

December 2005

The Procedural Due Process Requirements for No-Fly Lists

Soumya Panda

Franklin Pierce Law Center, Concord, NH

Follow this and additional works at: https://scholars.unh.edu/unh_lr

 Part of the [Aviation Safety and Security Commons](#), [National Security Law Commons](#), and the [Transportation Law Commons](#)

Repository Citation

Soumya Panda, *The Procedural Due Process Requirements for No-Fly Lists*, 4 *Pierce L. Rev.* 121 (2005), available at http://scholars.unh.edu/unh_lr/vol4/iss1/7

This Notes/Comments is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact ellen.phillips@lawunh.edu.

The Procedural Due Process Requirements for No-Fly Lists

SOUMYA PANDA*

I. INTRODUCTION

Imagine arriving at the airport and checking in at the ticketing booth. You tell the ticketing agent your name, your flight number, and show the agent your identification. The agent enters the information into the terminal and a look of shock appears on his or her face. While other passengers are waiting behind you, the agent calls for security and mentions in front of other passengers that you are denied from boarding the plane. Now imagine that you are a famous United States senator arriving from a political convention and the ticketing agent tells you that you cannot board a plane because your name appears in a database.¹ Or imagine that you are an ACLU lawyer who spoke at a conference concerning terrorism and are denied boarding because your name appears in a database.² Or imagine that you are a former pop star singer who converted to Islam and are denied boarding a plane. Whether you are a leisure traveler, a political figurehead, a professional business traveler, or popular figure in society, the security measures for air travel in this post 9/11 era affect everyone.

In response to the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the United States increased security measures within its borders for air travel. One such security measure denies any person the United States Government considers a flight risk from boarding an airplane.³ The first time passengers are told that they cannot board a plane occurs after they have already purchased a ticket and are attempting to check in. Furthermore, a ticketing agent does not inform

* J.D. Candidate, 2006, Franklin Pierce Law Center – Concord, N.H.; M.S. Electrical Engineering, 2003, University of Colorado – Boulder, CO; B.S. Electrical and Computer Engineering, 2001, University of Colorado – Boulder, CO.

1. Senator Ted Kennedy was denied boarding because the name “T. Kennedy” appeared in the database. Senator Kennedy’s staff attempted to clarify the situation with the Department of Homeland Security, but the situation was not rectified until Senator Kennedy was denied boarding an additional three times. Sara Kehaulani Goo, *Sen. Kennedy Flagged by No-Fly List*, Washington Post A03 (Aug. 20, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A17073-2004Aug19.html> (accessed September 29, 2005).

2. Dave Lindorf, *The No Fly List: Is a federal agency systematically harassing travelers for their political beliefs?*, <http://www.inthesetimes.com/issue/27/02/feature3.shtml> (accessed September 29, 2005).

3. 49 U.S.C. § 114(h)(2) (2000 & Supp. 2004).

passengers why they cannot board the plane or why they are subject to additional searches prior to boarding the plane. Passengers often face humiliation when a ticketing agent announces aloud that they cannot board a plane or subjects the passenger to additional searches in front of other passengers.⁴ Common questions that arise are: (1) who generates the list?; (2) what is the authority for generating the list?; (3) what is the criteria for putting passengers on the list?; (4) who has access to the list?; and (5) how do passengers challenge their name on the list?

This article will focus on why placing an individual's name on a No-Fly or Selectee List without prior notice or a hearing is a violation of the Fifth Amendment's due process clause. Part II will provide a general background of the Transportation Security Administration and the agency's authority to generate the No-Fly and the Selectee Lists. Part III will focus on why placing passengers on one of the lists deprives them of their right to interstate travel and reputation sufficient to invoke the Fifth Amendment's due process clause. Part IV will discuss why passengers are entitled to notice and a hearing prior to placement of their names on the lists and the requirements for a constitutionally adequate hearing.

II. BACKGROUND

In response to the terrorist attacks on the World Trade Center and the Pentagon, Congress created the Transportation Security Administration ("TSA") on November 19, 2001.⁵ The head of the TSA is the Under Secretary of Transportation for Security.⁶ The primary function of the Under Secretary ("Secretary") is to oversee and carry out security measures for modes of transportation exercised by the Department of Transportation.⁷

Part A will discuss the statutory authority of the Secretary. Part B will discuss the documents that the Electronic Privacy Information Center obtained from the TSA. Part C will discuss affidavits the TSA submitted in a lawsuit filed by a listed passenger. Finally, Part D will discuss the constitutional implications of listing passengers.

4. Electronic Privacy Information Center, *Passenger Complaints*, http://www.epic.org/foia_docs/airtravel/congress1.pdf (accessed September 29, 2005).

5. 49 U.S.C. § 114.

6. *Id.* at § 114(b).

7. *Id.* at § 114(d)(2).

A. Statutory Authority of the Secretary

The Secretary has no explicit statutory authority to create a No-Fly or a Selectee List.⁸ The Secretary's authority to manage security threats, however, is quite broad. For example, the Secretary's security duties include carrying out actions he or she considers necessary to the extent authorized by law,⁹ which allows him or her to "issue, rescind, and revise such regulations . . . necessary to carry out the functions of the Administration."¹⁰ Furthermore, the Secretary is authorized to oversee security measures implemented at airports,¹¹ which include overseeing screening¹² and determining threats to civil aviation.¹³ If the Secretary determines that an order must be issued immediately,¹⁴ then he or she has authority to issue the order without providing notice.¹⁵

Furthermore, the Secretary has broad authority to identify passengers who pose a threat to transportation and to prevent them from boarding an aircraft.¹⁶ For example, the Secretary is responsible for establishing procedures for notifying the Administrator of the Federal Aviation Administration ("FAA"), state and local law enforcement officials, and airport or airline security officers of "individuals known to pose, or suspected of posing, a risk of . . . terrorism or a threat to airline passenger safety."¹⁷ Moreover, the Secretary may require air carriers "to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation,"¹⁸ and to prevent such individuals from boarding the aircraft.¹⁹

8. *See id.* at § 114 (no explicit mention of authority to create a No-Fly or Selectee List).

9. *Id.* at § 114(f)(15).

10. *Id.* at § 114(l)(1).

11. *Id.* at § 114(f)(11).

12. The Secretary is responsible for day-to-day federal security screening operations, developing standards for hiring security personnel, training security personnel, and providing security personnel at all airports in the United States. *Id.* at §§ 114(e)(1)-(4).

13. *Id.* at § 114(f)(2). The Secretary's duties also include receiving and distributing intelligence information related to transportation security, as well as managing security information distributed to airports. *Id.* at §§ 114(h), (f)(1).

14. An order may constitute a regulation or a security directive. *Id.* at § 114(l)(2)(A).

15. *Id.* All emergency regulations are subject to review by the Transportation Security Oversight Board and cannot exceed ninety days unless the board ratifies the regulation. *Id.* at § 114 (l)(2)(B).

16. *Id.* at §§ 114(h)(1), (2), (3)(A).

17. *Id.* at § 114(h)(2).

18. *Id.* at § 114(h)(3)(A). This section does not give authority to create passenger lists, but assumes that they already exist.

19. *Id.* § 114(h)(2). The Secretary may also require "air carriers to share passenger lists with appropriate Federal agencies." *Id.* at § 114(h)(4).

B. Freedom of Information Documents

The TSA's governing statute already assumes that passenger lists exist and only regulates how the TSA may distribute and use these lists.²⁰ Therefore, the primary question is, where do these lists come from? In 2002, the Electronic Privacy Information Center ("EPIC") obtained documents from the TSA through the Freedom of Information Act ("FOIA").²¹ The FOIA documents that EPIC received from the TSA confirmed that from 1990 to September 11, 2001, the FAA issued Security Directives ("SDs") and companion Emergency Amendments ("EAs") identifying persons that air carriers could not transport.²² In November 2001, the FAA and TSA assumed full administrative responsibility for the lists.²³ The FAA issued an SD that separated the lists into a No-Fly List and a Selectee List.²⁴ The No-Fly List includes persons that are not allowed to board an aircraft,²⁵ while the Selectee List includes persons who are subject to additional security screening prior to boarding an aircraft.²⁶ The FOIA documents further contained letters from passengers to their respective congressmen. The passenger complaints confirmed that passengers received no prior notification that their name was on one of these lists.²⁷

C. Longmire Declaration and Ombudsman Clearance Procedures

The TSA discussed the importance of keeping the lists secret in *Green v. Transportation Security Administration*,²⁸ where passengers on a No-Fly List filed suit against the TSA for violation of their Fifth Amendment rights.²⁹ The TSA submitted an affidavit from Lee Longmire ("Longmire

20. *Id.* at §§ 114(f), (h).

21. EPIC filed a FOIA request in October 2002. When the TSA failed to respond to EPIC's request, EPIC filed suit in the United States District Court for the District of Columbia in December 2002. TSA subsequently responded, releasing documents in compliance with the FOIA. Electronic Privacy Information Center, *Memo From Acting Associate Under Secretary* (October 16, 2002), http://www.epic.org/foia_docs/airtravel/memo-10-16-02.pdf (accessed October 1, 2005) [hereinafter *Memo From Acting Associate Under Secretary*].

22. *Id.*

23. *Id.*

24. *Id.*

25. SD-108-01-20 supports the "No-Fly list." *Id.*

26. SD-108-01-21 supports the "Selectee list." *Id.*

27. Passengers often complain that they have no prior notification that they are on a list. The first time that they receive notification that they are on a list is when they attempt to board an aircraft. Congressional letters to the TSA indicate that congressmen do not know where the lists come from or how to take the names off of the lists. *Passenger Complaints*, *supra* n. 4, at http://www.epic.org/foia_docs/airtravel/congress1.pdf.

28. 351 F. Supp. 2d 1119 (W.D. Wash. 2005).

29. *Id.* at 1122. For a discussion on *Green v. Transp. Sec. Admin.*, review Reputation as a Liberty Interest, *infra* pt. III(B).

