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## Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists

**ABSTRACT.** Since 9/11, the federal government's use of terrorist watchlists has constrained the liberty of thousands of American travelers and transportation workers. While watchlists make sense for security purposes, they have a pair of troubling side effects: Individuals may be listed by mistake, and once on a list it is not easy to get off. This Note argues that all people kept from working or traveling by government use of terrorist watchlists have a due process right to receive meaningful procedural protections, including notice of their status and a fair hearing. The Note then proposes model procedures that protect both constitutional liberties and national security.

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**INTRODUCTION**

What does Democratic Senator Edward Kennedy of Massachusetts have in common with Republican Congressman Donald Young of Alaska? Watchlists maintained by the United States government have kept them both from flying. In the spring of 2004, airline agents tried to block Senator Kennedy from boarding airplanes on five occasions because his name appeared on a federal terrorist watchlist.<sup>1</sup> In September 2004, Young faced similar frustrations when he attempted to catch an Alaska Airlines flight.<sup>2</sup>

These members of Congress are not alone. Since 9/11, the U.S. government has placed thousands of American travelers on the No Fly List<sup>3</sup> as part of a massive security initiative that affects all of the nearly seven hundred million passengers who fly within the United States annually.<sup>4</sup> The government performs watchlist-based security threat assessments on each of these airline passengers, as well as millions of other individuals employed in the transportation industry, by checking each passenger's or employee's name against one or more terrorist watchlists.<sup>5</sup>

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1. Sara Kehaulani Goo, *Sen. Kennedy Flagged by No-Fly List*, WASH. POST, Aug. 20, 2004, at A1; Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES, Aug. 20, 2004, at A1.
  2. Sara Kehaulani Goo, *Committee Chairman Runs Into Watch-List Problem*, WASH. POST, Sept. 30, 2004, at A17.
  3. Sara Kehaulani Goo, *Hundreds Report Watch-List Trials*, WASH. POST, Aug. 21, 2004, at A8.
  4. This figure is projected to pass one billion passengers by the end of the decade. Press Release, Fed. Aviation Admin., FAA Forecasts Passenger Levels To Top One Billion in the Next Decade (Mar. 17, 2005), available at <http://www.faa.gov/apa/pr/pr.cfm?id=1932>.
  5. The use of government watchlists extends far beyond the transportation sector. A provision of the Patriot Act mandates that nonprofit organizations check employees' names against government terrorist watchlists to be eligible to receive contributions through the Combined Federal Campaign (CFC), a program allowing federal employees to donate to nonprofit organizations through payroll deductions. See Memorandum from Mara T. Paternoster, Dir., Office of CFC Operations, Office of Pers. Mgmt., to All 2004 CFC Applicants, New Certification for 2004 CFC Application (2003), available at <http://www.opm.gov/cfc/opmmemos/2003/2003-10.asp>. Watchlists are also used to screen foreign visitors and immigrants through the US-VISIT program. See Dep't of Homeland Sec., US-VISIT Q&As: Information Collection & Use, [http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0525.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0525.xml) (last visited Apr. 11, 2006). The State Department maintains a watchlist of foreign terrorist organizations. See Off. of Counterterrorism, U.S. Dep't of State, Fact Sheet: Foreign Terrorist Organizations (Aug. 12, 2004), <http://www.state.gov/s/ct/rls/fs/2004/35167.htm>. And the Department of the Treasury's Office of Foreign Assets Control (OFAC) keeps a watchlist for freezing and blocking terrorist assets. U.S. Dep't of the Treasury, Office of Foreign Assets Control,

These measures make sense for security purposes, but have a pair of troubling side effects: People may be listed by mistake, and once on a list it is not easy to get off. It took Senator Kennedy several phone calls to high level officials in the Department of Homeland Security (DHS). As Kennedy said at a Judiciary Committee hearing: If the DHS has “that kind of difficulty with a member of Congress, how in the world are average Americans, who are getting caught up in this thing, how are they going to be treated fairly and not have their rights abused?”<sup>6</sup>

In December of 2004, in response to a recommendation of the 9/11 Commission, Congress included in the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 a brief clause requiring that the Transportation Security Administration (TSA), the division of DHS responsible for the transportation sector, “establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight” because the watchlist showed they might pose a security threat to “appeal such determination and correct information contained in the system.”<sup>7</sup> The Act, however, did not give specific guidance to the agency or require a formal hearing, nor did it cover transportation-sector employees affected by watchlists.

The agency has yet to act. The government has objected that granting watchlisted individuals the core elements of due process—notice and a fair hearing—would threaten transportation security and require disclosure of classified information. But a fair process need not do so. Drawing on the Supreme Court’s invitation to develop narrowly tailored procedures, and programs designed by Congress in other contexts, this Note proposes a balanced approach that would allow for pretravel clearance and a fair hearing for travelers and employees alike, without endangering homeland security.<sup>8</sup>

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Specially Designated Nationals & Blocked Persons, <http://www.treas.gov/offices/enforcement/ofac/sdn> (last visited Apr. 11, 2006).

6. See Swarns, *supra* note 1; see also Lolita C. Baldor, *Terror List Snag Nearly Grounded Ted Kennedy*, ASSOC. PRESS, Aug. 20, 2004, available at <http://207.114.199.161/news/3336.html>.
7. Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, Pub. L. No. 108-458, § 4012(a)(1)(C)(iii)(I), 118 Stat. 3638, 3715 (codified as amended at 49 U.S.C.S. § 44903(j)(2)(C)(iii)(I) (LexisNexis 2005)). The section of the Act pertaining to the use of a No Transport List for cruise ship travelers only requires a process for misidentified persons, not persons incorrectly placed on this list. *Id.* § 4071(c)(2).
8. While my proposals could apply to all watchlist-based security programs, I focus on the transportation sector because transportation watchlists affect the fundamental liberties of large numbers of people already inside the United States, including citizens and lawful permanent residents.

The Note proceeds in three Parts. Part I briefly describes the value of terrorist watchlists and how they are created. Part II argues that travelers and transportation employees adversely affected by watchlists are entitled to due process because of their constitutional liberty interests in travel, employment, and avoiding the stigma of being identified as a potential terrorist. Part III proposes and describes specially tailored notice and hearing mechanisms for individuals on watchlists. The Conclusion considers the proper role for Congress and the courts in implementing these proposals.

## I. WATCHLIST-BASED SECURITY

### A. *The Value of Watchlists*

Today's transportation watchlist system, had it been in place at the time, might have prevented the 9/11 attacks.<sup>9</sup> Watchlists not only provide an effective layer of security, but are also relatively cheap, efficient, and noninvasive. The expense of running names through a computer database pales in comparison to the cost of hiring extra law enforcement officers or checkpoint screeners. And for most people the delay, inconvenience, and privacy invasion of submitting to a watchlist check is far smaller than that imposed by other security methods, such as the full-body pat-downs in vogue at some airports,<sup>10</sup> or the behavioral profiling used in select airports and other mass transit systems.<sup>11</sup>

Watchlists are becoming more effective as technological and policy innovations make the lists more difficult to evade. New programs like the Transportation Worker Identification Credential (TWIC) (for employees), US-VISIT (for people entering the country), and Registered Traveler (for frequent fliers) all use fingerprints or iris scans to confirm identities, making

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9. As the 9/11 Commission reported, "[o]n 9/11, the 19 hijackers were screened by a computer-assisted screening system called CAPPs. More than half were identified for further inspection." NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 392 (2004) [hereinafter 9/11 COMMISSION REPORT]. The watchlist failed in that case because the follow-up was limited to searching luggage, not more extensive precautions. *Id.* Under the current regulations, the individuals would have been selected for extra searches at a minimum, and perhaps kept off the airplanes.

10. See Joe Sharkey, *Many Women Say Airport Pat-Downs Are a Humiliation*, N.Y. TIMES, Nov. 23, 2004, at A1.

11. See Sara Kehaulani Goo, *Metro Officers Keep a Keen Eye on Riders*, WASH. POST, Jan. 10, 2005, at A6 (noting that security officials in some mass transit systems and airports use behavioral profiling to decide which passengers to question or detain).

this form of security more effective and less susceptible to fraud.<sup>12</sup> New TSA regulations require commercial drivers holding hazardous materials endorsements (HMEs) to give fingerprints.<sup>13</sup> And Congress has passed legislation standardizing requirements for state driver's licenses.<sup>14</sup> These technological and policy developments—which make the link between people and names more accurate—make the use of watchlists more effective.

