PLANE HARASSMENT: THE TRANSPORTATION SECURITY ADMINISTRATION'S INDIFFERENCE TO THE CONSTITUTION IN ADMINISTERING THE GOVERNMENT'S WATCH LISTS

Yousri Omar

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PLANE HARASSMENT: THE TRANSPORTATION SECURITY ADMINISTRATION'S INDIFFERENCE TO THE CONSTITUTION IN ADMINISTERING THE GOVERNMENT'S WATCH LISTS

Yousri Omar*

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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.¹

I. Introduction

The tragedy of 9/11 left the United States reeling, frightened by a threat to domestic security that resulted in the single most damaging terrorist attack the world has ever seen. In response to the attacks, the United States vowed to secure itself from an enemy unlike anyone has faced before. The resulting war on terror is a multi-faceted effort, fought on multiple fronts. Financially, the federal government has targeted terrorist organizations by freezing bank accounts, limiting their funds and resources. Internationally, the government has entered into a war in Iraq to rid the world of a despot it perceives as a threat to national security. Domestically, the United States has tried to consolidate its intelligence communities and passed sweeping legislation, such as the Patriot Act, to ensure that these communities have the necessary resources to combat terrorists effectively. Though there has not been another attack of the same magnitude domestically, many criticize the government’s approach as too invasive, too unilateral, and just plain ineffective.

Given the nature of the 9/11 attacks, the government has focused on aviation security to ensure that a similar attack will not happen again. As part of the focus on aviation security, the Transportation Security Administration (TSA) has begun to use government watch lists to screen potential terrorists and terrorist suspects and prevent them from boarding aircrafts. The use of these watch lists has been highly scrutinized by the public and Congress for lack of adequate redress procedures for passengers.

who are flagged as false positives. When TSA attempted to develop improved and more comprehensive pre-screening procedures, Congress stopped further progress because TSA’s changes failed to address the lack of redress procedures. The TSA’s first attempt, CAPPS II, was never implemented and their new program, Secure Flight, seems destined to the same fate unless it addresses Congressional concerns.

To date, the TSA has failed to address the issue, seemingly indifferent to the continual constitutional violations presented in falsely identified passengers. The only remedy available to falsely identified passengers at this point is to have a United States Court of Appeals compel the agency to develop redress procedures. This is the only avenue for passengers to receive a meaningful opportunity to be heard and have their names removed from the list.

Part I of this Note establishes a factual background of the tragedies of 9/11, a brief history of governmental responses to national tragedies, and a story of a South Asian immigrant facing harassment at airports across the country. Part II provides an understanding of aviation security prior to 9/11 then analyzes post 9/11 security measures. Specifically, Part II focuses on the current procedures used by the government and airlines to ensure aviation security and the development of new procedures designed to afford greater protection while simultaneously protecting individual passenger’s constitutional rights. Of particular relevance to this Note is the promulgation and use of government watch lists in order to ensure aviation safety.

Part III analyzes a failed attack on the government’s use of the terrorist watch lists in the United States District Court for the Western District of Washington. Part IV establishes a legal understanding of procedural due process. Part V then applies the due process framework to passengers who are on government watch lists. Part VI incorporates the due process analysis of Parts IV and V to present a legal strategy that will force the TSA to adopt adequate grievance procedures for passengers falsely identified on the government watch lists.

II. The Tragedies of 9/11

On September 11, 2001 the United States suffered the greatest atrocity ever committed on its soil and the worst international terrorist attack in history. On that day, 19 hijackers of Arab descent boarded four transcontinental flights. The four planes originated at Boston’s Logan Airport, Washington’s Dulles Airport, and Newark’s Liberty International
Airport. 3 Bound for destinations in California, three to Los Angeles and one to San Francisco, the planes never arrived at their destinations. 4

The hijackers commandeered the planes and redirected their flight paths to targets within our borders. At 8:46 a.m., American Airlines Flight 11 from Boston crashed into the North Tower of the World Trade Center, killing all passengers and thousands of people in the building. 5 At 9:03 a.m., United Airlines flight 175 out of Boston struck the South Tower of the World Trade Center, killing everyone on board and thousands of people in the building. 6 At 9:37 a.m., American Airlines Flight 77 crashed into the United States Pentagon Building in Arlington, Virginia, killing all on board and many people in the building. 7 The final flight, United Airlines Flight 93 out of Newark, did not fly to its destination, nor did it arrive at its intended target—the passengers of the flight succeeded in retaking the plane and forcing the hijackers to crash the plane into a field in Shanksville, Pennsylvania. 8 There were no survivors of the flight, but those passengers will always be remembered as heroes for being able to thwart the attack which was almost certainly headed for another target in our nation's capital. 9

The attacks left nearly 3,000 people dead, 10 making it the deadliest attack ever to be committed on American soil. 11 The nation, united in the days after the attack, committed itself to ensuring the safety of all its citizens and has endeavored to secure its airports and airplanes. Many argue the United States has been successful, as it has not endured another such incident, but the constitutional sacrifices that many American citizens are forced to make at airports may not be justified. National security is a paramount concern that should not be treated lightly, but Americans must be cautious not to overzealously pursue phantom security measures that do little more than turn ordinary citizens into unfairly ostracized "suspects." A look at historical responses to national tragedies may shed light on why caution is necessary even in these troubling times.

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3 Id. at 1–4.
4 Id. at 4–14.
5 Id. at 7.
6 Id. at 8.
7 Id. at 10.
8 Id. at 10–14.
9 Id.
A Historical Perspective on Excessive Responses to National Tragedies

Every major horror of history was committed in the name of an altruistic motive.\(^\text{12}\)

The truth behind those words can easily be understood by looking at America's historical responses to national tragedies. During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus,\(^\text{13}\) and as a result thousands of civilians were imprisoned.\(^\text{14}\) In *Ex Parte Milligan*,\(^\text{15}\) the Supreme Court held that President Lincoln had exceeded his authority in suspending the writ of habeas corpus while courts were still functioning.\(^\text{16}\) Many view the suspension of the writ of habeas corpus during the Civil War as a black mark on our nation's history, and only one example of an overzealous and excessive response under the guise of national security.\(^\text{17}\)

Fifty years later, in 1917, the United States entered World War I. In another example of an aggressive response that history has not treated well,\(^\text{18}\) Congress passed the Espionage Act on June 15, 1917,\(^\text{19}\) allowing federal authorities to prosecute over 2,000 people for their opposition to conscription

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\(^\text{14}\) See Rosenzweig, *supra* note 13, at 668 (referring to the Civil War suspension of the writ of habeas corpus); *see also* WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222 (1998) (noting that over 13,000 were detained); MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 113–38 (Oxford 1991).

