.S. Constitution permits the TSA's use of CAPPs II to achieve security within the air transportation system.

Part II of this Note briefly explains the history of airline passenger profiling in the United States and outlines the proposed operation of CAPPs II. Part III examines the Supreme Court's interpretation of the Fourth Amendment and reviews several situations for which the Fourth Amendment does not apply. After demonstrating that past profiling systems applied to airline passengers have been found consistent with the Fourth Amendment, Part IV segues into the constitutional analysis of CAPPs II in Part V. That section will reveal that even if the Fourth Amendment is implicated by CAPPs II, CAPPs II fits within one of the Fourth Amendment's exceptions and is therefore constitutionally valid. Concluding thoughts about profiling and the Fourth Amendment appear in Part VI.

## II. AIR PIRACY, SEARCHES, AND PROFILING

The problem of airline hijacking, sometimes called skyjacking, is not new to the United States. The first hijacking of an American commercial airplane occurred in 1961.<sup>25</sup> During the two year period from 1968 to 1969, hijackers successfully gained control of over 50 planes in the United States.<sup>26</sup> Since then, the FAA has responded to the threat of hijackings with several systems designed to catch hijackers on the ground before planes depart,<sup>27</sup> including a combination of general searches of all passengers boarding planes and targeted searches of specific individuals based on "behavioral profiles."<sup>28</sup> Since 1973, all passengers and carry-on baggage have been subjected to magnetometer searches.<sup>29</sup> All checked bags have been screened for explosives since the beginning of 2003.<sup>30</sup>

Like the dangers that it is meant to prevent, profiling – the practice of

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<sup>24</sup> "Judges are free to decide each case according to their conscience and best judgment; they need not worry that their rulings will cause them to be ousted from office." Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 629-630 (2003).

<sup>25</sup> *United States v. Davis*, 482 F.2d 893, 897 (9th Cir. 1973).

<sup>26</sup> *Id.* at 898.

<sup>27</sup> *Id.* at 900, n.20.

<sup>28</sup> *Id.* at 898.

<sup>29</sup> 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.6(c), at 634, (3d ed. Supp. 2002). Magnetometers are more commonly known as metal detectors. For a general primer on the science behind airport metal detectors, see <http://travel.howstuffworks.com/airport-security2.htm>.

<sup>30</sup> Transportation Security Administration, *Travelers & Consumers: Security Procedures: Baggage Security Checkpoints, available at* [http://www.tsa.gov/public/interapp/editorial/editorial\\_0598.xml](http://www.tsa.gov/public/interapp/editorial/editorial_0598.xml) (last visited Mar. 25, 2003).

selecting specific airline passengers based on personal characteristics to undergo searches more intrusive than those imposed on all passengers – is not a novel concept. Appearing in the early 1970s, the first airline passenger profiling in the United States relied on behavioral characteristics of known hijackers to help identify potential hijacking suspects.<sup>31</sup> For years, narcotics agents have used a similar behavioral profile, dubbed the “drug courier profile,” to identify airline passengers likely to be transporting drugs illegally.<sup>32</sup> Then, shortly after TWA flight 800 crashed under suspicious circumstances off the coast of Long Island, NY on July 17, 1996,<sup>33</sup> President Clinton established the White House Commission on Aviation Safety and Security (“the Gore Commission”), chaired by Vice President Al Gore.<sup>34</sup> The Gore Commission’s tasks included developing a strategy to improve domestic and international aviation safety and security.<sup>35</sup> In its Final Report to President Clinton, the Gore Commission recommended that the FAA institute a new profile for identifying potentially dangerous airline passengers dubbed the Computer Assisted Passenger Screening (“CAPS”) system.<sup>36</sup>

The Gore Commission noted the successes of the Customs service in using

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<sup>31</sup> See *United States v. Lopez*, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971).

<sup>32</sup> Jonathan Lewis Miller, *Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight*, 22 *TRANSP. L.J.* 199, 209-211 (1994) (noting that since *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), “the utilization of the hijacker, and then the drug courier profile has seldom been questioned except in law review articles and dissents”). *United States v. Montoya de Hernandez* permitted customs agents at Los Angeles International Airport to detain a passenger arriving on an international flight based on the suspicion that she carried drugs in her alimentary canal. 473 U.S. 531 (1985). Among the relevant factors that the agents considered were: (i) her eight recent trips to Miami or Los Angeles, (ii) her arrival from Bogota, Columbia, a “source city” for drugs, (iii) the fact that she spoke no English, (iv) the fact that she had not family or friends in the United States, (v) her possession of \$5,000 cash but no wallet, (vi) her lack of a hotel reservation, and (vii) her possession of only one pair of high-heeled shoes. *Id.* at 533-34. Further searching revealed that her abdomen was firm and that she wore two pairs of elastic undergarments lined with paper towel. *Id.* at 534. A physician’s exam later discovered a balloon in her rectum; she ultimately passed 88 balloons of cocaine. *Id.* at 535-36.

<sup>33</sup> National Transportation Safety Board, Aircraft Accident Report: In-Flight Breakup Over the Atlantic Ocean, Trans World Airlines Flight 800 (Adopted Aug. 23, 2000), available at <http://www.nts.gov/Publicatn/2000/aar0003.htm>. The National Transportation Safety Board would later rule out the possibility that a bomb or missile destroyed the plane but could not identify the source that ignited the plane’s center fuel tank and brought the plane down. See CNN, FAA Orders Fuel Tank Safety Systems on Jets (Feb. 17, 2004), available at <http://www.cnn.com/2004/TRAVEL/02/17/faa.fuel.tank.system/index.html>.

<sup>34</sup> Exec. Order No. 13,015, 3 C.F.R. 213 (1996).

<sup>35</sup> *Id.* § 2(b).

<sup>36</sup> White House Comm’n on Aviation Safety and Sec., Final Report to President Clinton, § 3.19 (1997) [hereinafter Gore Commission Final Report].

profiles to identify drug smugglers at the nation's borders while limiting the number of innocent travelers subjected to intrusive searches.<sup>37</sup> In 1998, the airlines deployed CAPS to determine which passengers, carry-on bags, and checked luggage would be scrutinized more heavily than the rest, but then scaled it back in 1999, in response to public criticism.<sup>38</sup> After that time, the system's use was limited to determining whether a passenger's checked luggage would be subjected to more intense security; it had no effect on the screening of the passenger or his carry-on luggage.<sup>39</sup> After the terrorist attacks of September 11, 2001, Congress ordered CAPS to once again be used to determine which passengers, carry-on bags, and checked luggage required additional security screening and authorized the creation of the next generation profiling system: CAPPS II.<sup>40</sup> The TSA began testing the CAPPS II system in March 2003 but stopped soon thereafter when airlines refused to supply the passenger data required for testing.<sup>41</sup>

When fully operational, CAPPS II will initiate the profiling process when a passenger makes a reservation.<sup>42</sup> CAPPS II will first compare the passenger's name, address, telephone number, and date of birth against commercial databases to give a measure of reliability that the passenger actually is the person he says he is.<sup>43</sup> Next, the passenger will be placed into one of three groups which determines the nature of the passenger's security screening.<sup>44</sup> Like CAPS, CAPPS II will not utilize race, religion, or ethnicity as factors in its analysis.<sup>45</sup> The system will neither maintain files on all passengers, nor house a new database of information.<sup>46</sup> Passengers' data will be deleted from the system shortly after their flights land safely.<sup>47</sup> Beyond this, the factors and methodology that will be used by the CAPPS II system remain a closely

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<sup>37</sup> *Id.*

<sup>38</sup> See Paul Rosenzweig and Ha Nguyen, *CAPPS II Should be Tested and Deployed*, 1683 THE HERITAGE FOUNDATION BACKGROUNDER 1, 2, Aug. 28, 2003, available at <http://www.heritage.org/Research/HomelandDefense/BG1683.cfm>.