*B. The Expansion of Watchlists*

As watchlists have become more effective, they have expanded dramatically in size and scope. Although an early version of the No Fly List dates back to the 1980s, it contained only sixteen names on September 11, 2001. Since then, the number of names has grown exponentially: Leaks from agency officials and newspaper reports have put the number as high as 325,000 names.<sup>15</sup> The No Fly List has also been transformed into a broad No Transport List: An addendum to the 9/11 Commission Report urged the government to check

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12. Under the Registered Traveler program, TSA collects personal information from applicants—including names, addresses, and phone numbers—along with biometric data such as fingerprints or iris scans. TSA then assesses whether the traveler poses a threat, a process that includes checking “intelligence data sources” and watchlists. Approved registered travelers go through an expedited security screening process during which they provide a Registered Traveler Smart Card with the biometric information for identity confirmation. The program has been piloted at individual airports and is being expanded nationwide. See Press Release, Transp. Security Admin., *TSA Announces Key Elements of Registered Traveler Program* (Jan. 20, 2006), available at <http://www.tsa.gov/public/display?theme=44&content=09000519801a0136>; Transportation Security Administration, *What is Registered Traveler?*, [http://www.tsa.gov/interweb/assetlibrary/RT\\_Factsheet.pdf](http://www.tsa.gov/interweb/assetlibrary/RT_Factsheet.pdf) (last visited Apr. 11, 2006). Rejected registered traveler applicants receive the same process as those on watchlists. See *infra* Section I.D.
  13. Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License, 69 Fed. Reg. 17,969 (Apr. 6, 2004) (codified at 49 C.F.R. 1572.9 (2005)). In addition, the IRTPA requires DHS to research how to better use biometric technology in airports to screen both transportation employees and travelers. IRTPA, Pub. L. No. 108-458, § 4011(a), 118 Stat. 3638, 3712 (2004).
  14. REAL ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 311 (codified at 49 U.S.C.A. § 3301 note (West 2005)).
  15. Walter Pincus & Dan Eggen, *325,000 Names on Terrorism List: Rights Groups Say Database May Include Innocent People*, WASH. POST, Feb. 15, 2006, at A1; Press Release, ACLU, *TSA and FBI To Pay \$200,000 in Attorneys' Fees To Settle “No Fly” Lawsuit (Gordon v. FBI)* (Jan. 24, 2006) (noting that TSA had released some information on the growth of the lists after 9/11 in response to an ACLU Freedom of Information Act (FOIA) suit), available at <http://www.aclunc.org/pressrel/060123-nofly.html>.

Amtrak and cruise ship travelers' names against watchlists,<sup>16</sup> and Congress implemented this suggestion as part of IRTPA.<sup>17</sup>

The expansion and proliferation of watchlists extends beyond travelers to transportation workers. Various statutes and agency regulations require TSA to check terrorist watchlists for airline pilots,<sup>18</sup> people who work at airports,<sup>19</sup> helicopter pilots,<sup>20</sup> commercial truck drivers holding HMEs (an estimated 2.9 million Americans),<sup>21</sup> and maritime, cruise ship, and port workers.<sup>22</sup> The

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16. See *9/11 Panel: TSA Needs a Plan for Attacks*, ASSOC. PRESS, Sept. 9, 2004, available at [http://www.washingtonpost.com/wp-dyn/article/A7743-2004Sep9\\_2.html](http://www.washingtonpost.com/wp-dyn/article/A7743-2004Sep9_2.html).
  17. IRTPA § 4071(a)(1). The Act requires the Secretary of Homeland Security to “compare[] information about passengers and crew who are to be carried aboard a cruise ship with a comprehensive, consolidated database containing information about known or suspected terrorists and their associates” and also to use “information obtained by comparing the passenger and crew information with the information in the database to prevent known or suspected terrorists and their associates from boarding such ships or to subject them to specific additional security scrutiny, through the use of ‘no transport’ and ‘automatic selectee’ lists or other means.”
  18. Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2561 (2003) (codified at 49 U.S.C.S. § 46111 (LexisNexis 2004)); see also *Coalition of Airline Pilots Ass’ns v. FAA*, 370 F.3d 1184 (D.C. Cir. 2004); *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004). TSA issued a regulation on January 24, 2003 explaining that “[i]n the course of carrying out this responsibility, TSA receives information from other federal agencies and other sources identifying specific individuals who pose security threats.” Threat Assessments Regarding Citizens of the United States Who Hold or Apply for FAA Certificates, 68 Fed. Reg. 3756, 3756-57 (Jan. 24, 2003).
  19. IRTPA requires watchlist-based screening of all transportation employees certified by the FAA or those with unescorted access to the secure area or air operations area of an airport. IRTPA § 4012(a)(1). The Aviation Transportation Security Act (ATSA), 49 U.S.C. § 114 (Supp. I 2001), also requires TSA to perform background checks on “airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel.” *Id.* § 114(f)(12). TSA regulations and security directives require security threat assessments for these transportation-sector workers. See, e.g., 49 C.F.R. § 1542.209 (2005) (airport operators, users, and others with access); *id.* §§ 1544.101, .229, .230 (aircraft operator employees); *id.* § 1546.101 (foreign air carrier employees); *id.* § 1548.5 (indirect air carrier and air cargo employees).
  20. Eric Lichtblau & Michael Luo, *U.S. Security Officers Will Take Over Passenger Screening on Helicopter Tours*, N.Y. TIMES, Aug. 10, 2004, at A14 (“The helicopter tour operators will also be required to provide the names of passengers to the federal government to run against federal ‘no fly’ lists of terrorist suspects and to provide names and data on their own employees for federal background checks.”).
  21. See USA PATRIOT Act, 49 U.S.C. § 5103a (Supp. I 2001). The regulation implementing this statute states that “before determining that an individual [who holds or applies for an HME] does not pose a security threat warranting denial of an authorization,” the agency must check international databases, TSA watchlists, and “other databases relevant to

checks may eventually expand to include all transportation workers at seaports, airports, and rail, pipeline, trucking, and mass transit facilities.

*C. How the Lists Work*

The government does not comment on how it decides whether to put an individual on a watchlist, and lawsuits to compel disclosure of this information have failed.<sup>23</sup> Yet some basic information is publicly available. The public record suggests that the federal watchlists are largely compiled from classified evidence collected by confidential sources.<sup>24</sup> Although the No Fly List is maintained by TSA, it is based on information from other government agencies,<sup>25</sup> in particular the FBI's Terrorist Screening Center (TSC).<sup>26</sup> The

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determining whether an applicant poses or is suspected of posing a security threat or that confirm an individual's identity." 49 C.F.R. § 1572.107 (2004).

22. See Maritime Transportation Security Act, 46 U.S.C.S. § 70105(a)-(b) (LexisNexis 2005). TSA has begun to implement this statutory requirement through its TWIC program. The statute provides that the government can only issue these cards to employees after making a determination that they do not pose a "terrorism security risk." *Id.* § 70105(c). To that end, the statute authorizes background checks against watchlists, including "[r]eview of any other national security-related information or database." *Id.* § 70105(d)(2)(D); Press Release, Transp. Sec. Admin., TSA To Test New ID Card for Transportation Workers (Aug. 10, 2004), available at <http://www.tsa.gov/public/display?theme=44&content=09000519800c10bd>.
23. The ACLU sued the FBI and TSA under FOIA, demanding that they release information about the compilation and maintenance of the No Fly List, but the parties settled the case with limited disclosure. See *Stipulation of Compromise and Settlement of Plaintiffs' Claim for Attorney's Fees and Costs and Order*, *Gordon v. FBI*, No. C-03-1779 CRB (N.D. Cal. Jan. 24, 2006). In another case, a private plaintiff alleged that airport security was governed by "secret laws," but his constitutional challenges were rejected in part on the merits and in part for lack of standing. See *Gilmore v. Gonzales*, No. CV-02-03444-SI (9th Cir. Jan. 26, 2006) (rejecting the plaintiff's constitutional claims about identification requirements, and dismissing other claims about the watchlists for lack of standing).
24. The TSA regulation implementing security assessments on pilots, for example, explicitly states that, "[i]n most cases, the determination that an individual poses a security threat will be based, in large part or exclusively, on classified national security information, unclassified information designated as SSI [Sensitive Security Information], or other information that is protected from disclosure by law." *Threat Assessments Regarding Citizens of the United States Who Hold or Apply for FAA Certificates*, 68 Fed. Reg. 3756, 3758 (Jan. 24, 2003); see also 49 C.F.R. § 1540.115 (2005).
25. TSA's website states that the watchlists are "based on recommendations and information received from Federal agencies, including intelligence and law enforcement agencies." *TSA Watch Lists Clearance Procedures*, <http://www.tsa.gov/public/display?theme=157&content=09000519800fb8af> (last visited Apr. 11, 2006).



nation's foreign intelligence agencies now readily share leads with the FBI, including intelligence information collected through controversial means, such as the NSA's domestic surveillance programs.<sup>27</sup>

More information is available about how the list works.<sup>28</sup> Currently, the government sends updated versions of the No Fly List to airlines, who are then responsible for checking passengers' names against the list.<sup>29</sup> TSA has long planned to take over administration of the No Fly List, at first through the CAPPs II (Computer Assisted Passenger Pre-screening System) program,<sup>30</sup> and now through its successor known as Secure Flight.<sup>31</sup> The IRTPA required