\(^\text{15}\) See Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) (finding that when the courts are still open and when martial law is not in effect, defendants must be given full judicial process). In *Milligan*, the petitioner was arrested and tried before a military tribunal and was subsequently imprisoned in a military prison. *Id.* at 107. The Court found that the petitioner's rights were violated when he was denied a trial by jury. *Id.* at 122–23. The Court also stated that a citizen's right of judicial process cannot be replaced with martial law while the courts and government are still functioning regardless of whether or not the country is at war. *Id.* at 119–22.

\(^\text{16}\) Ex Parte Milligan, 71 U.S. 2, 220–22 (1866) (finding that even during times of war martial law is only appropriate when judicial process is unavailable because the courts are not open).

\(^\text{17}\) See Rosenzweig, *supra* note 13, at 668 (referring to current perspectives of Lincoln's suspension of the writ of habeas corpus); Wood *supra* note 13, at 460 (noting Lincoln's suspension of the writ of habeas corpus); *see also* Kite *supra* note 13, at 1389 (citing the suspension of the writ of habeas corpus as a wartime deprivation of civil liberties).

\(^\text{18}\) *Id.*

and their dissemination of Communist ideals. The Supreme Court initially upheld federal actions taken under the Espionage Act but, in the 50 years of jurisprudence that followed, the Court overruled each of its World War I decisions.

Perhaps the most harrowing example of an extreme response is the internment of over 100,000 Japanese-Americans during World War II. President Franklin Delano Roosevelt signed Executive Order 9066, which forced people of Japanese descent to abandon their homes, liberty, and dignity as they were shipped to internment camps. The President alleged that the success of the war hinged upon protection from espionage. Although this was not an absurd idea, the methods used to protect against espionage were unnecessary, dehumanizing an entire minority population. In Korematsu v. United States, the Supreme Court upheld the internment as within the war power of both Congress and the President. President Reagan finally made amends for this ghastly atrocity nearly fifty years later when he officially apologized to Japanese-American internees.

See Rosenzweig, supra note 13, at 668 (noting that federal authorities under the aegis of the Espionage Act prosecuted more than 2,000 people); see also Holly Hawkins, A Sliding Scale Approach for Evaluating the Terrorist Threat over the Internet, 73 GEO. WASH. L. REV. 633, 635 (2005) (discussing prosecutions under the Espionage Act); Wood, supra note 13, at 460 (noting extensive prosecutions and convictions under the Espionage and Sedition Acts).

21 Rosenzweig, supra note 13, at 668-69; see also Wood, supra note 13, at 460 (indicating that protections for civil liberties re-emerged following the end of the war); Hawkins, supra note 19, at 635-37 (discussing the evolution of the "clear and present danger" doctrine).

22 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); see also Kite, supra note 13, at 1388 (referring to the removal of Japanese-Americans from their homes to internment camps); Rosenzweig, supra note 13, at 669 (chronicling the World War II Japanese-American internment camps).


25 Brinkley, supra note 21, at 23, 40-42; Kite, supra note 13, at 1389; Rosenzweig, supra note 13, at 669.

26 See Korematsu v. United States, 323 U.S. 214, 219 (1944) (concluding that Roosevelt's Executive Order imposing restrictions on Japanese-Americans was valid). In Korematsu, the Supreme Court addressed a challenge to Roosevelt's Executive Order 9066 which imposed various restrictions on Japanese-Americans residing on the West Coast. Id. at 217. Petitioner was convicted of violating an exclusion order promulgated under that order. Id. at 216. The Court found that although the order was suspect because it limited the rights of a specific racial group, it was within the discretion of the war-making branches—Executive and Legislative—of government to take such measures to ensure the safety of the nation. Id. at 216-18. The Court determined that the government should have power to take extreme measures to protect the country when it is under a dire threat even though the exclusion of one group is not historically consistent with national principles. Id. at 219-20.

27 Id. at 217-18.

Congress passed the Civil Liberties Act of 1988, awarding reparations to each internee.\textsuperscript{29}

The historical record looms ominously over America’s current reaction to terrorism and demands the most effective means to combat terrorism without becoming overzealous and disenfranchising the Arab-American population. Though the United States is faced with what has proven to be a difficult and elusive enemy without borders, Americans must remember that their fellow countrymen are not the enemy. In fact, neither Arabs nor Muslims, as entire groups, are the enemy; rather, it is the actions of a few that the nation must be guarded against. A well-balanced approach that protects our country and yet does not sacrifice individuals’ constitutional rights is pivotal in winning the war on terrorism. As Senator Russ Feingold elaborated in the days following September 11th, “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 terrorists.”\textsuperscript{30}

\textbf{B. My Mother’s Story}

The week of June 13, 2004 began like any other for my mother, a consultant for one of the largest corporations in the world. She awoke early in the morning and called a taxi cab to take her the 15 miles to Washington D.C.’s Reagan National Airport. She was scheduled to board a flight from Reagan to Milwaukee’s General Mitchell Airport in order to attend a corporate training session. At the electronic check-in kiosk, my mother was surprised to learn that she could not use the machine. As an experienced traveler, this frustrated her immensely; she had never encountered problems with the machine before. Per the directions on the screen, my mother stood in line to see the next available ticketing agent. When she finally reached the ticket counter, my mother was surprised to learn that this was not going to be a routine check-in.

The agent informed her that she was going to have to undergo additional security measures before being issued her boarding pass. Initially believing that she had been randomly selected, my mother waited patiently for about half an hour, understanding the realities of air travel in a post 9/11 world. A TSA agent finally came to the counter and asked her to retrieve her luggage and follow him. The TSA agent then began asking her a series of questions to verify her identity, destination, and reason for travel. After about an hour of questioning, my mother was cleared to fly and just barely

\begin{small}
\begin{itemize}
\item \textsuperscript{30} 147 CONG. REC. S10, 570 (daily ed. Oct. 11, 2001) (Statement of Sen. Fiengold).
\end{itemize}
\end{small}
made her flight. She didn’t think twice about the incident until she tried to return home.

That Thursday, my mother was scheduled to return to National Airport, but was surprised to find that she was again selected for additional security measures before being allowed to board her flight. She chalked it up to a random coincidence and complied with the instructions of the airline and TSA agent. Again, after a delay of about an hour and half, she was issued her boarding pass and allowed to fly.