<sup>39</sup> *Id.*

<sup>40</sup> TSA Selects Lockheed, *supra* note 13.

<sup>41</sup> GAO Report, *supra* note 18, at 10.

<sup>42</sup> *Id.*

<sup>43</sup> Roy Mark, *DHS Issues New CAPPS II Guidelines*, INTERNETNEWS, July 31, 2003, at <http://www.internetnews.com/ec-news/article.php/2242861> [hereinafter CAPPS II Guidelines].

<sup>44</sup> *Id.*

<sup>45</sup> CNN, U.S. Plan: Threat Level for Every Flyer (Feb. 28, 2003), available at <http://www.cnn.com/2003/TRAVEL/02/28/airport.security.ap/index.html> [hereinafter U.S. Plan]. The Constitutionality of CAPS is discussed *infra* Part V.

<sup>46</sup> *Id.*

<sup>47</sup> CAPPS II Gives Equal Weight, *supra* note 17.

guarded secret for security purposes.<sup>48</sup> Unlike CAPS, which was administered by the airlines, the TSA will administer the CAPPs II system.<sup>49</sup> The only information CAPPs II will send to the airline is a passenger's risk assessment score.<sup>50</sup>

Privacy advocates and civil libertarians oppose this expansion of CAPS, fearing that it will delve too deeply into passengers' private backgrounds, in violation of the Fourth Amendment.<sup>51</sup> Among their concerns is the fear that an airline security profiling system like CAPPs II could be used for criminal law enforcement unrelated to airline security.<sup>52</sup> The ACLU has urged Congress to accept as a "central principal of information privacy" the tenet that information collected for one use, such as a frequent-flyer program, should not be used for another use, such as a passenger profile.<sup>53</sup> Another fear of privacy advocates is that the system will be over inclusive or will falsely target passengers for intrusive searches based on inaccurate data.<sup>54</sup> Comparing security profiles to databases maintained by direct marketers, the ACLU urged that passengers incorrectly identified by the security profile will have as much trouble correcting the error in the CAPPs II system as one has removing oneself from a marketer's mailing list.<sup>55</sup> Part V of this Note explains how CAPPs II addresses these concerns.

### III. BACKGROUND: FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment protects people from unreasonable searches and seizures.<sup>56</sup> "No right is held more sacred, or is more carefully guarded, by the

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<sup>48</sup> Megan Lisagor, *TSA Prepares Passenger Screening System*, FED. COMPUTER WK., Feb. 26, 2003, available at <http://www.fcw.com/fcw/articles/2003/0224/web-tsa-02-26-03.asp> (site last visited Dec. 8, 2003).

<sup>49</sup> GAO Report, *supra* note 18, at 2.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> See O'Harrow, *supra* note 12, at A18.

<sup>52</sup> *Id.*

<sup>53</sup> Profiling for Public Safety: Rational or Racist: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure, 107th Cong. § 46 (2002) (statement of Katie Corrigan, Legislative Counsel, ACLU Wash. Nat'l Office) [hereinafter Corrigan Statement].

<sup>54</sup> Press Release, ACLU, CAPPs II Data-Mining System Will Invade Privacy and Create Government Blacklist of Americans, ACLU Warns (Feb. 27, 2003), available at <http://www.aclu.org/Privacy/Privacy.cfm?ID=11956&c=130> [hereinafter ACLU Press Release].

<sup>55</sup> Corrigan Statement, *supra* note 53, at § 46.

<sup>56</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST.



common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>57</sup> The text of the Fourth Amendment indicates that the right protected is not absolute – only *unreasonable* searches are forbidden.<sup>58</sup> Fourth Amendment jurisprudence is complicated in part because the Supreme Court has preferred to develop the doctrine by judging reasonableness based on the facts of each case rather than by adopting bright-line rules.<sup>59</sup> To elucidate the understanding of the Supreme Court’s reasonableness standard requires examination of several Fourth Amendment cases dealing with both searches and seizures.

#### A. Searches

Modern Fourth Amendment jurisprudence rests upon the Supreme Court’s decision in *Katz v. United States*.<sup>60</sup> In *Katz*, the Supreme Court redefined the meaning of a “search,” abandoning the traditional requirement of a physical trespass in favor of a conception based on a person’s right to privacy.<sup>61</sup> Justice Harlan’s concurrence articulated the new rule in his description that a “search” takes place when: (i) a person’s subjective expectation of privacy is invaded; as long as (ii) society is prepared to recognize that expectation as reasonable.<sup>62</sup> *Katz* therefore created a threshold test for the Fourth Amendment: if there is no reasonable expectation of privacy, then the Fourth Amendment is not implicated, and any search or seizure is presumably reasonable.<sup>63</sup> This does not mean that the police can render an expectation of privacy unreasonable merely by asserting their intention not to recognize it.<sup>64</sup> Where there is a

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amend. IV.

<sup>57</sup> *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>58</sup> U.S. CONST. amend. IV. The “touchstone of the Fourth Amendment is reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

<sup>59</sup> *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

<sup>60</sup> 389 U.S. 347 (1967).

<sup>61</sup> *Id.* at 353. When police officers placed a listening device on the outside of a phone booth in order to record *Katz*’s incriminating statements, they violated his reasonable expectation of privacy. *Id.* at 352. The determinative factor for the Court was no longer whether the device physically penetrated the walls of the phone booth, but whether *Katz* expected the phone booth to keep his words unknown to others. *Id.* After *Katz*, a person could feel safe from unreasonable searches and seizures no matter where he was, because the Court affirmed that the Amendment “protects people, not places.” *Id.* at 351.

<sup>62</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>63</sup> *United States v. Davis*, 482 F.2d 893, 904 (9th Cir. 1973).

<sup>64</sup> See Donna Smith, Comment, *Passenger Profiling: A Greater Terror Than Terrorism Itself?*, 32 J. MARSHALL L. REV. 167, 192 (1998). Scott McNealy, CEO of Sun Microsystems, once reportedly told a group of reporters “You have zero privacy. Get over it.” A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1462 (2000).

reasonable expectation of privacy, however, the government must either get a search warrant or demonstrate that society does not recognize the particular expectation of privacy at issue as reasonable.<sup>65</sup>

Law enforcement officers may use a wide variety of tactics, some more technologically advanced than others, to carry out their duty to protect the public. Permissible tactics have employed aircraft,<sup>66</sup> flashlights,<sup>67</sup> microphones,<sup>68</sup> pen registers,<sup>69</sup> drug-sniffing dogs,<sup>70</sup> and an officer's hands.<sup>71</sup> However, some technologies used by the police intrude too far into the Fourth Amendment right "against unreasonable searches and seizures."<sup>72</sup> The Supreme Court ruled in *Kyllo v. United States* that the police could not use thermal imaging devices on a residence without a warrant.<sup>73</sup> The Court ruled that the use of the device was an unreasonable search under the Fourth Amendment and therefore unconstitutional unless accompanied by a warrant.<sup>74</sup>

### *B. Seizures*

While *Katz* concerned Fourth Amendment searches, *Soldal v. Cook County*<sup>75</sup> and *Terry v. Ohio*<sup>76</sup> addressed the limits of Fourth Amendment

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Although McNealy's statement was descriptive rather than authoritative, it is comforting to know that the Fourth Amendment prevents the government from making such claims.