Declaration”), the Assistant Administrator for Operations Policy, and the TSA’s clearance procedures.³⁰

The Longmire Declaration established that the TSA publishes neither the procedures the agency uses for administering the lists nor the selection criteria for placing a passenger on the list.³¹ The TSA argues that publicly disclosing the procedures that air carriers follow in administering the lists would jeopardize passenger safety because terrorists would be able to identify weaknesses in the system and circumvent the system’s safeguards.³² The TSA further argues that publicly disclosing the identity of individuals on the list would also jeopardize passenger safety because terrorists would learn which of their agents have been identified and which of their agents can travel undetected.³³ For these security reasons, the TSA does not publicly disclose the No-Fly and the Selectee Lists.³⁴

The TSA further provides clearance procedures for passengers who have their names confused with another name on the list.³⁵ The procedures require passengers to submit a Passenger Identity Verification Form (“PIVF”) to the Office of the Ombudsman.³⁶ The PIVF allows passengers to submit identifying information such as height, weight, or hair color.³⁷ The TSA will review the PIVF and determine if a passenger has a mistaken identity and help expedite the passenger’s check-in process.³⁸

D. Constitutional Issues

The No-Fly and the Selectee Lists present multiple constitutional issues that have yet to be settled by the courts. For example, the additional searches required under the Selectee Lists may implicate the Fourth Amendment, where detaining an individual for additional screening may constitute an unlawful search and seizure.³⁹ Furthermore, airlines use a

30. *Id.* at 1122-24.

31. Aff. Lee Longmire, ¶ 9 (June 4, 2004), <http://secondaryscreening.net/static/docs/legal/2004/longmire%20nofly%20declaration.pdf> (accessed on September 29, 2005) [hereinafter *Longmire Declaration*].

32. *Id.*

33. *Id.*

34. *Id.*

35. *Notice of Filing Expedited No-Fly List and Selectee List Clearance Procedures. Attachment A* (November 2, 2004), <http://hasbrouck.org/documents/nofly/2004-11-02NoticeofFilingforPublicDocs.pdf> (accessed on October 1, 2005) [hereinafter *Clearance Procedures*].

36. *Id.*

37. *Id.*

38. *Id.*

39. See Eric J. Miller, *The Cost of Securing Domestic Air Travel*, 21 John Marshall J. Computer & Info. L. 405, 409-20 (Spring 2003) (discussing Fourth Amendment standards and analyzing whether airline security measures in response to 9/11 meet them).

computer system,⁴⁰ which utilizes sophisticated search algorithms, to search the passenger lists.⁴¹ The use of this computer system may amount to an invasion of privacy.⁴² While these issues have yet to be settled, this article will focus on why the No-Fly and the Selectee Lists violate the Fifth Amendment's due process clause. More specifically, this article will explain why the TSA should afford passengers notice and opportunity for a hearing before the TSA places them on one of the lists.

III. FIFTH AMENDMENT DUE PROCESS CLAUSE

The Fifth Amendment of the United States Constitution affords the right against state action such that "no person shall be . . . *deprived* of life, liberty, or property, without due process of law."⁴³ The Fifth Amendment due process clause provides both procedural and substantive due process.⁴⁴ Substantive due process concerns the constitutionality of government action, while procedural due process concerns the necessity of adequate procedural safeguards, such as notice and hearing.⁴⁵ A passenger on a No-Fly or a Selectee List may have grounds under substantive due process to challenge the constitutionality of the No-Fly and the Selectee Lists. However, this article will explore whether the procedure of placing a passenger's name on one of the lists without providing the passenger with notice or opportunity for a hearing violates the Fifth Amendment's procedural due process requirements.

Before a court can require the TSA to provide notice and opportunity for a hearing prior to placing a passenger on one of the lists, the passenger must demonstrate that having his or her name on one of the lists deprives him or her of a liberty interest.⁴⁶ Part A will discuss how placing a passenger on a No-Fly List deprives the passenger of his or her right to interstate travel. Part B will discuss how a passenger on a No-Fly or Selectee List deprives the passenger of his or her reputation if the passenger can show

40. The TSA-enabling Act authorizes the Computer Assisted Passenger Pre-Screening System II ("CAPS II"), a database containing information about passengers. Deborah von Rochow-Leuschner, *CAPS II and the Fourth Amendment: Does it Fly?*, 69 J. Air L. & Com. 139, 141 (Winter 2004).

41. *Id.* at 143-46.

42. *Id.* at 146-49.

43. U.S. Const. amend. V.

44. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 523-24 (2d ed., Aspen Publishers 2002).

45. *Id.* An individual seeking to have a government action declared unconstitutional for violating a constitutional right is claiming a violation of substantive due process. *Id.* An individual seeking to have a government action declared unconstitutional due to lack of notice and opportunity for a hearing before a deprivation of liberty is claiming a violation of procedural due process. *Id.*

46. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' . . . interests.").

that having his or her name on one of the lists affects a more tangible interest.

A. *The Right to Interstate Travel as a Liberty Interest*

The right of citizens to travel freely from one state to another is a fundamental constitutional right.⁴⁷ The Court recognizes that the right exists even though the text of the United States Constitution does not explicitly mention the right to travel.⁴⁸ In *Crandall v. Nevada*,⁴⁹ an 1867 case where the Court declared unconstitutional a state law that taxed persons who wanted to leave the state or pass through it, the Court recognized the importance of the right to travel.⁵⁰ Although the Court did not cite a particular constitutional provision, the Court recognized the right to travel as necessary to carry out the functions of the government.⁵¹

The Court in *United States v. Guest* affirmed that the right to travel is a fundamental constitutional right without referencing a specific constitu-

47. *U.S. v. Guest*, 383 U.S. 745, 758 (1966).

48. *Id.*

49. 73 U.S. 35 (1867).

50. Noting that the people of the United States constitute one nation and “have a government in which all of them are deeply interested,” the Court stated

[t]hat government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the *pleasure of a State over whose territory they must pass* to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its subtreasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, *and no power can exist in a State to obstruct this right* that would not enable it to defeat the purposes for which the government was established.

Id. at 43-44 (emphasis added). The Court further recognized that if the right to travel is necessary to carry out the functions of government, then citizens inherently have the right to travel:

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, *and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.*

Id. at 44 (emphasis added).

51. *See id.* at 43-44 (no explicit mention of a constitutional provision when discussing the right to travel as a necessity of government).

tional provision.⁵² The *Guest* Court did not find that the right to travel came from a specific constitutional provision, but held that the “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”⁵³ Furthermore, the Court held that the constitutional right to travel was broader than the Fourteenth Amendment because neither the government nor private actors can interfere with the citizens’ right to travel.⁵⁴ More recently, in *Saenz v. Roe*,⁵⁵ the Court reaffirmed that the right to travel from one state to another was a fundamental right without identifying the source of the right in the text of the Constitution.⁵⁶

The right to interstate travel implicates three primary areas: (1) the right to travel from one state to another; (2) the right to visit another state without being treated differently than the state’s permanent residents; and (3) the right to move permanently to another state without being treated differently than the state’s permanent residents.⁵⁷ The second and third components primarily apply when a state law imposes a durational residency restriction.⁵⁸ Asserting that passengers have a right to fly only implicates the right to travel from one state to another.⁵⁹

The Supreme Court has never held that denying the right to air travel deprives citizens of their fundamental right to travel. To invoke the Fifth Amendment’s due process procedures, a passenger on a No-Fly List will need to show that placement on this list amounts to a deprivation of the fundamental right to travel.⁶⁰ While the No-Fly List deprives a passenger

52. *Id.* at 759 (“The constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union.”). In *U.S. v. Guest*, six defendants were charged with violating a federal law that made it illegal to “conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution.” *Id.* at 746-47. The defendants were accused of intimidating African American citizens by threatening their lives, filing false criminal reports against them, and burning crosses. *Id.* at 748.

53. *Id.* at 758. The Court noted that while the Articles of Confederation explicitly provided the right for people to travel from state to state, the U.S. Constitution does not explicitly mention the right to travel. *Id.* The Court hypothesized that the right to travel was so basic to building a stronger Union that it need not be mentioned. *Id.*

54. *Id.* at 759 n. 17.

55. 526 U.S. 489 (1999).

56. *Id.* at 501.

57. *Id.* at 500. The Court did not find a specific source for the right to travel from one state to another. *Id.* at 501. The Privileges and Immunities clause of Article IV, § 2 supports the right to visit other states without the burdens of alienage. *Id.* The Fourteenth Amendment’s Privileges and Immunities clause supports the right to move to another state without the burdens of alienage. *Id.*

58. See *Kansas v. U.S.*, 16 F.3d 436, 441 (D.C. Cir. 1994) (“[C]ourts have seldom . . . encountered . . . laws which directly burden interstate travel, but the right has been relied upon . . . to condemn state laws that prefer long-time residents or penalize new residents[,] thus indirectly implicating the right to travel.”).

59. See *id.* (noting that the right to travel is implicated when the law actually deters travel).

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

the ability to fly, the primary challenge facing the passenger is demonstrating that placement on the list is a deprivation of the right to travel despite the availability of other modes of travel.⁶¹

Although the Fifth Circuit held that passengers have no constitutional right to the “most convenient form of travel,”⁶² the court’s holding relies on keeping restrictions on interstate travel minor.⁶³ In *Houston v. Federal Aviation Administration*, the Department of Transportation (“DOT”) promulgated a perimeter rule that prohibited nonstop flights between Washington National and any airport located more than 1000 miles away.⁶⁴ The two primary airports in Washington, D.C., are Washington National (“National”), located within the District, and Dulles International (“Dulles”), located thirty miles from the District.⁶⁵ The DOT adopted the perimeter rule to divert air traffic from the overcrowded National to the underused Dulles airport.⁶⁶ The Fifth Circuit held that the perimeter rule did not bar interstate travel to National because the rule gave passengers the choice of nonstop service to Dulles or a slightly longer trip if they wanted to land directly at National.⁶⁷ Although the court held that passengers were not entitled to “the most convenient form of travel,”⁶⁸ the court probably reasoned that traveling from Dulles to D.C.,⁶⁹ or requiring a stopover if the passenger wanted to fly directly to National, did not amount to a significant burden on interstate travel.⁷⁰

Similarly, the Fifth Circuit held that regulations restricting interstate flights to certain locations did not bar the right to interstate travel when a passenger could fly to the restricted locations from an airport located only twelve miles away.⁷¹ In *Cramer v. Skinner*, Congress adopted an amendment that restricted interstate service from Love Field, Texas except to the states contiguous to Texas.⁷² Passengers could still fly to the restricted locations from the Dallas Fort Worth (“DFW”) airport, located only twelve

61. See *Longmire Declaration*, *supra* n. 31, at ¶ 7 (does not explicitly mention that passengers cannot use other modes of transportation).

