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Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPS II System Meet the Constitutional Challenge?

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Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPS II System Meet the Constitutional Challenge?

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Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.[1]

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1. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, Nov. 11, 1755, *in* 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963). A plaque located on the pedestal of the Statue of Liberty contains an inscription of this quotation.

I. Introduction

Over two million passengers travel by air each day in the United States,[2] making airline travel a vital part of our modern society. The ready availability and low cost of flights to locations both within the United States and abroad provide the American public with an efficient, convenient, and relatively inexpensive form of travel.[3] Americans can board one of the thousands of

2. *See Congressional Briefing on the Office of National Risk Assessment (ONRA) and the Computer Assisted Passenger Prescreening (CAPPS II) Program*, 108th Cong. (2003) (statement of Ben H. Bell, III, Director, Office of National Risk Assessment of the Transportation Security Administration), *at* http://www.acte.org/initiatives/CAPPS_II_Congress Briefing.pdf (March 7, 2003) [hereinafter *Bell Briefing*] (discussing the number of airline travelers each day in the United States) (on file with the Washington and Lee Law Review).

3. *See World Tourism Statistics 2000–2002*, *at* http://www.trentu.ca/anthropology/anth 409h/statistics.html (last visited Feb. 29, 2004) ("Between 1978–1998, the real cost of air travel fell by 35 percent . . . . A thousand miles of air travel now requires 61 less work hours than it

flights departing from airports around the country each day[4] and travel hundreds of miles for business meetings, vacations, or visits with family and friends in only a matter of hours. Passengers can board a plane in Los Angeles and be in New York City in six hours[5] or in Honolulu in a little over five hours.[6] Other forms of transportation provide neither the expediency nor the convenience of airline travel. For example, the approximate driving time from New York to Los Angeles is more than forty-one hours,[7] and an Amtrak train scheduled to leave New York at 2:50 p.m. on Monday afternoon will not arrive in Los Angeles until 8:20 a.m. on Thursday, almost sixty-nine hours later.[8] Yet, as much as Americans have come to rely on the ease and efficiency of airline travel, the government's response to the tragic events of September 11, 2001 (September 11) threatens to limit the public's ability to travel by air.

On September 11, nineteen hijackers flew two planes into the World Trade Center, causing the collapse of both towers and killing over 2800 people.[9] The hijackers flew a third plane into the Pentagon, causing an

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did a generation ago.") (on file with the Washington and Lee Law Review).

4. *See, e.g.*, CITY OF CHICAGO, *Monthly Operations, Passengers, Cargo Summary by Class for December 2002*, 3, *at* http://www.ohare.com/doa/stats/1202.pdf (Feb. 13, 2003) (listing the number of domestic air carrier flights at Chicago's O'Hare International Airport in 2002 as 676,504) (on file with the Washington and Lee Law Review); *DFW Operations Statistics December, 2003*, *at* http://www.dfwairport.com/stats/03/12/operations-dec03.xls (last visited March 2, 2004) (listing the number of domestic air carrier flights at Dallas/Fort Worth International Airport in 2002 as 496,200) (on file with the Washington and Lee Law Review); *Monthly Air Traffic Report, December, 2002*, 4, *at* http://www.atlantaairport.com/sublevels /airport_info/pdfs/Traffic/200212.pdf (last visited March 2, 2004) (listing the number of domestic air carrier flights at Atlanta's Hartsfield-Jackson International Airport in 2002 as 610,509) (on file with the Washington and Lee Law Review).

5. *See New York City: Smart Travel Tips*, *at* http://www.fodors.com/miniguides /mgresults.cfm?destination=new_york_city@111&cur_section=tra (last visited Feb. 24, 2004) (providing approximate flight times from several destinations to New York City) (on file with the Washington and Lee Law Review).

6. *See Honolulu & O'ahu: Smart Travel Tips*, *at* http://www.fodors.com/miniguides /mgresults.cfm?destination=honolulu_oahu@75&cur_section=tra (last visited Feb. 24, 2004) (listing approximate flight times to Honolulu from several destinations) (on file with the Washington and Lee Law Review).

7. AMERICAN AUTOMOBILE ASSOCIATION, *Driving Directions*, *at* http://www.mid atlantic.com/travel/triptik.asp (last visited March 2, 2004) (on file with the Washington and Lee Law Review).

8. AMTRAK, *Departure and Return Options*, *at* http://tickets.amtrak.com/Amtrak /availability (last visited March 2, 2004) (on file with the Washington and Lee Law Review).

9. *Compare September 11, 2001 Victims, WTC Statistics*, *at* http://www.september 11victims.com/september11victims/wtc_statistics.htm (last visited Feb. 25, 2004) (listing the number of victims at the World Trade Center as 2824) (on file with the Washington and Lee Law Review) *with* Phil Hirschkorn, *New York reduces 9/11 death toll by 40*, *at* http://www. cnn.com/2003/US/Northeast/10/29/wtc.deaths/index.html (Oct. 29, 2003) (stating that 2752

additional 184 deaths, and a fourth plane crashed in western Pennsylvania, killing all forty passengers and crew members on board.[10] The hijackers turned the four commercial airliners into weapons of mass destruction, proving that airline security was no longer only a matter of safeguarding the flying public, but it was also a matter of protecting national security.[11] The events of September 11 changed the course of America's history and encouraged the nation's leaders to reassess the balance between civil liberties and the security of the nation.

In a press conference on the night of September 11, Secretary of Health and Human Services, Tommy G. Thompson, began his remarks by stating that "[e]very single American lost something today."[12] As much as Americans lost on September 11, the extent of the liberties we stand to lose as a result of legislation and regulations enacted in the wake of September 11 remains to be seen. As Justice Thurgood Marshall wrote:

> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, . . . and the Red Scare and McCarthy-era internal subversion cases . . . are only the most 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.[13]

Indeed, the discord between civil liberties and national security that has surfaced in the post-September 11 era, with the passage of bills such as the USA PATRIOT Act[14] and the enforcement of government policies that call

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people were killed at the World Trade Center in the September 11 attacks) (on file with the Washington and Lee Law Review). Sources disagree on the exact number of people killed in the World Trade Center attacks. Rebecca Blackmon Joyner, Note, *An Old Law for New World? Third-Party Liability for Terrorist Acts—From the Klan to Al Qaeda*, 72 FORDHAM L. REV. 427, 461 n. 281 (2003).

10. *See* Phil Hirschkorn, *New York adjusts terrorist death toll downward*, *at* http://www.cnn.com/2002/US/08/22/911.toll/ (Aug. 22, 2002) (listing the death tolls at the September 11, 2001 attack sites) (on file with the Washington and Lee Law Review).

11. *See* 147 CONG. REC. S9583 (daily ed. Sept. 21, 2001) (statement of Sen. Kerry) ("[A]irport security is also a matter of national security.").

12. Press Briefing by Attorney General, Secretary of HHS, Secretary of Transportation, and FEMA Director (statement of Secretary Thompson), *at* http://www.whitehouse.gov/news/releases/2001/09/20010911%2D10.html (Sept. 11, 2001) (on file with the Washington and Lee Law Review).

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

14. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act]. *See infra* note 21 for a discussion of the USA PATRIOT Act.

for the indefinite detention of enemy combatants and increased surveillance of American citizens,[15] is not a new phenomenon. In the midst of the Civil War, Abraham Lincoln suspended the writ of habeas corpus.[16] During World War I, the courts permitted restrictions on the freedom of expression and prosecuted many foreigners living in the United States because of their suspected political views.[17] The government interned over 100,000 Japanese-Americans during World War II, stripping them of their homes and their freedom.[18] In the 1950s, Congress, led by Senator Joseph R. McCarthy, sought to rid the nation of persons with suspected Communist ties.[19] In hindsight, these severe restrictions on the civil liberties of United States citizens are unsightly blemishes on the record of a country that was founded on the ideals of democracy and freedom. As Senator Russ Feingold stated on the Senate floor in October 2001, "We must not allow this piece of our past to become prologue. . . . We will lose [the war against terrorism] without a shot being fired if we sacrifice the liberties of the American people in the belief that by doing so we will stop the terrorists."[20]

In the rush to enact legislation during the months immediately following September 11, Congress seemed to pay little attention to the words of Senator Feingold and instead consistently placed national security ahead of protecting the civil liberties of Americans.[21] Certainly, it was the rising concern for

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15. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003) (arguing that the government has infringed upon the civil liberties of citizens and noncitizens with post-September 11 policies).

16. *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 (2003) (noting that Lincoln suspended habeas corpus during the Civil War).

17. *See* COLE, *supra* note 15, at 8 (explaining that during the "Palmer Raids," the government "round[ed] up thousands of foreign nationals for their suspected political associations").

18. *See* Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, *in* THE WAR ON OUR FREEDOMS 23, 40–42 (Richard C. Leone & Greg Anrig, Jr. eds., 2003) (describing the Japanese internment during World War II).

19. *See* Wood, *supra* note 16, at 463 (discussing the anti-Communist campaign waged by Senator McCarthy).

20. 147 CONG. REC. S10,570 (daily ed. Oct. 11, 2001) (statement of Sen. Feingold).

21. *See, e.g.*, USA PATRIOT Act ("An Act To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes."). On October 26, 2001, just six weeks after the September 11 attacks, Congress passed the USA PATRIOT Act "with practically no debate over its potentially disastrous impact on civil liberties." Kevin Bankston & Megan E. Gray, *Government Surveillance and Data Privacy Issues: Foundations and Developments*, PRIVACY & INFO L. REP., Apr. 2003, at 1, 3. Bankston and Gray argue that in passing the USA PATRIOT Act, "Congress vastly expanded the government's authority to spy on its own citizens while simultaneously weakening the judicial oversight needed to prevent abuse of that authority." *Id.*

safeguarding national security that served as an impetus for enacting legislation aimed at increasing airport security.[22] In response to the September 11 terror attacks, Congress enacted the Air Transportation Safety and System Stabilization Act[23] and the Aviation and Transportation Security Act (ATSA),[24] statutes that federalized all airport screening services.[25] Although the ATSA may not have restricted civil liberties on its face, at least one program implemented under the mandates of that act has sparked widespread debate about its restrictions on civil liberties.[26]

The USA PATRIOT Act enables the FBI to monitor Internet activity of suspected terrorists, *see* NAT HENTOFF, THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE 11–12, 43–49 (2003) (explaining that the USA PATRIOT Act allows the FBI to plant surveillance devices on computers), and the Department of Justice to hold "enemy combatants" without charging them with a crime or providing them with an attorney. *See generally* COLE, *supra* note 15 (discussing the treatment of enemy combatants in the aftermath of September 11). In February 2004, the Supreme Court upheld provisions of the USA PATRIOT Act by denying an enemy combatant being held at Guantanamo Bay, Cuba, the opportunity to meet with an attorney. Gherebi v. Bush, 124 S. Ct. 1353, 1353 (2004); *see* Bill Mears, *Court keeps Gitmo detainee from seeing lawyer, at* http://www.cnn.com/2004/LAW/02/05/scotus.gitmo.detainee/index.html (Feb. 18, 2004) (discussing the *Gherebi* case) (on file with the Washington and Lee Law Review). In June 2004, the Court upheld the government's ability to detain enemy combatants at Guantanamo Bay for the duration of active hostilities during the war on terrorism, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2642 (2004), but also ruled that the men and women being detained had a right to challenge the legality of their detention in a United States Court. *See id.* at 2648 (finding that an enemy combatant "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); *see also* Rasul v. Bush, 124 S. Ct. 2686, 2699 (2004) (stating that federal courts have jurisdiction to hear enemy combatants' challenges to the legality of their detention before a United States court).

22. A brief glance at the nation's recent history shows that following disasters involving commercial aircraft, the government often reacts by imposing legislation aimed at increasing airline security. *See, e.g.*, Heather E. Reser, Comment, *Airline Terrorism: The Effect of Tightened Security on the Right to Travel*, 63 J. AIR. L. & COM. 819, 829–30 (1998) (explaining that Congress passed the Aviation Security Improvement Act of 1990 after the bombing of Pan Am Flight 103); Jamie L. Rhee, Comment, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 854 (2000) (describing the creation of the Gore Commission to study aviation security following the crash of TWA Flight 800).

23. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C.).

24. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

25. *Id.* § 101, 115 Stat. at 597; *see* David T. Norton, *Recent Developments in Aviation Law*, 67 J. AIR L. & COM. 1107, 1117–19 (2002) (discussing the Air Transportation Safety and Stabilization Act and the Aviation and Transportation Security Act).

26. *See* Sarah Kehaulani Goo, *Fliers to Be Rated for Risk Level: New System Will Scrutinize Each Passenger, Assign Color Code*, WASH. POST, Sept. 9, 2003, at A1 (noting that CAPPS II "has sparked so much controversy among both liberal and conservative groups that

Section 136 of the ATSA mandated the creation of enhanced passenger screening programs at all United States airports.[27] One such program, the Computer-Assisted Passenger Prescreening System (CAPPS II), has already been tested in several airports[28] and was originally scheduled to be implemented by the end of 2004.[29] As originally conceived, the CAPPS II System was designed to screen all passengers boarding commercial aircraft using a two-step process,[30] first verifying the passengers' identification information using commercial databases, and then conducting a risk assessment by comparing the passengers' information to classified federal databases.[31]

From the CAPPS II System's conception, civil liberties advocates expressed concerns that the System would increase the number of people mistakenly detained at airports under the current screening system without increasing the number of terrorists apprehended through the screening process.[32] Additionally, these advocates were concerned that the CAPPS II System treated every passenger like a terror suspect.[33] Pressure from privacy

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the TSA has struggled to get it going").

27. *See infra* note 53 and accompanying text (quoting section 136 of the Aviation and Transportation Security Act that mandated the creation of a system that screened all airline passengers).

28. *See* Gregory P. Cirillo & Christopher M. Mills, *New Air Traveler Prescreening System Raises Privacy Concerns*, METROPOLITAN CORP. COUNS., July 2003, at 13, WL 7/03 METCC 13, (col. 1) (explaining that Delta Airlines tested CAPPS II at three airports beginning March 2003).

29. *See* Press Release, U.S. Dep't of Homeland Security, Undersecretary Hutchinson's Remarks at a CAPPS II Media Roundtable, *at* http://www.dhs.gov/dhspublic/display?content=3166 (Feb. 13, 2004) (explaining that the agency plans to implement testing of the program before the end of 2004) (on file with the Washington and Lee Law Review).

30. *See* Notice of status of system of records; Interim final notice; Request for further comments, 68 Fed. Reg. 45,265, 45,266 (Aug. 1, 2003) [hereinafter August 1 Notice] (describing the CAPPS II screening process).

