CHAPTER ELEVEN

AVIATION SECURITY AND AIRLINE TRAVEL RESTRICTIONS

A. Air Transport Security for Passengers and Baggage

Threats to the security of air transportation require restrictions on carriage. The Transportation Security Administration (TSA) intensely regulates the security of air carriage and polices who may fly. All passengers and property on board commercial aircraft in the United States must be screened (49 U.S.C. § 44901). Furthermore, all persons entering sterile areas of airports must be screened (49 U.S.C. § 44903). After the events of September 11, 2001, Congress passed the Aviation and Transportation Security Act (ATSA), pursuant to which the government and airlines must focus on screening and refusing transportation to persons who appear to be terrorists. Establishment of the Homeland Security Department resulted in transfer of the large FAA civil aviation security function over to the Homeland Security Department by the Homeland Security Act of 2002, Pub. L. No. 107–267. This organization became the Transportation Security Administration. TSA developed two screening systems for screening of passengers and their baggage:

(1) The No-Fly List: Under this screening system, the TSA identifies passengers by name (Passenger Name Record, or PNR) and compares the PNR against the watch list maintained by the federal government (the so-called No-Fly List and the Selectee List). TSA began to take over the identification functions from the airlines on August 15, 2009; and by late 2010, TSA was responsible for vetting all domestic and international flights. TSA obtains the passenger name record (PNR) by electronic means from airline sources and from government and private sources. The list is now compiled by the Terrorist Screening Center at the Federal Bureau of Investigation. Selected information will be securely transmitted to commercial data providers for the sole purpose of authenticating passenger identity. This authentication will be accomplished by a commercial data provider transmitting back to TSA a numeric score. This score is used to identify the passenger. Then a risk assessment is conducted internally within the U.S. Government to determine whether a passenger is a known terrorist or has links to terrorist organizations. National security information from within the federal government, much of it based on the knowledge of federal officials with high levels of security clearance, is part
of this analysis function. Passengers on the No-Fly List are prohibited from flying and passengers on the Selectee List are subject to additional screening. Confusion about similar names has caused innocent travelers and even airline crew members to be added to the watch list. In 2009, it was reported that as many as 24,000 people were incorrectly on an F.B.I. Terrorist watch list. In 2012, reportedly 21,000 names were on the No-Fly List.

(2) The Computer Assisted Passenger Prescreening System (CAPPS): The purpose of CAPPS is to screen passengers by studying the Passenger Name Record (PNR) and by identifying suspicious indicators associated with the passengers’ behavior. CAPPS was mandated by 49 U.S.C. § 144(h)(2) which requires the DHS to maintain a watchlist on “individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety.” In essence, CAPPS is intended to augment the No Fly List.

TSA may use passenger profiles to determine whether passengers constitute a threat to the aviation security. Although the government claims that the passenger screening criteria are confidential, national origin is reported to be a factor in screening passengers. Other reported factors are the destination of the passenger, whether they possess any accompanying baggage, and whether the ticket was bought with cash or credit card. According to TSA, an intrusion into personal privacy is appropriate when the intrusion is slight and is reasonably tailored to further the government’s interest in aviation security.

In 2003, Congress authorized an update to CAPPS, known as CAPPS II, that expanded CAPPS to cover all passengers and airlines; but CAPPS II was quickly withdrawn by DHS in 2004 due to civil rights concerns. Numerous civil rights groups had protested the program, and a 2004 study by the US General Accounting Office questioned the constitutionality of CAPPS II. A successor watch list called Secure Flight was implemented in 2010. Secure Flight attempts to avoid the misidentifications that plagued CAPPS by collecting more information about potential passengers, including name, gender, birthdate, and Redress Number (when applicable). Additionally, TSA released a Privacy Impact Assessment of Secure Flight, attempting to alleviate the privacy concerns that plagued CAPPS; however, many civil liberties organizations worry that innocent citizens placed on the watchlist have insufficient means of redress.

The case of *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008) illustrates the operation of the augmented No-Fly list. Because the information on the list may be derived from secret or sensitive source information (SSI) that cannot be made publicly available, cases like *Ibrahim* demonstrate the legal difficulty of legal review. Despite these difficulties, the Circuit Court nevertheless decided to review why Ibrahim’s name had been placed on the list.