62. *Houston v. Fed. Aviation Admin.*, 679 F.2d 1184, 1198 (5th Cir. 1982).

63. See *id.* (The perimeter rule does not bar travelers from flying to National, but merely gives them a choice.).

64. *Id.* at 1187.

65. *Id.* at 1186-87.

66. *Id.* at 1187-88.

67. *Id.* at 1192.

68. *Id.* at 1198.

69. See *id.* at 1187 (“Ground transportation to downtown . . . takes approximately forty five minutes.”).

70. See *id.* at 1192 (“[T]hose who do not mind a stopover in Chicago, Atlanta, St. Louis, Memphis, Pittsburgh, New Orleans, or Charlotte, may take a slightly lengthier trip and arrive at . . . National.”).

71. *Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir. 1991).

72. *Id.* at 1023.

miles from Love Field.⁷³ The court reasoned that the amendment did not deny passengers of their right to travel because “[m]inor restrictions on travel. . . [did] not amount to the denial of [the right to travel].”⁷⁴

Furthermore, while the Ninth Circuit held that “burdens on a single mode of transportation do not implicate the right to interstate travel,”⁷⁵ the court’s holding relies on the availability of other feasible modes of transportation.⁷⁶ In *Miller v. Reed*, the California Department of Motor Vehicles (“DMV”) rejected the petitioner’s application for a renewal of his driver’s license because the petitioner refused to give his social security number.⁷⁷ The court reasoned that denying the petitioner a driver’s license did not bar his right to interstate travel because the petitioner still had the alternative of using public transportation or carpooling with somebody else.⁷⁸

A court should find that the No-Fly List denies passengers of their fundamental right to interstate travel. The regulations in *Houston* and *Cramer* were only minor burdens on the right to interstate travel rather than an outright bar.⁷⁹ The No-Fly List is a significant burden on passengers’ right to interstate travel because the list is effectively an outright bar to travel to other locations. For example, unlike *Cramer*, where passengers had the option of using another airport to fly to the restricted locations, passengers who find out that they are on a No-Fly List cannot travel to another airport and board a plane because the listed passengers are barred from boarding any commercial flights.⁸⁰

Furthermore, although other modes of transportation are technically available to passengers on a No-Fly List,⁸¹ the No-Fly List effectively bars passengers’ right to interstate travel because no other *feasible* modes of transportation are available. In *Miller*, denying a motorist the ability to drive did not deprive him of his right to interstate travel because the motorist could use other means of ground transportation to travel.⁸² Further-

73. *Id.*

74. *Id.* at 1031 (Passengers could still fly to the unrestricted locations by using DFW or by purchasing a second ticket at a location within the restricted area.).

75. *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999).

76. *See id.* (“The plaintiff is not being prevented from traveling interstate by public transportation.” (quoting *Berberian v. Petit*, 374 A.2d 791, 794 (R.I. 1977))).

77. *Id.* at 1204.

78. *Id.* at 1206.

79. Passengers in *Houston* were not barred from flying to Washington, D.C. 679 F.2d at 1192. The passengers could either fly nonstop to Dulles and commute to Washington, D.C. or fly directly to National with a stopover in another city. *Id.* The passengers in *Cramer* still had the option of flying to the restricted locations from DFW. 931 F.2d at 1031.

80. *Longmire Declaration*, *supra* n. 31, at ¶ 7.

81. *See Longmire Declaration*, *supra* n. 31, at ¶ 7 (only mentions that SDs prevent passengers from boarding planes).

82. *See Miller*, 176 F.3d at 1206 (noting that public transportation and carpooling are still available).

more, if the motorist needed to travel a long distance, the motorist could still board a plane.⁸³ Unlike a motorist, who has other feasible modes of ground transportation for traveling short distances, airline passengers have no other feasible modes of transportation for traveling long distances. If a passenger needs to fly from New York to Los Angeles, the passenger on a No-Fly List is stuck in New York unless he or she chooses to make the cumbersome journey either by car, bus, or train. A court should not find any of these options feasible due to the amount of time it would take to reach long destinations using alternative modes of transportation.⁸⁴ Therefore, although passengers do not have a right to a “single mode of transportation,”⁸⁵ a court should find that the No-Fly List denies passengers the right to interstate travel because the No-Fly List effectively bars all modes of transportation.

A court will probably not find that the Selectee List denies passengers of their right to interstate travel because the passengers can still board a plane.⁸⁶ For the Selectee List to constitute a deprivation of the right to interstate travel, a court would need to conclude that the additional searches are a major restriction on the passengers’ right to interstate travel.⁸⁷ If a court does not find that the Selectee List deprives passengers of their right to interstate travel, passengers on the Selectee List will need to find another deprivation of a liberty or property interest to invoke the Fifth Amendment’s due process clause. The next section will discuss reputation as a liberty interest for passengers on a No-Fly or a Selectee List.

B. Reputation as a Liberty Interest

Damage to one’s reputation may constitute a liberty interest in certain circumstances.⁸⁸ The passengers on a No-Fly or a Selectee List may face public humiliation because (1) airport personnel may identify these passengers as a threat in front of other passengers,⁸⁹ and (2) passengers that are on the Selectee List may be subject to additional searches in front of

83. *See id.* (never explicitly mentions that the motorist was barred from boarding a plane).

84. Although the Ninth Circuit held that the petitioner did not have a right to drive, the court indicated that denying the petitioner a license did not implicate his right to interstate travel because the petitioner had the feasible alternative of traveling by public transportation or carpooling with somebody else. *See id.* at 1205-06.

85. *Id.* at 1205.

86. *Longmire Declaration*, *supra* n. 31, at ¶ 7 (passenger only subject to additional searches).

87. *See Cramer*, 931 F.2d at 1031 (“Minor restrictions on travel simply do not amount to the denial of a fundamental right.”).

88. *See Paul v. Davis*, 424 U.S. 693, 709 (1976) (Fourteenth Amendment’s due process clause invoked when damage to one’s reputation affects a tangible interest).

89. *Green*, 351 F. Supp. 2d at 1122.

other passengers.⁹⁰ Furthermore, air carriers are allowed to share passenger lists and security information provided by the TSA to other airlines.⁹¹ Because of the stigma that attaches to passengers who are on these lists, airlines may be hesitant to provide the same services to these passengers as they would to passengers not on the lists. Therefore, a passenger may claim that the No-Fly and Selectee Lists damage their reputation and therefore constitute a deprivation of liberty.

Unfortunately for those passengers who assert reputation as a liberty interest, the Supreme Court held in *Paul v. Davis* that damage to reputation *by itself* does not constitute a deprivation of liberty.⁹² In *Paul*, the Court held that the “stigma” attached to one’s damaged reputation is not sufficient to invoke the Fourteenth Amendment’s due process clause without showing an effect on a more tangible interest.⁹³ The tangible interest that the Court referred to is a right recognized under law.⁹⁴

In *Paul*, two police chiefs distributed flyers during the Christmas season in an attempt to warn local area merchants of potential shoplifters.⁹⁵ The plaintiff’s picture appeared on the flyers because he was arrested for shoplifting the previous summer.⁹⁶ The State chose not to prosecute the plaintiff, and thus he was never convicted.⁹⁷ The plaintiff’s employer saw the flyer and informed the plaintiff that he would not be fired, but better not “find himself in a similar situation in the future.”⁹⁸ The plaintiff subsequently filed suit challenging that the distribution of the flyer violated his right to due process.⁹⁹

The primary question the Court answered was whether damage to one’s reputation constituted a deprivation of liberty sufficient to invoke the Fourteenth Amendment’s due process procedures.¹⁰⁰ The Court first noted

90. *Id.*

91. 49 U.S.C. § 114(h)(3)(B).

92. 424 U.S. at 709 (emphasis added).

93. *Id.*

94. *Id.* at 708.

95. *Id.* at 694-95.

96. *Id.* at 695.

97. *Id.* at 695-96.

98. *Id.* at 696.

99. The plaintiff brought suit in the District Court for the Western District for Kentucky. *Id.* The plaintiff brought his cause of action under 42 U.S.C. § 1983. 42 U.S.C. §1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

100. *Paul*, 424 U.S. at 698.

that because the plaintiff alleged damage to his reputation, the complaint formed the basis of a classical claim of defamation.¹⁰¹ Affording individuals the right to due process when their reputation is damaged would make the State liable as a tortfeasor, and the Court declined to expand the scope of the due process clause to that extent.¹⁰² Therefore, to bring an actionable claim under 42 U.S.C. § 1983, the plaintiff needed to assert that the State violated a specific constitutional guarantee.¹⁰³

The Court held that damage to one's reputation does not constitute a deprivation of liberty sufficient to invoke due process procedures unless that damage results in a loss of a constitutional right or a right previously held under state law.¹⁰⁴ For example, in *Wisconsin v. Constantineau*¹⁰⁵ a state law required the names of "public drunkards" to be posted where alcoholic beverages were purchased or served.¹⁰⁶ *Constantineau* found that the posting of the names violated the due process clause of the Fourteenth Amendment and noted that "[w]here a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential."¹⁰⁷ In response, *Paul* noted that the posting requirement in *Constantineau* altered an existing right under state law – the right to purchase liquor.¹⁰⁸ Therefore, *Paul* construed the language in *Constantineau*, "because what the government is doing to him," to mean that an individual is afforded the procedural safeguards of the due process clause when government action deprives that individual of a recognized right.¹⁰⁹

101. The Court stated that "[i]mputing criminal behavior to an individual is generally considered defamatory per se." *Id.* at 697. Furthermore, the Court recognized that "if the same allegations had been made about respondent by a private individual, . . . nothing more than a claim for defamation under state law [is available]." *Id.* at 698.