<sup>65</sup> *Davis*, 482 F.2d at 905.

<sup>66</sup> *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (holding that the expectation that a fence would prohibit all observation of backyard marijuana plants, including observation from a high vantage point, was not one that society was prepared to recognize as reasonable).

<sup>67</sup> *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) (classifying the police action as not a "search").

<sup>68</sup> *On Lee v. United States*, 343 U.S. 747, 751 (1952).

<sup>69</sup> *Smith v. Maryland*, 442 U.S. 735, 743-744 (1979) (finding no reasonable expectation of privacy in information volunteered to third parties).

<sup>70</sup> *United States v. Place*, 462 U.S. 696, 707 (1983) (classifying the police action as not a "search").

<sup>71</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that the actions of the police officer constituted a "search" but that the search was reasonable under the circumstances).

<sup>72</sup> U.S. CONST. amend IV.

<sup>73</sup> 533 U.S. 27, 40 (2001). The device measured the infrared radiation (heat) emitted from the residence as compared to the heat emitted from neighboring houses. *Id.* at 30. The relatively large amount of heat emanating from *Kyllo's* home came from large lamps used to grow marijuana. *Id.*

<sup>74</sup> *Id.* at 40.

<sup>75</sup> 506 U.S. 56 (1992). In *Soldal*, before obtaining a judgment of eviction in his favor, the owner and manager of a mobile home park physically removed a tenant's trailer from the premises as county sheriff's officers, called by the landlord to quell any dispute between the landlord and the tenant, looked on. *Id.* at 58. Even though there was no invasion of the

“seizures” of property and people. According to the Supreme Court in *Soldal*, a “seizure” of property occurs when “there is some meaningful interference with an individual’s possessory interests in that property.”<sup>77</sup> In *Terry*, the Court explained that a “seizure” of a person could occur “when a police officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”<sup>78</sup> However, the Court warned that “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.”<sup>79</sup>

In *Florida v. Royer*, the Supreme Court held that a seizure occurred when narcotics officers requested that an airline passenger accompany them to their office on the suspicion that the passenger carried drugs in his luggage,<sup>80</sup> while failing to inform the passenger that he was free to leave.<sup>81</sup> The passenger was seized because the officers retained his airline ticket and driver’s license, causing the passenger reasonably to believe that he was being detained by the agents.<sup>82</sup> The officers’ seizure in *Royer* can be explained as either the unlawful interference with the passenger’s possessory interest in his airline ticket and driver’s license (under *Soldal*), or as the restraint of the passenger’s liberty by means of a show of authority (under *Terry*).

In contrast, five Justices found that no seizure took place under similar circumstances in *United States v. Mendenhall* when the agents returned the passenger’s identification and ticket before asking the passenger to accompany them to their office and the passenger was informed of her right to decline further search.<sup>83</sup> Since neither a possessory interest nor a liberty interest was implicated, no seizure had taken place. Once a court has found that a seizure has taken place, the particular circumstances of the case help courts objectively determine whether the particular seizure was reasonable.<sup>84</sup>

The Fourth Amendment’s protections are not absolute.<sup>85</sup> There are some

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mobile home owner’s privacy, the Court ruled that a “seizure” of the mobile home had taken place. *Id.* at 69.

<sup>76</sup> 392 U.S. 1 (1968). *Terry* is discussed in greater detail in the next section of this Note.

<sup>77</sup> *Soldal*, 506 U.S. at 61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

<sup>78</sup> *Terry*, 392 U.S. at 19, n. 16.

<sup>79</sup> *Id.*

<sup>80</sup> *Florida v. Royer*, 460 U.S. 491, 501 (1983).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 501-502.

<sup>83</sup> *United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

<sup>84</sup> *Id.* at 21-22.

<sup>85</sup> *California v. Acevedo*, 500 U.S. 565, 582-583 (1991).

Even before [*California v. Acevedo*], the “warrant requirement” had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions. . . . Since then, we have added at least two more. . . . Our intricate body of law regarding “reasonable expectation of privacy” has

instances, described below, in which the government is excused from the Fourth Amendment's warrant requirement. The principle underlying these exceptions is that the government may act without a warrant when the circumstances are such that the imminence of harm or the fleeting encounter with an individual limits the government's ability to get a warrant.

*C. The Terry Stop Exception*

Although the Fourth Amendment protects people from a wide range of searches and seizures, certain exceptions have developed. *Terry v. Ohio* announced one such exception to the Fourth Amendment, permitting police officers to stop an individual and search his person for weapons that might be used against the officer or others.<sup>86</sup> In *Terry*, an undercover police officer observed two individuals walk past the same store window a total of a dozen times, stopping each time to peer into it.<sup>87</sup> When the individuals were not looking into the window, the officer observed them conversing on the corner.<sup>88</sup> Thinking a crime might be imminent, the officer approached the two individuals, as well as a third who had joined them, and asked them their names.<sup>89</sup> The individuals "mumbled something" and the officer grabbed Terry and felt the outside of his clothing for weapons, finding a pistol.<sup>90</sup> Though the officer did not have a warrant, the Supreme Court upheld the search and seizure as reasonable because the officer had "reasonable grounds to believe that [Terry] was armed and dangerous" and because a search "was necessary for the protection of himself and others."<sup>91</sup>

The *Terry* doctrine has been applied to validate searches of airline passengers.<sup>92</sup> *United States v. Lopez* relied upon *Terry* to justify a warrantless search of an airline passenger after the passenger, identified as a possible risk by a security profile, set off a metal detector and then failed to produce identification when requested.<sup>93</sup> The subsequent search of the passenger revealed a package of heroin wrapped in foil.<sup>94</sup> The fact that the search yielded

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been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement.

*Id.* at 582-583 (Scalia, J., concurring).

<sup>86</sup> 392 U.S. 1, 30 (1968).

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 6-7.

<sup>90</sup> *Id.* at 7.

<sup>91</sup> *Id.* at 30.

