

WHAT PRICE DOES SOCIETY HAVE TO PAY FOR SECURITY? A LOOK AT THE AVIATION WATCH LISTS

JAMES FISHER*

I. INTRODUCTION

Ms. Maya Shaikh is an American citizen and graduate of Stanford University School of Law. She resides in Honolulu, Hawaii with her fourteen-year-old daughter. On January 2, 2005, she arrived at Honolulu International Airport to attend her law firm's quarterly meeting in New York City. She approached the ticket counter and presented her reservation information to the ticket agent. Subsequently, an American Airlines supervisor approached Ms. Shaikh and requested her reservation information. The supervisor called the Honolulu Police Department and two officers were dispatched to the ticket counter. The officers notified Ms. Shaikh that her name was on the No-Fly List. The officers then seized Ms. Shaikh's luggage, driver's license, and reservation information and asked her to follow them into an interrogation room. The police officers questioned Ms. Shaikh and searched her person and luggage. No weapons or prohibited articles were found in the officer's search.

After waiting in the interrogation room for an hour and a half, an agent from the Federal Bureau of Investigation ("FBI") arrived and arrested Ms. Shaikh. Ms. Shaikh was handcuffed and led through the airport in front of her fourteen-year-old daughter and other airport patrons. Ms. Shaikh was taken to the Honolulu Police Station and placed in a holding cell. After approximately two hours, she was released and informed that her name had been removed from the

* Willamette University School of Law, J.D. expected 2008; Embry-Riddle Aeronautical University, B.S. 2003. I would like to thank Professor Gilbert Paul Carrasco, the editors and staff of Willamette Law Review, and Courtney Quale for their invaluable advice and editorial skills. I would also especially like to thank my wife, Kimberly Fisher, for her advice and encouragement throughout the drafting of this Note. Finally, I would like to dedicate this Note to the memory of my Father, who inspired my interest in aviation.

No-Fly List. On the following day Ms. Shaikh discovered that her name was still on the No-Fly List.

Subsequent to Ms. Shaikh's detainment, she has been subjected to increased security screenings and interrogations every time she has attempted to fly. When Ms. Shaikh contacted the Transportation Security Administration ("TSA") to clear her name from the No-Fly List, she was informed that her name could not be removed and this was the price she and society has to pay for security.

The above illustration highlights the constitutional downfalls that stem from reactionary legislation. The attacks of September 11, 2001 created feelings of hatred and anger for many Americans.¹ Americans and the United States government, however, tend to forget the teaching history has provided. The World War II Japanese internment camps, the Red Scare and the McCarthy-era internal subversion cases, as highlighted by Justice Marshall, provide "extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."² Congress has once again placed national security before constitutional rights by denying due process to persons on aviation watch lists and by subjecting such persons to unreasonable searches and seizures.³

This Note first discusses the history and use of the aviation watch lists by the government. The term "aviation watch lists," as referred to in this Note denotes two lists.⁴ The first list, known as the No-Fly List, contains the names of individuals prohibited from flying.⁵ The second list, known as the Selectee List, contains the names of individuals who must be subjected to enhanced security screening before being allowed into secured areas of airports or onto aircraft.⁶ Secondly, this Note provides an in-depth look into the violations of civil liberties implemented by the government after September 11, 2001 ("9-11") through the use of the aviation watch lists.

1. Ali Khan, *Attack On America: An Islamic Perspective*, JURIST, Sept. 17, 2001, available at <http://jurist.law.pitt.edu/forum/forumnew29.htm>.

2. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

3. *See Ibrahim v. Dep't of Homeland Sec.*, 2006 WL 2374645 (2006) (rejecting a constitutional challenge to "No-Fly Lists").

4. *Green v. Transp. Sec. Auth.*, 351 F. Supp. 2d 1119, 1121 (W.D. Wash. 2005).

5. *Id.*

6. *Id.*

In closing, this Note highlights potential safeguards that could ensure the safety of the general public without the deprivation of civil liberties.

II. REGULATING THE AVIATION INDUSTRY

The Federal Aviation Administration (“FAA”), prior to 9-11, was the government agency in charge of aviation security.⁷ Congress granted the FAA broad authority through the Federal Aviation Act to set policies, proscribe regulations, and issue orders governing the aviation industry.⁸ This authority included the ability to develop activities and devices for the protection of passengers and property from aircraft piracy and terrorism.⁹ The FAA utilized its authority and regulatory control over air carriers by transferring the security responsibilities to these entities.¹⁰ Air carriers, however, were provided discretion in how to meet the security requirements, and therefore performed to the minimally required federal standard.¹¹ In an effort to cut costs, the majority of air carriers contracted with independent security firms.¹² These firms, in order to ensure they received the contract, provided poor training and underpaid their employees tasked with ensuring the security of America’s aviation infrastructure.¹³

Congress, in order to regain Americans’ confidence in flying after 9-11, federalized the function of airport security pursuant to the Aviation and Transportation Security Act (“ATSA”).¹⁴ The ATSA created the TSA within the United States Department of Transportation (“DOT”).¹⁵ This multimodal administrative agency was granted authority over the security of civil aviation, removing

7. 49 U.S.C. § 40113 (2000).

8. *Id.*

9. 49 U.S.C. § 40119 (2000).

10. PRESIDENT’S COMMISSION ON AVIATION SECURITY AND TERRORISM, REPORT TO THE PRESIDENT 32–33 (May 15, 1990); Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT’L L. 649, 721 (2003) (finding that of the 102 nations with international airports, only the United States, Canada, and Bermuda allowed private entities to control the security of its aviation infrastructure).

11. Dempsey, *supra* note 10, at 721.

12. *Id.*

13. *Id.*

14. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 49 U.S.C.; 5 U.S.C. §§ 5313, 8331; 26 U.S.C. § 9502; 31 U.S.C. § 1105).

15. *Id.*

control from the air carriers.¹⁶ The ATSA also provided the TSA, under the leadership of the Under Secretary for Border Transportation and Security, the ability to perform research and develop activities that preserve civil aviation security.¹⁷

III. PROFILING IN AVIATION

Air carriers currently use a system known as Computer Assisted Passenger Pre-Screening System (“CAPPS”) to profile passengers.¹⁸ CAPPS uses behavioral characteristics, including the type of payment utilized and duration of the trip, as well as the aviation watch lists to determine if a passenger poses a threat to aviation.¹⁹ The federal government has made many attempts to incorporate the aviation watch lists into a profiling system more advanced than CAPPS.²⁰ Every attempt to date, however, has failed due to the lack of constitutional protections afforded to passengers who are “flagged” as a security threat.²¹ While the aviation watch lists component of CAPPS and other proposed advanced profiling systems create the majority of concerns, these systems warrant discussion due to their involvement and interrelation with the aviation watch lists.

A. CAPPS

President Bill Clinton established the White House Commission on Aviation Safety and Security in the late 1990s after the mysterious in-flight breakup of Trans World Airlines (“TWA”) Flight 800 and increased threats of terrorist activity.²² This Commission’s task was to develop and recommend a “strategy designed to improve aviation safety and security, both domestically and internationally.”²³ The Commission recommended in its final report that an automated profiling system be implemented.²⁴ CAPPS was subsequently

16. 49 U.S.C. § 114 (d) (2000).

17. 49 U.S.C. § 114(f)(8) (2000).

18. U.S. GENERAL ACCOUNTABILITY OFFICE, AVIATION SECURITY: SECURE FLIGHT DEVELOPMENT AND TESTING UNDER WAY, BUT RISKS SHOULD BE MANAGED AS SYSTEM IS FURTHER DEVELOPED 8 (Mar. 2005), available at <http://www.gao.gov/new.items/d05356.pdf>.

19. *Id.* at 8–9.

20. *Id.* at 9–11.

21. *See id.* at 7, 10.

22. Dempsey, *supra* note 10 at 709–10.

23. Exec. Order No. 13015, 61 Fed. Reg. 43,937 (Aug. 27, 1996).

24. AL GORE ET AL., WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY FINAL REPORT TO PRESIDENT CLINTON 3.19 (Feb. 12, 1997), available at

implemented in 1998.²⁵

CAPPS separates passengers into two groups, those who require enhanced security screening or are barred from flight and those who require general security screening.²⁶ This determination is made based on the program's analysis of the potential passengers' behavioral characteristics and the government's supplied aviation watch lists.²⁷ The intent of CAPPS was to increase airport security without causing significant delays for all aircraft passengers.²⁸

Prior to the implementation of CAPPS, the Commission on Aviation Safety and Security sought advice from civil liberties experts, who in turn provided recommendations to the Commission.²⁹

<http://www.fas.org/irp/threat/212fin~1.html>.

25. Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 712 (2004).

26. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, AVIATION SECURITY COMPUTER-ASSISTED PASSENGER PRESCREENING FACES SIGNIFICANT IMPLEMENTATION CHALLENGES 5 (Feb. 2004), available at <http://www.gao.gov/new.items/d04385.pdf>.

27. Rosenzweig, *supra* note 25, at 712.

28. GORE ET AL., *supra* note 24.

29. *Id.* at appendix A. The following is a list of the recommendations provided to the commission by civil liberties experts:

Should the Commission decide to recommend an automated profiling system, we urge the Commission to include the following principles among its recommendations (without suggesting that this exhausts the possible civil liberties concerns):

1. Any profile should not contain or be based on material of a constitutionally suspect nature—e.g., race, religion, national origin of U.S. citizens—and should be consistent with the constitutional right of freedom to travel.