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26. The Bush Administration inaugurated the TSC in September 2003 to "ensure that America's government screeners are working from the same unified set of anti-terrorist information." Press Release, Dep't of Homeland Sec., Fact Sheet: The Terrorist Screening Center (Sept. 16, 2003), available at <http://www.dhs.gov/dhspublic/display?theme=43&content=1598>; see also INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2004, H.R. REP. NO. 108-381, § 360(a)-(b) (2003) (Conf. Rep.) (requiring a report on the TSC to ensure that it does not violate the Constitution or any other law, and requesting information about the possibility of including more databases in the TSC).
  27. Lowell Bergman et al., *Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends*, N.Y. TIMES, Jan. 17, 2006, at A1.
  28. 9/11 COMMISSION REPORT, *supra* note 9, at 392-93.
  29. Statutory authorization for the No Fly List is 49 U.S.C. § 114(h) (Supp. I 2001). TSA is instructed to "enter into memoranda of understanding with Federal agencies or other entities to share or otherwise cross-check as necessary data on individuals identified on Federal agency databases who may pose a risk to transportation or national security" and to notify "airport or airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." *Id.* TSA is also directed to establish policies and procedures requiring air carriers "to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security" and to "prevent the individual[s] from boarding an aircraft." *Id.* The lists themselves are authorized by Security Directives, issued by TSA without notice or comment. See *Gilmore v. Gonzales*, No. CV-02-03444-SI, slip op. at 1144 (9th Cir. Jan. 26, 2006).
  30. In July 2004, DHS announced that it was significantly modifying CAPPs II: "After a significant review of TSA's proposed CAPPs II system, DHS is nearing completion of a next-generation passenger prescreening program that meets our goals of using the expanded no-fly and selectee lists to keep known or suspected terrorists off of planes . . ." *The 9/11 Commission and Recommendations for the Future of Federal Law Enforcement and Border Security: Hearing Before the S. Comm on the Judiciary*, 108th Cong. 11 (2004) (statement of Asa Hutchinson, Undersecretary for Border and Transportation Security Directorate, Department of Homeland Security), available at <http://judiciary.senate.gov/hearing.cfm?id=1291>.
  31. Press Release, Transp. Sec. Admin., TSA To Test New Passenger Pre-Screening System (Aug. 26, 2004), available at <http://www.tsa.gov/public/display?theme=44&content=09000519800c6c77>; see also Rachel L. Swarns, *Government To Take Over Watch-List Screening*, N.Y. TIMES, Aug. 17, 2004, at A14.

that TSA begin testing this program by January 1, 2005 and that it assume the passenger prescreening function within 180 days of completing the testing,<sup>32</sup> but the development continues to be delayed.<sup>33</sup> A TSA press release notes that, once Secure Flight “is phased in, TSA will be able to check passenger records against watch list information not previously available to airlines.”<sup>34</sup>

The secrecy of the administration of the watchlists—important for security purposes—leaves many questions unanswered. How many people are on the No Fly List (and not allowed to fly at all) as compared to the Selectee List (and subject only to additional screening)? How many persons on watchlists are American citizens or lawful permanent residents? How many people are watchlisted by mistake or because their names are similar to those of suspected terrorists?<sup>35</sup> The answers to these questions affect how much process is constitutionally due to watchlisted individuals.<sup>36</sup>

#### D. The Current Process

While employees adversely affected by government use of watchlists currently receive some process, travelers are granted none at all. The government gives transportation-sector workers predeprivation notice of government actions based on security threat assessments, but the government has little choice in the matter: Employees need to be told not to come to work.<sup>37</sup> Under the current regulations, some transportation employees

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32. IRTPA, Pub. L. No. 108-458, § 4012(a)(1), 118 Stat. 3638, 3715 (2004) (codified as amended at 49 U.S.C.S. § 44903(j)(2)(C)(i)-(ii) (LexisNexis 2005)).
33. See, e.g., Leslie Miller, *TSA Chief Suspends Traveler Registry Plans*, ASSOC. PRESS, Feb. 9, 2006, available at <http://www.breitbart.com/news/2006/02/09/D8FLMBT81.html> (noting that TSA’s director told Congress in February 2006 that it was putting the Secure Flight program on hold due to security concerns).
34. Press Release, Transp. Sec. Admin., *supra* note 31.
35. See, for example, recent news stories about babies who have been placed on the watchlist. E.g., Kristie Rieken, *4-Year-Old Boy on Government ‘No-Fly’ List*, ASSOC. PRESS, Jan. 5, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2006/01/05/national/a111845S48.DTL>; see also Caroline Drees, *US No-Fly List Vexes Travelers from Babies on up*, REUTERS, Dec. 15, 2005, available at <http://today.reuters.com/business/newsarticle.aspx?type=tnBusinessNews&storyID=nN14284107>. A woman named Sarah Zapolsky reported that she was told that her nine-month-old son was on the No Fly List when she checked in for a flight to Italy. She said she was initially amused, but when she “‘found out you can’t actually get off the list, [she] started to get a bit annoyed.’” *Id.*
36. For example, see *infra* note 84 and accompanying text for a discussion of distinctions between the process due to citizens and aliens.
37. 49 C.F.R. § 1540.115-.117 (2005) (airmen certificates); *id.* § 1572.141(d)(3) (HMEs). While employees are given notice that they are on a watchlist, they are not told why.

adversely affected by the use of watchlists receive a minimal appeals process. For example, citizen pilots are statutorily entitled to an on-the-record hearing under the Administrative Procedure Act.<sup>38</sup> Other types of transportation workers,<sup>39</sup> and noncitizen pilots, receive only the opportunity to offer a written challenge through an ex parte exchange of documents. Even those given an opportunity to challenge their status are not informed of the basis for their being on the lists in the first place.<sup>40</sup>

In contrast to employees, the government need not practically—and therefore does not—tell travelers in advance that they have been placed on the No Fly List. Sometimes, passengers are informed that they are on a security list when they arrive at an airport.<sup>41</sup> Other times, passengers are detained at the ticket counter but not told why. For example, Senator Kennedy recalled an airline agent saying to him: “We can’t give [the ticket] to you, you can’t buy a ticket.” After Kennedy asked why not, the agent responded simply, “We can’t tell you.”<sup>42</sup>

Once informed of their status, watchlisted travelers have no opportunity for a hearing. TSA provides a clearance process—in the form of a paper identity verification form—only if a person is watchlisted because he has a name similar to that of a suspected terrorist. Once the individual gets the form from the agency, he can then display it at airports to be permitted to fly. The Agency’s

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38. 5 U.S.C. § 555 (2000).

39. The HME regulation provides the individual with an opportunity for a written appeal only, with no access to the secret evidence used and no ability to appear in person or call or cross-examine witnesses. 49 C.F.R. § 1572.141 (2005). The port and maritime statute, however, requires the government to “establish an appeals process under this section for individuals found to be ineligible for a transportation security card that includes notice and an opportunity for a hearing.” 46 U.S.C.S. § 70105(c)(3) (LexisNexis 2005). No such process has been created yet.

40. The paper hearing process for nonresident aliens has been upheld by the D.C. Circuit. *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004), upheld a procedure under which nonresident alien pilots did not receive any of the classified information used as a factual basis for the revocation of their certificates. As the *Jifry* court noted, the key factor was that the pilots were nonresident aliens who worked outside of the United States. *Id.* at 1182-83. Several unions representing aviation workers also challenged the regulations TSA had promulgated for American citizens. The D.C. Circuit considered those claims in *Coalition of Airline Pilots Ass’n v. FAA*, 370 F.3d 1184 (D.C. Cir. 2004), and held the challenge moot because Congress had passed a statute requiring new regulations, and TSA had ceased to apply the existing regulations in the interim.

41. See Complaint at 6, *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005) (No. Co4-763Z), available at <http://news.findlaw.com/cnn/docs/aclu/greenvtsa40604cmp.pdf>.

42. Swarns, *supra* note 1.

procedures specifically provide that the process “will not remove a name” from the watchlist, but only “distinguish[] passengers” with similar names from persons who are in fact on the list.<sup>43</sup> TSA has stated that the Secure Flight program “will help eliminate most of the false alerts caused by the current outdated system” and will “include a redress mechanism through which people can resolve questions if they believe they have been unfairly or incorrectly selected for additional screening.”<sup>44</sup> TSA has not announced, however, what form that mechanism will take.

## II. PRIVATE INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE

The use of government watchlists for transportation security deprives individuals of liberty and property interests protected by the Constitution’s Due Process Clause. The Supreme Court has refused to define precisely what counts as “liberty” or “property” under the Constitution, noting only that these concepts are broad and expansive.<sup>45</sup> Nonetheless, the Court has identified a number of specific interests protected by the Due Process Clause,<sup>46</sup> three of which are directly affected by watchlist programs: the liberty to travel; the liberty to pursue an occupation and the property right in a government-issued license or certificate; and the liberty to maintaining one’s reputation in the community.

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43. TSA Watch Lists Clearance Procedures, *supra* note 25.

44. Press Release, Transp. Sec. Admin., *supra* note 31.

45. With respect to property rights, “the Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972). The Court defined liberty similarly:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed.

*Id.* at 571-72 (internal quotation marks omitted).