31. *Id.*

32. *See* Ann Davis, *Boarding Impasse: Why a 'No Fly List' Aimed at Terrorists Often Delays Others*, WALL ST. J., Apr. 22, 2003, at A14 ("Privacy and civil-liberties advocates fear . . . that [increasing the number of databases searched] will result in even more passengers being wrongly tagged."). Under the current screening system, passengers' identities are compared to a "No Fly" list, which contains a database of persons with suspected ties to terrorist organizations. *See* Eric Lichtblau, *Government's 'No Fly' List is Challenged in a Lawsuit*, N.Y. TIMES, Apr. 23, 2003, at A17 (describing the "No Fly" lists). The Federal Bureau of Investigation and federal transportation agencies created the "No Fly" list following the September 11 terror attacks. *Id.*

33. *See* Matthew L. Wald, *Government Is 'Reshaping' Airport Screening System*, N.Y. TIMES, July 16, 2004, at A21 (quoting an ACLU official as stating that they did not want the government to use the CAPPS II System to help turn the United States "into a society where everybody is treated like a suspect and everybody is investigated").

advocacy groups prompted the Bush Administration to send the CAPPS II System back to the drawing board in July, 2004.[34] The changes in the original CAPPS II System, which were announced in August, 2004, primarily related to the protection of passengers' privacy interests and included changes in the first stage of the CAPPS II System risk assessment, the identity verification process.[35] The Transportation Security Administration (TSA) states that the redesigned system, which the government renamed Secure Flight, will continue to use commercial databases to verify the identities of passengers, but will no longer use algorithms in the verification process and will no longer scan the passenger lists for violent criminals.[36] There is no indication that the TSA is contemplating any changes to the redress procedures for passengers who are erroneously detained by the redesigned CAPPS II System.

This Note contends that the redress procedures that the TSA currently plans to provide to erroneously detained passengers, under both the original and redesigned Systems, fail to adequately safeguard passengers' constitutionally protected liberty and property interests. Part II of this Note will explain the CAPPS II System, the changes expected under the Secure Flight Program, and the redress procedures that the government will make available to passengers who are mistakenly identified as security risk.[37] Also, Part II will contend that because the government does not make the data used in conducting the risk assessments available to passengers contesting their assessment, the redress procedures provide little protection for the passengers' affected interests.

Part III of this Note provides a constitutional background for the analyses conducted in Parts IV and V and explains the framework for identifying what, if any, procedural due process protections are required before the government may deprive citizens of a constitutionally protected

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34. *See, e.g.*, Leslie Miller, *New passenger screening plan not ready to fly*, CHI. SUN-TIMES, July 14, 2004, at 46, 2004 WL 63149361 (explaining that although the TSA chief did not say what prompted the decision to reshape the CAPPS II System, he did indicate that "privacy concerns were involved").

35. *See* Robert O'Harrow, Jr., *Airport Screening System Touted as Improvement*, WASH. POST, Aug. 27, 2004, at E3 (explaining the changes the government is implementing under the redesigned CAPPS II System).

36. *See id.* (same). The government's announcement that it will continue to use commercial databases when verifying passengers' identities is a departure from earlier announcements that the redesigned System would not use commercial databases. *See, e.g.*, Wald, *supra* note 33, at A21 (explaining that although "[t]he government is backing away from a plan to use commercial databases" in the CAPPS II System, the government "is pressing ahead with a new computer system that will rely on government databases").

37. *See infra* Part II (explaining the CAPPS II System).

interest. Part IV applies the first step of this framework. Relying on the right to travel jurisprudence, Part IV contends that airline passengers have a judicially cognizable liberty interest in the right to air travel. Part IV further contends that passengers maintain a judicially cognizable property interest in their purchased airline ticket and reserved seat.

Part V applies the *Mathews v. Eldridge*[38] balancing test in order to address the second step of the framework. Part V weighs the interests of the passengers against the interests of the government, in light of the risk of erroneous deprivation and the probable value of any additional procedural safeguards. First, Part V outlines the fundamental nature of passengers' interest in travel within the United States, their liberty interest in international travel, and their property interest in their purchased ticket and seat. Second, Part V discusses passengers' high risk of erroneous deprivation under the government's currently planned redress procedures and contends that the inclusion of additional safeguards would significantly reduce that risk. Finally, Part V addresses the government's substantial interest in safeguarding the nation's security but concludes that the government's interest would not be unduly burdened by certain additional procedural safeguards.

This Note concludes by recommending three procedural safeguards that should be implemented before the redesigned CAPPS II System is launched in American airports. These safeguards, if implemented, would adequately protect the liberty and property interests of red-coded passengers, those passengers forbidden from flying. First, the government should conduct additional risk assessments of those passengers who were identified as a high risk to aviation security during the initial assessment. Second, the government should provide these passengers with predeprivation notice prior to their arrival at the airport. Finally, the government should provide red-coded passengers with a postdeprivation hearing and an opportunity to challenge the evidence against them. [39]

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38. Mathews v. Eldridge, 424 U.S. 319 (1976). See *infra* Parts III and V for a discussion of *Mathews*.

39. The arguments presented in this Note, particularly those in Part V, are limited by the ongoing development of the redesigned CAPPS II System. However, all indications show that the government plans to implement the new System, even with the passengers' limited ability to access and correct erroneous information. These indications will guide the arguments offered in the following pages. This Note seeks only to determine whether the redesigned CAPPS II System provides adequate procedural due process safeguards to protect the civil liberties and property interests of erroneously detained passengers.

II. The Computer-Assisted Passenger Prescreening System (CAPPS II) and Secure Flight

Beginning in late 1997, commercial airline carriers implemented the first Computer-Assisted Passenger Prescreening System (CAPPS), an automated computer system developed by the Federal Aviation Administration (FAA) to screen airline passengers.[40] The original CAPPS System, managed by the FAA, gathered information about passengers and assessed whether a particular passenger represented a security threat.[41] The System did not scan any government or law enforcement databases,[42] but instead identified high-risk passengers by assessing behavioral characteristics,[43] looking for suspicious itineraries and purchasing patterns,[44] and comparing information about the passengers' identities to a watch list for suspected terrorists.[45] The System selected passengers with a high-risk profile[46] and applied extra security procedures to the luggage of the high-risk passengers.[47] In addition

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40. *See* Press Release, U.S. Dep't of Transportation, DOT Investigates Passenger Security Screening's Impact on Minorities, *at* http://www.dot.gov/affairs/dot5501.htm (June 4, 2001) [hereinafter DOT Press Release] ("CAPPS was adopted by DOT's Federal Aviation Administration in late 1997 in response to a recommendation of the White House Commission on Aviation Safety and Security.") (on file with the Washington and Lee Law Review).

41. *See* Ellen Baker, Comment, *Flying While Arab—Racial Profiling and Air Travel Security*, 67 J. AIR L. & COM. 1375, 1379 (2002) (describing the procedure for screening passengers).

42. *See* Press Release, U.S. Dep't of Justice, Justice Department Review of FAA Passenger Screening Proposal Concludes It Won't Discriminate Against Airline Travelers, *at* http://www.usdoj.gov/opa/pr/1997/October97/413cr.html (Oct. 1, 1997) ("CAPS [sic] will not prompt the gathering of any additional information by the federal government or air carriers, and is not connected to any law enforcement or national security database.") (on file with the Washington and Lee Law Review).

43. *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, AVIATION SECURITY: COMPUTER-ASSISTED PASSENGER PRESCREENING SYSTEM FACES SIGNIFICANT IMPLEMENTATION CHALLENGES, GAO-04-385, at 6 (Feb. 2004) [hereinafter GAO REPORT] (explaining the CAPPS II System), *available at* http://wwwgao.gov/new.items/d04385.pdf. The CAPPS II rules used in assessing the risk level of passengers are "behavioral characteristics used to select passengers who require additional security scrutiny." *Id.* at 6 n.5.

44. *See* Sharon Begley, *Will We Ever Be Safe Again?*, NEWSWEEK, Sept. 24, 2001, at 58, 60 (explaining the screening process of the CAPPS System). Under the original CAPPS System, security officials often flagged passengers who purchased open tickets or paid cash for one-way tickets. *See id.* (stating that security personnel may view open ticket purchases as suspicious).

45. GAO REPORT, *supra* note 43, at 6.

46. *See* Bankston & Gray, *supra* note 21, at 8–9 (describing how the CAPPS System selected passengers). Bankston and Gray also note that the specifics of the CAPPS files are confidential. *Id.* at 9.

47. *See* Baker, *supra* note 41, at 1379 (explaining that the intent of the original CAPPS

to identifying high-risk passengers for additional screening, the System also randomly selected other passengers to undergo additional screening measures.[48]

Following the events of September 11, Congress determined that the original CAPPS System was inadequate,[49] and that *all* passengers must be screened in order to thoroughly assess any terrorist threats that could endanger commercial airline flights.[50] In November 2001, Congress enacted the ATSA,[51] which created the TSA and granted the federal government full control over aviation security.[52] In the Act, Congress mandated:

> The Secretary of Transportation shall ensure that the Computer-Assisted Passenger Prescreening System, or any successor system–
>
> (i) is used to evaluate all passengers before they board an aircraft; and
>
> (ii) includes procedures to ensure that individuals selected by the system and their carry-on and checked baggage are adequately screened.[53]

In response to this mandate, the TSA, while still under the auspices of the Department of Transportation, issued a "Notice to amend a system of records" on January 15, 2003 (January 15 Notice).[54] In this Notice, the TSA proposed to establish a system of records to support a new version of the Computer-Assisted Passenger Prescreening System, CAPPS II.[55] The Notice stated that

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program was to screen only the checked baggage of passengers whom security officials identified as posing a security risk).

48. *See* DOT Press Release, *supra* note 40 (stating that CAPPS would also randomly identify passengers whose bags would be subject to search).

49. Under the original CAPPS System, security officials provided additional screening only for those passengers whom the System either identified as a high risk or selected randomly. Security officials allowed all other passengers to board the aircraft after simply walking through a metal detector. *See* GAO REPORT, *supra* note 43, at 5–6 (describing CAPPS's screening process).

50. *See infra* note 53 and accompanying text (quoting Section 136 of the Aviation and Transportation Security Act, which requires that any passenger screening system implemented at U.S. airports must assess all passengers); *see also Bell Briefing*, *supra* note 2 (explaining that Congress required the passenger screening system to screen all passengers).

51. Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

52. *Id.* § 101, 115 Stat. at 597; *see also* Kent C. Krause, *Putting the Transportation Security Administration in Historical Context*, 68 J. AIR L. & COM. 233, 244 (Spring 2003) (explaining that the Aviation and Transportation Security Act established "full-time federal control over aviation security through creation of the Transportation Security Administration").

53. Aviation and Transportation Security Act of 2001, Pub. L. No. 107–71, § 136, 115 Stat. 597, 637 (2001) (codified as amended in scattered sections of 49 U.S.C.).

54. Notice to amend a system of records, 68 Fed. Reg. 2101 (Jan. 15, 2003) [hereinafter January 15 Notice].

55. *See id.* at 2102 (stating that the TSA will use the system of records for screening

the records would "be used to facilitate the conduct of an aviation security-screening program, including risk assessments to ensure aviation security."[56] Although the TSA has described CAPPS II as "an enhanced system to confirm the identities of passengers and identify foreign terrorists or persons with terrorist connections before they board U.S. aircraft,"[57] the January 15 Notice failed to provide any definitive information on the new CAPPS II System. Instead, the Notice addressed only the types and manner of information that the System would use in conducting the risk assessments and the categories of records that would be affected.[58] The January 15 Notice clarified that the risk assessment would be based on information provided by the passengers, reservation information from the airports, risk assessment reports, and law enforcement and intelligence information.[59]

The TSA received a significant number of comments concerning the January 15 Notice,[60] prompting the agency to make considerable changes to the proposed System.[61] On August 1, 2003, the TSA issued an interim final notice (August 1 Notice) concerning the CAPPS II System[62] that better outlined the System and how it would be used by the government to conduct risk assessments on all "passengers traveling by air to, from or within the United States."[63] In addition to identifying passengers as terrorist risks, the August 1 Notice stated that the CAPPS II System may be used for other purposes in the future, such as identifying persons with outstanding arrest warrants and submitting their information to the appropriate authorities.[64]

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airline passengers).

56. *Id.*

57. Press Release, U.S. Dep't of Homeland Security, Transportation Security Administration, TSA's CAPPS II Gives Equal Weight to Privacy Security, *at* http://www.tsa.gov/public/display?theme=44&content=250 (March 11, 2003) [hereinafter Privacy Press Release] (on file with the Washington and Lee Law Review).

58. *See* January 15 Notice, 68 Fed. Reg. at 2102 (listing the categories of records that would be held in the new system of records and also describing persons or entities to whom the information contained in the system may be disclosed).

59. *Id.* at 2102.

60. *See* August 1 Notice, 68 Fed. Reg. 45,265, 45,265 (Aug. 1, 2003) (stating that "substantial comments were received in response to the prior Privacy Act notice").

61. *Id.*

62. *Id.*

63. *Id.* at 45,266.

64. *See id.* ("After the CAPPS II system becomes operational, it is contemplated that information regarding persons with outstanding state or federal arrest warrants for crimes of violence may also be analyzed and applied in the context of this system."); *see also* Press Release, Dep't of Homeland Security, Undersecretary Hutchinson's Remarks at a CAPPS II Media Roundtable, *at* http://www.dhs.gov/dhspublic/display?content=3166 (last visited Aug. 1,

The August 1 Notice explained in much greater detail than the previous Notice how the System will screen each passenger.[65] To verify the identity of a passenger, the government will use the data collected from the passenger reservation system.[66] This System will contain the passenger name record (PNR) that is assigned to each passenger when they purchase an airline ticket.[67] A passenger's PNR will contain the passenger's name, address, telephone number, and date of birth, as well as the passenger's itinerary.[68] The System would compare a passenger's PNR to databases maintained by commercial data providers[69] in order to verify the passenger's identity[70] and then conduct a risk assessment of each passenger, searching within the government's national security and other classified databases for known terrorists or any connection to terrorist activities or groups.[71]

2004) (stating that CAPPS II will identify violent criminals with outstanding warrants) (on file with the Washington and Lee Law Review). Under the redesigned CAPPS II System, the TSA eliminated the component that would compare passengers' information against criminal databases. *See* O'Harrow, Jr., *supra* note 35, at E3 (explaining that the new Secure Flight System will not scan passenger lists for violent criminals).

65. *See* August 1 Notice, 68 Fed. Reg. at 45,266 (explaining how the system will first verify a passenger's identity and then conduct a risk assessment on each passenger).

66. *Id.*

67. *See* Bankston & Gray, *supra* note 21, at 9 (stating that airlines, travel agencies, and computerized airline reservations systems maintain PNRs).

68. August 1 Notice, 68 Fed. Reg. at 45,266; *see also* Bankston & Gray, *supra* note 21, at 9 (explaining that PNRs can be "particularly revealing" as they can show your travel companion(s), whether you shared a hotel room on your trip, and even what food you ate while traveling). Government officials state that the revised CAPPS II System may still require passengers to submit their name, address, telephone number, and date of birth. *See* Wald, *supra* note 33, at A21 (stating that a government official explained that the revised system may still require passengers to submit this information).

69. Commercial databases compile public records and consumer data on U.S. residents. These databases are frequently used by credit card companies and cell phone providers to verify the identity and credit record of the applicant or purchaser. *See* USAToday.com, *Government scours commercial databases for terror suspects, at* http://www.usatoday.com/tech/news/techinnovations/2003-04-14-database-search_x.htm (Apr. 14, 2003) (describing commercial databases) (on file with the Washington and Lee Law Review). The TSA plans to use three primary databases to verify passengers' identities: Acxiom Corporation, ChoicePoint, and LexisNexis Group. *See* O'Harrow, Jr., *supra* note 35, at E3 (listing the databases that the TSA plans to use).