The next week, my mother resumed her consulting duties and was scheduled to fly from Washington DC to New York City before flying from New York to Boston, then returning home. At each airport, she was stopped and required to undergo additional screening. At this point my mother realized that this was no freak accident. She called the TSA on June 24, 2004 in order to determine why she was being stopped each time she flew. Unable to reach anyone, she left a message and her contact information. On July 12, 2004, the TSA responded via e-mail that she should submit a written request documenting exactly what events had occurred. In the two week period it took the TSA to respond, my mother had flown another 6 times, with the same result at each airport.

On August 2, 2004 my mother submitted a written complaint documenting each incident. The TSA responded on August 4, 2004, informing her that she needed to fill out a Passenger Identity Verification Form (PIVF) because her name matched or was similar to a person on a Federal Watch List. The PIVF form looks simple and unassuming, but requires much information. My mother completed the PIVF and sent it to the TSA on August 9, 2004.

Despite numerous calls in the coming months from both my mother and the legal team of her corporation there was no correspondence from the TSA. In the rare event that someone actually answered the phone, the response was the same: "we are working on it." In the meantime, my mother was stopped for additional screening every single time she flew. It became so second nature to her that she always allotted an extra hour or two just to ensure that she wouldn’t miss her flight. Finally, on December 13, 2004, my mother received a letter from TSA stating that her identity had been verified. Interestingly enough, the letter also stated that TSA did not have the ability

32 Id. The PIVF requires personal information such as name, address, sex, place of birth, date of birth, social security number, height, weight, hair color, eye color, and both home and work telephone numbers. Id. at 3. In addition to this information, the document also requires copies of three of the following documents: passport, birth certificate, naturalization certificate, voter registration card, driver’s license, government identity card, or military identity card. Id. The copies must be notarized save for birth certificates, which must be certified. Id.
to remove her name from the list but that she would be added to a cleared list. My mother was immensely relieved that her ordeal was over and that she could fly again without any extra delays, as flying to various locations is essential to her livelihood. Since being placed on a "cleared list" my mother has had to endure relatively little trouble, but has been stopped twice since for additional screening.

III. Aviation Security

A. Pre 9/11 Aviation Security: Learning from Past Mistakes

The events of September 11, 2001 are not the only time the United States has had to face terrorist threats through its airways. In trying to understand the current system and the procedures in place, it is necessary to have a solid foundation in the infrastructure that the United States government has developed in trying to combat terrorism.

Congress first addressed the issue of airline safety in 1958 when it enacted the Federal Aviation Act.33 Under the act, Congress created the Federal Aviation Administration (FAA) and gave it the authority to propagate and utilize regulations to ensure the safety of air passengers and cargo.34 The first major challenge for the FAA occurred in late 1960s when airline hijackings rose dramatically; with nearly 200 hijackings worldwide from 1968–1970.35 The FAA responded by creating a Task Force that was charged with establishing procedures to minimize the risk of hijackings; pivotal to the new system was the use of magnetometers36 and searches of individuals who triggered them.37 The Task Force’s attempt at curbing hijacking, however, turned out to be an incredible failure.38 One of the most
telling indications of why the system was a failure, showing that we do not learn from history, is that the FAA and the Task Force called for the airlines to implement and run the new security measures themselves.\(^3\)

In order to address the number of hijackings, Congress enacted the Anti-Hijacking Act of 1974.\(^4\) Under the new act, the President was authorized to suspend all air service to any nation that was suspected of allowing terrorists or terrorist organizations to use their country as a base or refuge.\(^4\) Additionally, the act imposed severe penalties on anyone engaged in air piracy.\(^4\) The new regulations seemed to be working as there was a significant decrease in hijackings of American planes during the 1970s with only 25 hijackings reported in the U.S. from 1973–1978.\(^4\)

The 1980’s, however, proved to be a different story, as hijacking increased, with 74 hijackings occurring in the U.S. from 1979–1985,\(^4\) and terrorist organizations got bolder with their attempts. Traditional methods of hijacking, such as armed men taking over planes, proved to be a difficult task for hijackers as a result of the use of magnetometers. In response, hijackers altered their approach to incorporate more deadly means of achieving their goals. Hijackers turned to gasoline and explosives, undetectable by magnetometers,\(^4\) showing their propensity to adapt in order to defeat security measures. Numerous planes were subjected to the terror of bombs exploding on board during the 1980s with the most traumatic being the explosion of Pan Am Flight 103 in 1988; the flight, which left London’s Heathrow airport destined for JFK in New York, exploded over Lockerbie, Scotland, killing all 259 people on board, along with 11 on the ground.\(^4\)

Under intense pressure to increase air safety, President George H.W. Bush

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\(^3\) See Schroer, supra note 35, at 76 (noting that the Task Force placed the responsibility for implementation of the plan in the hands of the airlines themselves).


\(^4\) See Paul Stephen Dempsey, Aviation Security: The Role of Law in the War Against Terrorism, 41 COLUM. J. TRANSNAT’L L. 649, 699 (2003) (explaining that the Antihijacking Act of 1974 granted the President emergency powers to suspend air service to countries suspected to be refuges or bases of operation for terrorists).


\(^4\) Id.

\(^4\) Kash, supra note 42, at 77.

\(^4\) Kent C. Krause, Putting the Transportation Security Administration in Historical Context, 68 J. AIR. L. & COM. 233, 238 (2003); see also Rogers, supra note 38, at 509 (indicating that the Pan Am Flight 103 Hijacking was the worst terrorist-related incident in United States aviation history to that date).
issued Executive Order 12,686, which established a commission to evaluate the FAA's performance in securing air travel. The commission returned a scathing report of the FAA that indicated that aviation security was not as high a priority as it should be, and even more telling, that there was a severe "lack of coordination and communication between the State Department, the FAA, and the American intelligence gathering community." If these findings sound familiar, they should: the 9/11 Commission made very similar findings nearly 15 years later.

B. Post 9/11 Security

With the tragedies of September 11, the United States government again undertook a sweeping reform of air travel security in an effort to secure the nation from similar threats. As a direct response to the attacks, Congress passed the Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration (TSA) as part of the Department of Transportation (DOT). When the Department of Homeland Security (DHS) was created in 2003, DHS assumed control of the TSA.

The TSA was granted broad authority in ensuring the safety of the nation's transportation systems. Aviation security was of particular importance to the creation of the organization, which is appropriate considering the nature of the 9/11 attacks. One of the specific mandates of the ATSA, a mandate which is the focus of this note, is to use intelligence information from government agencies and federal databases in order to identify individuals who may pose a risk to aviation security.