2. Factors to be considered for elements of the profile should be based on measurable, verifiable data indicating that the factors chosen are reasonable predictors of risk, not stereotypes or generalizations. Efforts should be made to avoid using characteristics that impose a disproportionate burden of inconvenience, embarrassment, or invasion of privacy of members of minority racial, religious or ethnic groups. Law enforcement data should be used with caution and only to the extent that the data used is a reasonable predictor of risk, because these data may be incomplete or inaccurate and may not be directly relevant to the goal of enhancing aviation security.

3. Passengers should be informed of the airlines' security procedures and of their right to avoid any search of their person or luggage by electing not to board the aircraft. When the use of an automated profiling system leads to a request to open luggage or to submit to a personal search, an explicit reminder of the option not to board the aircraft should be given.

4. Searches arising from the use of an automated profiling system should be no more intrusive than search procedures that could be applied to all passengers. For example, imaging devices which project an image of a passenger's body underneath his or her clothing should not be used on a passenger solely because the passenger

The panel of civil liberties experts specifically noted that “[l]aw enforcement data should be used with caution and only to the extent that the data used is a reasonable predictor of risk, because this data may be incomplete or inaccurate and may not be directly relevant to the goal of enhancing aviation security.”³⁰ A year after its implementation, CAPPS was limited to screening only passengers’ checked luggage due to the public criticism and potential violation of individuals’ civil liberties.³¹

After 9-11, Congress disregarded the concerns surrounding individuals’ civil liberties and ordered CAPPS to once again determine which passengers and carry-on luggage would be subjected to enhanced security screening.³² Congress also authorized the creation of the next generation profiling system: Computer Assisted Passenger Pre-Screening System II (“CAPPS-II”).³³

fits the profile or has been selected at random. The procedures applied to those who fit the profile should also be applied on a random basis to some percentage of passengers who do not fit the profile.

5. Procedures for searching the person or luggage of, or for questioning, a person who is selected by the automated profiling system should be premised on insuring respectful, non-stigmatizing, and efficient treatment of all passengers.

6. The panel is concerned that the maintenance or dissemination of records compiled in connection with an automated profiling system may invade the privacy of passengers. Reasonable restrictions on the maintenance of records and strict limitations on the dissemination of records should be developed. To the extent that records are maintained, there should be means for passengers to challenge the accuracy of personally identifiable information.

7. An independent panel should be appointed and given appropriate authority to monitor implementation of airport security procedures to insure that they do not unduly limit the exercise of civil liberties of the traveling public and do not unduly require augmented searches of the person or baggage of any particular group or groups.

8. Any profiling system should have a sunset provision which requires it to be terminated by a date certain unless an affirmative decision is made to continue use of the system. The assessment of the system should take account of its efficacy and necessity in light of improvements in detection technology as well as the civil liberties impact of the program.

9. Air carrier security plans submitted for approval by the Federal Aviation Administration to implement an automated profiling system should be consistent with these guidelines.

Id.

30. *Id.*

31. Michael J. DeGrave, *Airline Passenger Profiling and the Fourth Amendment: Will CAPPS II be Cleared for Takeoff?*, 10 B.U. J. SCI. & TECH. L. 125, 130 (2004).

32. *Id.* at 131; Rosenzweig, *supra* note 25, at 712.

33. DeGrave, *supra* note 31, at 131.

B. CAPPS-II

The improvements CAPPS-II would have over CAPPS mostly stemmed from the ownership and control of the new system by the federal government.³⁴ By providing the federal government with control, the system was expected to be a “more effective and efficient use of up-to-date intelligence information and [to] make CAPPS-II more capable of being modified in response to changing threats.”³⁵

Like CAPPS, CAPPS-II was designed to allow TSA to obtain passenger name records, including a passenger’s address, telephone number, date of birth, and other information about his or her itinerary for the purpose of authenticating identity.³⁶ CAPPS-II would also utilize the aviation watch lists to determine whether a passenger was a known terrorist or linked to a “known terrorist or terrorist organization.”³⁷

Concerns that CAPPS-II would violate individuals’ privacy and civil liberties were raised by organizations like the American Civil Liberties Union (“ACLU”) prior to its implementation.³⁸ Congress, in the Vision 100-Century of Aviation Reauthorization Act (“Vision 100 Act”), elected to address these concerns by directing the TSA to determine how the system dealt with errors, such as false positives, and the procedural challenges available to passengers who are prevented from traveling by air.³⁹ The United States General Accounting Office (“GAO”) reported in February 2004 that the TSA had not adequately addressed the concerns provided by the Vision

34. See Privacy Act of 1974: System of Records, 68 Fed. Reg. 45265-01, 45266 (Transp. Sec. Admin. Aug. 1, 2003) (request for further comments to establish a new system of records under the Privacy Act, known as the Passenger and Aviation Security Screening Records). Prior to 9-11, CAPPS was used by air carriers to evaluate passengers. Air carriers controlled CAPPS through their reservation systems. Francine Kerner and Margot Bester, *The Birth of the Transportation Security Administration: A View from the Chief Counsel*, 17-SUM Air & Space Law. 1, 22 (2002).

35. U.S. GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMM, ON AVIATION, COMM. ON TRANSPORTATION AND INFRASTRUCTURE, HOUSE OF REPRESENTATIVES: AVIATION SECURITY CHALLENGES DELAY IMPLEMENTATION OF COMPUTER-ASSISTED PASSENGER PRESCREENING SYSTEM 4–5 (Mar. 2004), available at <http://www.gao.gov/new.items/d04504t.pdf>.

36. Privacy Act of 1974: System of Records, 68 Fed. Reg. at 45266.

37. *Id.*

38. American Civil Liberties Union, Letter to the Department of Transportation on “Aviation Security Screening Records,” 68 Fed. Reg. 2101 (January 15, 2003).

39. Vision 100-Century Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2490 § 607 (codified at 49 U.S.C. § 44903 (2003)).

100 Act.⁴⁰ The TSA and White House therefore dissolved the pursuit of CAPPS-II since the system was unable to accommodate the policy concerns voiced by Congress.⁴¹

C. Secure Flight

On August 23, 2007, the TSA provided notice of proposed rulemaking for Secure Flight.⁴² Secure Flight is noted as being an automated system that would “assume the watch list matching function from aircraft operators and to more effectively and consistently prevent certain known or suspected terrorists from boarding aircraft where they may jeopardize the lives of passengers and others.”⁴³ Secure Flight is designed to:

Identify known and suspected terrorists; Prevent individuals on the No-Fly List from boarding an aircraft; Identify individuals on the Selectee List for enhanced screening; Facilitate passenger air travel by providing fair, equitable and consistent matching process across all aircraft operators; and Protect individuals’ privacy.⁴⁴

Secure Flight does not appear to address many of the constitutional concerns that plagued both CAPPS and CAPPS-II. The ACLU noted that Secure Flight does not provide for meaningful due process, access to data, the right to challenge data used to include a person on the aviation watch lists, or procedures for removing names from the lists.⁴⁵ If Secure Flight is to be an effective and constitutional profiling system, it must direct its attention and oversight to true terrorist activity that poses a significant threat to air travel while upholding passengers’ civil liberties.

40. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 26, at 4.

41. Mimi Hall and Barbara DeLollis, *Plan to Collect Flier Data Canceled*, USA TODAY, July 14, 2004, available at http://www.usatoday.com/news/washington/2004-07-14-fly-plan_x.htm; Stephen W. Dummer, Comment, *Secure Flight and Data Veillance, a New Type of Civil Liberties Erosion: Stripping Your Rights when You Don't Even Know It*, 75 MISS. L.J. 583, 590 (2006).

42. Secure Flight Program, 72 Fed. Reg. 48356-01 (Transp. Sec. Admin. Aug 23, 2007) (notice of proposed rule making for Secure Flight).

43. *Id.* at 48357.

44. Transportation Security Administration, Secure Flight Program Layers of Security, http://www.tsa.gov/what_we_do/layers/secureflight/index.shtm (last visited on Oct. 27, 2007).

45. American Civil Liberties Union, The Four Biggest Problems with the “Secure Flight” Airline Security Program, <http://www.aclu.org/privacy/gen/15312res20050324.html> (last visited on Oct. 27, 2007).

IV. THE AVIATION WATCH LISTS

A. Introduction

The TSA established aviation watch lists by issuing a security directive pursuant to its authority set forth at 49 U.S.C. § 114(1)(2)⁴⁶ for the purpose of restricting air travel to those who “pose a risk to aviation safety.”⁴⁷ The aviation watch lists are distributed to airport security, local police officers, and other federal agencies for enforcement.⁴⁸ Most of the information regarding the aviation watch lists, such as what criteria is used to place persons on the lists and how the data is derived, are unknown due to the security concerns of the federal government.⁴⁹ The federal government speculates that if it were known how names were placed on the aviation watch lists, terrorists would find ways to bypass the lists and cause harm to America’s aviation infrastructure.⁵⁰

Irrespective of the secrecy surrounding the aviation watch lists, Columbia Broadcasting System (“CBS”) obtained a copy of the lists in 2006. The No-Fly List in paper form totaled five hundred forty pages and contained forty-four thousand names.⁵¹ The Selectee List, on the other hand, contained seventy-five thousand names.⁵² The ACLU speculated in September 2007, approximately a year and a half after the publication of CBS’s copy of the aviation watch lists, that the lists currently contained an astonishing five hundred to seven hundred thousand names.⁵³ These numbers are a drastic increase from the sixteen reported names on the watch lists prior to 9-11.⁵⁴

46. 49 U.S.C. § 114(1)(2) (2007) (provides the Under Secretary authorization to issue security directives as are necessary to carry out the functions of the Transportation Security Administration).

47. *Green v. Transp. Sec. Auth.*, 351 F. Supp. 2d 1119, 1121 (W.D. Wash. 2005).

48. AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, FBI DOCUMENTS FAIL TO REVEAL HOW THE “NO FLY” LIST MAKES AMERICANS SAFER 1 (Dec. 3, 2003), available at http://www.aclu.org/FilesPDFs/analysis_fbi_nofly.pdf.

49. Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2155–57 (2006).

50. Steve Kroft, *Unlikely Terrorist on No Fly List*, June 10, 2007, <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624.shtml>.

51. *Id.*

52. *Id.*

53. Transcript of Public Meeting on TSA Secure Flight Program, held by the Transportation Security Administration 73 (Sept. 20, 2007), available at http://www.tsa.gov/assets/pdf/sf_public_meeting_transcript.pdf.

54. Kroft, *supra* note 50.

The aviation watch lists are maintained in the Terrorist Screening Database (“TSDB”) at the FBI’s Terrorist Screening Center (“TSC”).⁵⁵ The Attorney General established the TSC through coordination with the Secretary of State, Director of the Central Intelligence Agency (“CIA”), the Secretary of Defense, Secretary of the Treasury, and the Secretary of Homeland Security.⁵⁶

This Note is not concerned with known terrorists whose names are placed on the aviation watch lists. What is of concern, however, is that these lists contain the names of many American citizens including ministers, lawyers, military service persons, and other highly respected members of American society who are being deprived of due process and routinely searched and detained in a manner inconsistent with the Fourth Amendment.⁵⁷

B. What if There is a Mistake?

The aviation watch lists have constitutional problems as well as secretarial and implementation problems. Joe Trento of the National Security News Service and 60 Minutes reporters spent many months combing through the aviation watch lists and noted that the lists contained many errors, such as including the names of the deceased⁵⁸ and persons who are currently serving life sentences.⁵⁹ While many might not see the problem with including these persons on the aviation watch lists, anyone whose name is similar to or the same as these persons will be accosted any time they attempt to travel by air. Including names of persons who no longer pose a threat to national security creates bloated lists useless for their intended purpose.

The government’s position on persons who are regularly accosted because they share common names with those intended to be on the aviation watch lists, such as Gary Smith, John Williams, or Robert Johnson, is that this is “a price society and anyone named Robert Johnson has to pay for security.”⁶⁰ Such a statement is

55. U.S. DEPARTMENT OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE SECURE FLIGHT PROGRAM 2 n.1 (Aug. 9, 2007), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_secureflight.pdf.

56. *Id.* at 3 n.8.

57. Complaint at 2–3, *Green v. Transp. Sec. Admin.*, No. CV04-07632 (W.D. Wash., Apr. 26, 2004), available at http://www.aclu.org/images/asset_upload_file102_24159.pdf.

58. Among the deceased were 14 of the 19 terrorist hijackers from 9-11.

59. Kroft, *supra* note 50.

60. *Id.* (statement by Donna Bucella, head of the FBI’s Terrorist Screening Center, which is responsible for evaluating security information and compiling the No Fly List).

repulsive and inconsistent with the Constitution. The aviation watch lists allow air carriers and the federal government to continually violate a passenger's Fourth Amendment right and treat a passenger as though they are a threat to national security without providing due process.

Another problem facing the aviation watch lists, although it might seem ironic, is the lack of names included on the lists.⁶¹ Although the aviation watch lists include well over 100,000 names, some of the most dangerous terrorists are not included on the lists because intelligence agencies do not want non-government employees using this information for fear that this information could end up in the hands of terrorists.⁶² This in itself is alarming and denotes the dysfunction that plagues the aviation watch lists.

C. Is There a Process to Remove Names from the Aviation Watch Lists?

Currently, the government does not provide adequate recourse for persons whose names are on the aviation watch lists. The TSA has established the Department of Homeland Security's Travel Redress Inquiry Program ("DHS TRIP") for persons who "seek resolution regarding difficulties they experienced during their travel screening at transportation hubs."⁶³ The government's recourse under DHS TRIP for potential constitutional violations is the ability for a passenger to fill out an on-line form, which ultimately might or might not resolve the individual's travel-related concerns.⁶⁴ This process does not provide the passenger a meaningful opportunity to be heard on the evidence against him or her, nor does it provide redress from future searches and delays.⁶⁵

The ACLU best described the current DHS TRIP process as "opaque," meaning no one knows how the appeals process actually works other than those who are directly involved, which does not include the person whose rights have been deprived.⁶⁶

61. *Id.*

62. *Id.*

63. DHS: DHS Travelers Redress Inquiry Program (DHS TRIP), http://www.dhs.gov/xtrvlsec/programs/gc_1169676919316.shtm (last visited Jan. 25, 2008).

64. *Id.*

65. *Id.*

66. Public Meeting on TSA Secure Flight Program, *supra* note 53, at 74.

This process is inconsistent with the due process required when a person has been deprived of their civil liberties.⁶⁷

D. Publication of the Aviation Watch Lists

There have been many attempts to obtain information about the aviation watch lists through the use of Freedom of Information Act (“FOIA”) request. The most noticeable suit to arise from such a request is *Gordon v. FBI*.⁶⁸ In *Gordon*, the court noted that the FBI had a clear law enforcement mandate that allowed for a FOIA exception if the FBI could “establish a ‘rational nexus’ between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.”⁶⁹ The FBI contended that disclosure of the aviation watch list selection criteria, procedures for dissemination of the lists, procedures for handling name matches, raising and addressing perceived problems in security measures, and compilation of the lists (involving such things as the adding or removing of names), would permit individuals to devise a plan that would allow them to circumvent procedures designed to protect the aviation industry.⁷⁰ The court recognized the public’s substantial interest in knowing how the aviation watch lists were created and implemented; however, the court found the government’s argument more compelling and held that disclosing the requested information would provide assistance to terrorists in “circumventing the purpose of the watch lists.”⁷¹

V. THE DUE PROCESS CLAUSE

A. Introduction

Passengers adversely affected by the aviation watch lists currently receive no form of due process.⁷² Passengers routinely discover that their names are on one of the aviation watch lists when they attempt to check in for a scheduled flight. This denial of rights should be considered a violation of the Due Process Clause of the

67. See *infra* Section V.

68. 388 F. Supp. 2d 1028 (N.D. Cal. 2005).

69. *Id.* at 1035 (citing *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995)).

70. *Id.* at 1035–36.

71. *Id.*

72. See *supra* text accompanying notes 63–65.

Constitution because passengers are being erroneously deprived of their liberty to travel and to maintain their standing in the community by the government without notice of the deprivation and an opportunity to be heard within a meaningful time and manner.⁷³

The first inquiry in the due process analysis is whether an individual has been deprived of a protected interest in liberty.⁷⁴ If a deprivation is found, the analysis must continue to determine whether the government's "procedures comport with due process."⁷⁵

i. Liberty Interest

1. Denial of a Constitutional Right to Travel

The Supreme Court has refused to provide a formal definition of liberty under the Constitution.⁷⁶ The Court has stated "that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."⁷⁷ While no specific clause of the Constitution provides an explicit right to interstate travel, the Supreme Court has recognized such a right since its early days.⁷⁸ Justice Samuel Miller in 1867 stated "[w]e are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."⁷⁹ This right to travel has been further defined by the Court as "a part of the 'liberty' of which the citizen cannot be deprived without the due process of law"⁸⁰ and includes the right "to use the highways and other instrumentalities of interstate commerce in doing so."⁸¹ In *Kent v. Dulles*, the Supreme Court further stated that the right to travel is as "close to the heart of the individual as the choice of what he eats, or wears, or reads."⁸²

73. U.S. CONST. amend. V; *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

74. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

75. *Id.*

76. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

77. *Id.*

78. *Crandall v. Nevada*, 73 U.S. 35, 49 (1867).

79. *Id.*

80. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

81. *United States v. Guest*, 383 U.S. 745, 757 (1966).

82. *Kent*, 357 U.S. at 126.

The Supreme Court has yet to determine whether restrictions on aviation as a particular mode of travel would violate the right to travel. The U.S. District Court for the Western District of Washington and the Ninth Circuit, however, have both held that a passenger does not have a fundamental right to air travel because “the Constitution does not guarantee the right to travel by any particular form of transportation.”⁸³ In support of its decision, the Ninth Circuit looked to its previous decision in *Miller v. Reed*, where it determined that the right to interstate travel was not unconstitutionally impeded by the denial of a single mode of transportation.⁸⁴ The court’s logic and interpretation of *Miller* is misguided. In *Miller*, the court noted that “[t]he plaintiff is not being prevented from traveling interstate by public transportation, by common carrier, or in a motor vehicle driven by someone with a license to drive it.”⁸⁵ The court relied on other means of transportation to support its conclusion.⁸⁶ Also, the court in *Miller* only limited a single mode of transportation, whereas limiting access to commercial air travel would be a complete bar to a person’s access to federal airways and air travel.

Furthermore, the Ninth Circuit’s decision is inconsistent with the treatment the Supreme Court has recognized for access to air travel.⁸⁷ The Court has provided due process for specific individuals targeted by international travel bans.⁸⁸ With the Court interpreting the right to interstate travel as fundamental, it would be inconsistent with this conclusion to hold that an individualized ban on international travel requires due process, while such bans on domestic travel do not.⁸⁹

The Ninth Circuit’s decision is also inconsistent with the Supreme Court’s treatment of non-fundamental travel impediments.⁹⁰ It is well established that “driving is a privilege, not a right.”⁹¹ With

83. *Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 929 (2007).

84. *Id.* at 1136–37.

85. *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (quoting *Berberian v. Petit*, 374 A.2d 791, 794 (R.I. 1977)).

86. *Id.*

87. *See Florence*, *supra* note 49, at 2161–62.

88. *Aptheker v. Sec’y of State*, 378 U.S. 500, 505 (1964) (holding that portions of the Subversive Activities Control Act were too broadly and indiscriminately restrictive to the right to travel).