46. While the Due Process Clause of the Fourteenth Amendment applies to “persons,” and not just citizens, Congress and the courts have authorized and upheld different standards of process for citizens and noncitizens. See *Mathews v. Diaz*, 426 U.S. 67, 77-80 (1976); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). As such, the remainder of this Note focuses on U.S. citizens. While as a matter of fairness and policy I believe that Congress should grant the liberties and protections I propose to noncitizens—or at least to lawful permanent residents—I do not argue that it is constitutionally required to do so.

*A. Liberty To Travel*

The Constitution has long protected the right of individuals to travel between states. As a nineteenth-century Supreme Court case explained: “We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”<sup>47</sup> Although the Articles of Confederation provided that “the people of each state shall have free ingress and regress to and from any other state,”<sup>48</sup> no single clause of the Constitution explicitly guarantees the right to interstate travel. The Court has suggested that “a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created”<sup>49</sup> and has located the fundamental right to travel in textual provisions including the Privileges and Immunities Clause of Article IV, the Commerce Clause, and extratextual concepts like the “federal structure of government adopted by our Constitution.”<sup>50</sup>

As the Court has explained, the constitutional right to travel includes the right “to use the highways and other instrumentalities of interstate commerce in doing so,”<sup>51</sup> and to be “uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”<sup>52</sup> Although the Court’s recent cases in this area have concerned questions about whether states can condition certain benefits on residency requirements,<sup>53</sup> restrictions on air travel—such as

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47. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867) (Miller, J.) (striking down a Nevada statute that taxed people who traveled out of the state).

48. ARTICLES OF CONFEDERATION of 1789 art. IV.

49. *United States v. Guest*, 383 U.S. 745, 758 (1966).

50. *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 902 (1986); *see also Saenz v. Roe*, 526 U.S. 489 (1999) (holding that the right to travel protects (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that restricting welfare benefits to new residents of a state violates the fundamental right to travel). For further analysis of the development of the fundamental rights prong of the Equal Protection Clause with respect to the right to travel, *see* Bryan H. Wildenthal, Note, *State Parochialism, the Right To Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1572-75 (1989).

51. *Guest*, 383 U.S. at 757.

52. *Saenz*, 526 U.S. at 499.

53. In contrast to the *Shapiro* and *Saenz* line of cases, earlier right-to-travel cases did consider more direct barriers to interstate travel. *See* Wildenthal, *supra* note 50, at 1569 (noting that

the watchlist program—directly threaten this right. The Court has yet to decide whether a restriction on a particular mode of travel violates this fundamental right and is subject to strict scrutiny, but a ban on flight might.<sup>54</sup> An individual residing in Alaska, Hawaii, or even California would have a difficult time reaching the East Coast without air travel. And in the mobile society of the twenty-first century, air travel is critical in order to hold many high-paying professional jobs and even to keep in touch with one’s family members. As Justice Douglas wrote in one right-to-travel case, “Travel . . . may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads.”<sup>55</sup>

Whatever the precise dimensions of the fundamental right to travel, the liberty protected by the Due Process Clause includes the ability to travel by airplane. Restriction on movement is the very definition of a deprivation of liberty. As the Court has stated, “The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law.”<sup>56</sup> By analogy, even though there may not be a fundamental right to drive, a state cannot revoke a driver’s license without due process.<sup>57</sup> Another analogy can be made to the Court’s precedents on restrictions on international travel. Although the Court has explicitly distinguished the fundamental right to interstate travel from the liberty to travel abroad that is protected only by the

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in these cases the court considered whether a state could “place a direct and tangible obstacle in the path of interstate migration”).

54. Some lower federal courts have held that the fundamental right to travel does not include the right to use any particular mode of transportation. *E.g.*, *Gilmore v. Ashcroft*, No. C-02-3444-SI, 2004 U.S. Dist. LEXIS 4869, at \*19 (N.D. Cal. Mar. 19, 2004), *aff’d sub nom.* *Gilmore v. Gonzales*, No. CV-02-03444-SI (9th Cir. Jan. 26, 2006). The Ninth Circuit held that there is no fundamental right to fly, but qualified this by stating that “the identification policy’s ‘burden’ is not unreasonable” because one could still fly without identification by agreeing to additional screening. *Gilmore*, slip op. at 1155; *see also* *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (stating that there is no fundamental right to drive). Others have suggested that comprehensive restrictions, such as banning passengers from flying to a particular airport, may be susceptible to constitutional challenge. *E.g.*, *City of Houston v. FAA*, 679 F.2d 1184, 1192 (5th Cir. 1982) (“No one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim.”). The Supreme Court has yet to comment on this issue.
55. *Kent v. Dulles*, 357 U.S. 116, 125 (1958), *overruled on other grounds by* *Regan v. Wald*, 468 U.S. 222 (1984).
56. *Kent*, 357 U.S. at 125 (noting that this “right was emerging at least as early as the Magna Carta” and stating that “[f]reedom of movement is basic in our scheme of values”).
57. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971).

Due Process Clause,<sup>58</sup> it has held that this liberty can only be restricted without process if it is an across-the-board ban, not one that targets specific individuals.<sup>59</sup> To restrict the freedom to fly on a case-by-case basis, the government must provide due process.

### B. *Employment as Liberty and Property*

Just as travelers enjoy a constitutionally protected liberty to travel without undue government restriction, transportation-sector employees have a constitutional liberty to pursue the occupation of their choice. Courts have long characterized the ability to pursue a trade or profession as part of the liberty protected by the Due Process Clause.<sup>60</sup> In different cases, the Supreme Court has given lawyers, teachers, and members of other professions due process protection to “engage in any of the common occupations of life.”<sup>61</sup> Many transportation-sector employees covered by watchlists should find their liberty to pursue common occupations similarly protected. Although some—for

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58. *E.g.*, *Haig v. Agee*, 453 U.S. 280, 306 (1981) (“[T]he freedom to travel outside the United States must be distinguished from the right to travel within the United States.”).

59. In *Aptheker v. Secretary of State*, the Court held that the Subversive Activities Control Act, which made it illegal for members of the Communist Party to apply for or use a passport, “too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment.” 378 U.S. 500, 505 (1964). The Court held that this sort of blanket deprivation violated the Due Process Clause. The denial of passports needed to be based on specific information about the individual’s knowledge, activity, commitment to the association, and a consideration of the purposes for which an individual wished to travel. Two subsequent cases—*Zemel v. Rusk*, 381 U.S. 1 (1965), and *Regan v. Wald*, 468 U.S. 222 (1984)—clarified and refined the Court’s doctrine. The *Zemel* Court carefully distinguished that case from earlier precedents on the ground that the government “has refused to validate appellant’s passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.” *Zemel*, 381 U.S. at 13. In *Regan*, the Court upheld a ban on travel to Cuba because the government “made no effort selectively to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba following the break in diplomatic and consular relations with that country in 1961.” *Regan*, 468 U.S. at 241. The across-the-board restriction on travel, applied to all persons, thus alleviated the concerns raised by the selective application of the ban in *Aptheker*. Because it is applied selectively, the No Fly List presents a situation more akin to *Aptheker* than *Zemel* or *Regan*. As in *Aptheker*, the government has not blocked all travel, only the travel of certain persons.

60. *Truax v. Raich* held that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” 239 U.S. 33, 41 (1915). That holding has been echoed more recently in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.23 (1976).

61. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

example, waiters at restaurants inside the secured areas of airports – would be able to find similar employment elsewhere if denied the ability to continue employment at their present jobs, many others – including pilots, commercial truck drivers, or others who have specific skills – would have a valid claim that losing their employment as a result of a watchlist prohibits them from pursuing their occupation of choice and entitles them to due process.

Courts also consider government-issued licenses to be property interests protected by the Due Process Clause. In the air travel context, courts have specifically held that an employee has a property interest in an FAA-issued pilot's certificate.<sup>62</sup> So too with driver's licenses.<sup>63</sup> The denial of an HME for a commercial driver's license – the possession of which subjects the holder to watchlist-based security measures – may not affect one's ability to earn a living to the same extent that denial of the license itself would. However, without an HME, individuals are often unable to gain or maintain employment with trucking companies and thus lose the ability to practice the occupation of their choice.<sup>64</sup> Under the Court's due process precedents, persons who stand to have a government-issued license or certificate revoked or denied based on a threat assessment are entitled to procedural due process to challenge the threatened revocation or denial.

### C. Stigma, or Reputation in the Community

Courts have held that a person must receive due process before the government takes an action that damages his standing in the community or places a stigma on him. For example, in *Wisconsin v. Constantineau* the Court struck down a statute that permitted a city's chief of police to distribute a

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62. See *Pastrana v. United States*, 746 F.2d 1447, 1450 (11th Cir. 1984) (holding that a holder of an FAA-issued pilot certificate has a cognizable property interest and is entitled to due process). Courts regularly require due process for FAA suspensions or revocations of pilots' licenses based on safety issues. See, e.g., George S. Petkoff, *Recent Developments in Aviation Law*, 63 J. AIR L. & COM. 67, 121-30 (1997) (cataloguing FAA certificate cases).