70. *See* August 1 Notice, 68 Fed. Reg. at 45,266 (stating that the CAPPS II System will send the information from a passenger's PNR to commercial databases to verify the identity of the passenger); *see also* Privacy Press Release, *supra* note 57 (explaining that "CAPPS II will receive scores generated from commercial databases" to verify a passenger's identity).

71. *See* August 1 Notice, 68 Fed. Reg. at 45,266 (stating that the assessment will determine the probability that the passenger is a terrorist or has ties to a terrorist group by using "national security information from within the Federal Government" and other classified information).

After the System completes the risk assessment, it will assign each passenger a color code—green, yellow, or red[72]—and transfer the information to the ticket counter when the passenger checks in for his flight.[73] The System will assign a color code of green to those passengers identified as "low risk," and those passengers may proceed to their flight with no extra security checks.[74] Passengers who are flagged as having an "elevated, uncertain or 'unknown risk' of terrorism"[75] are color-coded yellow.[76] Passengers that receive a yellow code will be subject to additional scrutiny[77] but may board the flight as soon as they clear the heightened security measures.[78]

The passengers whom the System identifies as presenting a high risk of potential terrorist activity will be assigned a red code.[79] Red-coded passengers will not be subjected to additional screening—which would allow them to embark on their flight after clearing the extra security measures—but instead will be barred from boarding the plane.[80] Additionally, the airlines or the TSA will hand the names of the red-coded passengers over to appropriate law enforcement officials, thus subjecting the passengers to police questioning and possible arrest.[81] The TSA estimates that of the over two million passengers

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72. *See Bell Briefing*, *supra* note 2 ("Once the analysis is completed, a red, yellow, or green classification will be provided in the system."); August 1 Notice, 68 Fed. Reg. at 45,266 (explaining that "each traveling passenger will be identified with a 'risk score,' indicating whether that person's information leads to a determination of low, high, or unknown risk to passenger and aviation security").

73. *See* GAO REPORT, *supra* note 43, at 6–7 (explaining the risk assessment process).

74. *See Bell Briefing*, *supra* note 2 (explaining that "green" passengers may proceed to the gate without any extra scrutiny); August 1 Notice, 68 Fed. Reg. at 45,266 (stating that low-risk passengers "will simply pass through the ordinary airport security screening process to their flights").

75. August 1 Notice, 68 Fed. Reg. at 45,266.

76. *See Bell Briefing*, *supra* note 2 (noting that a "yellow" passenger will be subject to greater security than will "green" passengers).

77. *Id.*; *see also* August 1 Notice, 68 Fed. Reg. at 45,266 (explaining that passengers with an "elevated, uncertain, or 'unknown risk' of terrorism . . . will be subjected to heightened security screening prior to boarding their flights").

78. August 1 Notice, 68 Fed. Reg. at 45,266.

79. *See* GAO REPORT, *supra* note 43, at 7 (stating that "[p]assengers whose risk assessment is determined to be unacceptable will not be issued boarding passes").

80. *See* Goo, *supra* note 26, at A1 (stating that security officials will not allow red-coded passengers to board their flight); *see also Bell Briefing*, *supra* note 2 ("'Red' assessments are referred to law enforcement."); August 1 Notice, 68 Fed. Reg. at 45,266 (explaining that the TSA will refer high risk passengers to law enforcement officials).

81. *See* GAO REPORT, *supra* note 43, at 7 (stating that law enforcement officials will determine whether to subject passengers to additional questioning or arrest).

within the United States who travel by air each day,[82] the System will red-code one to two percent of these passengers.[83] Thus, even under a revised System, as many as 20,000 to 40,000 passengers may be red-coded and prevented from boarding their flight each day. These passengers will presumably be barred from flying unless they are able to challenge and correct any erroneous information that may have led to their risk assessment.[84]

The August 1 Notice spoke to many of the issues concerning the CAPPS II System that the previous Notice failed to address. The August 1 Notice did not, however, explain any redress procedures that will be available to passengers who are delayed or detained because of an erroneous assessment. The Notice did provide for a passenger advocate to deal with passengers' complaints about the information obtained from their records.[85] The only records the passengers will be able to access, however, are those "containing information [the passengers] provided"—essentially their name, address, phone number, and birth date.[86] The databases that the System accesses and the criteria it uses to conduct the risk assessments will remain confidential.[87] Because data from the commercial and government databases will not be available for review, passengers' efforts to contest their records will be relatively useless.[88]

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82. *Id.*

83. *See* Goo, *supra* note 26, at A1 (stating that approximately one to two percent of passengers will be assessed as a high risk to aviation security).

84. Officials will prohibit passengers from boarding a commercial aircraft if the CAPPS II System determines that the passengers are a high risk to aviation security. August 1 Notice, 68 Fed. Reg. at 45,266. Thus, until the passengers are able to correct the erroneous information that led to their risk assessment, they will continue to be tagged as a risk to aviation security.

85. *See* August 1 Notice, 68 Fed. Reg. at 45,269 (explaining that passenger complaints about the system will be directed to a CAPPS II passenger advocate); *see also* Privacy Press Release, *supra* note 59 ("When CAPPS II is implemented an independent ombudsmen will be available to address concerns of individuals who believe they have been incorrectly singled-out for additional screening.").

86. August 1 Notice, 68 Fed. Reg. at 45,269.

87. *See* GAO REPORT, *supra* note 43, at 26 ("TSA officials stated that passengers will not have access to any government data used to generate a passenger risk score due to national security concerns. TSA officials have also not determined to what extent, if any, passengers will be allowed to view information used by commercial data providers.").

88. *See* AMERICAN CIVIL LIBERTIES UNION, *Legislative Update: The Five Problems with CAPPS II: Why Airline Passenger Profiling Proposal Should Be Abandoned*, http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13356&c=206 (Aug. 25, 2003) [hereinafter *Legislative Update*] (explaining that the TSA will limit the data available to the public) (on file with the Washington and Lee Law Review); *see also* GAO REPORT, *supra* note 43, at 25–26 (identifying and discussing factors that could prevent the TSA from creating an adequate redress process). In its February 2004 report, the GAO explained that "there are three concerns regarding data in CAPPS II that may complicate the redress process." *Id.* at 25. The GAO's

Responding to concerns that the CAPPS II System will infringe upon the privacy and civil liberties of airline passengers, Congress amended the original CAPPS II legislation in the Vision 100—Century of Aviation Reauthorization Act.[89] The amendment gave Congress oversight of the CAPPS II System and mandated that the Secretary of Homeland Security, together with the Attorney General, submit a written report addressing specific issues that Congress finds troubling with the System.[90] One of the questions Congress posited to the Secretary was to explain how the System would "mitigate the effect of any errors, and what procedural recourse will be available to passengers who believe the System has wrongly barred them from taking flights."[91] In February, 2004, the United States General Accounting Office reported that the TSA had not adequately addressed the above question and six others listed in the Vision 100—Century of Aviation Reauthorization Act.[92]

In response to the February 2004 report and mounting pressure from privacy advocates, such as the American Civil Liberties Union (ACLU), in July, 2004, the TSA's acting administrator announced that the TSA was "'reshaping and repackaging' the screening system."[93] Although the Secretary of Homeland Security, Tom Ridge, stated that the CAPPS II System could be considered dead,[94] the TSA's acting administrator explained that the program had not been

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first concern is with the TSA's plans to remove information gathered through a passenger's risk assessment from the computer system soon after the completion of the passenger's flight. *Id.* at 26. This raises concerns about the ability of passengers to challenge their assessment if the information has already been deleted. *Id.* The second concern raised in the report is that the public will not have access to many of the records used in the risk assessment, making it extremely difficult for passengers to adequately challenge an erroneous assessment. *Id.* Finally, the GAO Report acknowledges concerns about correcting erroneous data. *Id.* The TSA has stated that the passengers will be responsible for contacting commercial database sources to correct mistakes in the data, which may not be possible if the database licensing agreement prevents the government from releasing the names of the databases to the passengers. *Id.* The GAO concluded that the TSA needed to resolve these, and other policy issues, before the implementation of CAPPS II. *Id.* at 25.

89. Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2490 (2003) (codified as amended in scattered sections of 49 U.S.C.); *see* Roy Mark, *Senate Wants Oversight of CAPPS II System*, *at* http://dc.internet.com/news/article.php /2110391 (Mar. 17, 2003) (quoting Sen. Wyden, who proposed the amendment giving Congress oversight of CAPPS II, stating that "[i]t's a matter of good public policy for the privacy and civil liberties implications of [CAPPS II] to be reported to Congress") (on file with the Washington and Lee Law Review).

90. Vision 100—Century of Aviation Reauthorization Act § 608, 117 Stat. at 2569–70.

91. *Id.* at 2570.

92. GAO REPORT, *supra* note 43, at 13.

93. Leslie Miller, *New passenger screening plan not ready to fly*, CHI. SUN-TIMES, July 14, 2004, at 46, 2004 WL 63149361.

94. *See* Cynthia L. Webb, *Uncle Sam Mothballs Screening Program*, *at*

eliminated, but that the agency was considering making changes to four components of the CAPPS II System: "an identity verification process; a check of each passenger's name against government lists of known terrorists; a process by which each passenger would be assessed and assigned a numerical score to rate the risk the traveler posed to the aircraft; and a comparison of each passenger's name against databases of known violent criminals."[95] In August, 2004, the TSA announced that the redesigned CAPPS II System, renamed Secure Flight, will continue to use a two-step process to verify passengers' identities and conduct risk assessments for possible terrorists.[96] The new System will not, however, use algorithms in the verification process and will no longer scan for wanted violent criminals.[97] Although the changes expected in the new System address the privacy concerns raised by civil liberties advocates, these changes do not address concerns that the System infringes upon the procedural due process rights of airline passengers detained by the System.

III. Roth *and* Perry: *The Constitutional Framework for Determining When Process Is Due*

As discussed in Part II, *supra*, the CAPPS II regulations provide few, if any, procedural due process safeguards to passengers who are identified as a high risk to aviation security and assigned a red color code, and the government has given no indication that any changes under the redesigned CAPPS II System will result in additional safeguards. Procedural due process is "our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action"[98] and is triggered when the government deprives a citizen of life, liberty, or property.[99] Courts have generally

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http://washingtonpost.com/ac2/wp-dyn/A54487-2004Jul16?language=printer (July 16, 2004) (stating that when Tom Ridge was asked at a press conference "'whether the [CAPPS II Program] could be considered dead,' [he] jokingly gestured as if he were driving a stake through his heart and said 'Yes'") (on file with the Washington and Lee Law Review).

95. *See* Sara Kehaulani Goo, *TSA May Change Screening*, WASH. POST, July 14, 2004, at E10 (summarizing the acting administrator's statement to Congress about the changes that the TSA is considering for the CAPPS II System).

96. *See* O'Harrow, Jr., *supra* note 35, at E3 (explaining the changes expected under the redesigned CAPPS II System).

97. *Id.*

98. Bd. of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting); *see also* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))).

99. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property,

interpreted due process as including notice and an opportunity to be heard.[100] Although procedural due process does not protect citizens from the deprivation of their interests, it is meant to protect them from the *erroneous* deprivation of those interests.[101] Courts will afford procedural due process protections regardless of whether the interests to be protected are "rights" or "privileges."[102]

To require the government to provide procedural due process safeguards to red-coded passengers, the passengers must possess an identifiable interest in life, liberty, or property, and the government's action must infringe upon that interest.[103] In *Board of Regents v. Roth*[104] and its companion case, *Perry v. Sindermann*,[105] the Supreme Court set forth a two-step process for determining

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without due process of law."). Because CAPPS II is a federal program, the Fifth Amendment is applicable when conducting a due process analysis of the System.

100. *E.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

101. Carey v. Piphus, 435 U.S. 247, 259 (1978).

102. *Roth*, 408 U.S. at 571–72 (rejecting the distinction between rights and privileges).

103. *See, e.g.*, *id.* at 569 ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."); *see also* Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89, 89 (2002) (explaining that the courts search for a constitutionally protected interest when deciding procedural due process cases).

104. Bd. of Regents v. Roth, 408 U.S. 564 (1972). The respondent in *Roth*, an assistant professor at a state university, sued the University alleging that the decision not to renew his teaching contract was a violation of his Fourteenth Amendment rights and that the failure of the University to provide him with an opportunity to be heard violated his right to due process. *Id.* at 568–69. In order to determine whether a hearing was required, the Court looked to whether the respondent had a liberty or property interest in his employment at the University. *Id.* at 571–78. The Court found that the respondent was not deprived of liberty when the University refused to renew his job contract because the school did nothing to injure the respondent's reputation or to prevent him from acquiring another job at other public universities. *Id.* at 573. In assessing whether the respondent was denied a property interest, the Court explained that the "procedural protection of property is a safeguard of security of interests that a person has already acquired in specific benefits." *Id.* at 576. In order for the interest to be protected, a person must have a "legitimate claim of entitlement" to the property. *Id.* at 577. Because the respondent's contract with the University was for a term of only one year and because there was no statute that granted the respondent entitlement to re-employment at the University, the Court found that the respondent did not have a property interest in being rehired by the University. *Id.* at 578. The Court therefore held that the University was not required to offer the respondent a hearing prior to or after his termination. *Id.* at 578–79.

105. Perry v. Sindermann, 408 U.S. 593 (1972). In *Perry*, the respondent was an employee of a state college for four consecutive years. *Id.* at 594. His initial one-year contract was renewed each of the consecutive three years for a one-year term. *Id.* During his last year of employment at the college, the Board of Regents voted not to renew his contract and issued a press release stating reasons for this decision. *Id.* at 595. The Board did not, however, provide the respondent with a statement of reasons for the decision not to renew his contract, nor did the

whether a property or liberty interest is at stake.[106] The court must first identify whether a liberty or property interest has been implicated by state action.[107] The *Roth* Court explained that when identifying this interest, "[courts] must look not to the 'weight' [of the interest involved] but to the *nature* of the interest at stake."[108] If the court finds that the nature of an interest gives rise to a liberty or property interest, then the court reaches the second prong of the analysis and assesses the adequacy of the procedural measures provided.[109]

A. Locating an Identifiable Interest in Liberty and Property

1. Liberty Interests

The redesigned CAPPS II System may infringe upon passengers' interests if those passengers have an identifiable liberty interest at stake.[110] Courts define liberty interests, relying on constitutional interpretation to determine the existence of such interests.[111] These interests are construed broadly and include the freedom to contract, to obtain knowledge, to marry, and to have children.[112] In determining whether there was a liberty interest at stake, the Court, in both *Roth* and *Perry*, declined to define specifically the scope of liberty interests. The *Roth* Court noted, however, that "'[w]ithout doubt, [the interest] denotes

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Board provide the respondent with an opportunity to be heard on the matter. *Id.* In determining whether the Board violated the respondent's procedural due process rights, the Court assessed the respondent's allegations that the interest in his employment was secured by an understanding that his long period of service guaranteed him some type of tenure at the college. *Id.* at 600–01. Finding that the respondent may be able to show that his reliance on the college's policies on tenure provided him with a legitimate claim of entitlement to the job, the Court remanded the case stating that if the respondent could prove his property interest, the college officials would be obligated to provide the respondent with a hearing. *Id.* at 603–04.