89. *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law . . .”).

90. *See Bell v. Burson*, 402 U.S. 535, 540–42 (1971).

91. Christina J. Nielsen, Comment, *The Foreclosure of Double Jeopardy in*

this in mind, the Supreme Court in *Bell v. Burson* held that a state could not deprive a person of a driver's license without due process.⁹² Therefore, regardless of whether air travel is fundamental in nature, due process must be provided.

In light of the Supreme Court's decisions, it is clear that due process is required for passengers banned from travel based solely on their names appearing on the No-Fly List. This begs the question: are passengers whose names are on the Selectee List provided the same protection? Since passengers on the Selectee List are not denied their right to interstate travel, the courts are likely to hold that due process is not required under this analysis, unless the additional searches and interrogations routinely required of such passengers are a major restriction to interstate travel.⁹³ Regardless of whether the courts determine that such treatment is a major restriction to interstate travel, passengers whose names are on the Selectee List are still required due process when the government's action damages the passenger's standing in the community as set forth below.

2. *Harming One's Reputation*

Due process is required prior to governmental action that would cause stigma and reputational harm to a person's standing in the community.⁹⁴ The Supreme Court set forth the "Stigma-Plus Test" in *Paul v. Davis*.⁹⁵ This test requires the "public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, *plus* the denial of 'some more tangible interest' . . ." prior to holding that a liberty interest has been violated and therefore requires due process.⁹⁶

Passengers who have been notified by airport security and either prohibited from a flight or subjected to increased security screening meet the proscribed Stigma-Plus Test. It has been demonstrated that passengers who are on the aviation watch lists "are sometimes informed, in full view of others waiting in line, that their names are on a federal security list. This results in significant embarrassment

Administrative License Suspensions and Civil Asset Forfeitures Following United States v. Ursery, 65 UMKC L. REV. 104, 115 (1996).

92. *Bell*, 402 U.S. at 542.

93. *See Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991).

94. *See Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971).

95. 424 U.S. 693, 701 (1976).

96. *Ulrich v. City & County of S.F.*, 308 F.3d 968, 982 (9th Cir. 2002).

and humiliation to the passenger, as fellow passengers and the traveling public subsequently regard the innocent passenger with suspicion or fear.”⁹⁷ Furthermore, TSA has clearly publicized that the aviation watch lists are “reserved for individuals that pose a known threat to aviation.”⁹⁸ Therefore, notification in full view of other passengers constitutes the stigmatization the Supreme Court was referring to in *Constantineau*.⁹⁹

The “plus” requirement of the test is satisfied when the government’s aviation watch lists require air carriers to either deny a passenger access to air travel or require the passenger to undergo enhanced security screening. The Court in *Constantineau* held that a law publicizing the defendant’s inability to purchase alcohol stigmatized and publicly disgraced him, violating his due process rights.¹⁰⁰ Passengers whose names are on the aviation watch lists are routinely subjected to interrogations, enhanced security screenings, and significant delays before either being allowed or denied access to air travel.¹⁰¹ But for the passenger’s name appearing on the aviation watch lists, minimally intrusive security screening would be provided. The interrogations, enhanced security screenings, and denial of access to air travel extends beyond damage solely to a passenger’s reputation and clearly meets the burden established by the Supreme Court’s Stigma-Plus Test.

It has been suggested that passengers whose names are on the aviation watch lists will not be afforded due process based on the reputational harm suffered because the lists are not published.¹⁰² That argument is based on the Supreme Court’s decision in *Bishop v. Wood*.¹⁰³ In *Bishop*, the Court held that a person’s liberty interest is

97. Complaint, *Green v. Transp. Sec. Admin.*, No. CV04-07632 (W.D. Wash., Apr. 26, 2004), available at http://www.aclu.org/images/asset_upload_file102_24159.pdf.

98. Transportation Security Administration, *Mythbusters: The “No Fly” List Includes an 8-Year Old Boy*, http://www.tsa.gov/approach/mythbusters/8yo_noflylist.shtm (last visited Jan. 25, 2008).

99. See *Constantineau*, 400 U.S. at 435. It is this author’s opinion that providing retail liquor outlets notices that sales to a person are forbidden for one year is substantially similar to the government providing air carriers list of passengers who are banned from flight or require enhanced security screening prior to a flight.

100. *Id.* at 437.

101. *Recommendations of the 9/11 Commission Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security and of the Committee on the Judiciary*, 108th Cong. 84 (2004).

102. Soumya Panda, Comment, *The Procedural Due Process Requirements for No-Fly Lists*, 4 PIERCE L. REV. 121, 135 (2005).

103. *Bishop v. Wood*, 426 U.S. 341 (1976).

not deprived where statements, regardless of their truth, are not published.¹⁰⁴ The decision in *Bishop*, however, greatly differs from the context of notice received by passengers whose names are on the aviation watch lists. These passengers, unlike the plaintiff in *Bishop*, are informed in front of other air carrier employees and airport patrons.¹⁰⁵ The Court specifically highlighted in *Bishop* that the communication was made in “private.”¹⁰⁶

Publication of the aviation watch lists is not required for an individual’s name to be made public. If this analysis were consistent with the Supreme Court’s holding, the government could, through any means of verbal communication, cause severe harm to a person’s reputation without punishment so long as it did not publish this information in written format. Such a theory is inconsistent with the Court’s holding in *Bishop*.

B. What Process is Due?

Once a court has determined that a liberty interest has been violated, it must determine what process is due under the circumstances.¹⁰⁷ “The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”¹⁰⁸ The Supreme Court has noted that due process is a flexible particularized determination of the governmental and private interest affected.¹⁰⁹ This flexible particularized determination prescribed by the Court, also known as the *Mathews v. Eldridge* balancing test, requires consideration of the following three factors for determining the appropriate process due:

- the private interest that will be affected by the official action;
- the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.¹¹⁰

104. *Id.* 348–49.

105. Complaint, *Green v. Transp. Sec. Admin.*, No. CV04-07632 (W.D. Wash., Apr. 26, 2004).

106. *Bishop*, 426 U.S. at 348.

107. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–71 (1972).

108. *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (quoting *Joint Anti-Facist Refugee Comm. v. McGrath* 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

109. *Id.* at 334.

110. *Id.* at 321.

i. Private Interest Affected by Official Action

The Supreme Court has found significant interest in both welfare and disability benefits owed to persons due to the lack of alternatives to receive compensation.¹¹¹ The Court has also noted the “severity of depriving a person of the means of livelihood.”¹¹² The ability to travel freely is a fundamental right.¹¹³ Therefore, persons must be provided safeguards from erroneous deprivation of this right.¹¹⁴

The government’s deprivation of the right to travel is economically devastating for persons whose names are on the aviation watch lists and could deprive them of their livelihood. Many jobs require travel to meet clients and attend conferences and other engagements as part of employment. The government’s denial of the right to travel would most certainly lead to the loss of employment and substantially decrease a person’s employability within the global market, built upon the convenience and availability of air travel. Also, passengers who are subjected to increased security screening, while still ultimately allowed to fly, would require more time to travel due to the increased time to pass through airport security, making them less desirable than employees who are not on the Selectee List.

The benefits derived from the freedom to travel are not limited to business. The Supreme Court has recognized the social value provided by travel.¹¹⁵ This freedom allows families and friends to stay united and provides scientists, scholars, and students the benefits of insight from their foreign colleagues.¹¹⁶

ii. Risk of Erroneous Deprivation and the Probable Value of Additional Procedural Safeguards

The second factor required by the *Mathews v. Eldridge* balancing test considers the risk of an erroneous deprivation and the probable value, if any, of additional or substitute procedural safeguards.¹¹⁷

111. *Id.*; *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

112. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985).

113. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

114. *See id.* at 125.

115. *Id.* at 126.

116. *Id.* (quoting ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION 195–96 (1956)).

117. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

1. *The Risk of Erroneous Deprivation*

The risk of erroneous deprivation is low where criteria are “specific enough to control government action.”¹¹⁸ In light of the evidence and speculation surrounding the aviation watch lists, names are regularly added to the lists in a random and arbitrary manner.¹¹⁹ The Supreme Court has noted that deprivations resulting from random and arbitrary procedures run a “high risk of an erroneous deprivation.”¹²⁰

The risk of erroneous deprivation is further substantiated by the passenger’s lack of access to evidence utilized by the government in its security assessment.¹²¹ Although the government provides a quasi-appeal to passengers whose names are on the aviation watch lists,¹²² this process is far from what should be required and provided for when the government has denied passengers their civil liberties. “[A]n adversarial hearing is essential, despite its expense, if there is a fundamental right at stake. . . .”¹²³ As noted by Justice Frankfurter, “democracy implies respect for elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts.”¹²⁴ Due to the secrecy surrounding the aviation watch lists, passengers are currently unable to correct erroneous information that led the government to include their name on the lists.¹²⁵ While the extent of erroneous deprivation is unknown,

118. Eric Broxmeyer, Comment, *The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT’L L. 439, 467 (2004) (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 301 (1981)).

119. Cable News Network, *Review: ‘No-fly list’ Lacks Rules, Procedures*, Oct. 10, 2004, <http://www.cnn.com/2004/US/10/10/terror.watch.list/> (the “principles [used to place an individual on the no-fly list] are necessarily subjective, providing no ‘hard and fast’ rules”).

120. Broxmeyer, *supra* note 118, at 467.

121. *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036 (held that the following information does not have to be disclosed: (1) aviation watch list selection criteria, (2) the watch lists themselves, (3) FBI procedures for dissemination of watch lists, (4) procedures for handling potential/actual name matches, (5) procedures for raising/addressing perceived problems in security measures, and (6) compilation of watch lists).