63. The Court in *Dixon v. Love* held that “[i]t is clear that the Due Process Clause applies to the deprivation of a driver's license by the State.” 431 U.S. 105, 112 (1977). Similarly, in *Bell v. Burson*, 402 U.S. 535, 539 (1971), the Court stated that the “[s]uspension of issued licenses . . . involves state action that adjudicates important interests of the licensees” and that the “licenses are not to be taken away without that procedural due process required.” See also *Aurelio v. R.I. Dep't of Admin., Div. of Motor Vehicles*, 985 F. Supp. 48, 56-59 (D.R.I. 1997) (“A driver's license is a significant and considerable private interest, impacting one's ability to earn a living and enjoy the liberty of travel, among other things.”).

64. Due to the structure of the commercial trucking industry, employers often require all drivers to hold an HME so that they may drive any truck in the fleet.



notice to all retail liquor outlets stating that certain listed persons were not to be sold liquor due to their previous “excessive drinking.”<sup>65</sup> The Court held that a person was entitled to due process before being placed on such a list:

Where 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. “Posting” under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.<sup>66</sup>

Even though the government does not actively broadcast the No Fly List to the larger community, the liberty interest identified in *Constantineau* is still implicated. First, according to the complaint in a lawsuit against TSA, passengers “are sometimes informed, in full view of others waiting in line, that their names are on a federal security list. This results in significant embarrassment and humiliation to the passenger, as fellow passengers and the traveling public subsequently regard the innocent passenger with suspicion or fear.”<sup>67</sup> The stigma attached to an individual who is thought of as a potential terrorist is, needless to say, extremely high. Second, the No Fly List satisfies the

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65. 400 U.S. 433, 434 (1971) (internal quotation marks omitted). In *Vitek v. Jones*, Justice White wrote of committing an individual to a mental hospital:

The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital “can engender adverse social consequences to the individual” and that “[w]hether we label this phenomena ‘stigma’ or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.”

445 U.S. 480, 492 (1980) (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979); *Parham v. J.R.*, 442 U.S. 584, 600 (1979)). The Court’s government-employment cases comment on the effect of loss of employment on an individual’s reputation, and, in turn, the effect of a damaged reputation on an individual’s ability to gain future employment. See, e.g., *Roth*, 408 U.S. at 574 & n.13.

66. 400 U.S. at 437. More recently, Justice Stevens has applied similar reasoning in requiring due process for persons on Sex Offender Registration lists: “The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply. . . . In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty.” *Smith v. Doe*, 538 U.S. 84, 111-12 (2003) (Stevens, J., dissenting).

67. Complaint, *supra* note 41, at 6.

limitation added by *Paul v. Davis* that the government imposition of a stigma be accompanied by some other government action to trigger due process protection.<sup>68</sup> In *Constantineau*, this consisted of the legal inhibition against buying alcohol;<sup>69</sup> for persons affected by security watchlists, the inability to fly constitutes the additional government action; and for transportation employees, it is the dismissal from employment.

### III. PROTECTING SECURITY AND LIBERTY: A MODEL PROCESS

The preceding Part has argued that individuals prevented from flying or deprived of transportation-sector careers because they have been placed on a security watchlist have a constitutional right to due process to challenge these government actions. This Part proposes a model process—guided by the Court’s jurisprudence and procedures that Congress has created in analogous national security situations—that would effectively protect both the individual and government interests at stake. Commentators and courts generally consider due process to have two main elements: adequate notice and a meaningful opportunity to be heard. This Part considers them in turn. In Section A, I suggest allowing individuals to get advance, in-person notice at airports of whether they are on a watchlist. In Section B, I propose a “compensatory counsel” program that would allow individuals a fair hearing and reduce the risk of erroneous deprivation of liberty, while still respecting the government’s interest in protecting classified evidence.

The Supreme Court has invited, indeed required, this sort of tailoring. The Court has repeatedly insisted that the requirements of due process are flexible and must be tailored to particular circumstances.<sup>70</sup> In recognition of this flexibility, the Court in *Mathews v. Eldridge* articulated a three-pronged balancing test for determining what process is due in an administrative

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68. *Paul v. Davis*, 424 U.S. 693 (1976) (holding that the circulation of handbills to merchants describing an individual as a shoplifter was not a deprivation of liberty absent additional government action).

69. *Constantineau*, 400 U.S. at 434.

70. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.”). Elsewhere, the Court has stated that due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)).

hearing,<sup>71</sup> which it has recently reaffirmed and applied in the terrorism context.<sup>72</sup> The three considerations to be balanced are,

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>73</sup>

The first two Parts of this Note, on the government's security interest in using watchlists, and the private interests affected by them, correspond to the third and first prongs of the *Mathews* test respectively. This Part will focus on the second prong: the risk of erroneous deprivation of these private interests and the value of other procedural safeguards. But it is not so simple. The process I propose implicates additional interests at the notice and hearing levels for private individuals and the government, beyond the security effectiveness of the watchlists generally and the deprivation of the individual's liberty and property. I discuss these in the following Sections.

#### A. *Advance Airport Notice*

Due process generally requires that a person be given notice of an impending government deprivation of his liberty or property.<sup>74</sup> As the Supreme Court has stated, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”<sup>75</sup> Only by receiving such notice—usually in

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71. 424 U.S. 319 (1976).

72. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

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

74. This Section applies only to travelers. Transportation-sector employees who are deprived of their jobs because their names are on a watchlist are currently given written notice of their status. See *supra* notes 37-38 and accompanying text. The following Section, proposing a hearing procedure, applies to both travelers and employees.

75. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). For a more recent statement of due process notice requirements, see *Dusenbery v. United States*, 534 U.S. 161 (2002) (affirming the “reasonably calculated” holding from *Mullane*).

writing—does an individual who has been watchlisted have the opportunity to prevent the mistaken deprivation of his liberty interests.

But there's a catch. The government argues that advance notice would allow terrorists to evade detection. Under the current system, a law enforcement officer is alerted when individuals on the No Fly List arrive at the ticket counter for their flight.<sup>76</sup> The government presumes that watchlisted individuals pose security threats, and it does not want them to avoid encounters with law enforcement by granting them advance notice of their status. If given advance notice in writing, individuals on the No Fly List could fly under fictitious identities to avoid questioning and evade capture.<sup>77</sup>

To escape this quagmire, I propose that the government create a system by which an individual could go in person to any airport at any time during normal business hours to inquire whether he is on the No Fly List. Three possible fates would greet him. (1) In all likelihood, he would be cleared and would have the peace of mind of knowing that he would not be held up on his next trip to the airport.<sup>78</sup> (2) If the individual were on the list, law enforcement officers could perform a *Terry* stop and question the individual.<sup>79</sup> If there were probable cause to do so, officials could then arrest and detain the individual. Once detained, the individual would be entitled to the due process protections provided to any arrestee.<sup>80</sup> (3) If the traveler were told that he was on the list, but not detained, he would be able to challenge his status. While the government would not necessarily be required to provide a hearing before the individual's next flight,<sup>81</sup> the individual should receive speedy process.<sup>82</sup> The

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76. See Complaint, *supra* note 41, at 6.

77. If biometric technology were in place to prevent travelers from assuming false names, the government could grant advance notice by mail because individuals could not evade detection. See *supra* notes 12-14 and accompanying text for a discussion of this technology in the context of the Registered Traveler program and TWIC.

78. The program thus shares the benefits of TSA's Registered Traveler program. See *supra* note 12 and accompanying text.

79. See *Terry v. Ohio*, 392 U.S. 1 (1968).

80. Even Jose Padilla, the American citizen detained in O'Hare Airport and originally held by the government with no process, has eventually found his way to the protections of the criminal justice system. Although the process due to a detained American is beyond the scope of this Note, the compensatory counsel hearing process proposed below could offer one model. See *infra* Section III.B; see also Peter H. Schuck, Editorial, *Terrorism Cases Demand New Hybrid Courts*, L.A. TIMES, July 9, 2004, at B13 (proposing a new model of process for enemy combatant cases).

81. The Supreme Court has stated that a hearing may be delayed until after deprivation in "emergency situations," *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 546, 570 n.7 (1972) (citing *Bell v. Burson*, 402 U.S. 535, 542 (1971)), or in "extraordinary situations where some

government, for example, could guarantee a resolution of the matter in advance of a person's next scheduled flight for those persons who used the notice procedure sufficiently in advance of that flight. While it might not entirely eliminate the possibility of an individual being unfairly prevented from traveling, the advance notice mechanism would substantially reduce the likelihood of unfair deprivation.

In other national security cases, federal courts have allowed the government to withhold advance notice of deprivations, either altogether or by obtaining prior judicial approval. For example, courts have upheld a procedure of the Treasury Department's Office of Foreign Asset Control (OFAC) by which financial assets of potential terrorists are blocked or seized without prior notice.<sup>83</sup> In another context, the D.C. Circuit has authorized the State Department to postpone notice of placement of organizations on a list of foreign terrorist groups if the government receives prior judicial approval. While holding that the Secretary of State "must afford to the entities under consideration notice that the designation is impending," the circuit court added that "[u]pon an adequate showing to the court, the Secretary may provide this

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valid governmental interest is at stake that justifies postponing the hearing," *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Courts have upheld post-deprivation process when the government interest is far weaker than preventing terrorist attacks, reasoning that when "a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). An example is *Dixon v. Love*, 431 U.S. 105, 114 (1997), which upheld a post-deprivation process for driver's license revocations because of "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard."