102. The Court did not want to make actionable wrongs inflicted by government employees that would "give rise only to state-law tort claims." *Id.* at 699. The Court further examined the criminal counterpart of 42 U.S.C. § 1983 to demonstrate that the Fourteenth Amendment does not cover all wrongs committed by the government and noted that the statute did not make all torts of state officials federal crimes. *Id.* at 700. The criminal provision of 42 U.S.C. § 1983 made actionable specific acts that were done under the color of law and "deprived a person of some *right secured by the Constitution or laws of the United States*." *Id.* at 700 (quoting *Screws v. U.S.*, 325 U.S. 91, 109 (1945)) (emphasis added).

103. *Id.* at 700. In review of its precedent, the Court rejected the argument that a constitutional doctrine exists that converts every defamation by a public official into a deprivation of liberty. *Id.* at 702.

104. *Id.* at 708.

105. 400 U.S. 433 (1971).

106. *Id.* at 434.

107. *Id.* at 437 (emphasis added).

108. 424 U.S. at 708.

109. *Id.* at 708-09. The Court noted that "stigma" that resulted from the individual's damaged reputation was a significant factor in determining the harm that occurred to the individual. However, the Court did not believe that damage to one's reputation, standing alone, deprived that individual any liberty protected by the Fourteenth Amendment's due process clause. *Id.* at 709.

Similarly, *Paul* noted that in *Goss v. Lopez*¹¹⁰ a student was entitled to the Fourteenth Amendment's procedural safeguards before she was suspended from school.¹¹¹ In *Goss*, a student was suspended after participating in a protest.¹¹² *Paul* recognized that while charges of misconduct could seriously damage the student's reputation, she was entitled to the procedural safeguards of the Fourteenth Amendment because the state conferred a right to all children to attend school.¹¹³ Therefore, like *Constantineau*, the individual in *Goss* was afforded the right to due process because government action deprived her of a right existing under state law.¹¹⁴ For the plaintiff in *Paul*, because flyers with his mug shot were merely distributed with no adverse effect on a liberty interest, the Court determined that there was no due process violation.¹¹⁵ Thus, the Court concluded that mere damage to an individual's reputation did not entitle the individual to the procedural safeguards of the Fourteenth Amendment.¹¹⁶

An individual on a No-Fly or a Selectee List asserting that the lists constitute a deprivation of liberty due to damage to their reputation would need to show that the lists impede upon a recognized right. In *Green v. Transportation Security Administration*, the plaintiffs on a Selectee List alleged that they were entitled to due process because the placement on the list damaged their reputation.¹¹⁷ The District Court dismissed the plaintiffs' complaint for failure to state a claim because the plaintiffs did not allege that their placement on the list deprived them of any other right.¹¹⁸ Therefore, a passenger will not have an actionable claim under the Fifth Amendment if the passenger cannot show that placement on one of the lists impeded upon a recognized right.¹¹⁹ Passengers might have an actionable claim if they can show that they are being treated differently than the general traveling public due to list placement.¹²⁰

Furthermore, the Court will not find that damage to one's reputation occurs when the State does not publicize information that would cause

110. 419 U.S. 565 (1975)

111. 424 U.S. at 710.

112. *Id.* at 570-71.

113. *Paul*, 424 U.S. at 710.

114. *Id.*

115. *Id.* at 696.

116. *Id.* at 711-12.

117. 351 F. Supp. 2d at 1128. The plaintiffs alleged in their complaint that "the government stigmatized [them] by identifying them on the No-Fly Lists, and, as a result, plaintiffs were treated as suspected terrorists." *Id.*

118. *Id.* at 1130. The plaintiffs needed to allege a "tangible harm to their personal or professional lives that [was] attributable to their association with the No-Fly List, and which would rise to the level of a Constitutional deprivation of a liberty right." *Id.*

119. *See id.*

120. *See id.* (In dismissing the complaint, the District Court noted that the plaintiffs did not allege that they "suffered impediments different than the general traveling public.')

harm to one's reputation.¹²¹ For example, in *Bishop v. Wood*, a police officer was fired for poor attendance at training sessions and conduct unsuited for an officer.¹²² The fired police officer argued that the reasons for his dismissal were false and damaged his reputation.¹²³ The Court explained that whether or not the reasons for the officer's dismissal were false was immaterial because the State never publicized those reasons and kept all personal conversations with him private.¹²⁴ Therefore, no damage to the police officer's reputation occurred.¹²⁵

A listed passenger might have trouble demonstrating that damage to their reputation occurs without the information from the list becoming public. In *Green*, the plaintiffs alleged that they were publicly associated with the No-Fly List when they were identified as people on the list in front of co-workers and the general traveling public.¹²⁶ The District Court did not determine whether this allegation constituted a sufficient public disclosure because the court dismissed the complaint on other grounds.¹²⁷ Therefore, the courts have not yet decided whether identifying a listed passenger in front of the general traveling public constitutes a public disclosure.

A court may determine that the lists do not damage the passenger's reputation because the government does not publicize the information and takes steps to make sure the information does not become public. For example, the TSA requires that airline operators take reasonable steps to safeguard sensitive security information ("SSI") from unauthorized disclosure.¹²⁸ Furthermore, airport operators are required to restrict the distribution, disclosure, and availability of SSI.¹²⁹ Therefore, like *Bishop*, where the plaintiff's reputation was not harmed because of a lack of public disclosure, the measures that the TSA takes to prevent SSI from becoming public reduces the chance that a passenger's reputation will be harmed.

IV. DUE PROCESS PROCEDURES

When the court finds that placement on a No-Fly or Selectee List deprives the passenger of a liberty interest, the court will determine (1) if the

121. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

122. *Id.* at 343.

123. *Id.* at 349.

124. *Id.*

125. The Court expressed concern that finding that a deprivation of liberty occurred when the officer was fired would give rise to a cause of action for every fired employee. *Id.*

126. 351 F. Supp. 2d at 1122.

127. *See id.* at 1130 (The District Court never addressed the public disclosure issue dismissing the complaint for failure to allege a harm to a tangible interest.).

128. 49 C.F.R. 1520.9 (a)(1) (2004).

129. 49 C.F.R. 1542.101 (c)(1) (2004).

passenger is entitled to a hearing *prior* to administrative action¹³⁰ and (2) the type of hearing the administration must provide.¹³¹ To determine if a passenger is entitled to a hearing prior to placement on a No-Fly or Selectee List, the court will need to consider (1) the significance of the private interest affected; (2) the risk of erroneously placing a passenger on one of the lists, and the probable value of additional procedures; and (3) the TSA's interest in providing additional procedures.¹³²

Part A will look at the *Goldberg v. Kelly* and *Mathews v. Eldridge* decisions, two of the leading cases in modern due process jurisprudence. Part B will set out the three prong *Eldridge* test to demonstrate why the TSA should provide a hearing prior to placing a passenger on one of the lists. Part C will discuss *Hamdi v. Rumsfeld*,¹³³ one of the Court's first decision regarding due process in the post 9/11 era, and how the TSA cannot use the threat of terrorism as a reason for not providing an administrative hearing. Finally, Part D will look at what type of administrative hearing the TSA should provide passengers for the hearing to be constitutionally adequate.

A. Origins of Modern Due Process – *Goldberg & Eldridge*

In *Goldberg v. Kelly*, New York welfare recipients were denied benefits without prior notice or a hearing.¹³⁴ In accordance with the then-current system, welfare recipients would receive notice of the reasons for termination at least seven days prior to termination.¹³⁵ They were then allowed to submit a written statement giving reasons why they believed their benefits should not be terminated.¹³⁶ Subsequently, a supervisor having a position superior to the official who approved the discontinuance would review the recipient's record and written statement.¹³⁷ If the agency ultimately terminated the recipient's benefits, the recipient could request a post-termination administrative hearing.¹³⁸ If the recipient did not prevail

130. *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970).

131. *Id.* at 266-67.

132. *See Eldridge*, 424 U.S. at 335 (stating the three prong test).

133. 124 S. Ct. 2633 (2004).

134. 397 U.S. at 256.

135. Prior to receiving the notice, a caseworker doubting a recipient's eligibility discussed the issue with the recipient. If the caseworker believed that the recipient was no longer eligible for the benefits, the caseworker recommended termination to the supervisor. If the supervisor concurred, then the notification letter was sent to the recipient. *Id.* at 258-59.

136. *Id.* at 258.

137. *Id.* at 258-59.

138. *Id.* at 259. At the post termination hearing, the recipient (1) is afforded an independent state hearing officer; (2) can offer oral evidence; (3) confront and cross-examine witnesses against him; and (4) have a record made of the proceedings. *Id.* at 259-60.

at the hearing, then the recipient could seek judicial review of the administrative decision.¹³⁹

The welfare recipients challenged that due process required a hearing *before* the benefits were terminated.¹⁴⁰ The Court agreed and further held that the fact that there was a constitutionally adequate hearing after the termination of benefits was irrelevant.¹⁴¹

In *Mathews v. Eldridge*, the Social Security Administration (“SSA”) terminated a recipient’s disability benefits without a pre-termination hearing.¹⁴² After obtaining relevant medical reports and other information from the recipient’s physician, the agency concluded that the recipient was no longer disabled.¹⁴³ The agency informed the recipient of its decision and gave him an opportunity to submit additional information to rebut the agency.¹⁴⁴ Eventually, the agency made its decision final and informed the individual that he would have the opportunity for a post-termination hearing.¹⁴⁵

In contrast to *Goldberg*, the *Eldridge* Court held that the SSA’s procedures afforded constitutionally adequate due process procedures.¹⁴⁶ On its face, it would appear that the Court should have come to the same decision in *Goldberg* and *Eldridge*. After all, both cases involved a termination of benefits that the recipients received based on certain qualifications. Furthermore, both cases, while offering a post-termination hearing, did not provide a pre-termination hearing. Although *Goldberg* and *Eldridge* involved termination of property entitlements, placing a passenger on the No-Fly or the Selectee Lists appears analogous to those agency decisions because: (1) listed passengers receive no prior warning that they are on the lists,¹⁴⁷ and (2) listed passengers have no hearing prior to placement on the list.¹⁴⁸ The *Eldridge* Court developed a three prong test – commonly referred to as the *Eldridge* factors – distinguishing *Goldberg*.¹⁴⁹ Analyzing the *Eldridge* factors will be necessary to determine whether passengers on the No-Fly and Selectee Lists are entitled to a hearing prior to placement on one of the lists.