<sup>92</sup> *United States v. Lopez*, 328 F. Supp 1077 (E.D.N.Y. 1971).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1082.

drugs rather than a weapon does not render it unconstitutional.<sup>95</sup> The officer “need not close his eyes to evidence of other crimes which he may uncover” as long as the good faith search was within “the limits of what is required to uncover such an object.”<sup>96</sup> The search was necessary and reasonable to ensure the safety of the other airline passengers and to determine whether the metal triggering the metal detector was dangerous or benign.<sup>97</sup>

*Terry* adopted a “sliding scale” for law enforcement officers: when the threatened harm by an individual is great, the officer may search the individual even though the search has a relatively low probability of success.<sup>98</sup> When the threatened harm is lower, however, the officer must articulate facts that would lead a reasonable officer to conclude that the search would have a higher probability of success.<sup>99</sup> The *Lopez* court explained that such searches are justified by comparison to a “continuum of probability” that crime is possible in the near future.<sup>100</sup> The incursion into the individual’s privacy in *Lopez* was only so much as required to identify the metal that triggered the metal detector and it only occurred after the profile identified the passenger as a potential risk, the passenger activated the magnetometer, and the passenger failed to produce identification.<sup>101</sup> The *Lopez* court concluded that “the Marshal’s conduct of this investigation was almost an exact model of the ‘frisk’ approved in *Terry*.”<sup>102</sup>

#### *D. The Administrative Search Exception*

Another exception to the Fourth Amendment’s usual protections that affects air travelers is the administrative search.<sup>103</sup> An administrative search is an examination conducted by the government in an effort to supervise a regulated activity.<sup>104</sup> Administrative searches conducted by the airlines are considered state action because they are done at the request of the government. Unlike police searches, administrative searches do not result from a suspicion of

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<sup>95</sup> *Id.* at 1098 (“[W]hether a frisk conducted in good faith to locate weapons believed to be present will justify the seizure of evidence of crimes other than those involved in boarding a plane with a weapon. The answer is yes.”).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 1094-1095.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1094 (“In each case it depends upon balancing the degree of incursion into the individual’s privacy against the society’s interest in the intrusion at the particular moment as perceived from the then known facts.”).

<sup>101</sup> *Id.* at 1098.

<sup>102</sup> *Id.*

<sup>103</sup> Miller, *supra* note 32, at 206.

<sup>104</sup> *Id.*

criminal activity, past or present.<sup>105</sup> Administrative searches may occur without probable cause or a warrant.<sup>106</sup> To pass constitutional muster, the administrative search must be: “conducted in good faith;”<sup>107</sup> “as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it;”<sup>108</sup> and passengers must have notice of their susceptibility to the search.<sup>109</sup> The Second Circuit summarizes the justification for and requirements of administrative searches of airline passengers,

[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that 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.<sup>110</sup>

The Supreme Court approves of this justification for administrative searches of airline passengers at airports.<sup>111</sup> To protect against airline hijackings, and to protect the safety of passengers generally, the federal government requires a pre-boarding administrative search of all passengers for weapons and explosives.<sup>112</sup> Since the goal of this screening is to prevent contraband from making its way onto airplanes, only passengers boarding the plane must undergo the search.<sup>113</sup> Thus, passengers may opt out of the screening by choosing not to fly.<sup>114</sup>

#### *E. The Consent Exception*

Finally, police may search or seize a person who voluntarily relinquishes his Fourth Amendment rights.<sup>115</sup> “Voluntariness is a question of fact to be

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<sup>105</sup> *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

<sup>108</sup> *Davis*, 482 F.2d at 910.

<sup>109</sup> *Edwards*, 498 F.2d at 500.

<sup>110</sup> *Id.* (quoting *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972)) (Oakes, J., concurring) (emphasis in original).

<sup>111</sup> *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675, n. 3 (1989) (Kennedy, J., approving of the searches in dicta). “It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.” *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Davis*, 482 F.2d at 910-911.

<sup>114</sup> *Id.*

<sup>115</sup> *United States v. Drayton*, 122 S.Ct. 2105, 2108 (2002).

determined from all the circumstances.”<sup>116</sup> One of the circumstances to be taken into consideration is whether the individual had knowledge of the right to refuse consent,<sup>117</sup> yet this factor is not determinative.<sup>118</sup> Nor must police explicitly tell a person lawfully seized that he or she is “free to go” before consent can be considered voluntary.<sup>119</sup> Consent to a search need not be express; it may be implied by a person’s actions,<sup>120</sup> such as silently handing a bag to a security screener.<sup>121</sup>

Police officers may approach and question anybody in public at any time.<sup>122</sup> A person approached by police in this manner may decide whether to speak with them.<sup>123</sup> At airports, authorities have used the drug courier profile to help decide which people, if any, to approach and ask for consent to search their belongings.<sup>124</sup> Surprisingly, many passengers carrying concealed drugs nevertheless consent to be searched.<sup>125</sup> “The proper inquiry concerning consent under these circumstances ‘is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.’”<sup>126</sup> Therefore, consent must be free of “duress or coercion, express or implied,”<sup>127</sup> and consent is distinguished from mere “acquiescence to apparent lawful authority.”<sup>128</sup>

#### IV. BRIDGING PAST AND PRESENT PROFILING SYSTEMS

Airlines first used profiles to aid in the identification of potential hijackers after a 1968 Task Force found that hijackers displayed several traits distinguishing them from the law-abiding public, including the tendency not to

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<sup>116</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249 (1973).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

<sup>120</sup> *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973).

<sup>121</sup> *Id.* at 1077.

<sup>122</sup> *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

<sup>123</sup> *Id.*

<sup>124</sup> *See generally* *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>125</sup> *United States v. Berry*, 670 F.2d 583, 598, n. 16 (5th Cir. 1982). Perhaps in these situations the passenger’s consent is not completely voluntary, or perhaps the agents involved did not properly inform the passenger that he was free to withhold consent. If the passengers were coerced into giving consent then the search should have been invalidated. On the other hand, the goals of law enforcement may be thwarted if officers must explicitly tell criminals that they are free to refuse consent or walk away.

<sup>126</sup> *United States v. Drayton*, 122 S.Ct. 2105, 2111 (2002) (quoting *Bostick*, 501 U.S. at 436).

<sup>127</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

<sup>128</sup> *United States v. Ruiz-Estrella*, 481 F.2d 723, 728 (2d Cir. 1973).

be highly motivated or resourceful.<sup>129</sup> Further studies investigated photographic data of boarding air passengers.<sup>130</sup> From these studies, a rudimentary behavioral profile was developed to identify those air passengers more likely to be hijackers.<sup>131</sup> Even if this profiling system identified a passenger as a potential hijacker, airline authorities only took further action if the passenger set off a magnetometer at the gate,<sup>132</sup> in which case airline employees searched the passenger only if he failed to produce identification or if he failed to demonstrate adequately that the metal triggering the magnetometer was not a weapon.<sup>133</sup> Judge Weinstein elegantly summarized the system, noting the lack of intrusiveness on the average passenger.

One sample consisting of 500,000 screened passengers showed that only 1,406 satisfied the profile— .28%. Approximately one-half of those were nevertheless permitted to board immediately after failing to activate the magnetometer, leaving 712, or .14% [t]o be interviewed. Of those interviewed, 283, approximately one-third, were actually searched. Therefore, only .05% [o]f the sample were ultimately subjected to a preventive weapons frisk. Twenty persons were denied boarding— approximately 1/15 of those searched and of these, 16 were arrested. In sum, almost everyone (99.86%) of the one-half million persons passed swiftly through the boarding process without even being asked a question and 99.95% [b]oarded without being searched.<sup>134</sup>

Judge Weinstein found through in camera testimony that the factors used in the profiling system “were well calculated to eliminate safe persons while isolating those likely to be dangerous,”<sup>135</sup> and held the profiling method “highly effective in narrowing the group which needs particular attention.”<sup>136</sup> More importantly, Judge Weinstein concluded the profile did not discriminate on the basis of race, religion, national origin, or political views.<sup>137</sup>

In 1997, the Gore Commission recommended the creation of the CAPS system to provide security within the airline industry.<sup>138</sup> The commission reported that profiling could use existing terrorist research and intelligence of the FBI, CIA, Bureau of Alcohol, Tobacco, and Firearms (“BATF”), along with passenger information compiled by the airlines to separate the vast

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<sup>129</sup> *United States v. Lopez*, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1083.

