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

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

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

This Note first discusses the history and use of the aviation watch lists by the government. The term "aviation watch lists," as referred to in this Note denotes two lists.[4] The first list, known as the No-Fly List, contains the names of individuals prohibited from flying.[5] The second list, known as the Selectee List, contains the names of individuals who must be subjected to enhanced security screening before being allowed into secured areas of airports or onto aircraft.[6] Secondly, this Note provides an in-depth look into the violations of civil liberties implemented by the government after September 11, 2001 [ighteeck -1.1302 TD-Teough-era

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

II. REGULATING THE AVIATION INDUSTRY

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

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

7. 49 U.S.C. § 40113 (2000).

8. *Id.*

9. 49 U.S.C. § 40119 (2000).

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

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

12. *Id.*

13. *Id.*

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

III. PROFILING IN AVIATION

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

A. CAPPS

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

16. 49 U.S.C. § 114 (d) (2000).

17. 49 U.S.C. § 114(f)(8) (2000).

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

19. *Id.* at 8–9.

20. *Id.* at 9–11.

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

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

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

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

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

After 9-11, Congress disregarded the concerns surrounding individuals' civil liberties and ordered CAPPS to once again

B. CAPPS-II

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

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

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

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

35. U.S. GENERAL ACCOUNTING OFFICE, TESTIMONY B

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

C. Secure Flight

On August 23, 2007, the TSA provided notice of proposed rulemaking for Secure Flight.[42] Secure Flight is noted as being an automated system that would "assume the watch list matching

IV. THE AVIATION WATCH LISTS

A. Introduction

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

Irrespective of the secrecy surrounding the aviation watch lists, Columbia Broadcasting System ("CBS") obtained a copy of the lists in 2006. The No-Fly List in paper form totaled five hundred forty pages and contained forty-four thousand names.[51] The Selectee List, on the other hand, contained seventy-five thousand names.[52] The ACLU speculated in September 2007, approximately a year and a half after the publication of CBS's copy of the aviation watch lists, that the lists currently contained an astonishing five hundred to seven hundred thousand names.[53] These numbers are a drastic increase from the sixteen reported names on the watch lists prior to 9-11.[54]

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

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

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

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

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

51. *Id.*

52. *Id.*

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

54. Kroft, *supra* note 50.

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

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

B. What if There is a Mistake?

The aviation watch lists have constitutional problems as well as secretarial and implementation problems. Joe Trento of the National Security News Service and 60 Minutes reporters spent many months combing through the aviation watch lists and noted that the lists contained many errors, such as including the names of the deceased[58] and persons who are currently serving life sentences.[59] While many might not see the problem with including these persons on the aviation watch lists, anyone whose name is similar to or the same as these persons will be accosted any time they attempt to travel by air. Including names of persons who no longer pose a threat to national security creates bloated lists useless for their intended purpose.

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

55. U.S. DEPARTMENT OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR

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

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

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

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

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

61. *Id.*
62. *Id.*
63. DHS: DHS Travelers Redress Inquiry Program (DHS TRIP), http://www.dhs.gov/xtrvlsec/programs/gc_1169676919316.shtm (last visited Jan. 25, 2008).
64. *Id.*
65. *Id.*
66. Public Meeting on TSA Secure Flight Program, *supra* note 53, at 74.

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

D. Publication of the Aviation Watch Lists

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

V. THE DUE PROCESS CLAUSE

A. Introduction

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

67. *See infra* Section V.

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

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

70. *Id.* at 1035–36.

71. *Id. p a e r 6a . 6(. 1 f a 5T 2 1 T T D . 9 8 i c ')- 1 1 . 8 (s)3p a e r 6 - 2 6678 (u)-*

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

this in mind, the Supreme Court in *Bell v. Burson* held that a state could not deprive a person of a driver's license without due process.[92]

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

The "plus" requirement of the test is satisfied when the government's aviation watch lists require air carriers to either deny a passenger access to air travel or require the passenger to undergo enhanced security screening. The Court in *Constantineau*

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

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

B. What Process is Due?

Once a court has determined that a liberty interest has been violated, it must determine what process is due under the circumstances.[107] "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[108] The Supreme Court has

1. The Risk of Erroneous Deprivation

The risk of erroneous deprivation is low where criteria are "'specific enough to control government action.'"[118] In light of the evidence and speculation surrounding the aviation watch lists, names are regularly added to the lists in a random and arbitrary manner.[119]

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

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

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

VI. ILLEGAL SEARCH AND SEIZURE: TACKLING THE FOURTH AMENDMENT

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[142]

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

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

140. *Id.*

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

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

143. *Id.*

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

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

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

A. What is a Search?

The Supreme Court has taken an extensive view as to what is considered a search under the Fourth Amendment. In *Katz v. United States*, the Supreme Court concluded that the use of electronic devices to record a phone conversation in a public phone booth was a search under the Fourth Amendment.[148] The Court noted that the "Fourth Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."