139. *Id.* at 260.

140. *Id.* at 259.

141. *Id.* at 261.

142. 424 U.S. at 324.

143. *Id.*

144. *Id.*

145. The agency informed Eldridge that he could seek reconsideration of the agency’s decision. Instead of requesting reconsideration, Eldridge filed suit challenging the constitutional validity of the agency’s decision. *Id.* at 324-25.

146. *Id.* at 349.

147. *Passenger Complaints*, *supra* n. 4, at 3, 7; *Longmire Declaration*, *supra* n. 31, at ¶ 9.

148. See 49 U.S.C. § 114 (no explicit mention of hearing prior to placing a passenger on the list).

149. 424 U.S. at 335.

B. *Eldridge* Factors

Historically, the Court has not considered due process as a “technical conception with a fixed content unrelated to time, place, and circumstances.”¹⁵⁰ Rather, the Court considers due process flexible, “[calling] for such procedural protections as the particular situation demands.”¹⁵¹ The three prong balancing test the *Eldridge* Court developed to determine if a due process hearing is required is:

- (1) the private interest affected by government action;
- (2) the risk of erroneous deprivation of the private interest if due process procedures were not used; and
- (3) the government’s interest in using the required procedures.¹⁵²

1. *The individual’s private interest*

When determining the individual’s private interest, the Court examines the severity of the potential loss.¹⁵³ The *Goldberg* Court noted that the termination of the welfare recipient’s benefits would cause grievous loss because welfare entitlements provide the basic means for recipients to survive.¹⁵⁴ Because the welfare recipient has no other means to support themselves, his or her situation “becomes immediately desperate” if benefits are erroneously taken away.¹⁵⁵ Moreover, the Court believed that because the recipient would need to “concentrate upon finding the means for daily subsistence,” his ability to challenge the welfare administration was adversely affected.¹⁵⁶

In *Eldridge*, the affected private interest concerned the termination of benefits for workers considered no longer disabled.¹⁵⁷ The Court noted that the potential loss could be as severe as the loss in *Goldberg* because a worker on disability is “unable to engage in substantial gainful activity.”¹⁵⁸

150. *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961).

151. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

152. 424 U.S. at 335.

153. *Id.* at 341; *Goldberg*, 397 U.S. at 262-63. In *Goldberg*, the Court first noted that whether welfare benefits were a privilege or a right was irrelevant. Continuing, the Court noted that welfare benefits were a statutory entitlement but did not come to a conclusion as to whether they were a right. The Court suggested that welfare entitlements, although not tangible, were more like property rather than gratuity. *Goldberg*, 397 U.S. at 262-63 n. 8.

154. *Id.* at 264. “For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.” *Id.*

155. *Id.*

156. *Id.*

157. 424 U.S. at 336.

158. *Id.* at 341.

An employee who remains disabled would not likely be able to find other employment to compensate for the termination of his benefits.¹⁵⁹ Therefore, just as welfare recipients rely on their benefits to support themselves, disability recipients also rely on their benefits for support while they are disabled.

The Court further recognizes “the severity of depriving a person of the means of [his] livelihood.”¹⁶⁰ In *Cleveland Board of Education v. Loudermill*, a security guard lied about a felony conviction on his application.¹⁶¹ When the education board discovered the false information, the board dismissed the security guard without a hearing prior to termination of his position.¹⁶² The Court held that the fired employee had a significant interest in retaining his employment and reasoned that even though a fired worker could find employment elsewhere, finding other employment would take time and be hindered by the “questionable circumstances under which he left his previous job.”¹⁶³ The Court affirmed this position in *Federal Deposit Insurance Corporation v. Mallen*,¹⁶⁴ stating that an employee has an interest in continued employment “that ought not be interrupted without substantial justification.”¹⁶⁵

A court would most likely determine that private citizens have a substantial interest in protecting their ability to fly because the right to interstate travel is a fundamental liberty.¹⁶⁶ With the TSA estimating a volume of at least 600 million airline passengers, air travel is an important form of travel in today’s society.¹⁶⁷ Placement on a No-Fly List effectively eliminates this fundamental right because passengers have no feasible alternative modes to travel long distances.¹⁶⁸ In *Goldberg* and *Eldridge*, the Court found a significant interest in protecting welfare and disability benefits because the recipients of such benefits had no alternative means to *compensate* for the purpose that the benefit would serve.¹⁶⁹ Analogous to the recipients in *Goldberg* and *Eldridge*, who could not compensate for the loss of their benefits, airline passengers have a significant interest in protecting their ability to fly because alternative modes of transportation –

159. *Id.*

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

161. *Id.* at 535.

162. *Id.*

163. *Id.* at 543.

164. 486 U.S. 230 (1988).

165. *Id.* at 243.

166. *Supra* pt. III(A).

167. *Clearance Procedures*, *supra* n. 35, at Attachment A.

168. *Supra* pt. III(A).

169. See *Eldridge*, 424 U.S. at 341 (noting that a recipient on disability is “unable to engage in gainful activity”); *Goldberg*, 397 U.S. at 264 (noting that recipients on welfare rely on their benefits to provide the basic means of daily living).

bus, train, car, etc. – do not *compensate* for the purpose of air travel – traveling long distances expediently. Moreover, restricting the ability to fly would hinder employment because passengers could not take business trips or complete other tasks of their jobs that require air travel. Therefore, passengers on the No-Fly List have a significant interest in protecting their ability to fly.

Passengers on the Selectee List will have a harder time convincing the court that they have a significant interest worth protecting because they can still board a plane. Such passengers will most likely need to demonstrate that the additional searches that follow placement on the list hinder their ability to fly to the point that they have a significant interest in taking their name off the list. The listed passengers may accomplish this goal by demonstrating that the additional procedures damage their reputation and cause harm to a tangible interest.¹⁷⁰

2. *The risk of erroneous deprivation*

The second *Eldridge* factor considers the risk of erroneous deprivation of the private interest if no hearing is provided.¹⁷¹

a. *The probative value of additional procedures*

The opportunity to provide evidence, probative of whether the administrative agency should act, can reduce the risk of erroneous deprivation.¹⁷² In *Goldberg*, the Court held that submitting written statements prior to the termination of benefits was an unrealistic option for most recipients because they “lack[ed] the educational attainment necessary to write effectively and. . . [could not] obtain professional assistance.”¹⁷³ Instead, the Court reasoned that providing recipients the opportunity to present evidence at a pre-termination hearing would be more probative of their status because the recipients could communicate more effectively in person with a decision maker.¹⁷⁴ Therefore, oral presentation of evidence by the wel-

170. *Supra* pt. III(B).

171. *Eldridge*, 424 U.S. at 335.

172. *See generally id.* at 345 (the use of medical evidence indicated to the SSA whether the recipient was still disabled); *Goldberg*, 397 U.S. at 268-69 (“The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

173. 397 U.S. at 269.

174. *See id.* (noting that written statements “do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important”). The Court further considered the presentation of the facts by the caseworker to the decision maker as deficient because the caseworker’s job was not to present data in an unbiased manner. *Id.*

fare recipients was necessary for the Court to make an accurate decision on the merits.¹⁷⁵

When extrinsic evidence is sufficiently reliable for the agency to make a decision, then a pre-termination hearing would provide no probative value.¹⁷⁶ In *Eldridge*, the termination of disability benefits was based on medical evidence such as the treating physician's recommendation, X-rays, and results of laboratory tests.¹⁷⁷ The Court considered these evidentiary items to be sufficient to determine the status of the disability recipient without the recipient presenting evidence orally.¹⁷⁸ Furthermore, the *Eldridge* Court noted that current procedural safeguards, such as allowing the disability recipient to submit additional evidence to rebut the agency's determination, reduced the risk of erroneous deprivation.¹⁷⁹ Therefore, the Court believed that the reliability of the medical evidence in combination with these additional safeguards sufficiently reduced the risk of an erroneous deprivation.¹⁸⁰

A court should find that the risk of erroneously placing passengers on the No-Fly or Selectee Lists is high without providing passengers the opportunity to submit evidence to the TSA prior to placement on the list. Unlike the agency in *Eldridge*, where the agency could accurately determine the disability status of a recipient with medical evidence, the information the TSA relies on to place a passenger on one of the lists is not as accurate. The TSA compiles the lists based on information provided from federal intelligence and law enforcement agencies.¹⁸¹ Information from a law enforcement agency is not like the advice of a medically trained physician, supported by X-rays and laboratory tests. Furthermore, the TSA keeps the selection criteria for placing a passenger on one of the lists secret.¹⁸²

Therefore, because a court would not know how the TSA creates the lists, the court would have no reasonable basis to believe that the risk of erroneously placing a passenger on one of the lists is low. As such, a court should find that allowing passengers to submit evidence to the TSA, either through written or oral statements, would reduce the risk of erroneously listing a passenger.

175. *Id.*

176. *See Eldridge*, 424 U.S. at 345 (indicating that the use of medical evidence supported by X-rays and laboratory tests would be more "amenable to written than to oral presentation").

177. *Id.*

178. *Id.*

179. *Id.* at 345-46.

180. *Id.*

181. *Clearance Procedures*, *supra* n. 35, at Attachment D.