<sup>133</sup> *Id.*

<sup>134</sup> *Lopez*, 328 F. Supp. at 1084.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1086.

<sup>138</sup> Gore Commission Final Report, *supra* note 36, at § 3.19.



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majority of passengers who present minimal risk from the small minority of passengers who should receive further scrutiny.<sup>139</sup> Finally, an advisory board was to be formed to resolve concerns over the implications of profiling on civil liberties.<sup>140</sup>

The CAPS system, developed by the FAA and Northwest Airlines, compiled some forty pieces of personal information and created a passenger profile that measured the passenger's security risk and returned a binary output alerting the airline to subject some passengers to heightened security screening.<sup>141</sup> Although many of the factors used in the CAPS profile remain secret for security purposes, the system is known to use such information as a passenger's name, address, travel companions, and credit card number, as well as the origin and destination of the flight and the presence or absence of reservations for a return flight.<sup>142</sup> Like the earlier profiling system reviewed by Judge Weinstein, the Justice Department reported in 1997 that the CAPS system does not use race, religion, or national origin as factors.<sup>143</sup>

Expanding on the CAPS system by taking advantage of "very fast access to existing databases,"<sup>144</sup> the preliminary testing of CAPPS II ended in June 2003 to address privacy concerns.<sup>145</sup> The Senate has suspended funding until these privacy concerns are resolved.<sup>146</sup> In response, the Department of Homeland Security published a notice inviting public comments on its changes.<sup>147</sup> According to the TSA, CAPPS II is "a narrowly focused threat assessment tool, based on continuously changing intelligence information and threat priorities."<sup>148</sup> Unlike CAPS, which was operated by the airlines, CAPPS II is operated by the TSA.<sup>149</sup>

V. ANALYSIS OF THE CONSTITUTIONALITY OF CAPPS II

The opponents of CAPPS II raise three primary concerns about the system: (i) that CAPPS II will result in government "fishing expeditions" through

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Gregory T. Nojeim, *Aviation Security Profiling and Passengers' Civil Liberties*, 13 *AIR & SPACE LAW*. 3, 5 (1998).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 7.

<sup>144</sup> U.S. Plan, *supra* note 45 (quoting Transportation Secretary Norman Mineta).

<sup>145</sup> See Mark, *supra* note 43.

<sup>146</sup> *Id.*

<sup>147</sup> Press Release, Transportation Security Administration, *New Notice Outlines Changes to CAPPS II System*, (July 31, 2003), *available at* <http://www.tsa.gov/public/display?content=634> [hereinafter "New Notice"].

<sup>148</sup> TSA Selects Lockheed, *supra* note 13.

<sup>149</sup> GAO Report, *supra* note 18, at 2.

personally sensitive data; (ii) that it will create a class of citizens unable either to travel freely or to appeal incorrect classifications in a meaningful way; and (iii) that CAPPS II will be used for purposes other than transportation security.<sup>150</sup> Based on these arguments, the opponents of CAPPS II conclude that the CAPPS II system violates the Fourth Amendment. However, the Fourth Amendment of the Constitution permits profiling as it is embodied in the CAPPS II system.

To implicate the Fourth Amendment, the argument that CAPPS II will initiate a government “fishing expedition” first requires that passengers have a reasonable expectation of privacy in personal information.<sup>151</sup> The Supreme Court holds that they do not. As early as the 1967 *Katz* decision, the Supreme Court recognized that “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.”<sup>152</sup> The Fourth Amendment cannot be invoked in such cases because “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>153</sup> A person that reveals information to a third party, even confidential information revealed for a limited purpose, does so at the risk that the third party discloses the information to the government.<sup>154</sup> In *United States v. Miller*, the Supreme Court found no reasonable expectation of privacy in the contents of bank records.<sup>155</sup> “The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.”<sup>156</sup>

Passengers initiate the CAPPS II system by providing the airline with their full name, address, phone number, and date of birth.<sup>157</sup> This information is freely volunteered by the passenger. Because individuals have no reasonable expectation of privacy in this and other information volunteered to others, the Fourth Amendment does not prevent CAPPS II from comparing this information to information in commercial databases to ensure that the passenger is who he says he is and that he is not dangerous. “[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable

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<sup>150</sup> ACLU Press Release, *supra* note 54.

<sup>151</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967).

<sup>152</sup> *Id.* at 351.

<sup>153</sup> *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (finding no expectation of privacy in telephone numbers conveyed to the telephone company in order to place a telephone call).

<sup>154</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>155</sup> *Id.* at 442 (noting that checks and deposit slips “are not confidential communications but negotiable instruments to be used in commercial transactions”).

<sup>156</sup> *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

<sup>157</sup> GAO Report, *supra* note 18, at 6.

despite the absence of such suspicion.”<sup>158</sup> Passengers have no privacy interest in personal information volunteered to others; the government interest in ensuring transportation security is obvious and compelling. Therefore, the government may use CAPPs II even in the absence of criminal suspicion.

Perhaps people feel uncomfortable with the government’s authority to search databases of freely-volunteered information because of the efficiency and thoroughness with which computers can perform this task. While CAPPs II certainly employs impressive technologies, this factor alone should not be fatal to the system. The Supreme Court, in invalidating the thermal imaging technology impermissibly employed in *Kyllo*, noted that the thermal imaging technology was not in general public use.<sup>159</sup> This suggests that the more common a technology is, the more reasonable it is for the government to use that technology.<sup>160</sup> The technology behind CAPPs II – interconnected computer databases – is a technology that is in general public use. It is also common for the public to use computers to sift through large amounts of data, just as CAPPs II does.<sup>161</sup> A primary function of police work is to draw conclusions from observations made in the field. Computers can facilitate this process of scanning millions of records at speeds never before imagined. Building a computer system to scour information found within databases is not a “fishing expedition” but an efficient, consistent, and reliable tool that remains ever vigilant to its task of confirming identification and assessing risk. No technology can be unconstitutional simply because of its speed or efficiency.

Aside from the benefits of speed and transaction volume, there is another reason to prefer the use of computers to screen airline passengers before their flights. Unlike humans, computers cannot generate post hoc rationalizations to justify the conclusion that a particular person fits a profile. As an example of the prejudices to which humans can become vulnerable, consider the list of factors of a drug courier profile used in cases compiled by Justice Marshall in his dissent in *United States v. Sokolow*: “first to deplane . . . last to deplane . . .

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<sup>158</sup> *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 624 (1989).