122. DHS TRIP, *supra* note 63.

123. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 582 (2006).

124. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

125. Leigh A. Kite, Note, *Red Flagged Civil Liberties and Due Process Rights of Airline Passengers; Will a Redesigned CAPPS II System Meet the Constitutional Challenge?*, 61

it is apparent that erroneous deprivation occurs from the complaints filed by passengers detained because their names are on the aviation watch lists.¹²⁶

2. Probable Value of Additional or Substitute Procedural Safeguards

Additional procedure would allow the accused to confront the accuser and the evidence used against him or her. Although the government's concern for security should not be overlooked, providing passengers with the ability to challenge the government's inclusion of their names on the aviation watch lists would ensure their right to travel is not unreasonably restricted.

In the context of the aviation watch lists, the TSA relies on information provided by federal intelligence, which is likely less accurate than the medical evidence utilized in *Mathews*.¹²⁷ Although in *Mathews*, a pre-deprivation hearing was not provided, the Supreme Court reached this conclusion on the reliability of the laboratory test, x-rays and the medically-trained physician.¹²⁸ The Court noted that the agency's decision in *Mathews* would not have differed if a pre-deprivation hearing were provided.¹²⁹ In contrast, information gathered by federal agencies such as the CIA, is known to be problematic.¹³⁰ Although this information is vitally important to our national security, adequate due process should be provided when this information is utilized to deny a person's right to travel.

iv. The Government's Interest

The government's interest is clear: secure the nation's aviation transportation system to prevent terrorist threats.¹³¹ The Supreme Court has held "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."¹³²

WASH. & LEE L. REV. 1385, 1424 (2004).

126. Complaint at 3, *Green v. Transp. Sec. Admin.*, No. CV04-07632 (W.D. Wash., Apr. 26, 2004).

127. See *Mathews v. Eldridge*, 424 U.S. 319, 345 (1976).

128. *Id.*

129. *Id.*

130. MSNBC, *Senate Report Cites CIA for "Failures" on Iraq*, July 9, 2004, <http://www.msnbc.msn.com/id/5395999> (citing S. Rep. No. 108-301 (2004)).

131. *Transp. Sec. Admin., What is TSA?*, http://www.tsa.gov/who_we_are/what_is_tsa.shtm (last visited Oct. 27, 2007).

132. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)).

However, the government cannot be allowed to hide behind national security as a means to reach an unconstitutional end. While the government is faced with a monumental task of protecting our nation against an enemy that has blended into American society, the Constitution must still control.¹³³

The focus must be narrowed to consider the direct burden in providing notice and an opportunity for a hearing prior to the deprivation of rights. As noted by the Supreme Court in *Mathews*, “the ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.”¹³⁴ Although the Court also stated that “substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals,”¹³⁵ the administrators of the aviation watch lists have provided no procedures.

v. Balancing the Factors

The balance that must be addressed in light of the above highlighted factors is whether the deprivation of a constitutional right outweighs the government’s interest in national security.¹³⁶

It is almost certain that if a passenger were a terrorist and received advanced notice of his or her status, the passenger would likely attempt to avoid detection. In most circumstances where a strong government interest is balanced against a strong private interest, the Supreme Court has provided post-deprivation due process.¹³⁷ However, due to the bloated nature of the aviation watch lists and the random and arbitrary way the government has determined who should be included on the lists, pre-deprivation due process should be provided. As the Supreme Court has recognized, due process is “flexible and calls for such procedural protections as the particular situation demands.”¹³⁸

133. Kite, *supra* note 125, at 1430.

134. *Mathews*, 424 U.S. at 348.

135. *Id.* at 349.

136. *Id.*

137. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241 (1988).

138. *Mathews*, 424 U.S. at 321 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Furthermore, post-deprivation due process and reinstatement of a passenger's ability to travel would not provide an appropriate remedy.¹³⁹ Not only have such passengers missed the purpose of their travel, the stigma of being labeled a high security risk would not be easily overcome.¹⁴⁰

While a pre-deprivation hearing would significantly decrease the risk of erroneous deprivation of passenger rights and should be provided in the context of the aviation watch lists, some courts might hold that such a hearing in light of the government's interest is not warranted. If the government's interest disallows a pre-deprivation hearing, the Court should find that, at minimum, a post-deprivation hearing is required.¹⁴¹ Such a hearing would at least protect a passenger's right to future air travel. Regardless of whether the hearing is pre-or post-deprivation, some form of hearing must be provided.

VI. ILLEGAL SEARCH AND SEIZURE: TACKLING THE FOURTH AMENDMENT

The Fourth Amendment provides:

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.¹⁴²

The Fourth Amendment allows the government to obtain information while providing a safeguard for personal security and privacy.¹⁴³ Many passengers whose names are on the aviation watch lists have been subjected to searches and seizures by the government.¹⁴⁴ While a literal reading of the Fourth Amendment

139. Kite, *supra* note 125, at 1421.

140. *Id.*

141. Parratt v. Taylor, 451 U.S. 527, 540 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

142. U.S. CONST. amend. IV.

143. *Id.*

144. See Katz v. United States, 389 U.S. 347, 350 (1967) (airline searches, although administered by private air carrier employees, are state action and Fourth Amendment standards apply to air carrier employees); see also United States v. Davis, 482 F.2d 893 (9th Cir. 1973) ("It is entirely clear . . . that throughout the period since late 1968 the government's participation in the development and implementation of the airport search program has been of such significance as to bring any search conducted pursuant to that program within the reach

would require any search and seizure to be reasonable and require probable cause, the Supreme Court has provided a balancing test between security and privacy within the confines of the Fourth Amendment.¹⁴⁵

This balancing test requires an assessment of “all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.”¹⁴⁶ The balance required can be further described as “an assessment of the nature of a particular practice and the likely extent of its impact on the individual’s sense of security, balanced against the utility of the conduct as a technique of law enforcement.”¹⁴⁷ Prior to a review of the circumstances surrounding the searches and seizures performed by the government against individuals whose names are on the aviation watch lists, this note makes clear what constitutes a search and seizure under the Fourth Amendment so that the proper balance can be made.

A. What is a Search?

The Supreme Court has taken an extensive view as to what is considered a search under the Fourth Amendment. In *Katz v. United States*, the Supreme Court concluded that the use of electronic devices to record a phone conversation in a public phone booth was a search under the Fourth Amendment.¹⁴⁸ The Court noted that the “Fourth Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”¹⁴⁹ The Court’s decision in *Katz* abandoned the traditional physical trespass requirement, stating:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹⁵⁰

The Supreme Court extended this rationale in *Kyllo v. United States*, where the Court determined that when “the government uses a

of the Fourth Amendment.”).

145. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

146. *Id.*

147. Deborah von Rochow-Leuschner, *CAPPS II And The Fourth Amendment: Does It Fly?*, 69 J. AIR L. & COM. 139, 157 (2004) (citing *United States v. White*, 401 U.S. 745, 786–87 (1971) (Justice Harlan, Jr., J., dissenting)).

148. *Katz*, 389 U.S. at 351.

149. *Id.* at 353.

150. *Id.* at 352–53.

device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant."¹⁵¹ However, in *Illinois v. Caballes*, the Supreme Court seemed to limit its decision in *Kyllo*.¹⁵² The Court in *Caballes* held that *Kyllo* was a search under the Fourth Amendment because the government's intrusion could reveal "intimate details in a home, such as at what hour each night the lady of the house takes her daily sauna and bath."¹⁵³ The Court distinguished *Kyllo* from *Caballes* because the drug-sniffing dog used in *Caballes* only revealed the location of drugs, while keeping private all lawful activities.¹⁵⁴

In rationalizing the Supreme Court's recent decisions with the technology utilized by air carriers, it would seem undisputed that a physical search of one's bag or person is a "search" under the Fourth Amendment. However, the question arises as to whether the use of metal, x-ray, or bomb detectors constitutes a search. One might argue, in light of the Supreme Court's decision in *Caballes*, that metal detectors should not be considered a Fourth Amendment search because, similar to a drug-sniffing dog, metal detectors only provide information as to prohibited items while maintaining the privacy of other lawful items. However, the comparison between a drug-sniffing dog and a metal detector has one major distinction: the metal detector detects all metal objects, some of which are not prohibited from accompanying a passenger on a flight, while a drug-sniffing dog is trained only to locate illegal items. The Fourth Circuit has held that metal detectors are a search in the context of the Fourth Amendment.¹⁵⁵ In addition, both X-ray and bomb detection equipment should also be considered a search under the Fourth Amendment. X-ray equipment provides the TSA screeners a greater wealth of insight into persons' private lawful possessions, while bomb detection equipment requires the screener to open a passenger's bag and swab the inside.

A much greater concern than the use of metal, X-ray, bomb or

151. *Kyllo v. United States*, 533 U.S. 27, 27 (2001).

152. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

153. *Id.*

154. *Id.*

155. *United States v. Epperson*, 454 F.2d 769, 770 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

other physical detection devices at airports is the government's use of profiling systems such as the proposed Secure Flight. In light of *Kyllo*, one could argue that the expectation of privacy extends to one's private information.¹⁵⁶ The use of Secure Flight to technologically invade the privacy of passengers is not limited to those who are on the aviation watch lists.¹⁵⁷ Secure Flight is intended to examine every passenger who desires to travel by air, and therefore could be considered a search under the Fourth Amendment.¹⁵⁸

Many searches occur in the context of air travel; however, a search must be unreasonable before it is prevented under the guides of the Fourth Amendment.¹⁵⁹

B. What is a Seizure?

A seizure under the Fourth Amendment "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest."¹⁶⁰ Thus, when a person is accosted and has no freedom to walk away, a seizure of that person has occurred.¹⁶¹ However, a seizure does not take place when

a law enforcement officer . . . merely approach[es] an individual on the street or in another public place, [and] ask[s] him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.¹⁶²

In *Florida v. Royer*, the Supreme Court ruled that the defendant was seized when the police officers requested that Mr. Royer accompany them to a private room after obtaining his driver's license, airline tickets, and checked luggage.¹⁶³ The Court held that "[n]either the evidence . . . nor common sense suggests that Royer was free to walk away."¹⁶⁴

The seizure in *Royer* is substantially similar to the seizures that have occurred to passengers whose names are on the aviation watch

156. Rochow-Leuschner, *supra* note 147, at 160–61.

157. Secure Flight Program, 72 Fed. Reg. at 48356.

158. *Id.*

159. U.S. CONST. amend. IV.

160. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

161. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

162. *Florida v. Royer*, 460 U.S. 491, 497 (1983).