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49 See 9/11 COMMISSION REPORT, supra note 2, at xvi (noting that the institutions charged with protecting our borders, civil aviation, and national security did not understand how grave the threat of terrorism could be and did not adjust their policies, plans, and practices to deter or defeat it).
51 ATSA, §114(a).
53 See Schroer, supra note 35, at 82 (noting that the TSA was given broad powers to ensure aviation security); Dempsey, supra note 41, at 714 (stating that in 2001 the U.S. Congress granted the TSA all aviation security functions previously performed by the FAA and the responsibility to regulate aviation security for all transportation modes).
54 ATSA, §114 (f)(1–15).
55 ATSA, §114 (h)(1–3).
1. The Current System

Even though the TSA was created in 2001, not much has been accomplished in trying to achieve the aforementioned goal. The TSA has made significant strides in other areas of airline security but has failed to make improvements in identifying and restricting potential terrorists. The system currently used to screen potential threats, Computer Assisted Passenger Pre-Screening System (CAPPS), was first used by Northwest Airlines in 1996 with other airlines beginning to use the system in 1998. CAPPS uses behavioral characteristics of passengers, such as duration of trip, cash payment, and last-minute reservations, in order to screen those who may pose a threat. In addition to CAPPS, airlines are given government watch lists that contain suspected terrorist names. The airlines are responsible for corroborating their passenger lists against the government watch lists to ensure that suspected terrorists do not board flights. Due to concerns about sharing sensitive information with private firms and foreign countries the airlines are not provided with the entire lists and many identifying characteristics are not supplied.

The government provides the airlines with two different lists. The no-fly list contains the names of passengers who are barred from flying unless cleared by law enforcement agents, and the selectee list contains the names of passengers who are issued boarding passes but must undergo additional security measures before being allowed to fly. These Federal Watch Lists are maintained by the Terrorist Screening Center (TSC). The TSC is an interagency effort administered by the Federal Bureau of Investigation that includes the DHS, Department of Justice, Department of

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56 See Rosenzweig, supra note 13, at 712 (indicating that the TSA has made changes in airport security focused on looking for potential weapons); see also Krause, supra note 46, at 247–51 (identifying improvements to check-in procedures).
57 See Rosenzweig, supra note 13, at 712 (noting that the current screening system does not attempt to determine whether or not the federal government has information that may connect a specific prospective passenger with terrorism or criminal activity that may indicate that they are a threat to the flight).
58 Id.
59 Kite, supra note 13, at 1394.
61 Id.
62 See id. at 54–56 (discussing how the TSA only collects information that is "relevant and necessary" to accomplish the purposes of the agency).
63 Id. at 56.
64 Id.; Federal Aviation Administration Security Directive 108-01-20 (the No-Fly List) and Federal Aviation Administration Security Directive 108-01-21 (the Selectee List). For the purposes of this Note, both lists will be addressed as the Watch Lists.
State, and intelligence community representatives. The TSC does not gather any intelligence information nor is it responsible for adding or removing names from the lists; it performs a solely administrative role in ensuring national security.

Once a passenger has been flagged as a possible threat to aviation, it is extremely difficult for them to adequately challenge the designation. Under the current system, no adequate redress procedures are available to these passengers. As indicated by my mother's story, the passenger has the opportunity to complete a Passenger Identity Verification Form, but the effectiveness of being placed on a so-called "cleared list" is extremely uncertain because there are no formal procedures for permanent removal from the watch lists in place. Of particular interest is the fact that there are no redress procedures for those inappropriately placed on watch lists.

2. CAPPS II: An Attempt That Never Took Off

In January of 2003, the TSA made an attempt to ensure aviation security by issuing a notice outlining new procedures that were aimed at identifying passengers who posed a potential threat. After receiving comments addressing potential privacy concerns, civil liberty issues, the scope of the program, and adequate redress procedures, the TSA issued an interim final notice on August 1, 2003 outlining the new system and the methods used. The CAPPS II system was designed to screen all passengers traveling in the United States. The government would collect passenger information via a Passenger Name Record (PNR) that would be supplied either by the airlines themselves or by a global distribution system. The PNR would contain the passenger's name, address, telephone number, date of birth, and itinerary, and would be forwarded to commercial
data providers to verify the passenger’s identity against commercial databases.\textsuperscript{75} The commercial data providers would then send a numerical authentication score for each passenger indicating their confidence in the passenger’s identity.\textsuperscript{76} Then, the government would use this score in order to conduct a risk assessment for each passenger.\textsuperscript{77} A critical function of the risk assessment is to check the passenger’s identity against the Federal Watch Lists to ensure that known terrorists or those with identifiable links to terrorist organizations do not board airplanes.\textsuperscript{78} A very important distinction between CAPPS II and CAPPS is that the government, not the airlines, takes control of assessing whether or not a passenger is on a Federal Watch List.\textsuperscript{79} One of the problems with the system, however, was that all PNRs were destroyed after use, rendering any meaningful opportunity to contest a determination moot.\textsuperscript{80} In fact, this was such a problem that Congress specifically forbade the TSA and DHS from implementing the system until they provided written certification indicating the redress procedures for passengers mistakenly identified as potential threats under CAPPS II.\textsuperscript{81} By January 1, 2004, the TSA and DHS had only addressed one of the many concerns of Congress, leaving unaddressed the adequacy of redress procedures.\textsuperscript{82} CAPPS II was never given the chance to become operational as too many concerns were raised by its implementation.\textsuperscript{83}

\begin{flushright}
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} See 9/11 COMMISSION REPORT, supra note 2, at 393 (recommending that the TSA assume control of screening passengers against the Federal Watch Lists).
\textsuperscript{80} See 68 Fed. Reg. 45,265 (discussing how the insignificant PNR data retention time in the CAPPS system made it nearly impossible to conduct a successful record access request).
\end{flushright}
3. Secure Flight: Doomed to Repeat the Past?

As CAPPS II suffered an untimely death at the hands of civil libertarians and Congress, the TSA unveiled a new program: Secure Flight. Under Secure Flight, the government took control from individual airlines the checking of passenger names against the Federal Watch Lists. This change allowed for expanded Watch Lists containing information not available to airlines to be utilized in an effort to reduce the number of false positives. Notably, Secure Flight claims to ensure adequate redress procedures for passengers who have been falsely identified in order to ensure that they are not continuously harassed at airports. Secure Flight also tests the use of commercial databases to see if they prove useful in verifying passengers' identities by using PNRs.