<sup>159</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

<sup>160</sup> Certainly, the public benefits when law enforcement remains abreast of technology. If criminals are going to find new ways to exploit technology for nefarious purposes, then it would be foolish to prevent law enforcement from exploiting technology for the public good. So to some extent, this is not a question of whether law enforcement should use technology, but of how much technology should be permitted. The Supreme Court partially answered this question by noting that the line between reasonableness and unreasonableness of a given technology falls somewhere close to the public’s access to and familiarity with the technology.

<sup>161</sup> Internet search engines such as Google (<http://www.google.com>) or Yahoo! (<http://www.yahoo.com>) allow Internet users to search billions of pages of content for specific words or phrases and rank the resulting information in order of its relevance. This allows the user to quickly and easily sort and locate information online.

deplaned from middle . . . one-way tickets . . . round-trip tickets . . . nonstop flight . . . changed planes . . . no luggage . . . gym bag . . . new suitcases . . . traveling alone . . . traveling with companion . . . acted nervously . . . acted too calmly.”<sup>162</sup> While each of these factors may have genuinely led agents to properly identify a drug courier when considered in the totality of the circumstances of each case, such a system has the tendency to appear irrational when considered in hindsight. This is true in part because none of the factors, taken alone, is indicative of criminal wrongdoing. Computer profiles like CAPPS II avoid this rationalization problem by objectively collecting facts and alerting the proper authorities of those facts.<sup>163</sup>

Information given to the airline and subsequently used for the CAPPS II profile is purged shortly after the passenger’s flight.<sup>164</sup> Even though passengers have no reasonable expectation of privacy in information freely volunteered to others, many people are concerned that their personal information will fall into the hands of an unscrupulous party or be used against them. “TSA will not allow commercial data providers to acquire ownership of passenger name records, or to retain or commercially use those records or passenger scores. Also, CAPPS II will not use bank records, records indicating creditworthiness or medical records.”<sup>165</sup> Citizens need not fear that their private information will be sold or otherwise transferred by the TSA to others because that might reveal the sorts of information used by CAPPS II and frustrate the system’s integrity. For the vast number of travelers, the government will not retain files or databases.

In addition to the physical security of the data, the government will limit access to the information used by the CAPPS II system. While airline personnel operate the current CAPS system, access to passengers’ CAPPS II scores will be limited to federal employees of the TSA who require the data to perform their duties.<sup>166</sup> “TSA will not see the data used to generate those scores.”<sup>167</sup> Thus access to the system will be kept to a minimum, and the computerized system will be free from the introduction of the user’s bias.<sup>168</sup> Computers are ideally suited for profiling since they are capable of gathering, storing, and processing huge quantities of information. In addition, they are not swayed by prejudice or other dangers of human frailty.<sup>169</sup> Thus, a

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<sup>162</sup> *United States v. Sokolow*, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting).

<sup>163</sup> *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

<sup>164</sup> New Notice, *supra* note 147.

<sup>165</sup> *Id.*

<sup>166</sup> Privacy Act of 1974: System of Records, 68 Fed. Reg. 2101, 2102 (Jan. 15, 2003).

<sup>167</sup> CAPPS II Gives Equal Weight, *supra* note 17.

<sup>168</sup> TSA employees checking passengers’ CAPPS II scores are unable to affect the inputs or outputs of the system.

<sup>169</sup> It is admitted that computers do no more and no less than they are instructed by their

computerized profiling system can operate in the background while revealing a minimal amount of personal information to human operators. Of the millions of passengers screened by CAPPS II, only those identified as unknown or unacceptable security risk (and, if CAPS serves as an example, a few others randomly selected to reduce the stigma of being selected<sup>170</sup>) will face greater scrutiny.<sup>171</sup> Even then, because of the security interest in keeping the specific factors triggering the profile's selection confidential, the only information revealed to another person will be the passenger's name and the security risk encoded on the boarding pass.<sup>172</sup>

Given that there is no reasonable expectation of privacy in data revealed to a third party – the very data that the CAPPS II system will use to determine a person's potential risk to the transportation system – the Fourth Amendment does not prevent the government from developing and using a profiling system for the purpose of ensuring the security of the transportation system. Passengers fearful about data security and system integrity neglect to consider the government's interest in protecting the system and its data from discovery by others. Even if the Fourth Amendment applied to information revealed to third parties, however, the CAPPS II system would fall within at least one of the Fourth Amendment's other exceptions.

#### *A. Profiles and Terry*

Traveling creates a unique circumstance in which upholding the usual search warrant requirement would frustrate the ability of law enforcement to do their job.<sup>173</sup> When confronted with a passenger identified as a potential threat to the transportation system, police must respond quickly to assess the situation and react accordingly before the passenger embarks on his voyage. The threat of harm to the public caused by a hijacker is immense while the burden of security procedures placed on passengers is much lower. *Terry* instructs that the key factor in determining the constitutionality of a search is the reasonableness of the search considered within the context of the exigencies of the case.<sup>174</sup>

An individual's profile compiles several characteristics that, taken

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human operators. While it is possible for a computer algorithm to be tainted by programming that incorporates factors such as race or religion, this Note assumes, justifiably, that the factors used in a profile can be reliably connected to a person's threat to commit crimes on board an aircraft and that they do not violate the Equal Protection Clause of the Constitution.

<sup>170</sup> Gore Commission Final Report, *supra* note 36, at Appendix A.

<sup>171</sup> GAO Report, *supra* note 18, at 7.

<sup>172</sup> U.S. Plan, *supra* note 45.

<sup>173</sup> *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972).

<sup>174</sup> *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

individually, may not be indicative of any unlawful activity but that, when considered in light of all the circumstances known at the time, may illuminate a person's increased likelihood of committing or attempting a crime. Such characteristics could include the fact the passenger paid for his \$2,100 ticket in cash,<sup>175</sup> that the passenger traveling twenty hours from Honolulu to Miami will spend less than 48 hours at his destination,<sup>176</sup> or perhaps that the person has no confirmed contacts in the United States.<sup>177</sup> Standing alone, none of these traits are criminal, nor would they give an officer probable cause for an arrest. Yet, when considered together, these factors could direct the attention of airport security agents to this passenger for further inquiry as a possible drug courier.

The CAPPS II profile merely automates the information gathering process employed by the observant police officer in *Terry*, helping airport security agents concentrate their resources where they are most needed and permitting the vast majority of the flying public to proceed to their destination without undue delay. By initiating the profiling process when a passenger makes a reservation, CAPPS II gives the TSA a head start on its security mission, which ultimately reduces the delays experienced by passengers at the airport.

Once identified by a profile, perhaps all that is needed to dispel any question of the passenger's intentions is a short conversation between the passenger and a TSA agent or a quick glance through the passenger's luggage. Inconsistent or unusual responses could be investigated through further questioning or searching the passenger's person and luggage. Provided that the police may approach and ask questions of anyone in public,<sup>178</sup> there is no harm in asking questions of only some. CAPPS II permits all passengers other than those labeled as unacceptable or unknown security risks – the vast majority of passengers – to proceed through security without further questioning. Only the passengers labeled as unacceptable or unknown security risks will be subjected to further questioning or denied a boarding pass.<sup>179</sup> CAPPS II will actually lower the number of passengers subjected to more rigorous screening procedures.<sup>180</sup>

Opponents of CAPPS II worry about what will happen to the passengers falsely identified as security risks. They contend that the system will create a "blacklist" of Americans who, through no fault of their own, are unable to fly.<sup>181</sup> The additional passenger searches will be conducted in the proximity of

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<sup>175</sup> *United States v. Sokolow*, 490 U.S. 1, 8 (1989).