163. *Id.* at 508.

164. *Id.* at 508–09.

lists.¹⁶⁵ Many of these passengers have been escorted to small rooms and had their passports and identification cards retained by the air carrier or a government employee.¹⁶⁶ At this point in the encounter, any court should rule a seizure has occurred. While it is clear that passengers have been seized under the Fourth Amendment when they are interrogated, detained, and subjected to enhanced security screening because their names are on the aviation watch lists, the question remains whether such detainment is unreasonable.

C. Suspicionless Searches

While the Fourth Amendment generally precludes searches or seizures in the absence of individualized suspicion or wrongdoing, the Supreme Court has recognized exceptions to this rule.¹⁶⁷ One such exception is found “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable.’”¹⁶⁸ Courts have recognized many “suspicionless searches,”¹⁶⁹ but the administrative search doctrine, the consent exception, the *Terry* stop-and-frisk exception, and the *Katz* reasonable expectation of privacy exception are of primary concerns for passengers whose names are on the aviation watch lists.

i. The Administrative Search Doctrine

The administrative search doctrine provides that:

[S]earches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.¹⁷⁰

Case law has established a balancing test for administrative

165. Complaint at 6, *Green v. Transp. Sec. Admin.*, No. CV04-07632 (W.D. Wash., Apr. 26, 2004).

166. *See id.*

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

168. *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

169. *See Edmond*, 531 U.S. at 37–38.

170. *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973); *see also United States v. Biswell*, 406 U.S. 311, 315 (1972) (a search by a federal agent authorized under the Gun Control Act was not prohibited by the Fourth Amendment because the interstate traffic of firearms was subject to close governmental control).

searches similar to that provided in *Mathews v. Eldridge*.¹⁷¹ In *Brown v. Texas*, the Supreme Court provided that the reasonableness under the administrative search doctrine depends “on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.”¹⁷² Although the Supreme Court has not determined that airport security screenings are within the confines of the administrative search doctrine, the Ninth Circuit Court of Appeals has held that:

[A]irport screening searches . . . are constitutionally reasonable administrative searches because they are “conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.”¹⁷³

In *United States v. Aukai*, the court further noted that for a search to be considered reasonable in the realm of aviation security, the search must 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 is confined in good faith to that purpose.”¹⁷⁴

In light of the court’s decision in *Aukai*, the administrative search doctrine would not apply to passengers who are detained longer than the time required to “rule out the presence of weapons or explosives.”¹⁷⁵ The detainment of passengers for an extended amount of time solely because their names are on the aviation watch lists, is outside the guides of the administrative search doctrine. The definition of an administrative search, as highlighted above, requires the search to be conducted in furtherance of the administrative purpose.¹⁷⁶ If the purpose of airport screening searches is to prevent the carriage of weapons or explosives aboard aircraft, then once this purpose has been satisfied, the administrative search doctrine no longer shields the government from the Fourth Amendment.¹⁷⁷

171. See *Brown v. Texas*, 443 U.S. 47, 50 (1979).

172. *Id.*

173. *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. Haw. 2007) (quoting *Davis*, 482 F.2d at 908).

174. *Id.* at 962 (quoting *Davis*, 482 F.2d at 913).

175. See *id.* at 962–63.

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

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

ii. The Terry Stop-and-Frisk Exception

The *Terry* stop-and-frisk exception (“*Terry* stop”) announced by the Supreme Court in *Terry v. Ohio*, allows for law enforcement personnel to search for weapons without probable cause if the search is “strictly circumscribed by exigencies which justify its initiation.”¹⁷⁸ The Court continued by stating that the search must be “limited to that which is necessary for discovery of weapons which might be used to harm the officer or others nearby.”¹⁷⁹ The Court further denoted that specific and articulable facts must be judged with rational inferences to determine whether the intrusion was reasonable.¹⁸⁰

In the context of aviation, courts have justified the use of metal detectors as a *Terry* stop in light of the interest in avoiding air piracy by noting that “[t]he rationale of *Terry* is not limited to protection of the investigating officer, but extends to ‘others . . . in danger.’”¹⁸¹ If the Fourth Circuit’s decision in *United States v. Epperson* is not overbroad as some have speculated,¹⁸² passengers whose names are on the aviation watch lists might be subjected to increased security screening to ensure that they are not carrying any weapons.¹⁸³ However, the court’s decision in *Epperson* does not provide support for extended detentions and interrogations by airport security.

iii. Consent Exception

If the consent to search or seize a person is voluntary, a person’s Fourth Amendment right has not been violated.¹⁸⁴ In *Culombe v. Connecticut*, Justice Frankfurter stated:

The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination

178. 392 U.S. 1, 25–26 (1968).

179. *Id.* at 26.

180. *Id.* at 21.

181. *United States v. Epperson*, 454 F.2d 769, 772 (4th Cir. 1972) (quoting *Terry*, 392 U.S. at 30).

182. See Steven R. Minert, Comment, *Square Pegs, Round Hole: The Fourth Amendment and Preflight Searches of Airline Passengers in a Post-9/11 World*, 2006 B.Y.U. L. REV. 1631, 1642 (2006).

183. *Epperson*, 454 F.2d at 772.

184. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

critically impaired, the use of his confession offends due process.¹⁸⁵

As a means of justifying a government search of a passenger at an airport, consent is inherently impossible because “the nature of the established screening process is such that the attendant circumstances will usually establish noting ‘more than acquiescence to apparent lawful authority.’”¹⁸⁶

If a passenger whose name is on the aviation watch lists does not express consent to the government search, is the passenger’s consent implied? Some have argued that “approaching the counter with the obvious intention of boarding a plane amount[s] to an implied ‘consent.’”¹⁸⁷ This theory, however, is inconsistent with the intent of the Fourth Amendment. A theory that the government is allowed to merely notify air carrier passengers that they have automatically consented to searches of their persons and effects is inconsistent with the notion that “the government cannot ‘avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped or that all homes would be searched.’”¹⁸⁸ Passengers whose names are on the aviation watch lists have not consented to any search unless they have met the test set forth by Justice Frankfurter.¹⁸⁹

iv. The Katz Reasonable Expectation of Privacy Exception

In air travel, courts have held that passengers’ expectation “to be free from the limited intrusion brought about by the screening process utilized in the boarding area of the airports, is not justifiable under the circumstances.”¹⁹⁰ Justice Harlan, in his concurrence in *Katz v. United States*, set forth a test that is often relied upon by courts in their assessments of whether an expectation of privacy exists.¹⁹¹ This test provides that “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second,

185. 367 U.S. 568, 602 (1961) (discussing the voluntariness of confessions under the Fourth Amendment).

186. 5 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 307–08 (4th ed. 2004) (quoting *United States v. Ruiz-Estrella*, 481 F.2d 723, 728 (2d Cir. 1973)).

187. *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973).

188. LaFave, *supra* note 186, at 309 (quoting *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973)).

189. *See supra* text accompanying note 185.

190. *Shapiro v. State*, 390 So. 2d 344, 347 (Fla. 1980).

191. *See* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

that the expectation be one that society is prepared to recognize as 'reasonable.'"¹⁹²

In the context of passengers whose names are on the aviation watch lists, the test set forth by Justice Harlan would not justify a reduction in the passengers' Fourth Amendment protection. While it is true air carrier passengers do not exhibit the expectation of privacy that is available in one's private home nor does society recognize total privacy after 9-11, passengers do, however, exhibit the expectation of privacy provided to all other passengers. It is reasonable for any passenger to expect that when entering an airport they will be subject to a reasonable search. However, no passenger expects to be arrested, detained, or interrogated regarding his or her private activities, as routinely occurs to passengers whose names are on the aviation watch lists.¹⁹³

D. Reliance on a Dysfunctional Database

Since the aviation watch lists do not fit within any of the above suspicionless searches, do the lists themselves provide probable cause to detain or provide enhanced security screening to persons whose names are included on the lists? In theory, this argument seems to have merit; however, the government's reliance on the aviation watch lists is problematic. In *Arizona v. Evans*, the Supreme Court provided that the government should not rely on inaccurate databases to arrest or detain an individual.¹⁹⁴ Thus, *Evans* provides a basis to challenge the Fourth Amendment search and seizure of passengers whose names are on the aviation watch lists due to the inaccurate unreliable data used to detain or provide enhanced security screening.¹⁹⁵ Justice O'Connor, in her concurrence in *Evans*, stated:

Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).¹⁹⁶

While the aviation watch lists make law enforcement more

192. *Id.*

193. See Complaint, Green v. Transp. Sec. Admin., No. CV04-07632 (W.D. Wash., Apr. 26, 2004).

194. 514 U.S. 1, 14-15 (1995).