Congress has expressed concerns over the implementation and development of the Secure Flight program and has limited any funding of the program to testing until the GAO has had an opportunity to address the areas of Congressional concern. Again, one of the main areas of concern is ensuring that passengers are granted adequate redress procedures to remove their names from the Federal Watch Lists in order to ensure that they are free from constant harassment.

The GAO released a report in March of 2005 addressing the concerns of Congress. Among the findings of the GAO is that, as of publication of the report, the TSA has yet to provide a detailed plan of how exactly passengers who are falsely identified will be allowed to seek redress. Generally, the TSA plans to include a procedure in which passengers are able to challenge their inclusion on the watch lists by working

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84 See 69 Fed. Reg. 57345 (Sept. 24, 2004) (describing "Secure Flight Test Records" as a program that "will compare the identifying information of airline passengers contained in passenger name records (PNRs) to the identifying information of individuals in the Terrorist Screening Database of the Terrorist Screening Center (TSC)").
85 See id. ("Th[e] screening function should be performed by TSA and it should utilize the larger set of watch lists maintained by the Federal Government.").
86 See id. (discussing the security benefits and improved efficiency provide by the comparison between expanded TSA No-Fly and Selectee Lists and "suspicious indicators associated with travel behavior, as identified in the passenger’s itinerary-specific PNR").
87 See id. (noting that "[s]ecure Flight will automate the vast majority of watch list comparisons; will allow TSA to apply more consistent procedures where automated resolution of potential matches is not possible; and will allow for more consistent response procedures at airports for those passengers identified as potential matches").
88 Id.
90 See generally id. (listing Congress’ various areas of concern regarding the Secure Flight system, with redress listed first at §522(1)).
91 SECURE FLIGHT DEVELOPMENT, supra note 60, at i.
92 Id. at 56.
with the TSC. Additionally, the TSA plans to include an appeals process that is currently unavailable to passengers. The TSA has yet to release any specific initiatives or procedures that it will use in assuring that passengers' due process rights are not compromised by Secure Flight in the same manner as the current system. Since the TSA is still in the testing phase of Secure Flight, it does not deem the redress procedure as a necessary prior for implementation. Even though Congress has continually requested and mandated that passengers' due process rights not be abridged, the TSA does not seem to think that protecting constitutional rights are a priority.

Unless adequate procedures are put in place, Secure Flight will follow down the footsteps of CAPPS II, and America will again be left without screening measures that protect American aviation from terrorists. The United States will be left with a system that is almost 8 years old and failed to prevent the 9/11 attacks, while ordinary citizens are continuously harassed, with no means to correct the infringements on their constitutional rights.

IV. An Unsuccessful Attack on the Constitutionality of the Lists: Green v. Transportation Security Administration

The watch lists used by the TSA and airport officials have been highly scrutinized, as evidenced by Congress' interest in the matter. Additionally, many groups devoted to protecting civil liberties have taken an interest in the watch lists. On January 7, 2005, the United States District Court for the Western District of Washington decided the first and only court challenge of the use of the government watch lists in Green v.
The plaintiffs in this matter brought multiple claims relating to use of the watch lists. First, the plaintiffs made a broad constitutional attack invoking the Fifth Amendment right to due process. Second, the plaintiffs alleged that their Fourth Amendment rights to be free from unreasonable searches and seizures were violated by the defendants in administering and maintaining the watch lists. As relief, the plaintiffs sought "some remedy that would allow Plaintiffs to avoid the ongoing and repeated investigations, interrogations, detention, delays and enhanced searches that they've experienced virtually every time they fly." The challenge was unsuccessful and the District Court dismissed the claim for lack of jurisdiction and failure to state a claim upon which relief could be granted.

Under 49 U.S.C. § 46110(a), Congress has explicitly delegated exclusive jurisdiction over final orders issued by the Secretary of Transportation, the Under Secretary, or the Administrator of the Federal Aviation Administration to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the district in which the plaintiff resides. The Green court found that the Security Directives used to promulgate the watch lists were final orders issued by the TSA. As such the court found that any claims relating to the maintenance,
administration, or use of the watch lists would fall under the jurisdiction of the United States Courts of Appeals, and thus dismissed them.\textsuperscript{108}

The \textit{Green} court severed the constitutional challenges to the use and administration of the lists, finding that they did not have jurisdiction to entertain the claims, and proceeded solely with the claims related to the clearance procedures used by the TSA.\textsuperscript{109} The plaintiffs' only remaining claim was a Fifth Amendment due process challenge to the lack of adequate grievance procedures for persons falsely identified by the lists.\textsuperscript{110}

The plaintiffs alleged that the clearance procedures used by the TSA do not provide adequate notice or a meaningful opportunity to be heard and thus violate their Fifth Amendment due process rights.\textsuperscript{111} For a due process challenge to be successful, a plaintiff must demonstrate that he has been deprived of a constitutionally protected liberty or property interest.\textsuperscript{112} In this proceeding, the plaintiffs did not allege a deprivation of property; instead, the plaintiffs claimed that their constitutionally protected liberty interests were being violated.\textsuperscript{113} The \textit{Green} court did not entertain this claim for the previously mentioned jurisdictional issues.\textsuperscript{114} The only claim the court recognized was a "stigma-plus" claim under the Fifth Amendment.\textsuperscript{115}

Under the "stigma-plus" prong of due process, a plaintiff must demonstrate "public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; plus [...] the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law."\textsuperscript{116} The \textit{Green} court went on to find that, although the plaintiffs had suffered stigmatizing statements at the hands of the government, they had failed to state a tangible harm that would rise to the level of a Constitutional deprivation and, as such, failed the "plus prong" of the "stigma-plus" test.\textsuperscript{117} The court dismissed the action under Rule 12(b) (6) for failure to state a claim upon which relief can be granted.\textsuperscript{118}

In the next section, a more in-depth analysis of constitutional due process is laid out. Since the \textit{Green} court did not address these issues, I believe that a successful attack on the watch lists can be launched as long as

\begin{footnotes}
\footnotetext{109} \textit{id.}
\footnotetext{110} \textit{id.} at 1128.
\footnotetext{111} \textit{id.} A more comprehensive analysis of constitutional due process is available in Part IV.
\footnotetext{112} \textit{id.} at 1129.
\footnotetext{113} \textit{id.}
\footnotetext{114} \textit{id.}
\footnotetext{115} \textit{id.}
\footnotetext{116} \textit{id.} (citing \textit{Ulrich v. City & County of San Francisco}, 308 F.3d 968, 982 (9th Cir. 2002) (emphasis added)).
\footnotetext{117} \textit{id.} at 1130.
\footnotetext{118} \textit{id.}
\end{footnotes}
the claim is filed in the appropriate court—one of the United States Courts of Appeals.