82. Courts have found that the Constitution requires speedy process in various contexts. In a case about a license suspension, the Court held that the respondent needed to "be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay" because the consequences of a brief suspension could be dramatic. *Barry v. Barchi*, 443 U.S. 55, 66 (1979); *see also* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (holding that the opportunity to be heard "must be granted at a meaningful time"). In the criminal context, the Speedy Trial Act requires that a defendant be brought to trial within seventy days of either the defendant's first appearance before a judicial officer or the filing of the indictment, whichever is later. 18 U.S.C. § 3161(c)(1) (2000).
83. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002) ("[T]he Government must satisfy the following requirements: (1) the deprivation was necessary to secure an important governmental interest; (2) there has been a special need for very prompt action; and (3) the party initiating the deprivation was a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." (citations omitted)). The district court found that the OFAC designation and blocking order satisfied all three of these requirements. *Id.* at 78. The OFAC appeals procedure is contained in 31 C.F.R. §§ 501.806-.807 (2005), and the statutory authorization in 8 U.S.C. § 1189 (2000 & Supp. II 2002).

notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States.”<sup>84</sup>

While these practices demonstrate that flexible approaches to notice are constitutionally appropriate, neither offers a perfect model for the transportation watchlists. Given the vast size of the watchlists, it would be impractical for the government to go through a preemptive judicial proceeding about whether notice should be given to each person on the No Fly List. Moreover, there are significant differences between these two situations and the No Fly List. First, these notice-postponing practices apply to foreign assets and organizations, not to American citizens and other persons inside the United States. Second, the seizure of assets can be fully compensated if later found to be wrongful. If an individual is held up at the airport and denied the freedom to travel, however, any ex post compensation will invariably be inadequate. Thus, both practically and legally, the OFAC and State Department notice models do not translate well to the No Fly context.

In contrast, the advance airport notice system not only works well in the transportation security context, it also satisfies the *Mathews* balancing test. First, it protects the individual’s interest in not being detained from catching a flight at the last minute. Second, it reduces the risk of erroneous deprivation of an innocent individual’s right to fly; under the existing system, nobody can be certain they will not be stopped on their next trip to the airport. Third, the system would place only a modest administrative burden on the government. All airports currently have the capacity to identify and detain persons on the No Fly List, so this would not create additional costs or bureaucracies. And, the system might even enhance security by bringing potentially suspicious persons in for further investigation.<sup>85</sup>

### *B. Compensatory Counsel*

What type of hearing should be provided to travelers who are kept from flying, or transportation employees who are kept from working? In typical administrative adjudications—whether governed by statute (generally the Administrative Procedure Act) or by the constitutional requirements of the Due Process Clause—individuals receive an in-person, trial-type hearing before a neutral decisionmaker during which they may challenge the government’s

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84. *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208 (D.C. Cir. 2001).

85. Some might argue that terrorists could find out that they are not on the list and thus would have access to transportation infrastructure. However, if the terrorist is not on the watchlist, then the watchlist system would not work in the first place.

evidence and cross-examine its witnesses. This trial-type adversarial process gives the individual the greatest chance to make his case.

In the context of transportation watchlists, there's once again a hitch. The watchlists are overwhelmingly based on secret information gathered by confidential sources,<sup>86</sup> and the government is understandably hesitant to disclose this information to people it considers to be potential terrorists. Yet without knowledge of why they have been placed on a watchlist, individuals will not be able to present a meaningful challenge.

I propose a way around this Catch-22. In exchange for using secret evidence to which the individual will not have access, the government should provide individuals with the next best thing to the information itself: a government-compensated attorney who holds a security clearance and may view and challenge classified evidence on behalf of his client. These "compensatory counsels" would undergo the necessary background checks, and receive top-level security clearances from the government. As in other administrative proceedings, the client could also retain his own attorney, although the private attorney would not have access to classified or sensitive information. The compensatory counsel would be able to consult with his client and review government evidence in advance of the hearing itself. The counsel would then assist the individual in presenting his case at the hearing. The portion of the hearing dealing with any classified or sensitive security information would be conducted before an administrative law judge (ALJ) in camera in a secure location. In that closed portion of the hearing, the compensatory counsel could raise challenges to the secret government evidence and cross-examine any witnesses relevant to the government's case. These compensatory counsels would be bound on the one hand by professional rules of responsibility to vigorously represent their clients, and on the other hand by the legal requirements of holding a security clearance to keep confidential the information to which they are given access.

The Court has explicitly applied the *Mathews* test to determining whether individuals have a right to counsel in administrative hearings. In *Lassiter v. Department of Social Services*, the Court held that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."<sup>87</sup> For

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86. See *supra* notes 24-27 and accompanying text.

87. 452 U.S. 18, 26 (1981); *id.* at 31 ("The dispositive question, which must now be addressed, is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status.").

watchlist-based security threat assessments, the liberty and property interests may not be as weighty as they would be in criminal cases<sup>88</sup> or when the government seeks to commit an individual to a mental hospital.<sup>89</sup> In those cases, the Court has found that due process guarantees access to counsel. Yet even if the deprivation of liberty is not as serious in the watchlist cases as in these confinement cases, the use of secret evidence mandates the compensatory counsel system to reduce the “risk of erroneous deprivation.”

The remainder of this Section applies the three prongs of the *Mathews* test on a micro-scale to the hearing process itself, while drawing analogies to legislatively and judicially designed procedures used in related cases. First, it shows that the compensatory counsel system substantially protects the government interest in safeguarding information. Then, it considers the private interest in knowing the evidence that has resulted in an individual being placed on the watchlist. Finally, it argues that granting the individual a government-employed attorney with access to classified information strikes an effective balance that would significantly reduce the risk of erroneous deprivation of liberty and property. In sum, the solution satisfies both the spirit and the letter of the *Mathews* test.

### 1. *The Government Interest in Protecting Information*

In addition to its overwhelming interest in protecting transportation infrastructure and other passengers from terrorist attacks, the government has a strong interest in protecting classified information and the confidential sources used to gather counterterrorism intelligence. The government is not legally authorized to share classified information with individuals lacking security clearances; criminal and civil penalties protect against such disclosure,<sup>90</sup> as do TSA’s regulations.<sup>91</sup> Revealing secret evidence during a watchlist hearing could, at best, make intelligence collecting methods and personnel less effective by allowing terrorists to evade them; at worst, it could

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88. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that government must provide free counsel to indigent criminal defendants).

89. *See Vitek v. Jones*, 445 U.S. 480 (1980) (requiring access to counsel for persons facing involuntary transfers to mental institutions).

90. *See, e.g.*, 50 U.S.C. § 421 (2000) (covering classified information identifying covert agents).

91. *See* 49 C.F.R. pt. 1520 (2005) (covering sensitive security information).



reveal gaps in the government's ability to collect information and put intelligence personnel at risk.<sup>92</sup>

The government's significant security interest does not end the *Mathews* balancing test, but it does provide a justification for novel departures from standard procedures. The Court's opinion in *Department of the Navy v. Egan* reflects the deference the Court has given to the government's desire to protect security-related information in administrative hearings. In that case, the Court considered what process is due when government employees' security clearances are denied or revoked. The Court gave agencies broad discretion to make security clearance decisions for their employees.<sup>93</sup> As the Court explained:

Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.<sup>94</sup>

Following this ruling, agencies have devised specially tailored hearing processes for reviewing adverse decisions on employees' security clearances, decisions which are at times based on classified information that the affected employee is not allowed to view—a situation similar to watchlisted travelers and employees. The Defense Department's Office of Hearings and Appeals, for example, administers hearings in government security clearance cases for contractor personnel working for the Department of Defense and twenty other departments and agencies.<sup>95</sup> This process provides an in-person hearing during which the individual is given “as comprehensive and detailed a summary of the

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92. Finally, the government has a third relatively simple interest: the administrative cost of the hearing process itself. The actual administrative cost of these hearings—which would include the salary and overhead of the compensatory counsels, as well as the cost of conducting the hearings themselves—is difficult to estimate, because the government does not reveal the exact number of persons affected by terrorist watchlists. Forcing the government to pay the cost of these attorneys could create incentives not to place persons on watchlists without sufficient justification, which could reduce the overall administrative cost of this type of security and help the counsels pay for themselves.