182. *Longmire Declaration*, *supra* n. 31, at ¶ 9.

b. *Invoking the discretion of the decision maker*

When the deprivation of an interest requires discretion of the agency decision maker, the Court is more likely to find the risk of erroneous deprivation high if the recipient cannot present evidence prior to termination.¹⁸³ In *Loudermill*, where an employee was fired for lying about a conviction on his job application, the Court noted that dismissing an employee for cause often involved factual disputes.¹⁸⁴ Therefore, the employer would have to *exercise their discretion* to make a decision on these factual disputes.¹⁸⁵ The Court further noted that even if the facts were not in dispute, the employee should have had the opportunity to present the appropriate context of the facts – i.e. whether the employee had just cause for his action.¹⁸⁶ Therefore, the Court held that the decision maker required additional information from the employee to make an accurate decision.¹⁸⁷

When the decision maker need not exercise his discretion, a court will probably not find it necessary for the employee to submit additional evidence.¹⁸⁸ For example, in *Gilbert v. Homar* a police officer was charged with possession of marijuana with intent to deliver.¹⁸⁹ The police department suspended the officer without pay and without a hearing prior to the suspension.¹⁹⁰ The Court noted that under state law, a state employee, formally charged with a felony, would be automatically suspended until the criminal charges were finally resolved.¹⁹¹ The Court reasoned that because suspension was *mandatory* upon the filing of formal charges, the police department did not need to exercise any discretion in deciding whether to suspend the employee.¹⁹² Therefore, a pre-suspension hearing was not required because the police officer could not provide any probative evidence other than whether he had been formally charged with a felony.¹⁹³

In contrast, the TSA must exercise discretion in determining whether passengers should be placed on the No-Fly or Selectee Lists, and evidence submitted by passengers would be highly probative. The TSA issues secu-

183. *See Loudermill*, 470 U.S. at 543.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Gilbert v. Homar*, 520 U.S. 924, 933 (1997).

189. *Id.* at 926-927.

190. *Id.* at 927.

191. *Id.* at 933.

192. The appellant argued that the State improperly read the statute and that suspensions were not mandatory. *Id.* The Court ultimately found that no pre-suspension hearing was required on grounds independent of the interpretation of the statute. *Id.* at 934. However, the Court probably would have found that no pre-suspension hearing was required if the Court decided to interpret the statute independently. *See id.* at 933.

193. *Id.*

rity directives, which contain the lists, to aircraft operators.¹⁹⁴ The TSA may issue a security directive if the “[agency] *determines* that a regulation or security directive must be issued immediately.”¹⁹⁵ Therefore, unlike *Gilbert*, where a statute required mandatory suspension, the TSA’s decision to list a passenger is not mandatory and requires the exercise of discretion. Because the TSA must exercise discretion before listing a passenger, providing a passenger the opportunity to present additional evidence will have probative value.¹⁹⁶

Furthermore, allowing a passenger to explain any facts that the TSA relies on before the TSA makes a decision will reduce the risk of erroneous deprivation.¹⁹⁷ The *Loudermill* Court reasoned that even if facts about the employee were not in dispute, the employee could place the facts in the appropriate context to prevent the education board from making an erroneous decision.¹⁹⁸ Here, evidence from the passenger will most likely have probative value, like the evidence from the employee in *Loudermill*. The TSA relies on information from other law enforcement agencies.¹⁹⁹ Because the TSA will exercise its discretion before deciding to place a passenger on the lists, the agency will need to make an adjudication of the information from other agencies. Therefore, passengers should have the opportunity to explain whether this information is accurate. Moreover, even if the facts that the TSA relies on are accurate, a passenger should be able to place the facts in their appropriate context to reduce the risk of erroneous deprivation.²⁰⁰

c. Independent adjudication by a third party

The Court finds the risk of erroneous deprivation less likely when an independent third party adjudicates the facts.²⁰¹ The Court noted in *Loudermill* that providing a pre-termination hearing served the purpose of determining “whether there are reasonable grounds to believe that the charges against the employee are true and support the [termination].”²⁰² In *Mallen*, a federal grand jury indicted a president of a federal bank for making false

194. *Longmire Declaration*, *supra* n. 31, at ¶ 7.

195. 49 U.S.C. § 114(l)(2)(A) (emphasis added).

196. *See Gilbert*, 520 U.S. at 933 (noting that objective criteria decreases the risk of erroneous termination).

197. *See Loudermill*, 470 U.S. at 543 (noting that allowing employee to explain facts would inform the decision maker).

198. *Id.*

199. *Clearance Procedures*, *supra* n. 35, at Attachment D.

200. *See Loudermill*, 470 U.S. at 543 (noting that allowing employee to explain facts would inform the decision maker).

201. *Mallen*, 486 U.S. at 241, 244.

202. 470 U.S. at 545-46.

statements.²⁰³ The Federal Deposit Insurance Corporation (FDIC) suspended the bank president without providing him the opportunity to submit evidence on his behalf.²⁰⁴ The Court held that the bank president was not entitled to submit additional evidence because the grand jury indictment supported the suspension.²⁰⁵ The Court reasoned that the grand jury finding provided reasonable grounds that the suspension was not baseless or unwarranted.²⁰⁶

Similarly, the *Gilbert* Court found that an arrest and formal charges provided reasonable grounds for the police department's actions.²⁰⁷ The Court reasoned that because an independent body formally charged the police officer, the officer's suspension was not arbitrary or baseless.²⁰⁸ Furthermore, the Court noted that formal charges presented an objective fact for the police department to make a decision without additional evidence from the police officer.²⁰⁹

Thus, a court should further find that without providing passengers the opportunity to provide additional evidence, the risk of erroneous deprivation is high because no independent third party has adjudicated the facts. The *Mallen* and *Gilbert* Courts both reasoned that the government action was not baseless or unwarranted because the independent adjudication of a third party provided reasonable grounds for the government action.²¹⁰ Here, the TSA cannot prove that the agency's actions are not baseless or unwarranted because the TSA does not publish its criteria for placing a passenger on the No-Fly or Selectee Lists.²¹¹

The TSA only indicates that the agency compiles the lists using information from other law enforcement agencies.²¹² However, information from other law enforcement agencies is not an independent adjudication of the facts by a third party like a grand jury indictment²¹³ or filing of formal charges.²¹⁴ Therefore, because the TSA does not establish that an independent third party adjudicates the facts before the TSA places a passen-

203. 486 U.S. at 236-37. The appellee was convicted, but the conviction was set aside. *Id.* at n. 7. The Court noted that the conviction did not make the issue moot because the statute authorized suspension until the issue was finally resolved. *Id.*

204. *Id.* at 238.

205. *Id.* at 241, 244.

206. *Id.*

207. 520 U.S. at 933-34.

208. *Id.*

209. *Id.*

210. *Id.*; *Mallen*, 486 U.S. at 241, 244.

211. *Longmire Declaration*, *supra* n. 31, at ¶ 9.

212. *Clearance Procedures*, *supra* n. 35, at Attachment D.

213. *See Mallen*, 486 U.S. at 241, 244 (indictment established that an independent body believed there was probable cause that the bank president committed the crime).

214. *See Gilbert*, 520 U.S. at 933-34 (filing of formal charges by an independent body indicates that the suspension was not arbitrary).

ger's name on one of the lists, a court should find that the risk of erroneously listing a passenger is high.

A court should therefore require the TSA to provide a passenger the opportunity to present evidence prior to placing the passenger's name on one of the lists. The risk of erroneously listing passengers is high because (1) the TSA would not be able to make an accurate decision independent of evidence from the passenger; (2) the TSA must exercise discretion before making a decision; and (3) no third party adjudicates the facts independently of the TSA. Therefore, any evidence the passenger provides would reduce the risk of erroneous deprivation.

3. *Government interest in providing additional procedures*

The third *Eldridge* factor considers the government's interest in providing a hearing.²¹⁵ The Court is willing to give more weight to the government interest when the state must act quickly or when providing a pre-termination hearing would be impractical.²¹⁶ For example, in *Gilbert*, where a police officer was charged with possession of marijuana,²¹⁷ the Court held that the State had a significant interest in immediately suspending government employees who had been charged with a crime.²¹⁸ The Court reasoned that the State had an interest in removing these employees because they "[occupied] positions of great public trust and high public visibility."²¹⁹ Similarly, in *Mallen*, the Court held that the FDIC had a significant interest in quickly suspending bank officers to protect the interests of depositors and to assure the public's confidence in banking institutions.²²⁰ In giving the government interest greater weight than the individual's need for a pre-termination hearing, both the *Mallen* and *Gilbert* courts noted that the government action was not baseless because an independent third party had already adjudicated the facts.²²¹

Providing a hearing before the TSA places a passenger on one of the lists would require the TSA to publicly release the passenger's identity. The TSA argues that publicly disclosing the identity of individuals on the lists or the criteria used to select passengers would jeopardize public safety because terrorists would learn (1) "which one of their agents have been

215. 424 U.S. at 335.

216. *Gilbert*, 520 U.S. at 930.

217. *Id.* at 926-27.

218. *Id.* at 932.

219. *Id.*

220. 486 U.S. at 240-41.

221. *Gilbert*, 520 U.S. at 933-34 (noting that formal charges had already been filed against the police officer); *Mallen*, 486 U.S. at 241, 244 (noting that a grand jury's indictment indicated probable cause that the bank president committed the crime).

compromised,” and (2) “which of their agents may board an aircraft without any form of enhanced security.”²²² Despite this government interest, a court should find that the passenger’s interest in preventing erroneous or arbitrary government action outweighs the TSA’s interest in not holding a hearing. Because the TSA does not publish the criteria for placing passengers on one of the lists, the current system allows the TSA to list passengers without having to prove that the agency has a reasonable basis for its decision.²²³ Granting the TSA a higher interest over the passenger’s interest because the TSA is fighting terrorism would create a loophole where any government agency can use terrorism as a cover to act arbitrarily and capriciously.²²⁴ Therefore, a court should find that the passenger’s interest in preventing an erroneous, and possibly arbitrary, deprivation of his right to fly outweighs the TSA’s interest in preventing terrorism.