106. *Roth*, 408 U.S. at 570–71.

107. *Id.*; *see also* William P. Quigley, *Due Process Rights of Grade School Students Subjected to High-Stakes Testing*, 10 B.U. PUB. INT. L.J. 284, 290 (Spring 2001) (explaining the two-step process used in deciding procedural due process actions).

108. *Roth*, 408 U.S. at 571.

109. *See id.* at 569–70 (stating that before the Court can balance the interests of the parties involved, the Court must identify a liberty or property interest).

110. *See id.* at 569 (determining that due process is triggered when there is an identifiable liberty or property interest at stake).

111. *See* Joshua D. Zelma, Note, *Recent Developments in International Law: Anti-Terrorism Legislation—Part Two: The Impact and Consequences*, 11 J. TRANSNAT'L L. & POL'Y 421, 428 (2002) (explaining that liberty interests are determined based on constitutional interpretation).

112. *Roth*, 408 U.S. at 572.

not merely freedom from bodily restraint, but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'"[113] Therefore, courts will find that a liberty interest has been implicated even when the deprivation does not reach the level of restriction that is associated with a criminal conviction.[114]

2. *Property Interests*

The redesigned CAPPS II System may also infringe upon the passengers' property interests if they have an identifiable property interest at stake.[115] Unlike liberty interests, property interests are not defined through constitutional interpretation.[116] Instead, they are created and defined by "rules or understandings that stem from an independent source . . . that secure certain benefits and that support claims of entitlement to those benefits."[117] The *Roth* Court explained that when a person has more than an "abstract need or desire for" the property interest being protected, procedural due process safeguards are implicated.[118] To have an identifiable property interest, a person must have a "legitimate claim of entitlement" to the property.[119] To determine whether a person has a legitimate claim of entitlement, courts must look to outside sources, such as state and federal laws, regulations, customs, and well-settled practices.[120]

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113. *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

114. *Id.*; *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

115. *See Roth*, 408 U.S. at 569 (determining that due process is triggered when there is an identifiable liberty or property interest at stake).

116. *Id.* at 577.

117. *Id.*

118. *Id.*

119. *Id.*; *see also* Emilio Jaksetic, *Security Clearance Determinations and Due Process*, 12 GEO. MASON L. REV. 171, 180 (1990) (stating that a "person must have a benefit, privilege, status, or position under applicable law that cannot be removed or taken away by the government except 'for cause'").

120. *See Roth*, 408 U.S. at 577 (explaining that property interests are not defined by the Constitution, but rather come from an independent source).

B. Roth *and* Perry *Meet* Mathews*: Determining What Process Is Due*

Although locating an identifiable liberty and property interest satisfies the first prong of the *Roth/Perry* framework, "[o]nce it is determined that due process applies, the question remains what process is due."[121] If the redesigned CAPPS II System implicates either a liberty or a property interest, the second step of the framework requires the court to assess what minimum procedures must be provided and whether currently provided safeguards are adequate.[122] Although the minimum procedures required "var[y] directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it,"[123] the Court frequently has held that some kind of hearing is necessary when deprivation of either a liberty or property is at stake.[124]

To ascertain what minimum procedures are due, the Supreme Court, in *Mathews v. Eldridge*,[125] identified three separate factors that courts must weigh and balance: (1) the private interest; (2) the risk of erroneous deprivation under the current procedures used, "and the probable value, if any, of additional or

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121. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1136 (1984) (explaining that if due process is triggered, the courts must then determine what type of process is due).

122. *See supra* note 109 and accompanying text (describing the second prong of the *Roth/Perry* framework).

123. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1278 (1975).

124. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) (determining that a hearing is required when either property or liberty interests are implicated); Bd. of Regents v. Roth, 408 U.S. 564, 569–70 (1972) ("When protected interests are implicated, the right to some kind of hearing is paramount."); *see also* Friendly, *supra* note 123, at 1267 (stating that the Court has held that due process requires a hearing prior to deprivation of property or liberty).

125. Mathews v. Eldridge, 424 U.S. 319 (1976). In *Mathews*, the Court concluded that a beneficiary of social security disability benefits was not entitled to an evidentiary hearing prior to the deprivation of those benefits. *Id.* at 349. After terminating Eldridge's disability benefits, the Social Security Administration notified him that his benefits would be terminated, but that he could seek reconsideration of the decision. *Id.* at 324. Eldridge argued that his benefits should not be terminated until after he had an opportunity for a hearing on whether he remained disabled and thus eligible for the benefits. *Id.* at 325. The Court reasoned that because Eldridge would be entitled to retroactive benefits if the agency reversed the termination decision, Eldridge's only interest was uninterrupted receipt of the benefits pending final determination of his claim. *Id.* at 340. The Court also found that the pretermination procedures employed by the agency adequately safeguarded Eldridge's interest in his benefits. *Id.* at 343–47. The Court further explained that the financial and administrative burdens on the government would be substantial if a pretermination hearing was required. *Id.* at 347. The Court therefore concluded that the current procedures satisfied due process requirements and that due process did not mandate a pretermination hearing. *Id.* at 349.

substitute procedural safeguards;" and (3) the governmental interest, including how additional or substitute procedures would burden the government.[126] The *Mathews* Court explained that balancing these three interests is necessary in each case because due process requirements vary depending on the circumstances of each situation.[127] As such, a court's analysis for the second step of the framework must consider each of the three factors individually within the context of the particular case.

IV. Identifying Airline Passengers' Interests: Application of Roth *and* Perry

Before conducting the *Mathews v. Eldridge* balancing test to evaluate what process is due, this Note must ascertain whether the first prong of the *Roth/Perry* framework is satisfied. In order to meet the demands of the first prong, airline passengers must have an identifiable liberty or property interest (or both) upon which the state infringes. This Part will apply the *Roth/Perry* framework to evaluate: (1) whether passengers have a liberty interest in their right to travel by air both within the United States and internationally, and whether the redesigned CAPPS II System infringes upon passengers' liberty interest; and (2) whether passengers have an identifiable property interest, and if so, whether the government infringes upon that right by prohibiting red-coded passengers from boarding their scheduled flight.

A. Recognition of Passengers' Liberty Interest in the Right to Airline Travel

The federal courts have long recognized that United States citizens enjoy a right to travel.[128] The Supreme Court has concluded that although citizens have

126. *Id.* at 335.

127. *Id.* at 334. In discussing the importance of weighing the public and private interests, the *Mathews* Court cited two cases that described due process as a flexible legal concept. In *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the Court wrote that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 895 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951). In addition, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court noted that due process "calls for such procedural protections as the particular situation demands." *Id.* at 481.

128. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (recognizing that the right to travel is a fundamental right); Kent v. Dulles, 357 U.S. 116, 125 (1958) (recognizing that the right to travel is a liberty interest of which persons cannot be deprived without the due process of law); *see also* Reser, *supra* note 22, at 832 ("There exists in the United States a citizen's constitutional right to travel. This right may only be limited in certain circumstances.").

a fundamental right to engage in interstate travel within the United States,[129] citizens have only a freedom to travel internationally.[130] This difference equates only to a varying level of scrutiny in assessing the constitutionality of restrictions on the right to travel within the United States[131] and the freedom to travel abroad.[132] Regardless of whether the travel being restricted is within the United States or abroad, "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law."[133]

1. The Right to Interstate Travel: A Fundamental Liberty Interest

For almost two hundred years, the federal courts have acknowledged that the right to travel freely among the states is a fundamental right under the Constitution.[134] In *United States v. Guest*,[135] for example, the Supreme Court

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129. *See, e.g.*, *Shapiro*, 394 U.S. at 631 (finding that there exists a fundamental right to travel within the United States).

130. *See* Haig v. Agee, 453 U.S. 280, 306 (1981) (emphasizing that "the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States").

131. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 504 (1999) (applying strict scrutiny analysis when determining the constitutionality of a statute restricting interstate travel); *Shapiro*, 94 U.S. at 634 (adopting an equal protection analysis and applying strict scrutiny to actions that infringed upon a person's right to travel); *see also* Katherine Warner, Comment, *You Can't Get There from Here: Travel Restrictions and the Airlines*, 58 J. AIR L. & COM. 345, 352 (1992) ("[T]he interstate right to travel will be carefully protected, and intrusions into this right will be carefully scrutinized by the courts.").

132. *See, e.g.*, Califano v. Aznavorian, 439 U.S. 170, 176–77 (1978) (explaining that infringements on international travel will not be subject to as close scrutiny as intrusions on the right to interstate travel); *see also* Reser, *supra* note 22, at 836 (concluding that the freedom to travel internationally will only be limited when national security or foreign policy so mandate).

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

134. *See* Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 459 (1995) (explaining that a court first discussed the right to travel in *Corfield v. Coryell*, which was decided in 1823). In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), the court identified "the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture and professional pursuits" as a fundamental privilege. *Id.* at 552.

135. United States v. Guest, 383 U.S. 745 (1966). In *Guest*, the Supreme Court considered whether the district court erred in dismissing indictments charging the six defendants with conspiring to deprive black citizens in Athens, Georgia, of several constitutional and legal rights. *Id.* at 746–48. The Court reversed the judgment of the district court on all but one of the charges, including a charge that the defendants deprived the black citizens of their right to travel freely. *Id.* at 749. The Court explained that because the right to travel is a fundamental right recognized under the Constitution, the charge was based on a law of the United States. *Id.* at 757–60. The Court noted that in order for the defendants to be convicted on this count, at trial the prosecution would have to prove that the defendants acted with specific intent to deprive the

explained, "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[136] Although the Constitution does not specifically enumerate a right to interstate travel, the Supreme Court has suggested that the freedom to travel is such a basic right that it was implicit in the rights guaranteed by the Constitution.[137] At times, the Court has attempted to place the right within a particular textual source,[138] while at other times the Justices have considered the task of locating the right within a specific constitutional provision to be unnecessary, instead interpreting the right to travel as fundamental to the Union.[139]

In recent cases, the Supreme Court has reaffirmed the idea that the freedom to travel throughout the nation is a fundamental right under the Constitution.[140] In *Shapiro v. Thompson*,[141] for example, the Court concluded

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victims of their right to travel. *Id.* at 760.

136. *Id.* at 757.

137. *See, e.g.*, *id.* at 758 (explaining that there is no explicit reference to the right to travel from state to state in the Constitution because "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created"); *see also* ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION, 184–87 (1956) (proposing that, although the Constitution does not include the phrase from the Articles of Confederation granting citizens free movement to and from states, the Framers of the Constitution intended to include the right but believed that the right to travel was imbedded somewhere else in the Constitution).

138. *See, e.g.*, United States v. Edwards, 314 U.S. 160, 172–74 (1941) (stating that the right to travel is protected by the Commerce Clause); *id.* at 178 (Douglas, J., concurring) (suggesting that the right to travel is guaranteed by the Fourteenth Amendment's Privileges and Immunities Clause); *id.* at 182 (Jackson, J., concurring) (same).

139. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 66 (1982) (Brennan, J., concurring) ("[T]he frequent attempts to assign the right to travel some textual source in the Constitution seem . . . to have proved both inconclusive and unnecessary."); *Guest*, 383 U.S. at 757–59 (1966) (explaining that even though the Court has identified various textual sources for the right to travel, it is not necessary to determine the correct source because the Court has consistently held that the right exists); *see also* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1868) (finding that the right to travel was implied in the Constitution because "[w]e are all citizens of the United States, and as members of the same community we must have the right to pass and repass through every part of it without interruption"); Hartch, *supra* note 134, at 459 (noting that "the Court has struggled to identify a doctrinal justification for the right [to travel]").

140. *See* Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969) (stating that the Court had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision" and explaining that it is sufficient that the freedom to travel is a fundamental and long recognized constitutional right).

141. Shapiro v. Thompson, 394 U.S. 618 (1969). In *Shapiro*, the Supreme Court considered whether statutory provisions in two states and the District of Columbia (District) that

that the right to travel was a constitutional right, and any classification that infringes upon that right will be subject to strict scrutiny analysis,[142] whereby "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[143] The Court has continued to require a compelling government interest in cases in which the government has infringed upon the right to interstate travel,[144] thus making it clear that the Court will apply strict scrutiny analysis to any law or regulation that infringes upon this fundamental right.

Although the foregoing discussion clearly establishes that there is a fundamental right to interstate travel, assessing whether red-coded passengers

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denied welfare benefits to new residents were constitutionally permissible. *Id.* at 622. Each of the challenged statutes disallowed residents from receiving welfare benefits until they had resided in the state or District for one year. *Id.* The states and the District argued that the restrictions were justified because they served as protective mechanisms by which the financial solvency of their respective programs would be preserved. *Id.* at 627–28. The Court stated that, while requiring a one-year residency requirement prior to the distribution of welfare benefits may in fact have acted as a protective mechanism, such purpose was unconstitutional. *Id.* at 629. The Court reasoned that the statutes were an unconstitutional infringement on the plaintiffs' right to travel. *Id.* at 629–30. Because the states failed to provide the Court with a compelling government interest which would override the plaintiffs' fundamental right to travel freely from state to state, the Court found the statutes unconstitutional. *Id.* at 638.

142. *See id.* at 634 (adopting an equal protection analysis and applying strict scrutiny to actions that infringed upon a person's right to travel); *see also* Hartch, *supra* note 134, at 472 (stating that the *Shapiro* Court identified the right to travel as a fundamental right and applied strict scrutiny review).

143. *Shapiro*, 394 U.S. at 634.

144. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 507 (1999) (finding a statute that limited the maximum welfare benefits available to new residents unconstitutional because the state was unable to provide a compelling interest that would justify an intrusion on the right to travel); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (invalidating a state statute that imposed a durational residence requirement on one's ability to obtain state-provided free medical care because the statute was not substantiated by a compelling governmental interest); *cf.* Sosna v. Iowa, 419 U.S. 393, 408–09 (1975) (finding that Iowa had sufficiently compelling state interests in requiring one year of residency in order for the State to grant a divorce decree).

In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court clarified that the right to travel actually encompasses three separate interests: (1) the right to move freely from one state to another; (2) the right to be accepted as a friendly visitor to the state; and (3) the right to be treated the same as citizens of the state. *Id.* at 500. The Court specifically identified the Privileges and Immunities Clause of Article IV as the source of the second component and the Fourteenth Amendment's Privileges and Immunities Clause as the source of the third component of the right to travel. *Id.* at 501–03. With regard to the first component, the right to move freely from state to state, the Court declined to pinpoint a particular constitutional source granting that right and instead stated that this right "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Id.* at 501 (quoting United States v. Guest, 383 U.S. 745, 758 (1966)).

have a fundamental liberty interest upon which the government has infringed requires a determination of whether the right to interstate travel includes an entitlement to interstate airline travel. Even though a number of courts have held that burdens placed on a single mode of transportation do not implicate the right to travel,[145] several courts addressing minor restrictions on air travel have acknowledged that major restrictions, such as banning passengers from flying to a particular airport, "might well give rise to a constitutional claim."[146] These cases support the argument that even though there is no fundamental right to the most convenient form of travel, a restriction that completely bans passengers from traveling by air may be such a major burden that it unconstitutionally burdens the passengers' fundamental right to interstate travel.[147] Thus, because the government will completely bar red-coded passengers from traveling by air, it is possible that even the redesigned CAPPS II System unconstitutionally infringes upon these passengers' fundamentally protected liberty interests.[148]

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145. *See, e.g.*, City of Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982) (noting that there is no "constitutional right to the most convenient form of travel"); Monarch Travel Servs., Inc. v. Associated Cultural Clubs, 466 F.2d 552, 554 (9th Cir. 1972) (explaining that limiting the choice of mode of transportation is not unconstitutional).