93. *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

94. *Id.*

95. *Dep't of Defense*, Directive No. 5220.6 (Jan. 2, 1992) (implementing Exec. Order No. 10,865, 25 Fed. Reg. 1583 (Feb. 20, 1960)), available at <http://www.defenselink.mil/dodgc/doha/directive.html>.

information as the national security permits,” but no access to the actual secret evidence.<sup>96</sup> To compensate for this evidentiary handicap, the hearing officer is directed to give “appropriate consideration to the fact that the applicant did not have an opportunity to confront such evidence” and the head of the agency or department must personally review the case when secret evidence is used.<sup>97</sup> Similarly, the Department of Energy’s Office of Hearings and Appeals conducts hearings for individuals who wish to appeal security clearance denials and revocations.<sup>98</sup> As in the Defense Department, the hearing officer is instructed that “[a]ppropriate consideration shall be accorded to the fact that the individual did not have an opportunity to cross-examine” confidential witnesses.<sup>99</sup> As these procedures reveal, the government can tailor hearing practices to protect national security information.

Justice O’Connor’s opinion for the Court in *Hamdi v. Rumsfeld* offers a recent example of the Supreme Court’s flexible approach to hearing procedures in national security cases. There, the Court recommended special proceedings—“tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict”<sup>100</sup>—for Americans detained as enemy combatants. Following *Mathews*, the Court proposed specific alterations that would “sufficiently address the ‘risk of an erroneous deprivation’ of a detainee’s liberty interest” without unduly burdening the government.<sup>101</sup> While the burden of proof in administrative proceedings is generally placed on the party that is the proponent of the order being adjudicated,<sup>102</sup> the *Hamdi* Court proposed an alternative:

[T]he Constitution would not be offended by a presumption in favor of the government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist,

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96. *Id.* § E3.1.23.

97. *Id.*

98. See 10 C.F.R. §§ 710.20 to .36 (2005).

99. *Id.* § 710.26(m)(2).

100. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

101. *Id.* at 534.

102. 5 U.S.C. § 556(d) (2000) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”).

or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.<sup>103</sup>

Providing individuals adversely affected by government watchlists with compensatory counsel is precisely the kind of procedural accommodation of the government's national security interest endorsed by the Court in *Egan* and *Hamdi*. The compensatory counsel system would not burden the government's interest in protecting secret information. First, the government itself would select and hire these attorneys, evaluate them for the security clearances necessary to access the secret information, and train them on matters of information security. Second, these attorneys would be governed by the same laws concerning treatment and handling of classified and sensitive information as other officials. They would be subject to civil and criminal penalties—just like any other government employee or holder of a security clearance—for any violation of the laws pertaining to these types of information. Third, a wall would exist between the attorneys and their clients. The compensatory counsels would be prohibited from sharing any secret evidence with their clients, or even from giving information to their clients that might reveal the nature or source of the secret evidence. As a result, this system would allow the government to protect classified information and confidential sources.

## 2. *The Private Interest in Access to Evidence*

The compensatory counsel system would also give individuals a meaningful opportunity to be heard. A fair hearing requires that an individual know the evidence being used against him. For criminal defendants, this aspect of fundamental fairness is anchored in the Constitution's Sixth Amendment guarantee that the accused shall have the right "to be informed of the nature and cause of the accusation."<sup>104</sup> This Clause has an obvious rationale, one that applies with equal force in the watchlist context: An individual cannot present a credible defense without knowing what charges he is refuting and what evidence the government has against him.

The individual's need for access to evidence is no less in the administrative context. In *Cleveland Board of Education v. Loudermill*, the Court explained that

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103. *Hamdi*, 542 U.S. at 534.

104. U.S. CONST. amend. VI. Although the text of the Fifth Amendment does not contain all of the protections guaranteed by the Sixth, the Court has required disclosure of evidence to affected parties to satisfy due process in administrative proceedings. See *infra* note 105 and accompanying text.

the opportunity to be heard required by the Due Process Clause includes written notice of the charges against the individual as well as an explanation of the government's evidence.<sup>105</sup> The Court has not shied away from applying this requirement to evidence used in administrative proceedings related to national security. In *Greene v. McElroy*, for example, an employee of a defense contractor had his security clearance revoked based on secret testimony concerning his ex-wife's communist associations. In finding that the employee had been denied due process to challenge this revocation, the Court explained that American jurisprudence included certain "relatively immutable" principles, and that "[o]ne of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."<sup>106</sup>

Just as the Court in *Hamdi* and *Egan* authorized deviations from usual procedures to protect government security interests, Congress has also innovated to secure due process in cases involving secret evidence and information. Congress has created a statutory framework for regulating the use of classified information in Article III criminal trials through the Classified Information Procedures Act (CIPA).<sup>107</sup> Under CIPA, "upon a sufficient showing" a court may authorize the government to "delete specified items of classified information from documents to be made available to the defendant through discovery" and may substitute "a summary of the information for such classified documents" or "a statement admitting relevant facts that the classified information would tend to prove."<sup>108</sup> The government may further

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105. 470 U.S. 532, 546 (1985) ("The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." (citation omitted)).

106. 360 U.S. 474, 496 (1959).

107. 18 U.S.C. app. § 1 (2000). For scholarly commentary on CIPA, see Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277 (1986); David I. Greenberger, Note, *An Overview of the Ethical Implications of the Classified Information Procedures Act*, 12 GEO. J. LEGAL ETHICS 151 (1998); and Richard P. Salgado, Note, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 427-428 (1988). Every court that has considered the process has held that CIPA does not violate criminal defendants' due process rights. See Timothy J. Shea, Note, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 669-76 (1990).

108. 18 U.S.C. app. § 4 (2000).

“request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.”<sup>109</sup> The court may, at this hearing, decide to disclose information, or may authorize the substitution of a summary, or of a statement admitting relevant facts, “if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”<sup>110</sup> The government may submit an affidavit, to be considered in camera and ex parte, “certifying that disclosure of classified information would cause identifiable damage to the national security of the United States, and explaining the basis for the classification of such information.”<sup>111</sup> Once the district court determines that an item of classified information is relevant and material, it must be admitted unless the government provides an adequate substitute. The statute proposes a harsh default penalty to the government for failing to disclose information—either dismissal of the indictment or exclusion of the evidence—while giving judges the opportunity to modify these sanctions when appropriate.<sup>112</sup>

While CIPA itself does not apply to watchlisted individuals challenging their status in administrative hearings, the principles it stands for need not be limited to the letter of the statute. The Fourth Circuit, for example, has used these provisions for guidance in the case of alleged terrorist Zacarias Moussaoui, even though CIPA does not apply directly to his case.<sup>113</sup> Moussaoui requested that persons being detained as enemy combatants, including 9/11 mastermind Ramzi Binalshibh, be allowed to testify as part of his defense. The government refused access to the enemy combatants, citing national security concerns. The Fourth Circuit used the statute as a model for resolving the

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109. *Id.* § 6(a).

110. *Id.* § 6(c)(1).

111. *Id.* § 6(c)(2).

112. *Id.* § 6(e)(2) (“Whenever a defendant is prevented . . . from . . . causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate.”).

113. *United States v. Moussaoui (Moussaoui III)*, 382 F.3d 453, 472 n.20 (4th Cir. 2004) (“We adhere to our prior ruling that CIPA does not apply because the January 30 and August 29 orders of the district court are not covered by either of the potentially relevant provisions of CIPA: § 4 (concerning deletion of classified information from *documents* to be turned over to the defendant during discovery) or § 6 (concerning the disclosure of classified information by the defense during pretrial or trial proceedings).”); *see also* *United States v. Moussaoui (Moussaoui I)*, 333 F.3d 509, 514-15 (4th Cir. 2003).

tensions between the national security interest and the individual's interest in obtaining evidence for trial. As the court stated, "Congress' judgment, expressed in CIPA, [is] that the Executive's interest in protecting classified information does not overcome a defendant's right to present his case."<sup>114</sup> Following a Supreme Court precedent that, if the evidence "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [government's] privilege [in classified information] must give way,"<sup>115</sup> the Fourth Circuit looked to CIPA for guidance.<sup>116</sup> The panel explained that CIPA "enjoins district courts to seek a solution that neither disadvantages the defendant nor penalizes the government (and the public) for protecting classified information that may be vital to national security," because it gives judges discretion to impose a lesser sanction than dismissal of the indictment on the government if appropriate substitutions are available or are in "the interests of justice."<sup>117</sup> In *Moussaoui*, the Fourth Circuit concluded that "appropriate substitutions [were] available" for the testimony of the enemy combatants, and so the indictment was not dismissed.<sup>118</sup> Even though the exact terms of CIPA did not apply, the court recognized that the congressional intent to create a fair trial included providing the individual with access to all information "relevant and helpful" to his defense. So too, individuals kept from working or traveling by the government should have access to the information they need to present a case.

Like CIPA, the compensatory counsel model would effectively protect the individual's interest in a fair hearing. The proposal assumes that the government-provided counsel would zealously advocate for his third-party client. There are several reasons to believe that he would do so. First, the job is likely to attract attorneys who believe in the cause of defending civil liberties. In this sense, the counsels might mirror the pool of public defenders—people who are paid by the government to argue against the government. Second, these compensatory counsels would have, as all lawyers do, a professional responsibility to zealously advocate on behalf of their clients. Third, strict civil service protections would guard the attorneys' independence. Like ALJs, they would be hired, regulated, and removed by the Office of Personnel Management, not by DHS. Finally, to the extent feasible, watchlisted individuals could select their counsel from among the pool available.

