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TSA Profiling, Security Theater, and the Fourth Amendment

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This weekend, *The New York Times* reported that the Transportation Security Administration's "behavioral detection" program at Logan Airport has devolved into a racial profiling program, according to complaints from 32 federal officers who've seen up-close how it works. And yet to my eye, racial profiling isn't the only constitutionally problematic aspect of the program revealed in the article (emphasis mine below):

In interviews and internal complaints, officers from the Transportation Security Administration's "behavior detection" program at Logan International Airport in Boston asserted that passengers who fit certain profiles — Hispanics traveling to Miami, for instance, or blacks wearing baseball caps backward — are much more likely to be stopped, searched and questioned for "suspicious" behavior.

"They just pull aside anyone who they don't like the way they look — if they are black and have expensive clothes or jewelry, or if they are Hispanic," said one white officer, who along with four others spoke with The New York Times on the condition of anonymity. […]

At a meeting last month with T.S.A. officials, officers at Logan provided written complaints about profiling from 32 officers, some of whom wrote anonymously. ***Officers said managers' demands for high numbers of stops, searches and criminal referrals had led co-workers to target minorities in the belief that those stops were more likely to yield drugs, outstanding arrest warrants or immigration problems.***

Since everyone seems to be in agreement that the alleged profiling at the focus of the story is grossly unacceptable, I want to focus on what appears to have given rise to it: Managerial pressure to use TSA screenings as a means of enforcing drug laws and other ordinary criminal statutes, apparently resulting in a system of *de facto* quotas for "criminal referrals." Even if this goal were being

pursued without the use of racial profiling, it would be problematic, because the constitutionality of TSA searches is premised on the idea that they are *not* conducted for ordinary law enforcement purposes. We now seem to take for granted that narcotics interdiction is a legitimate aim of warrantless TSA searches—even on domestic flights not subject to the Fourth Amendment's "border search" exception—but if we hew closely to the legal rationale for these searches, it's not at all clear that ought to be the case.

Thanks to the Fourth Amendment, government agents cannot *normally* demand that we submit to intrusive, suspicionless searches as a condition of exercising our right to travel. In one 2000 case, the Supreme Court held that a police officer had violated the rights of a bus passenger by merely squeezing the outside of his carry-on bag, never mind conducting one of the "enhanced" pat-downs for which TSA has become infamous. The legal rationale for making an exception for airlines can be traced to a string of cases from the early 1970s, in which courts developed a "special needs" doctrine, largely in response to a string of high-profile plane hijackings in the 60s, creating an exemption from the Fourth Amendment's warrant requirement under certain circumstances. Once crucial test was that such warrantless "special needs" searches had to be conducted for the purpose of protecting public safety, not simply for carrying out ordinary criminal investigations or law enforcement functions.

As the 9/11 attacks showed, a hijacked airplane can be transformed into an incredibly destructive weapon. But bulletproof cockpit doors, new training for airline staff, and changed passenger behavior are the most important reasons a 9/11-style hijacking attempt would be extraordinarily unlikely to succeed today. Thus, as a recent House Transportation Committee report noted, "the primary threat is no longer hijacking, but explosives designed to take down an aircraft." But that's a problem we had pretty well in hand under the older, less intrusive procedures: No passenger has detonated a smuggled bomb on a U.S.-originating flight since 1962, though given TSA's consistently lackluster performance in spotting dummy bombs in tests, it's not clear how far that should be ascribed to gate searches. TSA does seize quite a few guns, mostly from the bags of people who'd forgotten about a legal firearm—along with pocket knives, corkscrews, and other contraband, much of which is later auctioned off. And of course, they turn up narcotics—though occasionally TSA screeners find it more lucrative *not* to turn them up.

If we take the Fourth Amendment seriously, we should demand strong justifications for departures from its core requirements, and take care to prevent the exceptions from swallowing the rule. We shouldn't just ask whether there's some legitimate safety or security purpose that might justify some form of search, but whether the scope and intrusiveness of the search is calibrated to the rationale for the exception. Police officers can pat-down detained persons for

weapons to ensure their own safety—but that doesn't entitle them to search, say, a locked container out of the suspect's reach. The question, in other words, should be whether the intrusiveness of the search reasonably serves the claimed security purpose, or whether its practical effect is, in reality, to serve ordinary law enforcement purposes with little marginal security benefit. And, indeed, some courts have held airport searches to be unlawful when they strayed too far from legitimate security purposes.

If these officers' allegations are accurate, the problem with the program they describe is not just that it employed racial profiling, but that it wasn't limited to profiling for security threats. Rather, it subjected passengers to additional intrusive searches in for the ordinary law enforcement purpose of detecting narcotics. And these were hardly incidental or exceptional: The officers estimated that 80 percent of stops and follow-up searches "focused on stopping minority members in response to pressure from managers to meet certain threshold numbers for referrals to the State Police, federal immigration officials or other agencies. " Such a program of searches simply cannot reasonably be said to be properly aimed at the purpose of serving the "special needs" of airport security. This kind of systematic exploitation of the security exception as a loophole for law enforcement searches is, perhaps, too routine now to raise an eyebrow—the *Times* makes no comment on it—but it should.