195. See *id.*

196. *Id.* at 17 (O'Connor, J., concurring) (emphasis in original).

efficient, this mere fact cannot justify a decrease in a passenger's Fourth Amendment right.¹⁹⁷ This Note does not suggest that passengers who have opted to proceed through airport security should not face enhanced security measures if doubts arise during the security check, however, this enhanced security should not be based solely on the passenger's name being included on the aviation watch lists unless passengers are afforded due process and the enhanced security adheres to the Fourth Amendment.¹⁹⁸

VII. DO AIR CARRIERS OR THE AVIATION WATCH LISTS DISCRIMINATE BASED ON RACE?

Less than a month after 9-11, the DOT issued a policy statement reminding its employees, and those carrying out transportation inspection and enforcement responsibilities, that they are prohibited from discriminating, intimidating, and harassing "individuals who are, or are perceived to be, of Arab, Middle Eastern, or South Asian descent and/or Muslim."¹⁹⁹ The DOT also stated "Federal civil rights laws prohibit discrimination on the basis of a person's race, color, national or ethnic origin, religion, sex, ancestry, or disability."²⁰⁰ Furthermore, this policy statement provided cautionary procedures, such as "[w]hen it is necessary to verify the identity of a veiled woman, whenever possible, her face should be checked by female safety or security personnel in private or only in the presence of other women so as not to violate her religious tenets."²⁰¹ Although the DOT provided a reasonable attempt to prevent discrimination, air carriers discarded the warnings and subjected passengers of South Asian, Arab, and Middle Eastern descent to enhanced security screening based solely on the belief that ethnicity and national origin increased a passenger's flight risk.²⁰²

197. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

198. *See LaFave*, *supra* note 186, at 9 (Supp. 2007)

199. OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS, DEP'T OF TRANSP., CARRYING OUT TRANSPORTATION INSPECTION AND SAFETY RESPONSIBILITIES IN A NONDISCRIMINATORY MANNER (Oct. 12, 2001), *available at* <http://airconsumer.ost.dot.gov/rules/20011012.htm>.

200. *Id.*

201. *Id.*

202. *See generally* BOB CUDDY, CAUGHT IN THE BACKLASH (Rachel Swain ed., American Civil Liberties Union Foundation of Northern California 2002) (documenting 20 individuals' experiences since Sept. 11, 2001), *available at* http://www.aclunc.org/issues/government_surveillance/asset_upload_file532_4380.pdf.

In due fashion, the American Civil Liberties Union (“ACLU”) filed lawsuits against American, Continental, Northwest, and United Airlines for allegedly discriminating against passengers, and for ejecting passengers from aircraft based solely on their national origin.²⁰³ The irony behind these claims was that although all of these plaintiffs were of Asian or Middle Eastern appearance, all had been cleared by “rigorous security checks” and allowed to enter restricted areas of the airport.²⁰⁴ However, these men were not permitted to board the aircraft after passengers and air carrier employees expressed their concerns of flying with such passengers.²⁰⁵ The intent of the air carriers to discriminate against these passengers based on their ethnicity rather than any suspected security threat was further underscored when the air carriers failed to perform additional security searches to determine whether the passengers were a threat to aviation prior to allowing the passengers to fly on other air carriers or take a different flight.²⁰⁶

The FAA and the Justice Department have relentlessly maintained that race and national origin are not utilized in determining whether a passenger poses a threat to national security and is therefore included on the aviation watch lists.²⁰⁷ Many organizations, such as the ACLU, however, speculate that the aviation watch lists utilize both racial and religious profiling to justify the inclusion of persons on the lists.²⁰⁸

While no proof is provided that the government utilizes race, religion, or national origin as factors in compiling the aviation watch lists, these lists act as a catalyst that has led to racial profiling.²⁰⁹ Air

203. Press Release, American Civil Liberties Union of Northern California, ACLU and Relman & Associates Sue Four Major Airlines for Discrimination Against Passengers (June 4, 2002), available at http://www.aclunc.org/news/press_releases/aclu_and_relman_associates_sue_four_major_airlines_for_discrimination_against_passengers.shtml?ht=.

204. *Id.*

205. *Id.*

206. *Id.*

207. See generally *Aviation Security with a Focus on Passenger Profiling: Hearing Before the Subcomm. on Aviation, of the H. Comm. on Transp. & Infrastructure*, 107th Cong. (2002), available at http://commdocs.house.gov/committees/trans/hpw107-64.000/hpw107-64_of.htm.

208. *Government Data Mining: Hearing Before the Technology, Information Policy, Intergovernmental Relations and the Census Subcomm. of the H. Comm. on Government Reform* (2003) (statement of Barry Steinhardt, Director, Technology and Liberty Program, American Civil Liberties Union), available at <http://www.aclu.org/safefree/general/17262leg20030520.html>.

209. See *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005). The reason for

carrier employees have questioned passengers on the aviation watch lists based on their ethnicity or organizational involvement.²¹⁰ The government notes that air carrier employees have asked passengers on the aviation watch lists questions about their religion, national origin, and even whether anyone at their mosque hates Americans or disagrees with current policies.²¹¹ One air carrier employee even stated that the individual and “his wife and children were subjected to body searches because he was born in Iraq, is Arab, and Muslim.”²¹² The American-Arab Anti-Discrimination Committee (“ADC”) reports that twenty-four percent of its yearly complaints are about air carrier profiling.²¹³

While such examples would likely provide sufficient evidence for discrimination, in the vast majority of cases the evidence is unclear. In such cases “without the ‘smoking gun’ of race, the claimant is left with proving some type of disparate impact in the administration of the law that is motivated by intentional discrimination.”²¹⁴ To establish a disparate impact claim, the plaintiff must demonstrate that similarly situated individuals of a different race, religion, or national origin were not treated the same way.²¹⁵ Without this proof, stereotypes held by air carrier employees and law enforcement will be expressed through discriminatory applications of the aviation watch lists.

The use of racial profiling within the aviation industry, as argued by some, is “a defensible tactic for picking out potential problem passengers.”²¹⁶ Profiling, however, is generally ineffective at identifying criminal actors.²¹⁷ It has been noted that profiling in 1972

the lack of proof is that courts have allowed the government to keep the list secret due to concerns of national security if the list were to be published for general circulation. *Id.*

210. Charu A. Chandrasekhar, Note, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 *ASIAN L.J.* 215, 217 (2003).

211. U.S. DEPARTMENT OF HOMELAND SECURITY, REPORT ON EFFECTS ON PRIVACY AND CIVIL LIBERTIES 18 (2006), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_rpt_nofly.pdf.

212. *Id.*

213. Ellen Baker, *Flying While Arab—Racial Profiling and Air Travel Security*, 67 *J. AIR L. & COM.* 1375, 1381 (2002).

214. *Id.* at 1387.

215. *Id.* at 1388; *United States v. Armstrong*, 517 U.S. 456, 457 (1996).

216. ROY L. BROOKS, GILBERT PAUL CARRASCO & MICHAEL SELMI, *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 693 (3d ed., Carolina Academic Press 2005) (quoting Fedwa Malti-Douglas, *Let Them Profile Me*, *N.Y. TIMES*, Feb. 2, 2002, at A2).

217. Liam Braber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and*

failed to stop two-dozen hijackings, while hijackings substantially decreased when profiling was abandoned for X-ray technology.²¹⁸ The profiling experienced by many South Asian, Arab, and Middle Eastern descendants mirrors profiling described as “driving while black,” which many states have prohibited.²¹⁹ There are ways discussed below that can prevent terrorist attacks without prejudicing the entire Muslim community.

VIII. ALTERNATIVES

A. Utilizing Increased Security but not Banning Persons from Flight

The Under Secretary of Transportation for Security has broad authority to identify passengers who pose a potential threat to aviation and restrict such passengers from boarding an aircraft.²²⁰ This power, however, must be utilized within the framework of the Constitution. As stated by Justice White over one hundred years ago, “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”²²¹

Passengers on the aviation watch lists are not provided with the presumption of innocence, nor do they have the ability to view the evidence against them. This problem could be addressed by allowing all passengers to fly, regardless of whether they are on the No-Fly List, if they can pass enhanced security screening.

One major problem with this solution is that it does not limit persons previously banned from flight from traveling together if they can all pass enhanced security screening. As was highlighted on 9-11, weapons are not necessarily required to hijack an aircraft.²²² While the hijackers of 9-11 were equipped with mace and knives, the number of hijackers per aircraft allowed them to control the aircraft.²²³ This concern could be remedied by restricting passengers

National Security, 47 VILL. L. REV. 451, 485 (2002).

218. *Id.* at 485 & n.194.

219. BROOKS, CARRASCO & SELMI, *supra* note 216, at 690–92.

220. 49 U.S.C. § 114(h)(1), (2), (3)(A)–(B) (2007).

221. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

222. Sara Kehaulani Goo & Dan Eggen, *9/11 Hijackers Used Mace and Knives*, *Panel Reports*, WASH. POST, Jan. 28, 2004, at A01.

223. *Id.*; Cable News Network, *Feds Think They've Identified Some Hijackers* (Sept. 13,

whose names are on the No-Fly List from traveling on the same flight. While this solution has its problems and is not suggested as the best course of action, it would provide individuals currently banned from flight the ability to utilize air travel.

B. Include Identifying Traits Within the Aviation Watch Lists

There is no doubt many persons throughout the world would not feel comfortable sitting next to a man named Osama bin Laden, who meets the physical description and shares the same birthday as the founder and leader of al-Qaeda, a terrorist organization involved with many mass killings around the world.²²⁴ Most persons, however, would not mind sitting next to a law professor from Salem, Oregon who shared the same name as the terrorist Osama bin Laden.