The Court further considers the administrative burden and other societal costs that a hearing would impose.²²⁵ The *Eldridge* Court noted that the public interest is also served “in conserving scarce fiscal and administrative resources.”²²⁶ Although the *Eldridge* Court did not have an exact figure for the cost of holding additional hearings, the Court noted that the administrative burden of holding pre-termination hearings “would not be insubstantial.”²²⁷ The *Eldridge* Court concluded that no pre-termination hearing was required for recipients of disability benefits because the fairness of existing procedures allowing the recipient to challenge the government’s claim were sufficient.²²⁸

The TSA cannot demonstrate that requiring a hearing prior to placing a passenger on one of the lists would be a financial burden on the agency because the TSA does not publicly disclose the number of people on the lists.²²⁹ In *Eldridge*, the Court was given at least enough information to find that the cost of holding pre-termination hearings for all recipients of disability benefits “would not be insubstantial.”²³⁰ Here, due to the limited

222. *Longmire Declaration*, *supra* n. 31, at ¶ 9.

223. *See id.* (criteria and basis for decision are not published for “safety and security” reasons); *see also Gilbert*, 520 U.S. at 932 (noting that formal charges had already been filed against the police officer); *Mallen*, 486 U.S. at 244 (noting that a grand jury’s indictment indicated probable cause that the bank officer committed the crime).

224. *See Due Process*, Post 9/11, *infra* pt. IV(D) (discussing the need to preserve liberty during times of war).

225. *Eldridge*, 424 U.S. at 347.

226. *Id.* at 348.

227. *Id.* at 347.

228. *Id.* at 349. Current procedures included the recipient’s ability to submit medical evidence to prove their disability and a full judicial type post-deprivation hearing where the recipient would receive retroactive payments if the disability benefits were erroneously taken away. *Id.* at 339, 345-46.

229. *Longmire Declaration*, *supra* n. 31, at ¶ 9.

230. 424 U.S. at 347.

information the TSA discloses, a court cannot make the same determination. Therefore, a court cannot find that the government's burden in conducting hearings outweighs a passenger's interest in preventing an erroneous deprivation of his right to fly.

4. Availability of judicial type post-termination procedures

In addition to the *Eldridge* factors, the availability of a full judicial type post-termination hearing also influences the Court's decision to require a pre-termination.²³¹ A full judicial type post-termination hearing was available in both *Goldberg* and *Eldridge*.²³² The *Goldberg* Court determined that despite the availability of a judicial type post-termination hearing, a pre-termination hearing was required due to the inability of welfare recipients to support themselves while waiting for a hearing.²³³ The *Eldridge* Court reached a different conclusion, noting that the risk of erroneous deprivation was low, and a full judicial type post-termination hearing provided the disability recipient full retroactive payments in the event of an erroneous deprivation.²³⁴

The TSA provides no judicial type administrative hearing after placing a passenger on the No-Fly or Selectee Lists.²³⁵ The TSA only provides a minimal clearance procedure through the Office of the Ombudsman.²³⁶ The Ombudsman clearance procedure provides no recourse for passengers who are on the lists due to erroneous information, because the Passenger Identity Verification Form ("PIVF") only allows passengers to submit identifying information.²³⁷ The PIVF does not allow passengers to deny or explain erroneous information that the TSA may be relying on.²³⁸ Therefore, the Ombudsman clearance procedures do not adequately address a passenger's erroneous deprivation of his right to fly. Unlike *Eldridge*, where the presence of an adequate post-termination hearing influenced the Court to not require a pre-termination hearing, in this case the lack of an adequate post-

231. *See id.* at 349 (taking into account that current procedures were fair because the recipient was assured a post-deprivation hearing).

232. *Id.* at 339; *Goldberg*, 397 U.S. at 259-60.

233. *Goldberg*, 397 U.S. at 264, 266.

234. 424 U.S. at 339, 345-46.

235. *See generally* 49 U.S.C. § 114 (no explicit mention of providing hearing).

236. *Clearance Procedures*, *supra* n. 35, at Attachment A.

237. *Id.* The identification form allows passengers to submit identifying information such as height, weight, hair color, etc. *Id.* at Attachment C. However, the form lacks a section for explaining the passenger's situation. *See id.* (no section for explaining the passenger's situation).

238. *See id.* (no section for explaining the passenger's situation); Invoking the Discretion of the Decision Maker, *supra* pt. IV(B)(2)(b) (discussing the passenger's need to place facts in their appropriate context).

termination hearing should influence a court to require a pre-termination hearing.

Furthermore, when no post-termination hearing is available, the Court is not likely to find resort to the judicial system as an adequate remedy.²³⁹ In *Logan v. Zimmerman Brush Company*, a shipping clerk was discharged allegedly because his short left leg hindered his ability to perform his duties.²⁴⁰ The employee brought a charge of unlawful conduct in front of the Illinois Fair Employment Practices Commission (“Commission”) where the Commission was required to hold an evidentiary hearing within 120 days of filing the complaint.²⁴¹ By administrative error, the Commission failed to hold an evidentiary hearing within 120 days, and the employee’s claim was subsequently terminated.²⁴² The employee’s only remedy was through a *post hoc* tort suit.²⁴³ The Court reasoned that a tort suit would not adequately redress the harm, because lawsuits are lengthy and could not fully restore the employee’s property rights.²⁴⁴

Without a post-termination hearing, a passenger’s only resort is filing a lawsuit. Like *Logan*, where the Court held that a remedy in a state tort law claim would not adequately protect the employee’s property interest because lawsuits were a lengthy process, a court should hold that a lengthy lawsuit would not adequately protect a passenger’s right to interstate travel.²⁴⁵ A lawsuit would not provide a passenger with adequate due process procedures because while the passenger is waiting for the court to adjudicate the lawsuit, the passenger will continue to suffer the harm of an erroneous deprivation of his right to interstate travel.²⁴⁶ Therefore, the lack of adequate procedures after the TSA deprives a passenger of his or her right to interstate travel should influence a court’s decision in requiring a hearing prior to placing a passenger’s name on one of the lists.

239. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982).

240. *Id.* at 426.

241. *Id.*

242. *Id.* at 426-27.

243. *Id.* at 436.

244. *Id.* at 436-37.

245. See *U.S. v. Guest*, 383 U.S. at 758 (finding that the right to interstate travel is fundamental); The Right to Interstate Travel as a Liberty Interest, *supra* pt. III(A) (discussing the lack of feasible alternative modes of transportation when a passenger cannot fly).

246. Cf. *Goldberg*, 397 U.S. at 264, 266 (pre-termination hearing required, because welfare recipients erroneously deprived of benefits will suffer without recourse while waiting for a post-termination hearing).

5. *The finality of the deprivation*

The Court further considers the “length or finality of the deprivation” to determine whether a pre-termination hearing is required.²⁴⁷ When due process procedures are required, the procedures are not constitutionally adequate unless they provide a meaningful opportunity to be heard.²⁴⁸ Whether a post-termination hearing, without the opportunity for a pre-termination hearing, provides a meaningful opportunity to be heard may depend on whether the right is terminated or merely suspended.²⁴⁹

For example, in *Loudermill*, where an employee was entitled to a hearing prior to termination of his job, the Court determined that “the only meaningful opportunity to invoke the discretion of the decision maker [was] . . . before the termination takes effect.”²⁵⁰ However, in *Gilbert* and *Mallen*, where a police officer and a bank president were temporarily suspended, the Court found that the suspended employee had a meaningful opportunity to invoke the discretion of the decision maker after the suspension.²⁵¹ The opportunity to be heard in *Gilbert* and *Mallen* was still meaningful after the suspension because the employees in both cases were entitled prompt post-suspension hearings.²⁵² When a suspended employee is provided a prompt post-suspension hearing, the suspended employee would not suffer as much injury as a terminated employee because the prompt hearing minimizes lost income and the suspended employee still receives the fringe benefits of employment such as health and life insurance.²⁵³ Therefore, because a terminated employee loses the full benefit of his or her entitlement, the only meaningful opportunity to be heard would be at a pre-termination hearing.²⁵⁴

Placing a passenger on a No-Fly or Selectee List is equivalent to a termination of the passengers’ rights, rather than a mere suspension. The TSA does not indicate how long a passenger will stay on a No-Fly or Se-

247. *Logan*, 455 U.S. at 434.

248. *Goldberg*, 397 U.S. at 267.

249. *Gilbert*, 520 U.S. at 934-35.

250. 470 U.S. at 543 (emphasis added).

251. *Gilbert*, 520 U.S. at 927, 934-35 (police officer); *Mallen*, 486 U.S. at 238, 243 (bank president).

252. *Gilbert*, 520 U.S. at 935-36 (case was eventually remanded to determine if employee received prompt post-suspension hearing); *Mallen*, 486 U.S. at 235 n. 6, 243 (statutory requirement entitled suspended employee to a hearing within thirty days and a decision within sixty days of the hearing). Although the employee in *Loudermill* was entitled to a full post-administrative hearing, there was no indication that the employee was entitled to have the hearing within a certain time period. See 470 U.S. at 546-47 (no explicit mention that the post-termination hearing had to be conducted within a certain time period).

253. *Gilbert*, 520 U.S. at 932.

254. *Id.*

lectee List.²⁵⁵ Furthermore, a passenger has no statutory entitlement to a post-termination hearing like the bank president in *Mallen*.²⁵⁶ *Mallen*'s suspension was not indefinite because he was statutorily entitled to a post-suspension hearing within thirty days.²⁵⁷ In contrast, placement on a No-Fly or Selectee List is more like a termination than a suspension because the lack of any statutory entitlement to an administrative hearing makes the placement indefinite.

Furthermore, unlike suspended employees who can still obtain the fringe benefits from their jobs, passengers on a No-Fly List will suffer the full loss of their right to interstate travel.²⁵⁸ Therefore, a court should find that the only meaningful opportunity for passengers to challenge their placement on the list would be at a pre-termination hearing.²⁵⁹ A court may not find that passengers on a Selectee List will suffer the full loss of their right to interstate travel because they are only subject to additional searches. However, even though passengers on a Selectee List may still board a plane, a court should still find that subjecting passengers to additional searches for an indefinite amount of time without the guarantee of a post-termination hearing would entitle them to a pre-termination hearing.