146. *See City of Houston*, 679 F.2d at 1192 (asserting that a ban on airline travelers from flying into Houston's National Airport could implicate the right the travel). In *City of Houston*, the court considered the constitutionality of a DOT regulation that prohibited flights originating more than 1000 miles from Washington, D.C., from flying directly into National Airport. *Id.* at 1187. The court noted that the "perimeter rule" did not completely ban persons from flying into National Airport; rather, it only required that in order to travel to National Airport, passengers' flights from outside of the one-thousand mile perimeter must make a stop somewhere within one-thousand miles of Washington, D.C. *Id.* at 1192.

In another case addressing limited operations at a particular airport, *Kansas v. United States*, 797 F. Supp. 1042 (D.D.C. 1992), the court found that the challenged statute was not an unconstitutional infringement on the right to travel because it did not prohibit airline passengers from engaging in interstate travel because an alternate airport was available. *Id.* at 1052. The court noted, however, that it would reach a different result if the airport in question was the only airport within the state. According to the court, "a congressional enactment that limited the flights from that airport to certain states would clearly implicate the right to interstate travel." *Id.* at 1052 n.20.

147. *See infra* notes 167–71 and accompanying text (discussing the implication of the right to travel). *See generally* William Mann, Comment, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 J. AIR L. & COM. 857, 866–70 (2000) (arguing that a ban on air travel could implicate the right to travel).

148. If a ban on airline travel implicates the fundamental right to interstate travel, it may give rise to a substantive due process claim and thus subject the CAPPS II System to strict scrutiny analysis. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (noting that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" (quoting Moore v. City of

Even if the redesigned CAPPS II System does not violate red-coded passengers' fundamental right to interstate airline travel, it does trigger procedural due process because the passengers certainly have a liberty interest in travel that the Due Process Clause of the Fifth Amendment protects. This argument is made by drawing a comparison to cases that have considered whether citizens have a constitutional right to operate a motor vehicle. Although these cases have held that there is no constitutional right to operate a motor vehicle, the courts explained that when licenses are taken away by state action, they "are not to be taken away without that procedural due process required by the Fourteenth Amendment."[149] Thus, even though citizens do not have a fundamental right to drive a car, the courts recognize that they have a liberty interest in maintaining their ability to do so.[150] Similarly, even if passengers do not have a fundamental liberty interest in the right to interstate airline travel, the courts will recognize that passengers maintain an interest in traveling by air that is sufficient to trigger due process if the government prohibits them from flying interstate.[151]

2. *The Freedom to Travel Internationally: A Recognized Liberty Interest*

The Supreme Court has explained that although there are few, if any, permissible limitations on the right to travel from state to state, "the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment."[152] Although the Court has applied strict scrutiny to any restrictions placed on the right to interstate travel, the Court has not offered this same protection to the freedom to travel abroad.[153] However, even though the Court does not consider

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E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion))). The constitutionality of the CAPPS II System and an inquiry into whether the System violates substantive due process are, however, outside of the scope of this Note. Instead, this Note identifies the right to travel as a liberty interest and focuses on whether the government provides sufficient procedural due process safeguards to protect red-coded passengers from erroneous deprivation of that liberty interest.

149. Bell v. Burson, 402 U.S. 535, 539 (1971); *see also* Dixon v. Love, 431 U.S. 105, 112 (1977) ("It is clear that the Due Process Clause applies to the deprivation of a driver's license by the State.").

150. *Bell*, 402 U.S. at 539 ("Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood.").

151. *See* Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) (stating that the courts must look to the nature of the interest, not the weight of the interest).

152. Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (citations omitted).

153. *See id.* at 176–77 (explaining that infringements on international travel will not be as

the right to foreign travel to be on the same constitutional footing as the right to interstate travel, because the Court has recognized the right to international travel as a liberty interest, any infringement on that right will trigger procedural due process safeguards.[154] Although the Court has struggled to enunciate clearly what rights Americans have to travel abroad during the last half century,[155] the Court has repeatedly stated that Americans have a liberty interest in the right to travel abroad "of which [they] cannot be deprived without the due process of law under the Fifth Amendment."[156]

The first line of Supreme Court cases to consider the right to travel abroad addressed the constitutionality of restrictions on who may travel abroad.[157] These cases determined when the Secretary of State or Congress may refuse to issue passports to American citizens.[158] In assessing these restrictions, the Court reiterated that Americans have a liberty interest in the right to travel and any restrictions must conform to the mandates of the Due Process Clause.[159] As such, the Court concluded that any laws or regulations that place restrictions on

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closely scrutinized as intrusions on the right to interstate travel); *see also* Reser, *supra* note 22, at 836 (suggesting that there are fewer limitations on the right to interstate travel than there are on the right to travel internationally); Warner, *supra* note 131, at 352 (explaining that the right to travel internationally has not been "as clearly or unqualifiedly stated" as the right to interstate travel).

154. *See Califano*, 439 U.S. at 176 (emphasizing that international travel "can be regulated in the bounds of due process" (citations omitted)); *Roth*, 408 U.S. at 569 (stating that the infringement of a liberty interest implicates procedural due process); Perry v. Sindermann, 408 U.S. 593, 599 (1972) (explaining that an opportunity to be heard is required when the government has infringed upon a liberty interest).

155. *Compare* Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (finding that the Secretary of State did not have the statutory authority to deny passports on ideological grounds) *with* Haig v. Agee, 453 U.S. 280, 309–10 (1981) (explaining that the President may take actions to restrict foreign travel when there is a substantial likelihood that the travel will jeopardize national security).

156. *Kent*, 357 U.S. at 125.

157. *See* Aptheker v. Sec. of State, 378 U.S. 500, 514 (1964) (concluding that a statute that prohibited members of a registered Communist organization to hold or use passports was an unconstitutional infringement on the appellants' right to travel); *Kent*, 357 U.S. at 130 (finding that the Secretary of State lacked statutory authority to deny passports to applicants wishing to travel abroad solely because of the applicants' ideological beliefs).

158. *See Aptheker*, 378 U.S. at 505 (determining that a congressional statute that prohibited members of a registered Communist organization to hold or use passports too broadly restricted the liberty interests of the applicants and was therefore unconstitutional); *Kent*, 357 U.S. at 130 (concluding that the Secretary of State lacked the statutory authority to deny passports solely because of the applicants' ideological beliefs).

159. *Kent*, 357 U.S. at 125.

who may travel abroad must be narrowly construed[160] and cannot abridge the citizens' liberty interest in their right to travel abroad.[161]

In addition to the cases that address whether restrictions placed on who may travel are constitutional, the Court also has considered cases involving restrictions on where one may travel abroad.[162] In *Zemel v. Rusk*,[163] the Court considered the constitutionality of the Secretary of State's refusal to validate the passports of United States citizens who planned to travel to Cuba.[164] On appeal of the district court's dismissal of the case, the Supreme Court distinguished this case from those involving restrictions on who may travel, stating that the government did not impose the area restriction in this case because of a person's membership in a certain political organization, but rather because of the foreign policy concerns of the nation.[165] The Court concluded that although the right to travel is a liberty interest that cannot be impeded without due process, "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."[166]

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160. *See Aptheker*, 378 U.S. at 505 (explaining that a statute that prohibited members of a registered Communist organization to hold or use passports was unconstitutional because it "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment"); *Kent*, 357 U.S. at 129 (noting that when the right to travel or other similar activities are involved, any "delegated powers that curtail or dilute them" must be narrowly construed).

161. *See Kent*, 357 U.S. at 130 (stating that the Secretary of State did not have the authority to curtail the applicants' liberty interests based on their suspected involvement in the Communist Party).

162. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 15 (1965) (determining that the Secretary of State was justified in concluding "that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel"); *see also* United States v. Laub, 385 U.S. 475, 481–87 (1967) (addressing whether the statute requiring a passport for entry into or departure from the United States authorized criminal sanctions for travel to or from Cuba without a valid passport).

163. *Zemel*, 381 U.S. at 15.

164. *Id.* at 3. In 1961, the United States broke off all diplomatic ties with Cuba and declared that passports would no longer be validated for travel to Cuba except with the permission of the Secretary of State. *Id.* The State Department issued a press release along with the regulation stating that it may allow persons covering news or those having previously established business interests in Cuba to continue traveling to Cuba. *Id.* The appellant sought to have his passport validated for travel to Cuba. *Id.* The Secretary of State, however, denied his request "on the ground that the purpose of the trip did not meet the previously prescribed standards for such travel." *Id.* at 4.

165. *Id.* at 13 ("In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.").

166. *Id.* at 14.

In 1981, the Supreme Court decided *Haig v. Agee*,[167] a case that does not clearly fall into either of the two lines of right to international travel cases previously discussed. In *Agee*, the Court clearly distinguished the freedom to travel abroad from the right to interstate travel, stating that "the freedom to travel abroad . . . is subject to reasonable government regulations."[168] The Court determined that the government may impose reasonable regulations "when there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of the passport holder's activities in foreign countries."[169]

Even though the *Agee* decision represented a departure from previous international right to travel cases that had protected the right of citizens to travel abroad, the *Agee* Court continued to recognize the freedom to travel abroad as a liberty interest, and stated that any regulations of that interest must be "within the bounds of due process."[170] As such, even if this right can be inhibited because of concerns for national security, citizens are entitled to procedural due process safeguards when the government places restrictions on their freedom to travel outside the United States.[171] A complete ban on foreign air travel would constitute a direct and severe restriction on passengers' ability to travel abroad. Because air travel is the only way that most United States citizens can travel to countries overseas, a prohibition against airline travel would effectively serve as a prohibition against international travel. Therefore, passengers certainly have

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167. Haig v. Agee, 453 U.S. 280 (1981). *Agee* concerned the Secretary of State's revocation of a passport based on the proposed activities of the passport holder while abroad. *Id.* at 282. Philip Agee, an American citizen residing abroad, was employed by the Central Intelligence Agency (CIA) for nine years. *Id.* at 283. Several years after the termination of his employment with the CIA, Agee announced that he was embarking on a campaign to expose the officers and agents of the CIA in an effort to fight against the CIA's operations. *Id.* Because he exposed the identities of several CIA agents, the Secretary of State revoked Agee's passport based on a State Department regulation that authorized revocation of passports when the holder's activities abroad lead to the damage of, or are likely to harm, our national security. *Id.* at 286. Agee filed suit, and the district court and a divided court of appeals held that the Secretary's action exceeded his statutory authority. *Id.* 287–88. On appeal, the Supreme Court reversed the district court, instead finding that Congress had implicitly authorized the Secretary to revoke passports on the ground that the holder represents a threat to the security of the nation. *Id.* at 306. The Court concluded that Agee's activities posed a threat not only to national security but also to the nation's relationships with other countries, and that such a restriction on Agee's foreign travel was the only means available to the government to prevent further damage to our national security and foreign relations. *Id.* 308.

168. *Id.* at 306.

169. *Id.* at 309.

170. *Id.* at 307 (quoting Califano v. Torres, 435 U.S. 1, 4 n.6 (1978)).

171. *Id.* at 306; *see also* Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (stating that the freedom to travel abroad may be "regulated in the bounds of due process").

a liberty interest in their right to travel by air to destinations outside the United States, and they should be entitled to procedural due process protections before an exacting restriction banning foreign air travel, such as CAPPS II or Secure Flight would institute, is placed on their liberty interest.

3. Implication of the Liberty Interest in the Right to Travel

Under the *Roth/Perry* framework, the government must infringe upon an identifiable liberty interest in a right to airline travel in order to trigger procedural due process.[172] The Court, in *Soto-Lopez v. New York City Civil Service Commission*,[173] explained that a law or regulation "implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'"[174] Under the *Soto-Lopez* framework, the redesigned CAPPS II System implicates the right to airline travel in two ways. First, the TSA developed CAPPS II with the express objective of impeding travel for red-coded passengers.[175] The System screens all airline passengers in an effort to prevent those persons who pose a threat to aviation security from boarding commercial aircraft.[176] Clearly, the objective of the System is to prohibit, or at least inhibit, red-coded passengers from traveling by air in the United States.

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172. *See* Bd. of Regents v. Roth, 408 U.S. 564, 569–70 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").

173. Soto-Lopez v. N.Y. City Civil Serv. Comm'n, 476 U.S. 898 (1986). In *Soto-Lopez*, two American citizens residing in New York, both of whom resided in Puerto Rico at the time of their enrollment in the United States Army, sued the Civil Service Commission after the Commission denied their bonus points for armed forces service when they applied for employment with the Commission. *Id.* at 900–01. The Commission disallowed the awarding of the bonus points because they were not residents of New York when they entered the Army. *Id.* at 901. The plaintiffs claimed that the denial of points violated both their equal protection rights and their constitutional right to travel. *Id.* Finding that the provision penalized the plaintiffs for traveling to New York, the court held that the provision violated the right to travel. *Id.* at 909. The Court also concluded that the provision awarding the bonus points based on residence in the State of New York at the time of entry into service violated the equal protection rights of the plaintiffs. *Id.* at 911.

174. *Id.* at 903 (citations omitted).

175. *See* Press Release, U.S. Dep't of Homeland Security, CAPPS II Fact Sheet, *at* http://www.tsa.gov/public/display?theme=8&content=708 (Sept. 29, 2003) ("CAPPS II is designed to ensure that terrorists and violent fugitives do not present a threat to aviation security.") (on file with the Washington and Lee Law Review).

176. *See id.* (explaining that the CAPPS II System is intended to prevent terrorists from posing a threat to aviation security); August 1 Notice, 68 Fed. Reg. 45,265, 45,266 (Aug. 1, 2003) (stating that CAPPS II's intended purpose is to screen all airline passengers for possible security risks).

Second, the ban on air travel imposed upon red-coded passengers will prevent them from obtaining their boarding passes and boarding their scheduled flight, thus deterring passengers from exercising their right to travel. Even if the TSA changes the manner in which passengers' identities are verified and the process by which the passengers are assessed, the CAPPS II System, or Secure Flight, will continue to implicate the right to airline travel under the *Soto-Lopez* framework, as the government's clear objective with any screening system is to impede the travel of passengers who represent a high risk to aviation security.

B. Recognition of Passengers' Property Interests

Roth and *Perry* established that in order for a person to have a property interest in a right or privilege, he must have a "legitimate claim of entitlement to it."[177] As discussed *supra*, the Constitution does not create property interests; "rather [property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source."[178] Therefore, to determine whether an airline passenger has a legitimate claim of entitlement to a property interest, we must look to outside sources, such as state law, contracts, or other rules.[179]

Passengers have a claim of entitlement by virtue of their contractual relationship with the airline. The *Perry* Court recognized that a claim of entitlement could arise from a specific contractual provision if it would give rise to a mutual understanding between the parties.[180] When passengers purchase an airline ticket, the purchase creates a contract for transportation between the passengers and the airline.[181] The ticket guarantees passengers a right to an available seat on a particular flight.[182] If the airline is unable to

177. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also* Perry v. Sindermann, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

178. *Roth*, 408 U.S. at 577.