The federal government's determination that the aviation watch lists are useful despite the fact that the lists contain only names, and no other identifying traits, is irrational. The information provided by the aviation watch lists should include as much of the following as possible: name, age, birthday, height, weight, build, hair color, eye color, scars and markings, complexion, race, nationality, social security number, passport numbers, fingerprints and any other available identifying information. In addition to providing this information, the lists should be maintained with "sufficient accuracy, relevance, timeliness, or completeness to ensure that innocent passengers are not incorrectly and unfairly stopped, interrogated, detained, searched, or subjected to other travel impediments."²²⁵

If the majority of the above information were provided, airport personnel could provide a more precise identification as to the person who is thought to be a threat to aviation. While the government has recognized the need, due to safety, to restrict rights, denying a passenger the right to travel based solely on his name with no other required criteria, will lead the nation's transportation system and constitutional integrity down a slippery slope.

2001), <http://archives.cnn.com/2001/US/09/12/investigation.terrorism/>.

224. Barry A. Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11 J. TRANSNAT'L L. & POL'Y 201, 214-16 (2002).

225. Complaint at 5, *Green v. Transp. Sec. Admin.*, No. CV04-07632 (W.D. Wash., Apr. 26, 2004).

D. Using Biometrics

Biometrics could be utilized by the aviation industry to prevent air terrorism. Biometrics²²⁶ is the use of unique personal characteristics that enable identification.²²⁷ Personal characteristics such as fingerprints, hand geometry, facial appearance, and retinal and iris scans could be utilized by air carriers and the federal government to ensure the security of our national transportation system.²²⁸

This system would require a massive database that would contain the personal characteristics of potential passengers. Once a passenger arrived at the airport he or she would approach the ticket counter or kiosk and utilize the biometric identification system. The identification system would check the passenger's identification and determine whether they are who they purport to be. If the passenger's biometric information is not in the database or the passenger is on the aviation watch lists, he or she must subscribe to enhanced security screening. While the intricacies of such a system will not be fully established herein, this system must be convenient for passengers who do not pose a threat to the aviation infrastructure.

While biometrics would ensure persons who share the names of known terrorists are no longer accosted at airports, the use of biometrics does have its own constitutional constraints. Iris and retinal scans can reveal certain medical conditions such as high blood pressure, pregnancy, and Acquired Immunodeficiency Syndrome ("AIDS").²²⁹ Fingerprints may reveal whether a person is suffering from Turner syndrome, Klinefelter syndrome, Down syndrome, leukemia, breast cancer, rubella, and chronic intestinal pseudo-obstruction disorder.²³⁰ In light of these constraints, security in the form of a password-protected database would, however, prevent this

226. Biometrics has been defined as "automated measurement of physiological or behavioral characteristics to determine or authenticate identity." Raj Nanavati, *Biometrics in Network and Information Security*, in SEVENTH ANNUAL INTERNET LAW INSTITUTE, at 113, 119 (PLI Patents, Copyrights, Trademarks & Literary Property, Course Handbook Series No. 755, 2003).

227. Greg Star, *Airport Security Technology: Is the Use of Biometric Identification Technology Valid Under the Fourth Amendment?*, 20 TEMP. ENVTL. L. & TECH. J. 251, 253 (2002).

228. *Id.*; Jennifer M. Walrath, Note, *The Promise of a Better Way: Biometric Voter Identification and the Homeless*, 14 GEO. J. ON POVERTY L. & POL'Y 95, 105 (2007).

229. Star, *supra* note 227, at 253.

230. *Id.* at 254-55.

information from being available to the general public.

Although the use of biometrics is not a perfect solution, it would likely be acceptable to air carriers and the government, and still preserve the rights of those who share names with known terrorists.

E. Providing Appropriate Hearings

It is readily apparent that passengers who are deprived of their right to travel are required some form of due process. Thus, due process should be in the form of an administrative hearing where the accused is allowed to cross-examine the government's witnesses and challenge the evidence against him or her. The problem with utilizing an administrative hearing is that the aviation watch lists are confidential.²³¹ Some have suggested the use of "a government-compensated attorney who holds a security clearance and may view and challenge classified evidence on behalf of his client."²³² Although this is a viable solution, it restricts the accused's involvement in the process and also dissolves the traditional free flow of information between the attorney and client.

The hearing provided to employees that are denied security clearances has been used as an analysis for what "should" be provided to those who are denied air transportation.²³³ The Supreme Court in *Department of the Navy v. Egan* provided that it is

not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.²³⁴

This analysis, however, is not analogous to passengers who are denied the right to travel or required to undergo enhanced security screening because their names are on the aviation watch lists. The decision in *Egan* should be viewed in light of its intended influence. The Court in *Egan* was specific in its clarification that "no one has a 'right' to a security clearance."²³⁵ To utilize a privilege analysis in the context of a constitutionally protected right would be inconsistent

231. *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005).

232. *Florence*, *supra* note 49, at 2170.

233. *Id.* at 2172.

234. 484 U.S. 518, 529 (1988).

235. *Id.* at 528.

with the Court's holding in *Egan*.²³⁶

In *Hamdi v. Rumsfeld*, the Supreme Court provides a greater justification and comparison than *Egan*, in the context of fundamental rights.²³⁷ Justice O'Connor suggested:

[T]he exigencies of the circumstances may demand that . . . proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence . . . the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove . . . error while giving due regard to the Executive once it has put forth meaningful support for its conclusion In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.²³⁸

Providing such a review, as highlighted by Justice O'Connor, would ensure a citizen's "core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."²³⁹ With this being said, receiving notice of the factual basis for inclusion on the aviation watch lists, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker are key elements.²⁴⁰ The suggestion of providing a government-compensated attorney and creating a wall which would prohibit the attorney from "sharing any secret evidence with their clients, or even from giving information to their clients that might reveal the nature or source of the secret evidence,"²⁴¹ does not appear to be a justifiable solution in light of the Court's decision in *Hamdi* or in the context of

236. *Id.*

237. 542 U.S. 507 (2004).

238. *Id.* at 533-34.

239. *Id.* at 535.

240. *Id.* at 533.

241. Florence, *supra* note 49, at 2174.

the ethical duty required of every attorney.²⁴²

F. Constitutional Profiling System

It is possible to devise a system, as commanded by Congress,²⁴³ which will ensure the safety of America's transportation infrastructure while protecting the constitutional rights of those who utilize air travel. While the intricacies of such a system will not be fully established herein, the following key characteristics could be further expanded and implemented to ensure passengers are not deprived of their civil liberties.

First, the system must address how names are placed on the aviation watch lists. The government must devise elements that a person must meet prior to being placed on either the No-Fly List or Selectee List. It should be noted that passengers, due to the severity of such deprivation, should not be included on the No-Fly List unless that person has shown a grave indifference to human life by committing or acting as an accomplice in terrorist acts.

Second, this system must ensure all passengers are treated equal without reference to race, color, national or ethnic origin, religion, sex, ancestry, or disability.

Third, notice must be provided to the individual that they are being placed on the aviation watch lists. This notice must be similar to a complaint, which provides details explaining the allegations against the person. This notice must also provide a contact so that a hearing can be scheduled to challenge the government's action. To ensure the person receives the "notice," personal service must be required. Requiring personal service also allows the government to obtain a "default judgment," and include the passenger on the aviation watch lists if the person does not respond in the time allotted in the notice.

Fourth, the system must provide key characteristics of the individual who is intended to be on the aviation watch lists so that others who share the same name are not accosted at airports.

Fifth, passengers who are on the aviation watch lists must not be informed in front of other airport patrons.

While this Note strongly suggest the use of technologies to

242. MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.7(a), 3.7, and 5.4(c) (2008).

243. Aviation and Transportation Security Act, Pub. L. No. 107-71, §§ 136-137, 115 Stat. 597, 636-39 (2001) (codified in scattered sections of 49 U.S.C.).

which all passengers are subjected rather than a profiling system, human error in using such technology currently plagues the aviation industry. Headlines such as “Government Investigators Smuggled Bomb Components Past Airport Screeners in Covert Tests”²⁴⁴ emphasize the importance of some form of profiling system due to the human error associated with the use of current airport screening technology. A profiling system would likely survive judicial challenge and scrutiny from civil liberties organizations if the above broad criteria were provided. However, this Note suggests that a profiling system should only be utilized if no technology exists that could determine with sufficient accuracy whether a passenger is carrying prohibited items that pose a treat to the aircraft and the safety of the traveling public.

IX. CONCLUSION

This Note does not cast doubt on the effectiveness of or the need for aviation watch lists. Such lists, however, must be carefully planned and implemented to protect civil liberties. Aviation watch lists that are implemented in a retaliatory fashion can easily overlook and trump civil liberties due to the urgency and prejudices garnished by its drafters. As noted by Professor Paul Stephen Dempsey, “[t]he fundamental challenge is to create a security regime that is highly effective in preventing acts of aerial terrorism, but does not: unduly interfere with the efficiency and productivity of commercial aviation; impose excessive costs; create unwarranted passenger inconvenience; or intrude unnecessarily into individual privacy or civil liberty.”²⁴⁵ This burden is exacerbated by the lack of technology to identify plastic weapons and chemicals that are extremely harmful and virtually undetectable. Legislatures and the American public, however, must learn from past mistakes and not repeat them.

Our nation has been built upon the foundational support provided by its Constitution. If such support is whittled away, our nation as a whole will crumble. A balancing between safety and constitutional rights is by no means an easy task, but by ensuring the fundamental provisions of our Constitution are satisfied, such a balance can be realized. The aviation watch list in its current form is

244. Fox News Network, Government Investigators Smuggled Bomb Components Past Airport Screeners in Covert Tests (Nov. 15, 2007), <http://www.foxnews.com/story/0,2933,311765,00.html>.

245. Dempsey, *supra* note 10, at 721–22.

2008]

AVIATION WATCH LISTS

613

inconsistent with the Constitution and should be required to comport with the considerations set forth above.