<sup>176</sup> *Id.*

<sup>177</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 533-534 (1985).

<sup>178</sup> *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

<sup>179</sup> GAO Report, *supra* note 18, at 7.

<sup>180</sup> CAPPS II Gives Equal Weight, *supra* note 17.

<sup>181</sup> ACLU Press Release, *supra* note 54.

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the traveling public's scrutiny.<sup>182</sup> The airlines have an interest in insuring that their passengers are not harassed by security agents<sup>183</sup> and may elect to have a representative present during the screening. The TSA will allow passengers falsely identified as security risks to pursue a complaint for redress.<sup>184</sup> The process will include rights of appeal in case the passenger is not satisfied with TSA's response.<sup>185</sup> The General Accounting Office has identified the data retention, access, and correction procedures of CAPPs II as areas of concern that must be addressed in developing the system for passenger complaints.<sup>186</sup>

*Terry* explicitly left open the possibility that police could seize a person upon less than probable cause.<sup>187</sup> In addition, it implicitly left open the possibility that police officers could search someone based on a profile, since *Terry* only required specific facts necessary to arouse the officer's reasonable suspicions,<sup>188</sup> and said nothing about the source of those specific facts. The CAPPs II system is designed to point to specific, articulable facts about an individual that would lead authorities to believe that the individual is more likely to pose a threat than the general flying public to the transportation system. In *Lopez*, Judge Weinstein relied upon the Supreme Court's *Terry v. Ohio* decision to justify the frisking of selected airline passengers.<sup>189</sup> In an airport, the harm threatened by carrying a weapon aboard an aircraft is immense, both in terms of the potential for loss of life and for property damage. The relative harm incurred by passengers subjected to additional security screening is minimal.

*B. Profiles and Administrative Searches*

While an administrative search for weapons at an airport gate is closely related to the goal of keeping weapons off of airplanes, it is not immediately apparent that a passenger profile is closely related to the administrative goal of transportation security. Privacy advocates fear that the transportation system could be used as a tool for general law enforcement, allowing police to stand by and wait for wanted suspects to utilize the transportation system and thus expose their whereabouts.<sup>190</sup> Yet the fact that an administrative search is

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<sup>182</sup> 4 LAFAVE, *supra* note 29, at § 10.6(a).

<sup>183</sup> *Id.*

<sup>184</sup> GAO Report, *supra* note 18, at 25.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Terry v. Ohio*, 392 U.S. 1, 20, n. 16 (1968) ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation.").

<sup>188</sup> *Id.* at 21.

<sup>189</sup> *United States v. Lopez*, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971).

<sup>190</sup> ACLU Press Release, *supra* note 54.

conducted to search for weapons does not mean that officials must turn a blind eye to other criminal conduct unrelated to weapons or hijackings revealed by the searches.<sup>191</sup> Indeed, officials frequently discover drugs and other contraband during these searches.<sup>192</sup> In the early days of the administrative search of airline passengers, more than one-third of the arrests stemming from the anti-hijacking system were for drug possession.<sup>193</sup>

The propriety of an administrative search for the purpose of ensuring safety and security in the transportation system is measured not by its unintended effects but by its compliance with the following objectives: (i) “to keep unauthorized persons from boarding an aircraft in possession of a deadly weapon;” (2) “to prevent sabotage devices from being carried or placed aboard these aircraft;” and (3) “to insure that the airport operators serving these aircraft have maintained a proper level of security in operating areas.”<sup>194</sup> Thus, searches will be upheld when: (i) they are conducted in a good faith effort to prevent harm to the persons or property; (ii) they are limited to a reasonable scope; and (iii) passengers have the option to avoid the search by choosing not to fly.<sup>195</sup>

Security profiles in an administrative search scheme that reveal evidence of criminal conduct unrelated to airport security might intrude too far into a person’s background, implicating the second factor requiring that administrative searches remain limited to a reasonable scope. Thus, the TSA might be prevented from acting on information of criminal activity unrelated to the administrative goal of deterring weapons from being carried aboard aircraft. The TSA has assured Americans that it understands this limitation. “Some critics have erroneously contended that a parking ticket or late credit card payment would keep someone from flying. This is simply inaccurate. Indeed, credit ratings – bad or good – will not lead to enhanced scrutiny at the airport.”<sup>196</sup> Note that the current administrative search scheme permits the seizure of drugs found incidental to the search for weapons. It is possible to differentiate the two situations by noting that possession of drugs uncovered in a search of which all passengers are aware is a volitional possessory offense, whereas information unrelated to airline safety revealed in a security profile will often reflect the passenger’s status. For example, the passenger may be a fugitive or he may appear on a government intelligence list of suspected terrorists. These statuses are not voluntary; they are imposed by the state.

The third factor used to determine the validity of a search, the option to

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<sup>191</sup> *Lopez*, 328 F. Supp. at 1098 (collecting cases).

<sup>192</sup> *See* *United States v. Davis*, 482 F.2d 893, 909 (9th Cir. 1973).

<sup>193</sup> *Id.* (quoting *New York Times*, Nov. 26, 1972 at p. 1 col. 2).

<sup>194</sup> *Davis*, 482 F.2d at 903 n. 26.

<sup>195</sup> *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972).

<sup>196</sup> *CAPPS II Gives Equal Weight*, *supra* note 17.



avoid the search, is an important feature that protects passengers, should they wish to avoid the CAPPS II profile. The CAPPS II system begins its work after a passenger makes a reservation.<sup>197</sup> To meet the notice requirements of an administrative search and ensure that passengers have the opportunity to withhold their consent to be profiled, passengers must have notice of the CAPPS II profiling system before the passenger completes the reservation process.<sup>198</sup> As long as this notice requirement is met, and the passenger has the opportunity to withhold consent (even though that means choosing a different form of travel), then the notice requirement of the administrative search scheme has been met and this exception to the Fourth Amendment permits the government to profile airline passengers. The traveler ultimately controls when and if CAPPS II investigates his background.

Once the justification for searching all passengers can be established, it is a relatively short step to permit officials also to search the baggage to which passengers have access while aboard the plane. Certainly, any search efforts would be thwarted if passengers could sneak weapons past security simply by placing them in a carry-on bag. Since passengers have access to carry-on baggage during the flight, any search of the person must be accompanied by a search of the carry-on baggage. One drawback of the CAPS system was that it failed to require additional searches for passengers traveling without checked luggage,<sup>199</sup> on the assumption that a terrorist identified as a security risk might have hidden an explosive device or weapon in his checked luggage. In fact, the CAPS system identified eleven of the nineteen September 11<sup>th</sup> hijackers, but issued a pass because of this exclusion.<sup>200</sup> Since the terrorists did not check any luggage, they were issued a pass and not identified for further inquiry.<sup>201</sup> CAPPS II removes this shortcoming by screening all passengers with a reservation.<sup>202</sup>

Administrative searches are imposed on all passengers as part of a comprehensive scheme designed to protect the airline industry.<sup>203</sup> To comply with the requirements of such schemes, a profile would have to be designed in good faith<sup>204</sup> to deter passengers from carrying weapons onto aircraft.<sup>205</sup> Thus, a profile cannot be based upon mere stereotypes or generalities. It must contain specific and credible information that can reliably and repeatedly

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<sup>197</sup> U.S. Plan, *supra* note 45.