V. Constitutional Due Process Requirement

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.119

The due process requirement of the Fifth Amendment is well established in our nation's jurisprudence and is applicable to the Federal government; the Fourteenth Amendment extends this requirement to the states.120 Due process is understood as the opportunity to be heard "at a meaningful time and in a meaningful manner."121 For the due process clause to be implicated, a liberty or property interest must be infringed upon by governmental action.122 Once it is established that either a liberty or property interest has been implicated, it is necessary to determine the level of process due to the individual.123

A. Liberty and Property Interests are at Stake

When airline passengers purchase plane tickets, they not only have a property interest at stake—they also have a liberty interest in airline travel, both domestically and internationally. Furthermore, business passengers have an additional property interest beyond the cost of the purchased ticket.

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119 U.S. CONST. amend. V (emphasis added).
120 U.S. CONST. amend. XIV.
122 Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972).
123 Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976) (recognizing that Social Security benefits are a property interest and the government must afford an individual due process before terminating the benefits, the question on Mathews is the amount of process due); see Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."); Goss v. Lopez, 419 U.S. 565, 577 (1975) (quoting Morrissey).
1. The Liberty Interest at Stake

The Supreme Court has not used rigid formalistic definitions of liberty in deciding whether or not procedural due process applies.\(^\text{124}\) Liberty has been broadly defined and not limited solely to bodily restraint.\(^\text{125}\) The definition of liberty addresses many different aspects of life, but the source of protected liberty may come either from state law or the Federal Constitution.\(^\text{126}\)

The Supreme Court, for over 150 years, has recognized a right to travel that should be protected.\(^\text{127}\) Furthermore, the Supreme Court has explicitly called the right to travel a liberty interest that is to be protected by the Fifth Amendment’s requirement of due process, even going so far as to insinuate that it is as important "as the choice of what [one] eats, or wears, or reads."\(^\text{128}\) Within the right to travel, however, a distinction must be made between interstate and international travel, as the court has interpreted the two differently.\(^\text{129}\) The Secure Flight program and the Federal Watch Lists will only be used to screen passengers flying domestically within the United States and, as such, it is unnecessary to analyze the right to international travel for the purposes of this note.\(^\text{130}\)

\(^{124}\) See Roth, 408 U.S. at 572 ("While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.") (quoting Meyer v. Nebraska, 262 U.S. 390, 399) (internal quotations omitted).

\(^{125}\) Id.

\(^{126}\) Ernest Schopler, Annotation: The Supreme Court's Views as to Concept of "Liberty" Under Due Process Clauses of Fifth and Fourteenth Amendments, 47 L. Ed. 2d 975, 981 (1977).


\(^{128}\) Kent v. Dulles, 357 U.S. 116, 125–26 (1958). "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Id. at 125.

\(^{129}\) See Kite, supra note 13, at 1407 (noting that the right to interstate travel is a fundamental right whereas the right to international travel is only a freedom); see also Reser, supra note 127, at 832–37 (distinguishing between the right to international travel and the fundamental right to interstate travel); Jaime Rhee, Comment: Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats, 49 DEPAuL L. REV. 847, 859 (2005) ("Generally, the right to interstate travel has been regarded as fundamental and subject to very few restrictions, whereas the right to international travel is subject to a somewhat greater level of interference.").

\(^{130}\) SECURE FLIGHT DEVELOPMENT, supra note 60, at 11. "Secure Flight will also only prescreen passengers flying domestically within the United States, rather than passengers flying into and out of the United States." Id.
The Supreme Court has continuously viewed the right to interstate travel as a fundamental liberty interest.\textsuperscript{131} Being a fundamental liberty interest protected by the Constitution, any infringement upon the right to travel will be subject to strict scrutiny.\textsuperscript{132} Even though the right to travel, generally, is a fundamental right subject to strict scrutiny, restrictions on a single mode of travel, i.e. air travel, may not be constitutionally protected.\textsuperscript{133} In \textit{Shapiro}, however, the court indicated that any rules or regulations that unreasonably burden or restrict free travel could not be upheld.\textsuperscript{134}

\section*{2. The Property Interests at Stake}

In restricting passengers from flying two separate property interests are at stake: the passenger's ticket cost and a statutory entitlement to air travel.\textsuperscript{135} In determining whether a property interest is at stake, the Supreme Court has held that the Constitution itself does not create property interests.\textsuperscript{136} Alternatively, property interests are defined by an analysis of

\textsuperscript{131} United States v. Guest, 383 U.S. 745, 757–58 (1966). "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 \textit{fundamental} to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . . Although the Articles of Confederation provided that 'the people of each State shall have free ingress and regess to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." \textit{Id.} (emphasis added); see \textit{Shapiro} v. Thompson, 394 U.S. 618, 629–31 (1969) (recognizing the right to travel to be a fundamental right under our Constitution).

\textsuperscript{132} \textit{Id.} at 634. "[I]n moving from State to State or to the District of Columbia, appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a \textit{compelling} governmental interest, is unconstitutional." \textit{Id.}

\textsuperscript{133} \textit{See} 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").

\textsuperscript{134} \textit{Shapiro} v. Thompson, 394 U.S. 618 (1969). In \textit{Shapiro}, the Supreme Court affirmed the decisions of three district courts that held unconstitutional certain statutory provisions that denied welfare assistance to residents of the state or district who had not resided within the jurisdiction for more than one year prior to applying for welfare. \textit{Id.} at 621–22. The appeals were consolidated from three-judge district court decisions in the District of Connecticut, District of Columbia, and Eastern District of Pennsylvania. \textit{Id.} at 622–27. In each case, persons were denied financial assistance under the programs Aid to Families with Dependent Children or Aid to the Permanently and Totally Disabled, programs jointly funded by the States and the Federal government. \textit{Id.} In defense of the provisions, it was argued that they were necessary to protect against an influx of dependents from other states seeking a more generous public assistance program. \textit{Id.} at 628–29. The Court found this to be a constitutionally impermissible purpose because it served to inhibit interstate migration, and thus infringed on the constitutional right to travel. \textit{Id.} at 629–31. Applying strict scrutiny, the Court held that the one-year waiting period restriction served no compelling government interest and was a clear equal protection violation. \textit{Id.} at 638.