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

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

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

other physical detection devices at airports is the government's use of profiling systems such as the proposed Secure Flight. In light of *Kyllo*, one could argue that the expectation of privacy extends to one's private information.[156] The use of Secure Flight to technologically invade the privacy of passengers is not limited to those who are on the aviation watch lists.[157] Secure Flight is intended

lists.[165] Many of these passengers have been escorted to small rooms and had their passports and identification cards retained by the air carrier or a government employee.[166] At this point in the encounter, any court should rule a seizure has occurred. While it is clear that passengers have been seized under the Fourth Amendment when they

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

ii. The Terry Stop-and-Frisk Exception

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

In the context of aviation, courts have justified the use of metal detectors as a *Terry* stop in light of the interest in avoiding air piracy by noting that "[t]he rationale of *Terry* is not limited to protection of the investigating officer, but extends to 'others . . . in danger.'"[181] If the Fourth Circuit's decision in *United States v. Epperson* is not overbroad as some have speculated,[182] passengers whose names are on the aviation watch lists might be subjectiat that tncsona thss v

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

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

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

iv. The Katz Reasonable Expectation of Privacy Exception

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

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

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

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

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

189. *See supra* text accompanying note 185.

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

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

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

In the context of passengers whose names are on the aviation watch lists, the test set forth by Justice Harlan would not justify a reduction in the passengers' Fourth Amendment protection. While it is true air carrier passengers do not exhibit the expectation of privacy

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

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

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

In due fashion, the American Civil Liberties Union ("ACLU") filed lawsuits against American, Continental, Northwest, and United Airlines for allegedly discriminating against passengers, and for ejecting passengers from aircraft based solely on their national origin.[203] The irony behind these claims was that although all of these plaintiffs were of Asian or Middle Eastern appearance, all had been cleared by "rigorous security checks" and allowed to enter restricted areas of the airport.[204] However, these men were not permitted to board the aircraft after passengers and air carrier employees expressed their concerns of flying with such passengers.[205]

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

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

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

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

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

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

212. *Id.*

213. Ellen Baker, *Flying While Arab—Racial Profiling and Air Travel Security*, 67 J. AIR L. & COM. TD.52 249.48 25S6E378(Fly 25S6E/www.dD0 TlE-1.1697.B7(som)6.5(1383 Tw[(Flying Whr(N)1. 3.)](d)]TJ-1.9)]TJ-

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D. Using Biometrics

Biometrics could be utilized by the aviation industry to prevent air terrorism. Biometrics[226] is the use of unique personal characteristics that enable identification.[227] Personal characteristics such as fingerprints, hand geometry, facial appearance, and retinal and iris scans could be utilized by air carriers and the federal government to ensure the security of our national transportation system.[228]

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

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

226. Biometrics has been defined as "automated measurement of physiological or behavioral characteristics to determine or authenticate identity." Raj Nanavati, *BiomeIn lightc7Tc0 1 1 ai-1.125-2 7 dr*

information from being available to the general public.

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

E. Providing Appropriate Hearings

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

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

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

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

231. Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005).
232. Florence, *supra* note 49, at 2170.
233. *Id.* at 2172.
234. 484 U.S. 518, 529 (1988).
235. *Id.* at 528.

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

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

> [T]he exigencies of the circumstances may demand that . . .

the ethical duty required of every attorney.[242]

F. Constitutional Profiling System

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

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

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

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

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

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

While this Note strongly suggest the use of technologies to

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

243. Aviation and Transportation Security Act, Pub. L. No. 107-71, §§ 136–137, 115

which all passengers are subjected rather than a profiling system, human error in using such technology currently plagues the aviation industry. Headlines such as "Government Investigators Smuggled Bomb Components Past Airport Screeners in Covert Tests"[244] emphasize the importance of some form of profiling system due to the human error associated with the use of current airport screening