<sup>198</sup> *Bell*, 464 F.2d at 675.

<sup>199</sup> U.S. Plan, *supra* note 45.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Skean, *supra* note 123, at 576.

<sup>204</sup> *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972).

<sup>205</sup> *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

separate the safe passengers from those who may present a higher risk.<sup>206</sup> Assuming this is possible, the passenger must also have the opportunity to opt out of the search by electing not to fly.

### *C. Profiles and Consent*

Finally, because the Constitution permits citizens to waive their Fourth Amendment rights by consenting to a search or seizure,<sup>207</sup> CAPPS II does not violate the Fourth Amendment. The CAPPSS II system only takes action after a person makes an airline reservation.<sup>208</sup> People choosing not to make reservations for air travel will therefore not trigger the CAPPSS II system.<sup>209</sup> Passengers, in completing a reservation for air travel, give implied consent to undergo a security screening by CAPPSS II.<sup>210</sup> If placing one's bags onto an x-ray machine's conveyor belt indicates his consent to a search of that bag,<sup>211</sup> so can making a reservation indicate one's consent to profiling by the CAPPSS II system. In both cases, the passenger retains complete control over whether the search takes place.

A person's consent to be searched is not valid if the consent was given under duress or coercion.<sup>212</sup> The question of consent with respect to the CAPPSS II system is whether the passenger's consent is actually given freely,

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<sup>206</sup> The Gore Commission referred to the practice of "positive profiling," that is, eliminating from the list of passengers to be given more scrutiny those who are determined not to pose a significant risk based on the presence of positive data, leaving those who are deemed a higher risk and those for whom no determination can be made. See Michael J. AuBuchon, *Choosing How Safe is Enough: Increased Antiterrorist Federal Activity and its Effect on the General Public and the Airport/Airline Industry*, 64 J. AIR L. & COM. 891, 904 (1999).

<sup>207</sup> *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

<sup>208</sup> GAO Report, *supra* note 18, at 6.

<sup>209</sup> As a practical matter, if an airline conditions travel on the passenger's consent to a search, then the passenger must consent to the search in order to board the aircraft. If the passenger does not want to be searched, he can elect not to fly and leave the airport. Of course, this says nothing about the propriety of the search procedures. It merely reflects the fact that passengers not wishing to subject themselves to searches, while free to withhold their consent, may be subtly coerced into giving their consent by the difficulty or impracticality in making alternative travel arrangements.

<sup>210</sup> *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973) (finding implied consent when a passenger sought to fly: (i) during a time of high concern over hijackings; (ii) after the FAA announced its intention to screen all passengers; (iii) when the passenger was an experienced flyer; (iv) when the passenger had seen the signs warning about searches of passengers and baggage; and (v) when the passenger understood the meaning of those signs).

<sup>211</sup> *United States v. Pulido-Baquerzo*, 800 F.2d 899, 902 (9th Cir. 1986).

<sup>212</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

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considering that the alternative to giving consent may involve stranding oneself in a strange city. While air travel was once considered a luxury available only to a few, today it is an affordable, safe, and efficient method of quick transportation. Despite the accessibility of airline transportation, it is still a convenience rather than a right. Other transportation alternatives like cars, buses, boats, and trains remain available. If a passenger chooses not to be profiled, he can make travel arrangements that do not involve planes or security profiling.

Another important question regarding consent and the CAPPS II system is whether one can truly give informed consent to a necessarily secret system. The need to keep the CAPPS II system secret is just one of the factors to be considered in the “totality of the circumstances.”<sup>213</sup> Another factor is the passenger’s ability to avoid the CAPPS II system altogether by not flying. There is and will always be a great need to keep the airline security profile system secret but passengers will blindly face a dilemma: they will not know the details of the system to which they must consent in order to fly. They must either consent to the airline’s thorough but secret investigation of their background or find alternative travel arrangements.

VI. CONCLUSION

Airline security profiles can very effectively review information already in the government’s possession, available in publicly accessible databases, or freely volunteered by the passenger and determine a person’s relative risk to the transportation system. Although passengers must have the opportunity to refuse to consent to airport security searches, they must also understand that the consequence of non-consent to the security profile program is the airlines’ refusal to provide them with tickets. Opting out of this system means opting for alternative travel arrangements. To permit passengers to defeat security measures by claiming an invasion of their privacy would render fruitless all efforts towards airline security.

Claims that CAPPS II violates passengers’ privacy not only frustrates the government’s legitimate goal in securing the transportation industry but also contradicts Fourth Amendment jurisprudence holding that there can be no reasonable expectation of privacy in information freely volunteered to others.<sup>214</sup> Even if one were to conclude that the Fourth Amendment requirements applied in these circumstances, however, the use of CAPPS II can be defended on other Fourth Amendment grounds.

The *Terry* exception permits police to make a decision in the field to search an individual in order to protect the safety of people in the immediate

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<sup>213</sup> *Id.* at 227.

<sup>214</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

vicinity.<sup>215</sup> The governing standard as to the validity of such searches is one that is based on the reasonableness of the encounter, taking all circumstances into account.<sup>216</sup> The CAPPS II profile automates the information gathering and processing functions employed by police in the field. From this, TSA officials may make an informed decision about which passengers to subject to an increased security screening. The demands of national security warrant this type of encounter, since it is only slightly more intrusive than the typical screening procedures to which all passengers are subjected. Using CAPPS II as a security tool is reasonable, given the totality of the circumstances.

National security demands that police and airport security agents have the power to seek out suspected terrorists. This is an extremely important interest that affects the entire nation – flyers and non-flyers alike. As a result, the TSA's use of CAPPS II is permissible on an administrative search basis as long as the system results from a good faith effort to protect the transportation system, remains closely tailored to the administrative goal of deterring passengers from carrying weapons onto planes, and permits passengers to opt out of the profiling process by choosing not to fly.<sup>217</sup>

As part of an expanded airport security system, CAPPS II will play an important role in separating passengers into groups according to their relative risk. The system classifies passengers into one of three categories,<sup>218</sup> the vast majority of which proceed through the airport without further scrutiny.<sup>219</sup> CAPPS II will subject fewer passengers to additional security procedures.<sup>220</sup> Police officers and airport security agents will then be able to concentrate their efforts where they will be most effective, while permitting most passengers to avoid additional scrutiny. The government must respond to the specific circumstances reasonably.<sup>221</sup> CAPPS II balances the need for an efficient screening system with the need for ensuring security at our airports by subjecting all passengers to a minimally intrusive search and then subjecting a few passengers to a more thorough search based on their calculated likelihood of posing a security risk.

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<sup>215</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>216</sup> *Id.* at 19.

<sup>217</sup> United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972).

<sup>218</sup> U.S. Plan, *supra* note 45.

<sup>219</sup> CAPPS II Gives Equal Weight, *supra* note 17.

<sup>220</sup> *Id.*

<sup>221</sup> United States v. Lopez, 328 F. Supp. 1077, 1094-1095 (E.D.N.Y. 1971).