179. *Id.*; *see also* D.J. GALLIGAN, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES 195 (1996) ("[W]hether or not there is an entitlement will . . . depend on the legislative framework under which the claim is made.").

180. *Perry*, 408 U.S. at 601.

181. *See* Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne, 242 F. Supp. 129, 144 (E.D.N.Y. 1965) (stating that an airline ticket constitutes a contract).

182. Air carriers guarantee reserved seats on a particular flight. *See, e.g.*, DELTA AIR LINES, INC., DELTA DOMESTIC GENERAL RULES TARIFF, *Rule 245: Denied Boarding Compensation*, 47, http://www.delta.com/pdfs/contract_of_carriage_dom.pdf (last modified Oct. 25, 2004) [hereinafter DELTA TARIFF] (explaining that a confirmed reserved ticket grants the passenger a

provide the passengers with service on that particular flight, the airline will provide the passengers with a refund,[183] rebook the passengers for another flight, or provide alternate means of transportation.[184] Thus, when passengers purchase airline tickets, there is a mutual understanding between the passengers and the airline that the passengers are entitled to the seat that they purchased, and that the airline has an obligation to transport the passengers, or to provide the passengers with a refund, or to provide alternate means of travel. The passengers therefore secure a legitimate claim of entitlement through the contractual relationship with the airline and recognize a property interest in the ticket and seat on a particular flight.

In addition to the property interest created by the passengers' contract with the airlines, federal statutes arguably grant the passengers a property interest in their ticket and airline seat. Passengers enjoy both a common law and statutory right to travel by commercial airlines.[185] Congress has granted all citizens "a public right of transit through . . . navigable airspace."[186] Although commercial airlines have a duty to carry passengers who have paid for a ticket,[187] Congress mandates that the airlines refuse to transport a passenger who does not consent

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right to a specific seat on a certain flight) (on file with the Washington and Lee Law Review); *see also* Harby v. Saadeh, 816 F.2d 436, 438 (9th Cir. 1987) (emphasizing that an open-return ticket guarantees "merely the right to the next available open seat").

183. *See, e.g.*, DELTA TARIFF, *supra* note 182, *Rule 260: Involuntary Refunds*, at 54 (guaranteeing a refund when a passenger is denied boarding for reasons such as flight cancellation, failure to provide proof of identity, or government request or regulation); *Id.*, *Rule 270: Voluntary Refunds*, at 55–56 (assuring that the airline will refund the ticket price if a passenger is unable to board the plane for reasons other than those listed in *Rule 260*); US AIRWAYS GROUP, INC. TERMS OF TRANSPORTATION, *VIII. Refunds*, http://www.usairways.com/customers/travel_policies/terms/terms.htm (last visited Feb. 11, 2004) [hereinafter US AIRWAYS TERMS] (explaining terms of both voluntary and involuntary refunds) (on file with the Washington and Lee Law Review).

184. *See, e.g.*, DELTA TARIFF, *supra* note 182, *Rule 245: Denied Boarding Compensation*, at 49 (describing policies providing for transportation when the airlines are unable to carry a passenger on the reserved flight); *see also* US AIRWAYS TERMS, supra note 183, *IX. Delayed and Cancelled Flights* (outlining the airline's policies for delayed or cancelled flights).

185. *See* Reser, *supra* note 22, at 839 ("Commercial airlines have a duty that arises from both statutory as well as common law to provide service to all paying customers, as well as a duty to protect the safety of their paying customers."); *cf.* Ward v. Housatonic Area Reg'l Transit Dist., 154 F. Supp. 2d 339 (D. Conn. 2001). In *Ward*, the plaintiff, after being suspended from transit bus services, alleged that the defendant had deprived him of his property interest in the bus service. *Id.* at 342. The court concluded that even though there was a state statute that created the transit district, "no where [sic] does that statute or any other establish a property interest for individuals in any such services." *Id.* at 348.

186. 49 U.S.C. § 40103(a)(2) (2000).

187. *See* Reser, *supra* note 22, at 839 (explaining that commercial airlines have a duty to carry passengers who purchase a ticket).

to a search of himself and his luggage.[188] The airlines also have discretion to deny boarding to a passenger whom the airline perceives to be a safety threat.[189] Despite the ability of the airlines to restrict passengers based on safety concerns, however, airlines maintain a duty to carry passengers who are not a threat to safety.[190] Because the airlines must transport paying passengers who are not a security risk, the federal statute grants the passengers a property interest in their ticket and seat. Regardless of whether erroneously red-coded passengers have a statutory entitlement to their ticket and seat, they clearly have a legitimate claim of entitlement based on their contractual relationship with the airline—a claim that is infringed upon when the government labels them as a high risk to security and prohibits them from boarding their flight.

V. The Due Process Challenge: Applying the Mathews *Balancing Test*

Having established that airline passengers have an identifiable liberty and property interest in airline travel and that the government has given no indication that it intends to alter any redress procedures provided under the CAPPS II System when implementing Secure Flight, this Part explores whether the redress procedures provided to red-coded passengers under the current regulations are sufficient to satisfy the requirements of procedural due process. If the current procedures are not sufficient, this Part asks what additional process must be provided to the detained passengers under the redesigned CAPPS II System, Secure Flight. *Mathews v. Eldridge*[191] provides a framework for determining the adequacy of the procedures. The *Mathews* Court developed a three-pronged test to determine whether the available procedures meet the procedural due process safeguards guaranteed by the Fifth and Fourteenth Amendments of the Constitution.[192] As discussed in Part III, *supra*, this test balances the government's burden in providing "additional or substitute procedural requirement[s]" against the importance of the passenger's interests at stake, in light of the risk of erroneous deprivation attributable to the

188. 49 U.S.C. § 44902(a)(1) (2000).

189. 49 U.S.C. § 44902(b) (2000).

190. *See id.* (stating that airlines *may* refuse to transport passengers who represent a threat to safety).

191. Mathews v. Eldridge, 424 U.S. 319 (1976). See *supra* note 125 for a discussion of *Mathews*.

192. *Mathews*, 424 U.S. at 335.

current procedures provided by the government and the probable value of any additional safeguards.[193]

A. The Interests of the Red-Coded Passengers

The first prong of the *Mathews* test is an assessment and analysis of the private interests at stake.[194] Red-coded passengers have a significant interest in avoiding erroneous deprivation of both their liberty interest in the right to travel and their property interest in their airline ticket and seat.[195] Although airline travel has continued to become more affordable during the last quarter-century,[196] passengers continue to spend a significant amount of money when purchasing an airline ticket. Passengers, however, not only have a property interest in the money they spent for the ticket,[197] they also have a property interest in their ticket and a seat on a particular flight by virtue of their contractual relationship with the airline.[198] By depriving the passengers of the right to use their purchased ticket, the government strips passengers of their property interest in their ticket and seat along with the money the passengers paid for the ticket. Even though airlines will provide a refund of the money spent on a ticket to passengers who are denied boarding because of government regulations,[199] the government's action in red-coding the passengers deprives the passengers' of their property interests in their ticket and the seat that their ticket guarantees.[200]

The government deprives red-coded passengers not only of their property interest in their purchased airline ticket, but also of their ability to move freely throughout the United States and their ability to travel abroad. Although passengers certainly are concerned with airline safety, especially in the wake of

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193. *Id.*

194. *Id.*

195. *See supra* Part IV (establishing passengers' liberty and property interests).

196. *See World Tourism Statistics 2000–2002*, *at* http://www.trentu.ca/anthropology/anth409h/statistics.html (last visited Feb. 29, 2004) ("Between 1978–1998, the real cost of air travel fell by 35 percent . . . . A thousand miles of air travel now requires 61 hours less work than it did a generation ago.") (on file with the Washington and Lee Law Review).

197. *See* Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 443 (1901) (stating that "[m]oney is certainly property").

198. *See supra* Part IV.B (determining that passengers have a property interest in their airline ticket).

199. *See supra* note 183 and accompanying text (stating that airlines will provide refunds to passengers who are denied boarding).

200. *See supra* note 182 and accompanying text (explaining that an airline ticket reserves a particular seat on a certain flight).

September 11, passengers also have an expectation of maintaining their right to travel by air. The ability to travel freely throughout the United States and abroad is an important and basic right of all citizens,[201] and, as such, passengers have a great interest in safeguarding against the government's erroneous deprivation of the passengers' interests in airline travel.

With almost two million passengers boarding commercial aircraft each day in the United States,[202] it is clear that Americans have become reliant on the availability of air travel as an indispensable aspect of today's fast-paced society. Thousands of business travelers rely on airline travel to attend meetings in cities across the country and the world each day.[203] If the redesigned CAPPS II System erroneously codes passengers as a high risk to aviation security, the passengers not only miss their scheduled flight, but, in all probability, will also miss business meetings or other job-related events. In addition to the detrimental effect a ban on airline travel would have on business travelers, such a ban could also prevent passengers from attending weddings, funerals, or family birthdays, therefore depriving them not only of their right to travel, but also of the experience of these important "one-time" events.[204] Passengers traveling for leisure who are banned from boarding their flight not only are denied their ability to travel to their vacation, but also are deprived of their vacation time.

The Supreme Court also has recognized the great social value in travel, especially in traveling abroad,[205] explaining that the freedom of movement allows persons to obtain first-hand knowledge of public affairs, scientists and scholars to discuss their work with colleagues, and students to supplement their

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201. *See* Kent v. Dulles, 357 U.S. 116, 126 (1958) ("Freedom of movement is basic in our scheme of values.").

202. *See supra* note 2 and accompanying text (discussing the number of daily airline travelers).

203. *See* OFFICE OF TRAVEL & TOURISM INDUSTRIES, *2002 Profile of U.S. Resident Travelers Visiting Overseas Destinations Reported From Survey of International Air Travelers*, http://tinet.ita.doc.gov/view/f-2002-101-001/index.html?ti_cart_cookie=20040229.213400.14795 (posted July 2003) (listing the number of business travelers flying overseas in 2002 at 7,487,000 or thirty-two percent of all overseas travelers) (on file with the Washington and Lee Law Review).

204. This is especially true given that because red-coded passengers are not informed of their risk assessment until they arrive at the airport to check-in for their scheduled flight, the passengers will likely be unable to use an alternate mode of transportation to get to their destination in time for the event. See *supra* notes 7–8 and accompanying text for a synopsis of varying travel times for transportation by train or automobile.

205. *Kent*, 357 U.S. at 126–27; *see also* Allan D. Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6, 14 (1955) ("[M]obility of the population is economically advantageous, is desired by most persons, and is considered one of the generally accepted rights of individuals in a free society.").

education.[206] Prohibiting passengers from traveling by air would infringe upon the social value of travel by almost completely preventing citizens from obtaining first-hand knowledge of countries overseas. A ban on air travel would also significantly inhibit the ability of Americans to obtain knowledge about public affairs within the United States in a timely and meaningful manner because using other modes of transportation for long-distance travel is neither efficient nor economical.[207] Further, the Court has also recognized that the ability to reunite with family and friends is an important reason to protect the freedom of movement because of its large social value.[208] However, because a ban on international air travel would act as an almost complete prohibition against travel abroad, citizens would be virtually deprived of their ability to reunite with family and friends who live overseas. Therefore, passengers who are deprived of the right to airline travel could also be denied their ability to participate in business, scholarly, political or family events.

The passengers' interest in protecting their right to travel from erroneous deprivation is especially significant in light of the fact that once passengers have been denied this liberty interest, the government cannot later undo the deprivation or its effects.[209] In other words, passengers who are deprived of their freedom to travel, even if for a short time,[210] cannot regain their lost liberty even if the government later reinstates the passengers' right because they have already missed their flight and suffered the stigma of being labeled a high risk to aviation security.[211] This problem has already arisen within the context

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206. *Kent*, 357 U.S. at 126–27 (quoting ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION 195–96 (1956)).

207. *See supra* notes 3–8 and accompanying text (stating that airline travel provides an efficient and relatively inexpensive form of travel).

208. *Kent*, 357 U.S. at 126 (quoting ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION 195–96 (1956)).

209. *See* Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT Act*, 55 STAN. L. REV. 1419, 1438 (2003) (proposing that all deprivations of liberty are substantial because the "deprivation of liberty cannot be undone"). Sinnar compares the deprivation of liberty with property, noting that "while mistakenly appropriated property can be returned to an individual, the loss of liberty cannot be restored upon a finding that the decision was in error." *Id.*

210. *See* Bd. of Regents v. Roth, 408 U.S. 564, 570–71 (1972) (explaining that when determining whether due process is triggered, it is the nature of the interest, not the weight, that is important); *see also* Goss v. Lopez, 419 U.S. 565, 576 (1975) ("[T]he length and consequent severity of a deprivation . . . 'is not decisive of the basic right' to a hearing of some kind." (citations omitted)). In *Goss*, the Court found it irrelevant that a student suspended from school for ten days did not suffer a "severe detriment or grievous loss." *Id.* at 575. The Court concluded that while the student's loss was not lengthy or severe, he was nevertheless entitled to due process prior to the suspension. *Id.* at 576.

211. In addition to the deprivation of a liberty interest in the right to travel, red-coded

of the current screening process at airports that compares passengers' identities to a government "No Fly" list.[212] There are many reports of citizens being detained at airports across the country because their name triggers a "match" to the government's watch list.[213]

For example, in 2002, members of Peace Action Wisconsin were tagged as a terror risk and were prohibited from boarding their flight to Washington, D.C., for a conference on United States military action in the nation of Colombia.[214] Even though government officials later cleared the members of the group to travel, the Peace Action members, including a nun, a priest, and several students, had already been deprived of their ability to travel to Washington, D.C., and as a consequence, missed their conference.[215] With concerns that the new screening system will actually increase the number of passengers who are mistakenly assessed as a threat to aviation security, it is likely that more airline travelers will be subject to a plight similar to that suffered by the Peace Action Wisconsin Group.[216] As such, passengers retain a significant interest in protecting their right to travel both domestically and internationally.

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passengers who are met at the airport by federal law enforcement agents may also have an identifiable liberty interest in their reputation that the government infringes. These passengers are turned over to police in front of other passengers, some of whom may know the passenger personally. This could cause great embarrassment to the passengers and could damage their reputation, both professionally and socially. *See* Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972) ("'[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971))).

212. *See* Davis, *supra* note 32, at A14 (providing several examples of citizens who have been wrongly detained at the airports).

213. *See id.* (explaining situations of passengers wrongly detained at the airports).

214. *Id.*

215. *Id.* This example and others raise a concern that passengers may be targeted as a risk solely because of their involvement in political and anti-war organizations. *See id.* (describing concerns "among activists that the government was targeting them [and preventing them from flying]"). If the CAPPS II System prevents people from boarding aircraft in the United States solely because of their affiliation with certain organizations, this may well give rise to an unconstitutional infringement of the right to freedom of speech or the right to peaceably assemble as guaranteed by the First Amendment. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble."). Although such an inquiry would be relevant in determining the constitutionality of the CAPPS II System, the constitutionality of the System is outside the scope of this Note.