\textsuperscript{135} 49 U.S.C. § 40103(a)(2) (2005); \textit{Kite}, supra note 13, at 1416–18; \textit{Reser}, supra note 127, at 839.

\textsuperscript{136} \textit{Roth}, 408 U.S. at 577 ("Property interests, of course, are not created by the Constitution.").
independent sources which create or establish the interest. For a property interest to be implicated, an individual must have a legitimate claim of entitlement to the interest.

When an airline passenger purchases a ticket, he or she enters into a contractual relationship with the airline. The contractual relationship entered into between the passenger and the airline guarantees the passenger a seat on the flight in return for adequate consideration in the form of money. When an airline is unable to board a passenger, the airline will normally refund the passenger's purchase cost or try to board the passenger on an alternate flight. As is evidenced by the nature of the relationship entered into between the passenger and the airline, a claim of entitlement to air travel exists that the government cannot deprive without due process.

In addition to the contractual relationship that creates a property interest, citizens of the United States are granted a statutory entitlement to airline travel. The Supreme Court has long recognized that when the government creates a right through a statute, individuals have a protected property interest in that right, even if the right is only a privilege. This statutory entitlement is, however, qualified by allowing airlines the right to refuse travel to any passenger who does not acquiesce to a search of his person and luggage or when the airline deems the passenger to be a safety threat.

B. Determining the Amount of Process Due

As it has been established that airline passengers have both a fundamental liberty interest in interstate travel as well as a property interest in their airline tickets, the next relevant question is what process is due.

137 Id.
142 Goldberg, 397 U.S. at 262. "Such benefits are a matter of statutory entitlement for persons qualified to receive them." Id.
The Court's fundamental understanding of due process necessitates that an individual be heard "at a meaningful time and in a meaningful manner."145

Again, as so much in the due process context, the Court has strayed from using rigid formulistic approaches in favor of flexible individualized inquiries into each particular situation.146 The nature and timing of hearing, whether it is post-deprivation or pre-deprivation, will hinge on a balancing of three factors as enunciated in Mathews v. Eldridge.147 The three factors that must be separately analyzed in order to determine the amount of process due are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."148

VI. Applying Due Process to Individuals on Federal Watch Lists

Airline passengers have both a fundamental liberty interest in interstate travel as well as a property interest in their airline ticket, as noted above. The relevant question is to effectively balance the three Mathews factors in order to determine the amount of process due.

A. The Private Interest Affected by the Official Government Action

In analyzing the private interest that is affected, it is important to remember the nature of the government action at issue.149 When an individual is placed on a Federal Watch List, their right to interstate travel is

146 Mathews, 424 U.S. at 334.
147 424 U.S. 319 (1976). In Mathews, the disabled Eldridge claimed that his due process rights had been violated when his social security disability benefits were terminated without a formal evidentiary hearing. Id. at 324. In making a preliminary decision to terminate benefits, the state agency relied on physician and psychiatric reports, as well as the answers Eldridge provided in a completed questionnaire. Id. at 323–24. Although Eldridge disputed the decision, he offered no additional evidence and the Social Security Administration officially terminated his benefits. Id. No pre-termination evidentiary hearing was provided, however, Eldridge was notified that he could seek a post-termination appeal and hearing. Id. at 324. He elected instead to file suit. Id. In determining whether Eldridge received constitutionally sufficient administrative review, the Supreme Court held that the decision rested on consideration of the three distinct factors discussed above. Id. at 334–35. In balancing these factors, the Court found that additional safeguards would impose significant burdens on the government and that the process currently in place was adequate to provide fair consideration of individuals' claims. Id. at 347–49. The Court found that an evidentiary hearing was not required in this proceeding and, therefore, there was no due process violation. Id. at 349.
148 Id.
149 Id.
substantially burdened. This is especially true in the context of business travelers who rely on air travel as a means to secure their very livelihood. In the particular case of my mother, traveling to various cities across the country with speed is a requisite of her job. Without the ability to travel by air, she would not be able to perform her job and as a consequence would be fired. As indicated by her story, a typical week for her can consist of flying up to 4 times a week in order to attend to various contractual obligations that she and her company have made. By having to arrive at each airport much earlier than other passengers, she is deprived of many hours per week, and, as the old adage goes, time is money. A conservative estimate of this additional time— one hour per airport, multiplied by an average of 3 flights per week— yields 156 hours wasted per year. In the context of a traditional 40 hour work week, this delay costs nearly a month of work time per year. As the right to interstate travel is a fundamental liberty that is substantially burdened by being placed on the Watch Lists, the government must have a compelling interest in burdening that right which is narrowly tailored to achieve that end.

B. The Risk of Erroneous Deprivation and the Probable Value of Additional Safeguards

The major problem with the use of the Federal Watch Lists is the uncertainty over their accuracy and probative value. The TSA has stated that they will not undertake efforts to determine whether individuals are appropriately identified by the lists, nor will they attempt to validate the information contained in the lists. An extremely important aspect of the lists that is frequently overlooked is the fact that the list not only identifies and stops passengers whose names appear on the list, but they also flag passengers whose names are similar to those on the lists. This similarity testing is especially troublesome because it substantially increases the risk of erroneous deprivation of the right to interstate travel. The risk of erroneous deprivation is especially high for people with Arabic or Islamic sounding names, as their names require translations from a language other than English, and the translations inevitably produce many variations of the same name.

150 SECURE FLIGHT DEVELOPMENT, supra note 60, at 6, 31–32.
151 Id. at 31–32.
152 Id. at 56.
153 Looking at just the name Mohamed, one of the most popular in the Islamic world, variations include: Muhammed, Muhamed, Mohammed, Mohamed, and Mohamud. Other examples Osama, Osamma, Ossama, Ossamma, Usamma, Ussama, and Ussama. Specifically my mother's name Lalli Omar, has been construed as Leila Omar, a substantially different spelling that none the less falls into the category of "similar" names.
Under the current system, when a person is identified as being on the list or having a name similar to the list, there is very little that the person can do to remedy the situation. Those falsely accused are forced to undergo additional scrutiny at any and every airport they travel from. If the TSA is willing to provide adequate procedures to ensure that persons falsely accused have the opportunity to be heard in a meaningful manner and have their names removed from the list, or placed on a "cleared" list that actually allows them to board flights without additional security, then the likelihood of continual erroneous deprivations will be greatly diminished.