C. Due Process, Post 9/11

In *Hamdi v. Rumsfeld*, the Court examined whether the government has a significant interest in not providing a hearing when the government action involves preventing terrorism.²⁶⁰ After the 9/11 attacks, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to use the necessary force to combat terrorism.²⁶¹ Shortly thereafter, the President sent armed forces to Afghanistan to remove the Taliban regime.²⁶²

255. See generally *Longmire Declaration*, *supra* n. 31, at ¶ 8 (no explicit mention of removal procedure, therefore placement on the list is implicitly permanent, unless appealed).

256. See *Mallen*, 486 U.S. at 235 n. 6 (statutory entitlement to a hearing within thirty days of employment termination); see generally 49 U.S.C. § 114 (no explicit mention of right to administrative hearing).

257. 486 U.S. at 235 n. 6.

258. See *Right to Travel as a Liberty Interest*, *supra* pt. III(A) (discussing the lack of feasible alternative modes of transportation when a passenger cannot fly).

259. Compare *Goldberg*, 397 U.S. at 264, 266 (pre-termination hearing required, because welfare recipients erroneously deprived of benefits will suffer without recourse while waiting for a post-termination hearing) with *Gilbert*, 520 U.S. at 932, 934-35 (suspended employee would have a meaningful opportunity to be heard at a post-suspension hearing because the employee could still receive the fringe benefits of his employment).

260. 124 S. Ct. at 2647.

261. *Id.* at 2635.

262. *Id.*

Yaser Esam Hamdi, an American citizen born in Louisiana, resided in Afghanistan in 2001.²⁶³ Hamdi was captured during a battle against the Taliban, initially detained in Afghanistan, and transferred to the United States Naval Base in Guantanamo Bay.²⁶⁴ The government contended that because Hamdi was an enemy combatant, the government had the authority to hold him indefinitely, without formal charges or proceedings, and to deny him counsel.²⁶⁵

Hamdi argued that his inability to challenge his status as an enemy combatant violated due process.²⁶⁶ The Court applied the *Eldridge* factors to determine whether Hamdi was entitled to a hearing to challenge his status as an enemy combatant.²⁶⁷ The *Hamdi* Court recognized that during times of war, the government has a legitimate interest “in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.”²⁶⁸ However, the Court further noted that “during our most challenging and uncertain moments . . . we must preserve our commitment at home to the principles for which we fight abroad.”²⁶⁹ Therefore, the government could not detain Hamdi indefinitely because the government interest in fighting terrorism did not outweigh a detainee’s interest in challenging his status as an enemy combatant.²⁷⁰

A court should not find that the government’s interest in combating terrorism relieves the government of holding a hearing prior to listing a passenger. A passenger suspected of posing a threat to air travel is equally as dangerous as an enemy combatant. In both situations, the terrorist flying on a plane or fighting with the enemy against the U.S. poses a serious threat to national security. However, as the *Hamdi* Court noted, there must be a commitment to preserving due process safeguards during times of war.²⁷¹ Therefore, even though an enemy combatant poses a threat to national security, the need to preserve due process outweighs the government’s interest in indefinitely holding prisoners to combat terrorism. Here, a court should find that even though notifying listed passengers may pose a threat to air travel, the need to prevent erroneous deprivation and arbitrary government action outweighs the government’s interest in preventing ter-

263. *Id.*

264. *Id.* at 2635-36.

265. *Id.*

266. *Id.*

267. *Id.* at 2646-48. The Court first noted that Hamdi had a liberty interest in being free from incarceration. *Id.* at 2646. The Court further noted that there was an “unacceptably high” risk of erroneous deprivation. *Id.* at 2648.

268. *Id.* at 2647.

269. *Id.* at 2648.

270. *Id.*

271. *See id.* (discussing the need to preserve the commitment to principles at home during times of war).

rorism.²⁷² Therefore, to satisfy the Fifth Amendment's procedural due process requirements, a court should find that the TSA must provide a hearing prior to placing a passenger's name on the lists.

D. Constitutionally Adequate Due Process Procedures

A hearing for passengers prior to placing their names on one of the lists must be constitutionally adequate to meet the Fifth Amendment's due process requirements.²⁷³ The minimum requirement of due process is the "opportunity to be heard,"²⁷⁴ and the hearing must be "at a meaningful time and in a meaningful manner."²⁷⁵ In *Loudermill* and *Goldberg*, the Court noted that a full judicial type pre-termination hearing was not required because the respondents were entitled to a full post-termination administrative review.²⁷⁶ Therefore, the pre-termination hearing served as an initial check on the agency action for reasonable grounds.²⁷⁷

A court may determine that passengers on one of lists are entitled to a full pre-termination hearing because the TSA does not provide a post-termination hearing.²⁷⁸ If passengers are not entitled to a full pre-termination hearing, the minimum requirements for a constitutionally adequate hearing are: (1) "timely and adequate notice detailing the reasons for a proposed termination";²⁷⁹ (2) an opportunity to confront and cross-examine adverse witnesses;²⁸⁰ (3) an opportunity to present evidence;²⁸¹ (4) an opportunity to retain counsel;²⁸² (5) a decision based "solely on the legal rules and evidence adduced at the hearing";²⁸³ (6) a statement providing the reasons for the final decision and the evidence relied on;²⁸⁴ and (7) an impartial decisionmaker.²⁸⁵

272. See The Individual's Private Interest, *supra* pt. IV(B)(1) (discussing the effects of an erroneous deprivation); Government Interest in Providing Additional Procedures, *supra* pt. IV(B)(3) (discussing the loophole that would be created if the TSA's interest were considered greater than the passengers' interest, thereby enabling arbitrary government action).

273. See *Goldberg*, 397 U.S. at 267-68 (discussing requirements for a constitutionally adequate hearing).

274. *Id.* at 267 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

275. *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

276. *Loudermill*, 470 U.S. at 545-46; *Goldberg*, 397 U.S. at 266-67, 269, 270-71.

277. *Loudermill*, 470 U.S. at 545-46.

278. See *id.* (full judicial type pre-termination hearing not required because full post-termination review was available); *Goldberg*, 397 U.S. at 264, 266 (pre-termination hearing required because post-termination procedures were insufficient).

279. *Goldberg*, 397 U.S. at 267-68.

280. *Id.* at 268, 269.

281. *Id.* at 268.

282. *Id.* at 270-71.

283. *Id.* at 271.

284. *Id.*

285. *Id.*

The TSA provides neither notice nor reasons for placing passengers on one of the lists.²⁸⁶ A constitutionally adequate pre-termination hearing would require the TSA to provide the reasons for a proposed action to determine if the action is reasonable.²⁸⁷ Passengers will be unable to deny or explain erroneous facts unless the TSA provides the information that the agency is relying on.²⁸⁸ Furthermore, because the TSA does not offer a constitutionally adequate post-termination hearing, a timely and adequate notice giving passengers the opportunity to effectively explain erroneous facts becomes more critical.

Without the guarantee of a post-termination hearing, a court should find that passengers on the No-Fly and Selectee Lists are entitled to present evidence orally at a pre-termination hearing. In *Eldridge*, the Court held that recipients of disability benefits were not entitled to present oral testimony because the recipients were afforded with a formal post-termination hearing, and the agency could determine whether or not a recipient was disabled without using evidence from the recipient.²⁸⁹ Here, passengers on the lists do not have a post-termination hearing, nor can the TSA accurately determine whether a passenger should be on the list without evidence from the passenger.²⁹⁰ Therefore, to meet the minimal requirements of due process, a passenger should be entitled to provide oral testimony at a hearing before the passenger's name is placed on a No-Fly or Selectee List. Even if a court decides that passengers may not present evidence orally,²⁹¹ passengers should be allowed to present evidence in some form because any information from the passenger will reduce the risk of erroneous deprivation.²⁹²

V. CONCLUSION

The TSA's administration of the No-Fly and Selectee Lists are a violation of the Fifth Amendment's procedural due process requirements. A court should find that the Fifth Amendment's procedural safeguards afford

286. *Longmire Declaration*, *supra* n. 31, at ¶ 9.

287. *See Loudermill*, 470 U.S. at 545-46 (pre-termination hearing should be initial check for mistaken decisions).

288. *See Invoking the Discretion of the Decision Maker*, *supra* pt. IV(B)(2)(b) (discussing passengers' need to place facts in their appropriate context).

289. 424 U.S. at 345, 349.

290. *See The Probative Value of Additional Procedures*, *supra* pt. IV(B)(2)(a) (discussing the information used by the TSA to determine whether a passenger should be added to the lists).

291. *See Mallen*, 486 U.S. at 247-48 (no requirement that "oral testimony must be heard in every administrative proceeding in which it is tendered").

292. *The Probative Value of Additional Procedures*, *supra* pt. IV(B)(2)(a); *Invoking the Discretion of the Decision Maker*, *supra* pt. IV(B)(2)(b).

a passenger a hearing prior to placing the passenger on one of the lists because: (1) the passenger has a significant interest in preserving his right to interstate travel; (2) the risk of erroneous deprivation is high without providing the passenger with an opportunity to explain the facts that the TSA is relying on; and (3) the interest in placing a check on government power outweighs the government's interest in fighting terrorism.

A constitutionally adequate hearing would allow a passenger to submit evidence to the TSA, thus allowing the passenger to explain any erroneous facts that the TSA relies on. The risk of the TSA erroneously listing a passenger is high because the TSA relies on information from other agencies and then must use its discretion to determine whether a passenger should be placed on one of the lists. Without providing passengers the opportunity to explain the facts in their appropriate context, the TSA may erroneously interpret the information and erroneously deprive a passenger of his or her rights.

Despite the government's interest in fighting terrorism, a court should find that the high risk of erroneous deprivation and the interest in placing a check on government power outweighs the government's interest. Because the TSA does not publish its procedures or selection criteria for the lists, the court cannot demonstrate that the agency has a reasonable basis for its actions. Although not all of the agency's actions are unreasonable, allowing the TSA to deprive passengers of their liberty interests without demonstrating that the agency's actions are reasonable creates a loophole allowing the government to act arbitrarily and use terrorism as an excuse. Like *Hamdi*, where the decision demonstrated that the Court is unwilling to allow the government to indefinitely detain a citizen under the guise of national security, a court should find that the TSA cannot act arbitrarily under the guise of passenger safety.