216. *See* Davis, *supra* note 32, at A14 (stating that there are concerns that the CAPPS II System will result in more erroneously tagged passengers because CAPPS II will search more databases than the predecessor system).

B. The Risk of Erroneous Deprivation and the Probable Value of Substitute Procedural Safeguards in the Current CAPPS II Redress Process

The second prong of the *Mathews v. Eldridge* balancing test consists of an analysis of the current procedures available to red-coded passengers who wish to contest their risk assessment.[217] This analysis requires two separate assessments. First, this Note will determine the risk of erroneous deprivation of the passengers' protected liberty and property interests as result of the current procedures being used. The second part of the analysis evaluates the probable value of requiring the government to increase or alter the procedural protections available to passengers who are mistakenly flagged as terror risks.

1. Failing to Meet the Challenge: Current Redress Procedures and the Risk of Erroneous Deprivation

Under current regulations, the risk of erroneous deprivation is substantial. Much of this risk seems to be associated with the first step of the screening process, verification of passengers' identities, as estimates indicate that the commercial databases that the System will access to verify the identity of airline passengers maintain an error rate of almost thirty percent.[218] In addition, there is a substantial risk of erroneous deprivation from the use of government databases to assess passengers' risk levels because the TSA concedes that it "has no indication of the accuracy of information contained in government databases."[219] Regardless of the errors that exist in the government and commercial databases, even if the redesigned CAPPS II System itself maintains an error rate of two percent—a low estimate[220]—at least 400, and as many as 800, of the 20,000 to 40,000 passengers who are red-flagged each day will be

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217. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the second prong of the analysis).

218. *See, e.g.*, LANE COUNTY BILL OF RIGHTS DEFENSE COMMITTEE, *CAPPS II, at* http://www.lanerights.org.capps.htm (last visited Feb. 22, 2004) (estimating the error rate of commercial databases at thirty percent) (on file with the Washington and Lee Law Review).

219. GAO REPORT, *supra* note 43, at 15.

220. The two percent error rate shows that even a small error rate has the potential of creating big problems. The *Washington Times* reported that transportation officials estimate the error rate to be much higher—around four percent. Audrey Hudson, *Airline Profiling System Defended*, WASH. TIMES, Feb. 13, 2004, at A11. If the error rate is as high as the *Washington Times* article reports, at least 800, and as many as 1600, passengers may be mistakenly identified as a terror risk each day. An error rate this high is also troubling because of the potential number of passengers who actually do pose a terror risk that will be allowed to board the aircraft because the System failed to flag them as a high risk to security.

mistakenly identified as a high risk to aviation security.[221] Although the TSA has stated that the number of passengers who are flagged for additional screening or prohibited from boarding their flights will actually decrease when the agency implements the System,[222] civil liberties groups, citing the high rate of error in the databases to be used by CAPPS II, believe that the number of passengers erroneously flagged and prohibited from flying will actually increase.[223]

In addition to the inaccuracy of the information used to make the risk assessments, the risk of erroneous deprivation is further heightened by the timing of the notice, leaving passengers without an opportunity to challenge meaningfully the assessment prior to the deprivation of their interests. Passengers whom the System determines to be a high risk to aviation security are not informed of their status until they arrive at the airport to check-in for their flight.[224] Consequently, the TSA's current redress procedures available to erroneously assessed passengers are provided only after the passengers have been denied access to their scheduled flights. Thus, by the time they have an opportunity to challenge their risk assessment, they have already been deprived of their liberty and property interests in their particular flight.

Further, even if the TSA provides erroneously deprived passengers with postdeprivation procedures, the procedures available are limited by the passengers' lack of access to the data used by the System, and by the TSA's inability to correct inaccurate information in the databases used to generate the passengers' risk assessments.[225] Although the TSA has stated that it will allow yellow-coded and red-coded passengers an opportunity to file a complaint contesting their risk assessment[226] and to appeal to the Department of

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221. *See* Goo, *supra* note 26, at A01 (stating that the CAPPS II System will assess approximately one to two percent of passengers as high risks to aviation security).

222. *See* Davis, *supra* note 32, at A14 (reporting that "[t]he TSA envisions [CAPPS II] as 'dramatically reducing' the number of people flagged [for additional screening]").

223. *See id.* (stating that there are concerns that the CAPPS II System will result in more erroneously tagged passengers because CAPPS II will search more databases than the predecessor system).

224. *See* GAO REPORT, *supra* note 43, at 7 ("When the passenger checks in for a flight at the airport, the passengers' risk category will be transmitted from CAPPS II to the check-in counter.").

225. *See id.* at 26 (citing data access and data correction as two primary problems with the TSA's redress procedures).

226. *See* August 1 Notice, 68 Fed. Reg. 45,265, 45,269 (Aug. 1, 2003) (stating that passengers may file a complaint with the passenger advocate). The August 1 Notice states that passengers should file a written complaint with the CAPPS II passenger advocate if they wish to contest their records, but it offers no information on how long any search of the records by the passenger advocate may take. *Id.* Even if the passenger advocate is able to locate an error in the

Homeland Security Privacy Office,[227] the passengers may bring complaints based only on information they obtained from their records,[228] making it extremely difficult for passengers to challenge successfully an erroneous risk assessment.[229] This difficulty is due, in large part, to the fact that the TSA, citing national security concerns, will prevent passengers from gaining access to the information in government databases that the System uses in conducting risk assessments.[230] Passengers therefore would be limited to accessing only information that they provided to the airlines when purchasing their ticket—their name, address, phone number, and birth date.[231] The lack of information available to passengers is likely to result in a high rate of erroneous deprivation as this information will give the passengers little, if any, insight into why the System assessed them as a high risk to aviation security.

In addition to passengers' inability to obtain the information necessary to adequately challenge their risk assessment, the passengers will have great difficulty, under the current System, in correcting any erroneous information that led to the mistaken risk assessment.[232] The TSA acknowledges that finding errors in the databases and correcting them may be problematic.[233] This difficulty is due in large part to the fact that the redesigned CAPPS II System will preserve a passenger's information for only a "short period after the completion" of the person's travel itinerary.[234] Although limiting the amount of time the data is retained aids in the protection of passengers' privacy, it will

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passengers' records, the advocate lacks the authority to rectify incorrect information contained in the government or commercial databases. GAO REPORT, *supra* note 43, at 16.

227. GAO REPORT, *supra* note 43, at 25. Neither the Notices nor the GAO Report explain the process of appealing to the DHS Privacy Office, except to say that passengers may file a complaint with the office. *Id.* at 25; August 1 Notice, 68 Fed. Reg. at 45,269.

228. August 1 Notice, 68 Fed. Reg. at 45,269.

229. *See supra* notes 87–88 and accompanying text (explaining that passengers will only be able to access the records that they provided when purchasing their ticket).

230. *See supra* note 88 and accompanying text (stating that the information in the databases will remain confidential).

231. *See supra* note 87 and accompanying text (explaining that passengers will have access to their records which contain only their name, address, phone number and birth date); *see also* GAO REPORT, *supra* note 43, at 26 (noting that "TSA officials stated that passengers will not have access to any government data" and that the TSA has not yet determined if passengers will have access to the information contained in commercial databases).

232. *See* GAO REPORT, *supra* note 43, at 26 (expressing concerns over TSA's ability to correct erroneous information).

233. *See id.* ("TSA documents and program officials stated that it may be difficult for the Passenger Advocate to identify errors.").

234. Press Release, U.S. Dep't of Homeland Security, CAPPS II: Myths and Facts, *at* http://www.dhs.gov/dhspublic/display?content=3163 (Feb. 13, 2004) (on file with the Washington and Lee Law Review).

make it very difficult for passengers to identify any erroneous information which may have led to their mistaken risk assessment.[235] Even if passengers find erroneous information, the TSA's lack of authority to correct any mistakes in the databases increases the probability that passengers will be erroneously deprived of their protected interests.[236]

The redress options currently available to red-coded passengers inadequately protect those passengers from erroneous deprivation. Even though the TSA provides passengers with an opportunity to file a complaint seeking to identify incorrect information, the lack of access and the inability to change inaccurate data render the redress procedures minimally, if at all, effective.[237] The most troubling aspect of the current redress process, however, is that passengers whom the government prohibits from flying are not notified of this decision until they arrive at the airport, thus denying those passengers of any meaningful challenge to the risk assessment prior to the deprivation of their identifiable liberty and property interests.

2. Stepping Up to the Challenge: The Probable Value of Additional or Substitute Procedural Safeguards

The second prong of the *Mathews v. Eldridge* test also calls for an assessment of the probable value of any additional or substitute procedures before the deprivation of the passengers' liberty and property interests.[238] In making this assessment, it is important to recall that the *Mathews* Court explained that "[t]he 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.'"[239] As discussed above, red-coded passengers do not receive notice of their risk assessment until they arrive at the airport to check in for their flight,[240] and even then, the notice does not inform the passengers of

235. *See* GAO REPORT, *supra* note 43, at 26 (emphasizing that "the short retention period might make it impossible for passengers to seek redress if they do not register complaints quickly").

236. *See id.* at 16 (noting that the "TSA does not have the authority to correct erroneous data in commercial or governmental databases").

237. *See id.* at 25 (discussing redress procedures available under CAPPS II).

238. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing that the second prong of the analysis includes an assessment of the "probable value, if any, of additional or substitute procedural safeguards").

239. *Id.* at 348–49 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–72 (Frankfurter, J., concurring)).

240. *See supra* note 224 and accompanying text (explaining that the CAPPS II risk assessment is not transmitted to the airlines until passengers check in for their flight).

the case against them. As such, red-coded passengers will be detained at the airport, deprived of their property interest in their airline ticket and seat, and deprived of their liberty interest in their right to travel.

The probable value of requiring the government to afford notice to the passengers prior to their arrival at the airport is substantial. Providing notice of a high-risk, or red-coded, assessment at the time passengers reserve their plane ticket would allow those passengers who believe that their risk assessment is erroneous to file a complaint prior to their scheduled departure date. While this notice may not be of great value to passengers who book their flights at the last minute,[241] predeprivation notice would have a significant value to passengers who book their flights days or weeks in advance.[242] Given that the Department of Homeland Security acknowledges that the prescreening process can be completed in as little as five seconds,[243] the government could provide notice of the risk assessment almost instantly, thereby allowing passengers with an erroneous risk assessment to immediately file a complaint with the TSA. Although difficulties plague the complaint process, early notice of the risk assessment would at least provide passengers with an opportunity to attempt to correct any mistakes that could have led to the erroneous risk assessment. At the very least, requiring the government to provide notice at an earlier time would allow passengers, at least those traveling within the United States, to arrange alternate transportation in order to arrive at their destination on time.

In addition to meaningful notice, due process generally requires a hearing prior to the deprivation of protected interests.[244] Under the current redress procedures, however, red-coded passengers are not offered a predeprivation

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241. Because the TSA requires a written complaint to be filed, it is unlikely that passengers who purchase their tickets within a few days of their flight will be able to correct any erroneous information that may lead to their high risk assessment before their scheduled departure date. *See* August 1 Notice, 68 Fed. Reg. 45,265, 45,269 (Aug. 1, 2003) (requiring passengers to file a written complaint if they challenge their risk assessment).

242. Many passengers purchase their airline tickets at least several days in advance. In 2002, international travelers purchased their airline tickets an average of 47.8 days in advance. ITA OFFICE OF TRAVEL AND TOURISM INDUSTRIES, *2002 Profile of U.S. Resident Traveler Visiting Overseas Destinations Reported From: Survey of International Air Travelers*, *at* http://tinet.ita.doc.gov/view/f-2002-101-001/index.html?ti_cart_cookie=20040228.223841.05171 (posted July 2003) (on file with the Washington and Lee Law Review).

243. Press Release, U.S. Dep't of Homeland Security, Fact Sheet: CAPPS II at a Glance, *at* http://www.dhs.gov/dhspublic/display?content=3162 (Feb. 12, 2004) [hereinafter CAPPS II at a Glance] (on file with the Washington and Lee Law Review).

244. *See* Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) (finding that a hearing is required prior to the deprivation of liberty and property interests); *see also* Friendly, *supra* note 123, at 1267 (emphasizing that "some kind of hearing is required . . . before a person is finally deprived" of his liberty and property interests (quoting Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974)).

hearing. The only predeprivation "procedure" that the government offers passengers is questioning by appropriate law enforcement officials.[245] Yet, there is no indication that these law enforcement officials will have access to the information which led to the passengers' risk assessment or, even if they do, that they will offer the evidence to the passengers. Without access to this information, passengers are denied a meaningful opportunity to present their side of the story. Further, because the police questioning occurs after the passengers are denied their boarding passes, thus depriving them of their liberty and property interests, the police questioning is not truly a predeprivation safeguard.

Providing a hearing prior to the passengers' arrival at the airport would give the passengers an opportunity to hear any evidence against them and to challenge any erroneous information before they are deprived of their property and liberty interests. While a predeprivation hearing would significantly decrease the risk of erroneous deprivation, this additional safeguard seems to be impractical given the relatively small time frame between the passengers' purchase of their ticket and the departure date. Similarly, providing a hearing at the airport for passengers who are notified of their risk assessment upon check-in seems unfeasible due to the short time available and the potentially large number of passengers who will be entitled to a hearing. Even if a predeprivation hearing is not feasible, however, there may be other predeprivation procedures available that could decrease the risk of erroneous deprivation. For example, the System could conduct a second risk assessment for those passengers who are identified as a high risk by the first assessment. It is possible that erroneous information could have been included in the first computation of the passengers' risk level, and that a second entry of the information would correct any erroneous information entered during the first computation. Thus, the probable value of this additional safeguard would be significant.

If a predeprivation hearing is not possible, there must be an adequate postdeprivation remedy available to red-coded passengers.[246] Although a

245. *See* GAO REPORT, *supra* note 43, at 7 (explaining that passengers who are red-coded may be subject to questioning at the airport).

246. *See* Parratt v. Taylor, 451 U.S. 527, 540 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986) (rejecting "the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property"); *see also* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 876–77 (2003) (discussing postdeprivation hearings). Professor Rubin explains that in procedural due process cases:

> [T]he 'constitutional violation . . . is not complete when the deprivation occurs; it is

postdeprivation hearing obviously would follow the initial deprivation of the interests—that is, after passengers are first denied their right to board a plane—such a hearing would at least ensure that erroneously deprived passengers are not permanently deprived of their liberty interest in their right to travel. Because red-coded passengers may continue to be assessed as a high risk to aviation security as long as any erroneous information about the passengers remains in the databases, a postdeprivation hearing is critical to make certain that the government does not continue to deprive these passengers of their right to future travel because of erroneous information.