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114. *United States v. Moussaoui (Moussaoui II)*, 365 F.3d 292, 312 (4th Cir. 2004).

115. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

116. *Moussaoui III*, 382 F.3d at 471-72.

117. *Id.* at 477.

118. *Moussaoui II*, 365 F.3d at 313.

### 3. *An Effective Balance*

The compensatory counsel hearing model would reduce the risk of erroneous deprivation of individuals' interests in freedom of travel and employment. If the government has placed an individual on a watchlist through a case of mistaken identity, the compensatory counsel can discover this error. If information used to place a person on the watchlist derives from illegal or unconstitutional sources—for example warrantless searches and seizures or unauthorized surveillance—the counsel can raise a statutory or constitutional challenge. The wall in place between the individual on the watchlist and his government attorney would not prevent effective representation of the individual's interests. The counsel could be particularly effective in challenging the government's documentary evidence and cross-examining the government's witnesses in the closed, in camera portion of the hearing.<sup>119</sup>

The compensatory counsel system is particularly appropriate because it parallels a process with which Congress is already familiar: the Alien Terrorist Removal Court (ATRC). Congress created the ATRC to review the deportation of certain lawful permanent resident aliens in cases involving secret evidence.<sup>120</sup> Using the ATRC, the Attorney General may seek removal of an individual believed to be a terrorist<sup>121</sup> based on classified information.<sup>122</sup> The ATRC is, like other administrative tribunals, a congressionally created Article I court, albeit one composed of Article III judges. Immigration cases are administrative proceedings, not criminal trials, so the parallel to persons on security watchlists is apt. Most appropriately, the ATRC was designed in the terrorism context to deal with the precise concern that hampers fair process for persons on security watchlists: the lack of access to classified information.

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119. Under the APA, parties are entitled to “conduct such cross-examination” of witnesses during oral hearings “as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d) (2000). Professor Tribe has explained that the due process right to a hearing “is generally found to embrace the right . . . to confront and cross-examine adverse witnesses.” LAURENCE TRIBE, *CONSTITUTIONAL LAW* 736 (2d ed. 1988) (citing *Greene v. McElroy*, 360 U.S. 474 (1959); *Morgan v. United States*, 298 U.S. 468 (1936)).

120. Congress passed, and President Clinton signed, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 in the wake of the bombing of the Alfred P. Murrah Building in Oklahoma City. Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258-68 (codified as amended at 8 U.S.C. §§ 1531-37 (2000)). The AEDPA includes a variety of provisions, including the creation of the ATRC. *Id.*

121. 8 U.S.C. § 1533 (2000).

122. The ATRC's definition of “classified information” is borrowed from the CIPA, 8 U.S.C. § 1531(2) (2000).

The ATRC provisions require the Chief Justice of the United States to “publicly designate 5 district court judges from 5 of the United States judicial circuits who shall constitute a court that shall have jurisdiction to conduct all removal proceedings.”<sup>123</sup> The alien terrorist removal procedure also requires the establishment of a “panel of special attorneys”—similar to the compensatory counsels I have proposed—each of whom “has a security clearance which affords the attorney access to classified information”<sup>124</sup> and “has agreed to represent permanent resident aliens with respect to classified information.”<sup>125</sup> Lawful permanent resident aliens brought before the court have one of these special attorneys designated to assist them by “reviewing in camera the classified information” and “challenging through an in camera proceeding the veracity of the evidence contained in the classified information.”<sup>126</sup> Special attorneys are prohibited from disclosing the information “to the alien or to any other attorney representing the alien” and those who do make such illegal disclosures are subject to fines and imprisonment.<sup>127</sup>

Providing individuals with an attorney who has access to the government’s secret evidence—whether through the ATRC or the compensatory counsel model I propose—is a particularly appropriate means of satisfying the *Mathews* test because it is essentially a balancing mechanism. The general rule in American law is that parties bear their own attorneys’ fees.<sup>128</sup> Without explicit statutory authorization, agencies have no authority to pay the attorney’s fees or litigation costs for private parties.<sup>129</sup> Congress, however, may authorize by statute the award of attorney’s fees to private parties.<sup>130</sup> Following the *Mathews*

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123. *Id.* § 1532(a). The ATRC is modeled after the eleven-member court set up under the Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. § 1803(a) (2000), and the Chief Justice may allow the FISA judges to serve concurrently on the ATRC, 8 U.S.C. § 1532(a) (2000).

124. 8 U.S.C. § 1532(e), (e)(1).

125. *Id.* § 1532(e)(2).

126. *Id.* § 1534(e)(3)(F)(i)(I)-(II).

127. *Id.* § 1534(e)(3)(F)(ii)(I)-(II). While the special attorney with access to classified information is only given to lawful permanent residents, all individuals before the ATRC have a right to be represented by publicly provided counsel. *Id.* § 1534(c)(1).

128. *See* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

129. *See, e.g., Pac. Legal Found. v. Goyan*, 664 F.2d 1221, 1224-27 (4th Cir. 1981); *Green County Planning Bd. v. Fed. Power Comm’n*, 559 F.2d 1227, 1235 (2d Cir. 1976).

130. The Federal Trade Commission Act, the Equal Access to Justice Act, FOIA, and certain environmental and civil rights provisions award attorney’s fees, generally to parties who have secured judicial relief against an agency.



logic, then, the individual sacrifice in not having access to secret evidence is balanced by the government sacrifice in paying for the individual's attorney.

## CONCLUSION

While it is for Congress to implement proper procedures such as those I have proposed here, courts are not without a role in protecting the constitutional rights of American travelers and transportation employees. Decisions by the agency concerning who is listed on the No Fly List or denied a transportation-sector job should be subject to judicial review in Article III courts.<sup>131</sup> In keeping with the APA, Article III judges should not second-guess the agency's decisions. The standard of review should be arbitrary and capricious, not *de novo*.<sup>132</sup>

The federal courts should, however, carefully scrutinize the fairness of the process.<sup>133</sup> In particular, judges should review the agency adjudications to ensure that the compensatory counsels have aggressively advocated for their clients. In APA-governed administrative hearings, if a person chooses to represent himself and does not have counsel, the ALJ must take special care to ensure a fair hearing.<sup>134</sup> A similar rule should apply to these cases: Even though the individual does have counsel, he does not have the usual full array of

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131. To facilitate judicial review, the hearing process should require the administrative judge to write an opinion stating the basis for his decision. *See* *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (“[T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.”); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“[T]he decision maker should state the reasons for his determination and indicate the evidence he relied on, . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”). *But see* *Ponte v. Real*, 471 U.S. 491 (1985) (holding that the state need not give reasons in writing for refusing to call a witness at a prison disciplinary hearing).

132. *See* APA, 5 U.S.C. § 706(2)(A) (2000) (providing that courts should review agency action under the standard of “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law” unless the action consists of formal rulemaking or adjudication).

133. *Cf.* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) (advancing an “appellate review” theory for decisions made by non-Article III tribunals including administrative courts).

134. *See, e.g.,* *Echevarria v. Sec’y of Health & Human Servs.*, 685 F.2d 751, 755 (2d Cir. 1982) (holding that the ALJ has a heightened duty to “scrupulously and conscientiously” explore all the relevant facts when the individual is not represented by counsel).

attorney-client interaction. The ALJ appointed to conduct the hearing should be given the opportunity to evaluate and monitor the advocate's representation of his client. On review, Article III judges would have the record before them to evaluate the effectiveness of the attorney's advocacy. Judicial review would thus create incentives both for the compensatory counsels to zealously protect the interests of their clients, and for government-paid administrative judges to remain neutral.

But the real responsibility for protecting Americans' constitutional liberties lies with Congress. There are several reasons for Congress to err on the side of granting procedural protections for deprivations of liberty based on watchlists. This Note demonstrates that it is possible for the government to devise procedures that protect the nation's security while protecting individual liberties at the same time. Because extra procedural protections occur after the revocation or suspension of the transportation-sector activity that has resulted in the threat assessment, the commitment to civil liberties and constitutionality does not conflict with the government's primary interest in security. And finally, members of Congress, no less than federal judges, have an obligation to protect and uphold the Constitution.

While this Note has focused on the transportation security context, the proposed process offers a useful model for other watchlists, as well as other cases in which the government does not wish to disclose classified or sensitive information to suspected terrorists. As technology improves and homeland security remains a pressing concern, the use of watchlists will continue to expand. With new intelligence-gathering and data-mining programs, the federal government has access to vast quantities of information about Americans on which to make security determinations. With the REAL ID Act, Congress has taken a step toward requiring uniform identification cards for all Americans. With the Registered Traveler, US-Visit, and TWIC programs, the government has demonstrated the capability of combining biometric identification cards with terrorist watchlists. It is not hard to imagine a world in which Americans have their names checked against a watchlist before swiping a Metrocard, entering an office building, or taking money from an ATM machine. In the face of such potentially troubling developments, members of Congress should act now to provide Americans adversely affected by terrorist watchlists with meaningful due process. Otherwise, as Senator Kennedy and Representative Young can attest, they may not make their next flights home from Washington.