C. The Government's Interest in Ensuring Suspected Terrorists Do Not Board Airplanes

The government's national security concerns in screening and preventing suspected terrorists from boarding airplanes are legitimate.\textsuperscript{154} There is no debate that the government's mandate to protect its citizens from another incident like 9/11 is paramount. An essential ingredient of this protection is screening potential terrorist suspects and threats. This interest weighs heavily against the passengers' protected liberty and property interests in air travel.

D. Additional Procedural Safeguards Will Protect Passengers' Due Process Rights

Even though the government has a compelling interest in ensuring national security by screening potential terrorist threats, the means chosen to accomplish this goal are not narrowly tailored to accomplish it. The current procedures used are over inclusive and deny people falsely accused of any meaningful redress procedures. In this particular situation, a pre-deprivation hearing of sorts, occurs prior to a passenger boarding a flight. A TSA agent makes a determination of whether or not the passenger is allowed to board the flight. The interest of the government is so compelling that this procedure is adequate.

It is the method of removing one's name from the list that is problematic. When a passenger poses no threat to aviation security, i.e. when they are not in an airport or boarding a plane, the government must have adequate procedures in place to contest the presence of one's name on the list. The right to interstate travel is a fundamental liberty that many people rely on in providing for their livelihood. The complete absence of meaningful redress procedures for falsely accused persons is appalling.

Obviously, in the pre-deprivation determination, each individual TSA agent is able to come to some sort of adjudication; in the case of my mother it has always been to allow her to fly. This begs the question of why this determination cannot be made once at the agency level and be used to clear her each time she flies, instead of repeated independent inquiries by lower level agents; repeated inquiries which are a waste of already limited airport security resources.

VII. Compelling the TSA to Adopt Adequate Redress Procedures

The plaintiffs in Green had the right idea in challenging the watch lists under the due process clause of the Fifth Amendment. Where their challenge failed was the court in which they chose to file their claim. The plaintiffs filed in the District Court for the Western District of Washington, and the court dismissed the bulk of the claims for lack of jurisdiction over the subject matter.\footnote{Green, 351 F. Supp. 2d at 1130.}

Congress has tried to force the TSA to adopt adequate redress procedures by severely restricting funding to implement any program that makes use of the watch lists without such procedures.\footnote{Department of Homeland Security Appropriations Act of 2005 § 522, Pub. L. No. 108-334, 118 Stat. 1298 (2004).} Unfortunately, the TSA has not been compelled to take any action in regards to these requests and continuously claims that adequate redress procedures will be implemented in the future.\footnote{SECURE FLIGHT DEVELOPMENT, supra note 60, at 56–57; 70 Fed. Reg. 36,320 (June 22, 2005).}

As the court in Green made explicitly clear, jurisdiction for challenges to the merits of final orders issued by the TSA, or the procedures used in their issuance, is vested solely in the United States Courts of Appeals.\footnote{See 49 U.S.C. §46110(a) (2005) (setting the venue for judicial review of such orders).} The Security Directives issued by the TSA to establish and maintain both the no fly list and the selectee list were issued under the authority of 49 U.S.C. §114(1)(2), which allows the TSA to issue security directives without providing notice or the opportunity to comment.\footnote{Id. at 1125; see also 49 U.S.C. §114(1)(2) (2005) (giving the Under Secretary authorization to issue regulations as are necessary to carry out the functions of the Transportation Security Administration).} The United States Courts of Appeals are granted exclusive jurisdiction to hear any challenges to orders issued under this statute.\footnote{Green, 351 F. Supp. 2d at 1123–26.}

A Fifth Amendment due process challenge filed in the appropriate court of appeals (either the Court of Appeals for the District of Columbia or...
the Court of Appeals for the district in which the plaintiffs reside) is the only legal remedy available to citizens whose constitutional rights are trampled on each time they fly. As the *Green* court did not entertain the merits of the constitutional challenges to the watch lists, an action filed in the proper court could be successful thus compelling the agency to finally adopt adequate grievance procedures.

The adoption of adequate grievance procedures would have dual benefits, even if court ordered. First, passengers who are falsely identified as terrorist suspects and face humiliating situations when they fly will finally be afforded a meaningful opportunity to be heard. Second and of more concern to the general public, the court ordered redress procedures would go far in quieting Congressional concerns with the new Secure Flight program, thus creating a new and hopefully safer system of passenger pre-screening that would be implemented.

**VIII. Conclusion**

The horrific events of September 11 have forever changed America's approach to national security, especially in the area of aviation. In developing an adequate response, the United States must not forget its history in responding to national tragedies. Nor can it ignore the developments and strategies that it has previously undertaken in an effort to secure its national aviation systems.

The current procedures used by the TSA in screening passengers who pose a potential threat to our aviation security have not substantially changed since 1998, three years prior to 9/11. The system currently in place is wholly inadequate, as it is over inclusive, with high likelihood of false positives, and completely lacking in meaningful redress. This problem has grown since 9/11, as the Watch Lists supplied by the government have grown tremendously in the wake of the attacks.

The TSA's first attempt at developing a new system to adequately deal with passenger screening, CAPPS II, was an enormous failure, as critics were appalled by its complete lack of concern for passengers' constitutional rights. The successor to CAPPS II, Secure Flight, seems to be headed down the same road. Again, the TSA has not heeded congressional warnings to ensure that falsely accused passengers are afforded procedural due process protections. Almost half a decade past 9/11, America still does not have an adequate pre-screening procedure in place that uses expanded watch lists.

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161 Various heightened airport security measures have changed since 9/11, but the method for screening "suspected" terrorists has not changed.
maintained by the government rather than redacted versions in the hands of airline personnel.

The TSA must develop and implement adequate redress procedures for passengers who are falsely accused of being suspected terrorists. Without this safeguard, the due process implications of using the Watch Lists overshadow the government’s interest in preventing terrorism. The argument is not that the government must allow terrorists to board planes, but that when an individual is falsely identified as possibly posing a threat to aviation security, or, even worse, sharing a similar name with someone who is a threat, the government must allow for adequate procedures to ensure that these individuals constitutional rights are not substantially burdened each time they fly. The adoption of adequate redress procedures is a win-win situation for all involved, as it could lead to the adoption of Secure Flight. As the TSA has not heeded congressional warnings, it is time for the rule of law to take effect and to compel the agency to adopt adequate grievance procedures that give passengers the opportunity to be heard in a meaningful manner.