Although the probable value of providing erroneously deprived passengers with a postdeprivation evidentiary hearing is significant, the benefits of such process will be limited by the passengers' inability to gain access to the erroneous information contained in the databases used in the risk assessment.[247] Identifying and correcting the errors is dependent upon the government making the passengers' records available for review, an unlikely occurrence under current government policies.[248] The TSA has emphasized that red-coded passengers will not have access to information contained in either the commercial databases accessed or the government's classified databases,[249] and has acknowledged that the passenger advocate is likely to have difficulty locating any errors that may have caused the erroneous assessment.[250] Thus, for any postdeprivation procedures to be meaningful, they must include access to the information that triggered the high-risk assessment. The lack of access, along with difficulty in identifying errors, only underscores the substantial risk of erroneous deprivation and the need for additional safeguards, including

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> not complete unless and until the State fails to provide due process.' In this, and only this, class of cases, the Court explained, might the availability of a state postdeprivation remedy serve to prevent a deprivation of liberty or property from violating the Clause.

Id. (quoting Zinermon v. Burch, 494 U.S. 113, 125–26 (1990)).

247. GAO REPORT, *supra* note 43, at 26; *see also* August 1 Notice, 68 Fed. Reg. 45,265, 45,269 (Aug. 1, 2003) (describing the redress procedures). *But see* Cafeteria Workers v. McElroy, 367 U.S. 886, 898–99 (1961) (holding that denying an employee of a private contractor access to a military base that was the site of her employment for security reasons did not violate requirements of the Due Process Clause of the Fifth Amendment, even though she was neither advised of the specific grounds for her exclusion nor given a hearing).

248. For an overview of the Bush Administration's policies supporting classifying documents as "secret, in the interests of national security," see generally John Podesta, *Need to Know: Governing in Secret*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 220, 221 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

249. GAO REPORT, *supra* note 43, at 26.

250. *Id.*

predeprivation notice and an opportunity for an evidentiary hearing where the government would confront the passengers with the evidence against them.

C. The Governmental Interests

The third, and final, prong of the *Mathews v. Eldridge* balancing test is the analysis of the government's interest in avoiding further due process procedures.[251] Although the governmental interests include "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail,"[252] the government's primary interest in preserving the current redress procedures is protecting the nation from future terrorist threats. September 11 threatened the security of the United States in a way that it had never before experienced.[253] The government suddenly was confronted with an enemy who walked freely among the citizens of the United States and exploited the very freedoms upon which this country was founded.[254] Because terrorists blend in with law-abiding American citizens and are often hard to identify, the government has faced unique challenges in developing new safety measures that would prevent future terror attacks using commercial aircraft.

The congressional mandate requiring the TSA to develop a system that screens all airline passengers is a part of the solution that attempts to meet the challenge of identifying terrorists who have immersed themselves into American life.[255] Congress recognized that to distinguish terrorists from law-

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251. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

252. *Id.*

253. *See* President George W. Bush, Address to a Joint Session of Congress and the American People, *at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (Sept. 20, 2001) (speaking to the nation about the September 11 attacks) (on file with the Washington and Lee Law Review). In his Address, President Bush explained:

> Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.

Id.

254. *See* Evan Thomas & Mark Hosenball, *Bush: 'We're At War'*, NEWSWEEK, Sept. 24, 2001, at 30–33 (explaining that the September 11 terrorists had blended into their communities). The article states that "[t]he pattern of bin Laden's terrorism is to insert operatives into a country where they are 'sleepers,' burrowed deep into the local culture, leading normal lives while awaiting orders." *Id.* at 33.

255. The redesigned CAPPS II System is only one part of the comprehensive program that the government has implemented in the wake of September 11 aimed at increasing aviation

abiding American citizens, the names of each passenger must be checked against a "coordinated list comprised of criminal, national security, intelligence and INS information."[256] Indeed, identifying potential terrorists and preventing recreation of the events of September 11 was the stated purpose of the CAPPS II System. [257] The Department of Homeland Security explains that the System "will seek to authenticate travelers' identities and perform risk assessments to detect individuals who may pose a terrorist-related threat or who have outstanding Federal or state warrants for crimes of violence."[258] Ensuring national security was clearly the impetus in creation of the CAPPS II System, and it will surely remain the focus of the program regardless of how it is reshaped, repackaged, or renamed.

The broad government interest in protecting national security weighs heavily against the passengers' liberty and property interests.[259] However, the government interest should not be measured in terms of the broad concern for national security. Instead, the government interests should be characterized more narrowly "as the interests in security and efficiency that are served by the absence of additional procedures."[260] The interests to be considered are the fiscal and national security burdens that are brought about by the additional safeguards of a meaningful predeprivation notice and an opportunity for an evidentiary hearing allowing red-coded passengers to be confronted with the evidence against them.

Providing notice to red-coded passengers at the time the passengers purchase their airline tickets would result in only a negligible fiscal and administrative burden. Under current procedures, the government already provides notice to red-coded passengers when they arrive at the airport. Concededly, some additional costs may be incurred in furnishing passengers with notice at the time of purchase, such as cost of mailing notices to passengers and the administrative burdens of training airline reservation agents

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security. As part of this program, Congress also transferred the control of all airport screening to the federal government, Aviation and Transportation Security Act, Pub. L. No. 107-71 § 101, 115 Stat. 597, 597 (2001), increased the number of air marshals on commercial flights, § 105, 115 Stat. at 606–08, and improved flight deck security. § 104, 115 Stat. at 605–06.

256. 147 CONG. REC. S9583 (daily ed. Sept. 21, 2001) (statement of Sen. Kerry).

257. CAPPS II at a Glance, *supra* note 243.

258. *Id.*

259. *See* Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (quoting Aptheker v. Sec. of State, 378 U.S. 500, 509 (1964))).

260. Sinnar, *supra* note 209, at 1440; *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (explaining that the governmental interest includes the burdens additional process would bring about).

in informing passengers of their risk assessment and possible redress procedures. These administrative and fiscal costs, however, are offset by a reduction in the costs incurred in dispatching law enforcement officers to meet passengers at the airport. In addition, because the System retains passengers' data until after the completion of the passengers' itinerary, providing notice at the time the passengers purchase their airline tickets will increase the probability that the TSA can better assist passengers in locating and correcting any incorrect information that may have led to the passengers' erroneous risk assessment.

Although the administrative and fiscal burdens of providing notice at the time of the ticket purchase are negligible, the government has a persuasive argument that the threat to national security would be increased if earlier notice is required. It seems that the System relies on a certain "surprise" element in apprehending suspected terrorists at the airport. Thus, the government has a viable argument that notifying red-coded passengers of their risk assessment prior to their arrival at the airport would tip terrorists off and allow them to make other plans if the terrorists know that they will not be able to fly in advance. But, because the sole purpose of CAPPS II, and now Secure Flight, is to keep terrorists off of commercial airliners, this argument does not hold much weight.

Providing notice to red-coded passengers before they arrive to check-in for their flight not only keeps potential terrorists from the airport, but also gives the government the opportunity to verify the location of, and possibly apprehend, known terrorists at an earlier date. Certainly, the government's interest in national security would be equally, if not better, served by identifying and apprehending suspected terrorists before they arrive at the airport. Even if the government provides earlier notice to red-coded passengers, the government still may deny boarding passes to those passengers who were unable to remedy their erroneous assessment prior to their flight. Requiring the government to provide passengers with notice of their risk assessment at an earlier time does not prevent the government from preventing red-coded passengers from flying. Instead, it simply gives those passengers notice of their risk assessment and an opportunity to attempt to correct any information that they believe may have led to their erroneous assessment prior to their arrival at the airport.

In addition to meaningful notice, a further safeguard to protect red-coded passengers against erroneous deprivation is providing these passengers with a meaningful hearing whereby they would have an opportunity to confront the evidence against them. A predeprivation hearing, while likely to decrease the risk of erroneous deprivation, would require the government to provide hearings in an extremely short period of time, resulting in a significant

administrative burden. Although it is certainly plausible that the government could develop a redress process that allows passengers to challenge an erroneous risk assessment in a meaningful manner prior to their scheduled flight, this seems highly improbable for two reasons: (1) the significant number of cases to be heard, and (2) the TSA may have neither access to the databases nor authority to change any incorrect information.[261] However, because the risk assessment takes only five seconds to complete,[262] the government could, with negligible financial and administrative burdens, conduct an additional assessment for red-coded passengers in order to verify that the first computation of the passengers' risk assessment was correct.

Even if it is implausible to provide red-coded passengers with a predeprivation hearing or other procedural safeguards, the government may still be required to provide these passengers with an opportunity to be heard following the initial deprivation of their interests. Although passengers will have already been divested of their property and liberty interests in their missed flight, a postdeprivation hearing will protect against further deprivation of their interests. Providing this additional safeguard would not prevent the government from blocking passengers that pose a legitimate threat to national security from flying; rather, a postdeprivation hearing would simply allow passengers an opportunity to present their side and to hear the government's reasons for assessing them as a high risk to aviation security.

Although the government has an important interest in protecting national security, this interest is not sufficiently burdened by requiring a postdeprivation hearing and is outweighed by the importance of protecting against a continued and erroneous deprivation of red-coded passengers' liberty and property interests. Further, any burden placed on the government's interest in limiting passengers' access to the data used in conducting the risk assessments does not tip the scales back in favor of the government. The TSA has stated that national security concerns prevent the agency from allowing passengers to view information contained in government databases.[263] Even if the government's interest in safeguarding national security may substantiate preventing passengers whom the government suspects as having ties to terrorist organizations from viewing classified evidence against them, the government should not have a blanket policy of nondisclosure of evidence against red-coded passengers. Instead, the government should be required to make the

261. *See* GAO REPORT, *supra* note 43, at 16 (explaining that the "TSA does not have the authority to correct erroneous data in commercial or government databases").

262. CAPPS II at a Glance, *supra* note 243.

263. GAO REPORT, *supra* note 43, at 26.

argument for nondisclosure on a case-by-case basis. This requirement would safeguard national security concerns in cases involving persons whom the government perceives to represent a legitimate threat to national security while allowing passengers who are able to show that they have no ties to terrorist organizations an opportunity to locate and correct any erroneous information in the government and commercial databases. Therefore, the government's interest in national security is not unreasonably burdened by allowing passengers an opportunity to be heard and to confront the evidence against them.

VI. Conclusion

Although safeguarding the nation against future terror attacks continues to be at the forefront of political discourse, fears of terrorism should not undermine the Constitution's protection of the freedoms and liberties upon which this nation was founded. Indeed, the nation's most powerful response to the terrorists should be the protection of the very freedoms that they sought to destroy.[264] Yet a fundamental concern arises as new security measures push aside these freedoms. As Justice O'Connor posited in the weeks after September 11, "At what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that that legislation provides?" [265] Three years after September 11, the question still remains, at what point do national security concerns outweigh the interest of Americans in protecting their civil liberties and other constitutionally protected rights?

Even though the now redesigned CAPPS II System is an apprehensible, and perhaps even necessary, response to the terror attacks of September 11, it must not be implemented in such a way that innocent Americans, those whom the System was created to protect, are deprived of their liberty and property without due process of the law. Although the government has now recognized that the CAPPS II System as originally envisioned does not ensure that Americans' privacy interests will be protected,[266] the government has failed

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264. *See* Richard C. Leone & Greg Arnig, Jr., *Foreword* to THE WAR ON OUR FREEDOMS, at ix, x (Richard C. Leone & Greg Arnig, Jr. eds., 2003) ("We must resolve that it is an essential part of winning the war on our freedoms to insist that we keep intact the civil liberties and other freedoms that we have gained in 225 years. That must be freedom's answer to the terrorists.").

265. Linda Greenhouse, *A Nation Challenged: The Supreme Court: In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

266. *See* Goo, *supra* note 95, at E10 (stating that the TSA plans to reshape the CAPPS II System "in order to address privacy concerns raised by U.S. Airlines, political leaders and advocacy groups").

thus far to acknowledge that this System does not adequately protect due process rights of American citizens. Thus, even the repackaged CAPPS II System will fail the constitutional challenge unless the government implements safeguards that will adequately protect the due process rights of its citizens.

It is clear that the impetus behind the creation of the CAPPS II System was to protect the country from another terror attack employing the use of commercial airliners. Yet, even when the government seeks to restrict the civil liberties or property interests of Americans because of national security concerns, these restrictions must be enacted within the bounds of due process.[267] Thus, because airline passengers maintain both an identifiable liberty interest in their right to travel and an identifiable property interest in their airline ticket and the particular seat that it guarantees, the government may not infringe upon those interests without providing the affected passengers with appropriate procedural due process safeguards. The current redress procedures that the TSA provides to erroneously detained passengers under the System, however, fail to adequately protect the affected interests of those passengers and as such, do not conform to the requirements of the Due Process Clause.

To meet the demands of procedural due process, the TSA must provide passengers with three additional procedural safeguards. First, to improve the accuracy of the risk assessments, the redesigned CAPPS II System should conduct a second risk assessment for those passengers who are red-flagged during the initial assessment. The second computation may yield a different result from the initial assessment. If this occurs, the government should calculate the passengers' risk score a third time. Only those passengers whose scores yield a high risk assessment at least two of the three times should be prohibited from flying. The addition of this safeguard is likely to decrease the number of erroneous risk assessments while resulting in only a negligible burden on the government.

Second, instead of instructing airlines to inform passengers of their risk assessment when they arrive to check-in for their flight, the TSA must afford red-coded passengers notice of their risk assessment prior to their arrival at the airport. The government should instruct airlines to inform red-coded passengers of their risk assessment at the time the passengers purchase their ticket. If, however, immediate notice over the telephone is not plausible, the TSA should promptly provide notice by mail. For those passengers who order their tickets over the Internet or through travel agencies, the government could provide notice in one of several ways, including providing a number on the

267. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

internet sites or with the travel agencies that passengers could call to find out their risk assessment or notifying the passengers by mail within a certain number of days from the purchase of their tickets. Providing earlier notice to red-coded passengers would allow those passengers the opportunity to challenge immediately their assessment and attempt to rectify any incorrect information that may have led to their erroneous risk assessment.

Finally, the TSA must provide red-coded passengers with a meaningful postdeprivation hearing whereby passengers are confronted with the evidence against them and given an opportunity to present their side of the case. Although the government has a legitimate national security concern in limiting passengers' access to classified information, the government should not have a general policy of refusal to disclose such information. Rather, the government should be required to make the argument for why information should not be disclosed to passengers on a case-by-case basis. Providing access to the data used for risk assessment would ensure that passengers who are able to show that they have no ties to terror groups are allowed to confront the evidence against them, while also protecting the government's ability to limit access by those passengers whom the government perceives to be a legitimate threat to national security.

Even though aviation security has now become a legitimate national security concern,[268] the government's appeal to such concerns should not equate to a carte blanche for depriving American citizens of their protected interests without the due process of the law. As Justice Marshall explained, procedural due process is "our fundamental guarantee of fairness [and] our protection against arbitrary, capricious and unreasonable government action."[269] To meet the constitutional challenge and to protect against the erroneous deprivation of the liberty and property interests of airline passengers, the government, before implementing the redesigned CAPPS II System, should be required to integrate the additional procedural safeguards described above with the already existing redress procedures. The implementation of these safeguards will ensure that the screening system maintains a proper balance between securing the nation and preserving those freedoms that the hijackers sought to destroy on September 11.

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268. *See* CONG. REC. S9583 (daily ed. Sept. 21, 2001) (statement of Sen. Kerry) ("Airport security is also a matter of national security.").

269. Bd. of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting).