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## **Interstate Travel: Constitutional Challenges to the Identification Requirement and Other Transportation Security Regulations**

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Todd B. Tatelman  
Legislative Attorney  
American Law Division

# Interstate Travel: Constitutional Challenges to the Identification Requirement and Other Transportation Security Regulations

## Summary

Since the terrorist attacks of September 11, 2001, security measures in and around our nation's transportation facilities have dramatically increased. Nowhere has the increase been more noticeable than with respect to air transportation. New federal statutes and agency regulations have been implemented, each with the purpose of ensuring the safety and security of passengers, facilities, and workers of our national transportation systems. Not all of these security measures, however, have been publically disclosed. In fact, pursuant to its statutory authority, the Transportation Security Agency (TSA) has issued a series of regulations relating to transportation security in which a majority of the information, including rules, orders, and directives has been classified as "sensitive security information" (SSI), and thus, withheld from public scrutiny. For example, the regulation requiring that all passengers produce photo identification before being allowed to enter the airport gate area or board an aircraft, bus, or train has been classified as SSI, and consequently, cannot be disclosed to the general public. In addition, the standards utilized for creating, maintaining and requiring airlines to screen passengers against government-provided "watch lists" and "no-fly lists" do not appear to have been made publicly available.

Recently, news reports have noted that at least two members of Congress have been delayed because of concerns relating to similar names appearing on such lists. Moreover, a California resident has brought a suit against the government alleging that the secret nature of these laws violates established rights under the Fifth Amendment's due process clause, as well as the constitutionally protected right to travel and the First Amendment. In addition, there is pending federal litigation with respect to the constitutionality of both the "watch" and "no-fly lists," as well as pending state litigation regarding the scope of TSA's authority to seize evidence obtained during a routine search of a passenger's luggage. While it is unclear precisely what the courts will decide, these lawsuits raise constitutional questions not only about the scope of the federal government's authority to prescribe regulations that impact the ability of citizens to freely move within our country's borders, but also about the government's ability to keep those regulations from public scrutiny. This report examines the legal basis for the transportation security measures, including the SSI regulations, and analyzes the constitutional provisions under which these measures are currently being challenged. This report will be updated as events require.

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# Interstate Travel: Constitutional Challenges to the Identification Requirement and Other Transportation Security Regulations

## Background

Since the early 1960s the federal government has made it unlawful to engage in behavior that threatens or endangers transportation security and safety. Prior to September 11, 2001, many of these restrictions focused primarily on aviation security. For instance, Congress has criminalized the “seizing or exercising control of an aircraft ... by force, violence or threat of force or violence.”<sup>1</sup> In addition, it has long been unlawful to have a concealed weapon, loaded firearm, or any other explosive device on ones person or in ones property while boarding or attempting to board an aircraft.<sup>2</sup> More recent security measures include protections for flight attendants and crew from interference with their duties, physical assault, and threatening behavior.<sup>3</sup>

To prevent such incidents before they happen, Congress has authorized the Under Secretary of Transportation for Security to screen both passengers and property for the purpose of assuring a safe flight, and to permit air carriers to refuse to transport any person or their property if an individual “does not consent to a search or inspection of his person ... to determine whether he is unlawfully carrying a dangerous weapon, explosive or other destructive substance.”<sup>4</sup> Currently, the Transportation Security Agency (TSA) is charged with assessing “current and potential threats to the domestic air transportation system,” and has the authority to “decide on and carry out the most effective methods for continuous analysis and monitoring of security threats to that system.”<sup>5</sup>

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<sup>1</sup> 49 U.S.C. § 46502 (2004).

<sup>2</sup> 49 U.S.C. § 46505(b) (2004).

<sup>3</sup> 49 U.S.C. § 46318 (2004); *see also* 49 U.S.C. § 46504.

<sup>4</sup> 49 U.S.C. § 44901 (2004); *see also* 49 U.S.C. § 44902 (2004).

<sup>5</sup> 49 U.S.C. § 44904(a) (2004).

Pursuant to the Aviation and Transportation Security Act, airport operators are required to “establish a security program ... adequate to ensure the safety of passengers” and to submit the program to TSA for review.<sup>6</sup> In addition, TSA is required to ensure that federal agencies “share ... data on individuals identified ... who may pose a risk to transportation or national security,” “notif[y] ... airport or airline security officers of the identity of [such] individuals” and “establish policies and procedures requiring air carriers [to] prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual.”<sup>7</sup> These requirements have been implemented through a series of Security Directives which are said to include a list of individuals who are either barred from boarding an aircraft altogether (the “no-fly list”) or required to undergo additional screening prior to boarding (the “selectee list”). It appears, however, that these directives have not been disclosed to the public because, except under narrow circumstances, federal law prohibits the disclosure of “sensitive security information”(SSI).

The law governing SSI dates back to the Air Transportation Security Act of 1974 (1974 Act),<sup>8</sup> which delegated authority for transportation security to various agencies within the Department of Transportation (DOT). The 1974 Act specifically authorized the Federal Aviation Administration (FAA) to prescribe regulations to:

prohibit disclosure of any information obtained or developed in the conduct of research and development activities ... if in the opinion of the Administrator the disclosure of such information – (A) would constitute an unwarranted invasion of personal privacy ...; (B) would reveal trade secrets or privileged or confidential commercial or financial information obtained from any person; or (C) would be detrimental to the safety of persons traveling in air transportation.<sup>9</sup>

The FAA implemented this authority by promulgating regulations, which, among other things, established a category of information known as Sensitive Security Information (SSI). In 1997, the DOT definition of SSI included “records and information ... obtained or developed during security activities or research and development activities.”<sup>10</sup> Encompassed within this definition had been airport and air carrier security programs as well as specific details concerning aviation security measures. Consistent with this grant of authority, the FAA limited the applicability of the SSI regulation to airport operators, air carriers, and other air transportation related entities and personnel.

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<sup>6</sup> Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2002) (codified as amended at 49 U.S.C. § 44903(c)(1) (2004)). Pursuant to its regulations, TSA can amend any security plan if the public interest requires, *see* 49 C.F.R. 1544.105, and can also issue “Security Directives” when it is determined that “additional security measures are necessary to respond to a threat assessment.” *See id.* at § 1544.305(a).

<sup>7</sup> *See* 49 U.S.C. § 114(h)(1)-(3) (2004).

<sup>8</sup> Air Transportation Security Act of 1974, Pub. L. No. 93-366 § 316, 88 Stat. 409 (1974).

<sup>9</sup> *Id.*

<sup>10</sup> 14 C.F.R. § 191.1 (1997).

After the attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), which, in addition to creating new security mandates, established the TSA within DOT, and transferred the responsibility for aviation security to the Under Secretary of Transportation for Security.<sup>11</sup> Among the legal authorities transferred to the Under Secretary was the protection of certain information vital to transportation security, or SSI. In addition to transferring SSI authority to TSA, the ATSA expanded the SSI authority by eliminating the specific reference to air transportation.<sup>12</sup> This statutory change appears to permit TSA to protect SSI with respect to virtually all forms of interstate travel including airplanes, buses, trains, and boats.

TSA and its legal authority, however, did not remain within the DOT. The Homeland Security Act of 2002, transferred TSA, along with its SSI classification authority, to the newly created Department of Homeland Security (DHS).<sup>13</sup> The Homeland Security Act of 2002 provides TSA with the authority to:

prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would— (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.<sup>14</sup>

In addition, the Homeland Security Act of 2002 amended the existing DOT authority with respect to SSI such that it would be almost identical to the TSA authority. The only difference between the statutes is contained in subpart (C), which provides DOT with authority to prohibit disclosure of information that would be “detrimental to transportation safety.”<sup>15</sup> By removing any reference to persons or passengers, Congress has significantly broadened the scope of the SSI authority. As a result, it appears that the authority to classify information as SSI now encompasses all transportation related activities including air and maritime cargo, trucking and freight transport, and pipelines.

Initially, DHS issued regulations that simply transferred the majority of the aviation security regulations, including SSI, from the FAA to TSA.<sup>16</sup> On May 18, 2004, however, TSA and DOT jointly promulgated revised SSI regulations in

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<sup>11</sup> The Under Secretary for Transportation Security is also known as the Administrator of the TSA.

<sup>12</sup> Aviation and Transportation Security Act, Pub. L. No. 107-71 §101(e)(3), 115 Stat. 597, 603 (2002).

<sup>13</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2312 (Nov. 25, 2002).

<sup>14</sup> *See id.* at § 1601(b) (codified as amended at 49 U.S.C. § 114(s) (2004)).

<sup>15</sup> *Id.*

<sup>16</sup> *See generally*, 67 Fed. Reg. 8340 (Feb. 22, 2002).

response to their newly expanded statutory authority.<sup>17</sup> These revised regulations adopt the Homeland Security Act language as the definition of SSI. In addition, the new regulations incorporate former SSI provisions, including the sixteen categories of information and records that constitute SSI. Included among these categories are: security programs and contingency plans;<sup>18</sup> security directives;<sup>19</sup> security measures;<sup>20</sup> security screening information<sup>21</sup> and; a general category consisting of “other information.”<sup>22</sup>

Since 2001, the implementation and use of the SSI regulations by TSA has created a number of controversies. These included the withdrawal of two federal criminal prosecutions involving TSA baggage screeners for fear that proceeding

<sup>17</sup> See 69 Fed. Reg. 28066, 28069 (May 18, 2004).

<sup>18</sup> This section includes

any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including:– (i) Any aircraft operator or airport operator security program or security contingency plan under this chapter; ... (iii) Any national or area security plan prepared under 46 U.S.C. 70103;....

See 49 CFR § 1520.5(b)(1) (2004).

<sup>19</sup> Defined as “any Security Directive or order: (i) Issued by TSA under 49 CFR 1542.303, 1544.305, or other authority; (ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 *et seq.* related to maritime security; or (iii) Any comments, instructions, and implementing guidance pertaining thereto. See 49 CFR § 1520.5(b)(2) (2004).

<sup>20</sup> Defined as including

specific details of aviation or maritime transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including– (i) Security measures or protocols recommended by the Federal government; (ii) Information concerning the deployments, numbers, and operations of ... Federal Air Marshals, to the extent it is not classified national security information;....

See 49 CFR § 1520.5(b)(8) (2004).

<sup>21</sup> Including:

information regarding security screening under aviation or maritime transportation security requirements of Federal law: (i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person; (ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system; (iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI; ....

See 49 CFR § 1520.5(b)(9) (2004).

<sup>22</sup> The “other information” category includes “[a]ny information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the Secretary of DOT may designate as SSI information not otherwise described in this section.” See 49 CFR § 1520.5(b)(16) (2004).

would require the public disclosure of SSI.<sup>23</sup> In addition, there has been a continuing controversy with respect to the proposed new version of the Computer Assisted Pre-Screening System, or CAPPS II.<sup>24</sup>

## Constitutional Challenges to TSA's Transportation Security Regulations

Recently, a California resident filed suit against the United States challenging TSA security procedures such as the requirement to show identification before boarding an aircraft, the existence of government “watch lists” and “no-fly lists,” as well as any implementation of a CAPPS II or similar passenger screening program. The basis for the lawsuit is that the existence of these security measures and their classification as SSI violate the Fifth Amendment’s due process clause, because they are in effect “secret laws” that cannot be effectively litigated by citizens in the courts.<sup>25</sup> In addition, the suit alleges that the regulation requiring passengers to show identification violates the constitutional right to interstate travel, and the First Amendment’s clauses with respect to free association and petitioning of the government. The case is currently pending before the United States Court of Appeals for the Ninth Circuit.<sup>26</sup>

**Fifth Amendment Due Process.** In *Gilmore*, the plaintiff argues that because TSA has classified its security regulations as SSI they have not been published or made available to the general public in violation of the due process clause of the Fifth Amendment.

The Fifth Amendment states, in relevant part, that “[n]o person shall be ... deprived of life, liberty, or property, without due process of law....” With respect to the government’s duty to make the law known by publication, the Supreme Court has held that inherent within the notion of due process are certain requirements regarding the notice and publication of the law.<sup>27</sup> Even administrative agency regulations,

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<sup>23</sup> For a more detailed discussion of the controversies that have arisen as a result of SSI implementation, see Mitchel A. Sollenberger, CRS Report RS21727 *Sensitive Security Information (SSI) and Transportation Security: Background and Controversies*.

<sup>24</sup> *Id.*

<sup>25</sup> A search of the United States Code, Code of Federal Regulations, or Federal Register yields no regulations, directives, or orders that require passengers to show identification prior to entering the gate area of an airport or boarding an airplane, bus, or train. Similarly, we were unable to locate any record of the federal government requiring that airlines check passengers against a government maintained “watch list,” “no-fly list” or any other type of record that may prevent an individual from traveling.

<sup>26</sup> See *Gilmore v. Ashcroft*, 2004 WL 603530 (N.D. Cal. 2004). The allegations regarding the Fifth Amendment due process clause were dismissed by the federal district court for lack of jurisdiction. See *id.* at \*3. The district court, however, did rule on the merits of both the First Amendment and right to travel claims. The court rejected both claims with minimal analysis and dismissed the entire case with prejudice. See *id.* at \*7.

<sup>27</sup> See e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); see also *Lambert v. California*, 355 (continued...)



directives, and orders are required to be published, and Congress has generally provided for their publication by statute.<sup>28</sup> As indicated above, however, with respect to regulations and directives that contain SSI, Congress has provided an exception to the general publication requirements.<sup>29</sup>

The phrase “due process of law” does not necessarily imply a proceeding in a court or a plenary suit and trial by jury in every case where personal or property rights are involved,<sup>30</sup> therefore, it may be possible to argue that the government’s failure to publish or otherwise make available specific requirements with respect to airline security deprives citizens of the ability to effectively pursue enforcement of their rights. There remains, however, a strong concern with respect to national security. Divulging specific information related to either airport or airline security measures may result in sensitive information being obtained and used to cause harm to transportation facilities and passengers. To evaluate these respective concerns it has been argued that federal courts employ a balancing test to determine what, if any, process is due in this situation. In *Matthews v. Eldridge*,<sup>31</sup> a case involving the termination of social security disability benefits, the Supreme Court established the following three part test for determining what procedures are constitutionally necessary to satisfy due process:

first, the Court must consider 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>32</sup>

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<sup>27</sup> (...continued)

U.S. 225, 228 (1957); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>28</sup> See 5 U.S.C. § 552 (2004) (requiring agencies to publish rules, opinions, orders, records and proceedings in the Federal Register); see also 44 U.S.C. § 1505 (2004) (requiring publication of Executive orders, Presidential proclamations, and administrative rules in the Federal Register).

<sup>29</sup> See 49 U.S.C. § 114(s) (2004).

<sup>30</sup> See *Ex parte Wall*, 107 U.S. 265, 289 (1883) (stating that “[i]n all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.”); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) (stating that “[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the considerations that must enter into the judicial judgment.”).

<sup>31</sup> *Matthews v. Eldridge*, 424 U.S. 319 (1976).

<sup>32</sup> *Id.* at 335.

Applying the first factor to the unpublished security requirements, the private interest affected by the government's action appear to be a citizen's right to legally challenge and fully litigate the constitutionality of such requirements. The effective litigation of constitutional rights often relies on access to information and other evidence used by the government. By withholding publication, the government is arguably keeping critical evidence private; and thus, is thwarting attempts to effectively challenge not only the basis for the regulations, but also the procedures being used to implement them. With respect to the second factor, it may be possible to argue that, in light of recent errors regarding the "no-fly lists," the possible risk of deprivation of personal liberty is high, while the probable value of additional procedural safeguards, such as public notice, opportunity to comment, publication of the process and compilation methods used and the means to challenge inclusion would be great. Finally, regarding the third factor, it appears possible to argue that while the government's interest in aviation security is certainly legitimate, it fails to rise to a substantial enough level to prevent regulations, directives, and orders from being made a part of the public record.

On the other hand, the government appears to be in a good position to argue that a court should never reach a *Mathews* type balancing test. It may be possible to argue that the due process clause has not been violated by keeping specific security regulations, directives, and orders from the public. This argument rests on a distinction between what the law itself requires, and what detection or law enforcement techniques the government has chosen to use to enforce the requirements of the law. In this case, the argument would appear to be that passengers' due process rights are limited to knowing what the law is, but do not extend to knowing how the government may detect violations. At least two Circuit Courts of Appeal have accepted that a distinction of this type exists, and have prevented the disclosure of law enforcement techniques.<sup>33</sup> By characterizing requirements like the presentation of identification, passenger screening programs, and the maintenance of "no-fly" and "watch" lists as techniques to enforce the prohibitions against aircraft piracy and bringing weapons onto airplanes, the government may be able to avoid a due process question altogether.

However, should the inquiry extend to a *Mathews* balancing test, the argument would likely focus on the test's third factor. One possible argument may be that in a post-9/11 world the interest in maintaining effective control over the security of our transportation facilities and passengers is of such substantial importance that it outweighs any other procedural concerns. Another possible argument may be that any additional procedural requirements would create such enormous administrative burdens on the federal government that it would render any transportation security efforts completely unworkable.

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<sup>33</sup> See *Dirksen v. Dep't of Health and Human Servs.*, 803 F.2d 1456, 1458 (9th Cir. 1986) (citing *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir.1980) (emphasizing the distinction between law-enforcement materials, which involve enforcement methods, and administrative materials, which define violations of the laws, and noting that only the latter are likely to contain "secret laws" and should be disclosed if requested)); see also *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir.1978) (holding that the FBI was not required to disclose information contained in their "Raids and Searches" manual).

**Right to Travel.** The second basis offered by the plaintiff in *Gilmore* was that TSA’s security regulations impose unreasonable burdens on common forms of interstate travel. By requiring people to show identification and potentially subjecting them to “watch lists” or “no-fly lists,” the government allegedly violates a citizen’s constitutionally protected right to travel.

While not expressly defined in the text of the Constitution, the Supreme Court has stated that the right to travel is a “privilege and immunity of national citizenship under the Constitution,”<sup>34</sup> as well as a “part of the ‘liberty’ of which the citizens cannot be deprived without due process of law.”<sup>35</sup> The Court has declared that the constitutional right to travel consists of three different components: first, it protects the right of a citizen of one state to enter and to leave another state; second, it protects the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and third, for those travelers who elect to become permanent residents, it protects the right to be treated like other citizens of that state.<sup>36</sup> In the context of transportation security, however, only the first prong of the right to travel appears to be relevant.

Precedent regarding the right to travel, has developed along two primary strands. The first addresses burdens imposed by state governments and involves the Fourteenth Amendment, while the second strand involves federally-imposed burdens on international travel and appears to involve the Fifth Amendment’s due process clause. Under the Fourteenth Amendment cases, the right to travel from one state to another has been considered a fundamental right under the Constitution.<sup>37</sup> Consistent with its status as a fundamental right is the requirement that the government’s action satisfy the constitutional standard of review often referred to as strict scrutiny, or heightened scrutiny.<sup>38</sup> Under strict scrutiny the government must provide a compelling state interest for the burden and show that the means utilized are narrowly tailored to the achievement of the goal or, phrased another way, the least restrictive means available.<sup>39</sup> In addition to the strict scrutiny cases, there have been cases

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<sup>34</sup> *United States v. Guest*, 383 U.S. 745, 764 (1966) (Harlan, J. concurring) (*citing Corfield v. Coryell*, 4 Wash. C.C. 371 (1825)); *see also* U.S. CONST. Art. 4, § 2, cl. 1; U.S. CONST. Amend. 14, § 1.

<sup>35</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

<sup>36</sup> *See Sanez v. Roe*, 526 U.S. 489, 500-03 (1999).

<sup>37</sup> *United States v. Guest*, 383 U.S. 745, 758 (1966) (stating that “[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”).

<sup>38</sup> *Att’y General of New York v. Sato-Lopez*, 476 U.S. 898, 906 (1986); *see also Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>39</sup> *Id.* at 909-10. (stating that “‘if there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” (*quoting Dunn v. Blumestien*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364

where the state has placed burdens on the act of travel itself. In these cases, the justification level appears to be much lower.<sup>40</sup> The Court has held that burdens on travel are justifiable as long as they are uniformly applied and support the safety and integrity of the travel facilities.<sup>41</sup> Thus, for example, highway tolls and airport fees have been upheld, but a general tax imposed on all individuals leaving a state may impermissibly restrict travel.<sup>42</sup>

Conversely, in right to travel cases involving federally-imposed burdens on interstate travel, which implicate the Fifth Amendment, courts appear to reject the Fourteenth Amendment fundamental rights analysis and apply a less stringent rational-basis test. The rational-basis test simply requires that laws be rationally related to a legitimate government interest.<sup>43</sup> Here again, the government appears not to be required to show a compelling interest to justify a uniformly applied, nondiscriminatory travel related restriction.<sup>44</sup>

Given that the airlines are seemingly authorized to refuse service to anyone who fails to present proper identification, it appears that a strong argument can be made that there is an additional burden imposed on citizens who wish to travel by airplane. Thus, the inquiry should focus on the standard of review that should be applied. It appears difficult to argue that passenger safety and transportation facility security are something other than compelling governmental interests. Thus, it seems that, regardless of which standard of review is applied, the government may be in a strong position to argue that not only are the current security restrictions justifiable, but also that their burden on the right to travel is minimal and given the present conditions entirely reasonable.

**First Amendment Rights.** Finally, the plaintiff in *Gilmore* contended that enacting security measures that arguably foreclose the ability to travel interstate by

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<sup>39</sup> (...continued)

U.S. 479, 488 (1960)) (citing *Memorial Hospital v. Maricopa Hospital*, 415 U.S. 250, 263 (1974)).

<sup>40</sup> See *United States v. Davis*, 482 F.2d 893, 912-13 (9th Cir. 1973) (upholding the pre-boarding screening of passengers and carry-on articles by stating that the “screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, ... to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly.”).

<sup>41</sup> See *Evansville-Wanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 711-715 (1972).

<sup>42</sup> *Id.* at 714-16

<sup>43</sup> See *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); see also *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>44</sup> See e.g., *Regan v. Wald*, 468 U.S. 222 (1983); see also *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964).

plane, train, or bus, is a violation of the First Amendment, because the measures infringe on a citizen's right to freely assemble, associate, and petition the government.

The First Amendment states that "Congress shall make no law ... abridging the ... right of the people peaceably to assemble, and to petition the government for a redress of grievances."<sup>45</sup> The argument that the identification requirements and other transportation security regulations violate these rights is hinged on the concept that full exercise of liberties, such as those provided by the First Amendment, depends on citizens being able to freely move throughout the country.<sup>46</sup> By imposing burdensome requirements on interstate travel the government has arguably prevented persons who wish to refrain from identifying themselves and/or submitting to enhanced security screening from exercising their constitutional rights.

While it appears that neither the Supreme Court nor any lower federal court has been presented with an analogous situation, the Court has indicated that anonymity is a concept protected by the First Amendment. For example, in *Thomas v. Collins, Sheriff*, the Court invalidated a Texas statute requiring labor organizers to register and obtain an organizer's card before making speeches to assembled workers as incompatible with the guarantees of the First Amendment.<sup>47</sup> As recently as last term the Court has upheld the general notion that citizens have a right to anonymity especially in situations where a citizen is not suspected of a crime.<sup>48</sup> In light of these precedents, it may be possible to challenge the identification requirement on the grounds that it violates the First Amendment's rights of citizens to be anonymous; however, claims made regarding the rights of association and petition of the government do not appear to have received the same support.

Although it may be argued that a general right of anonymity exists, it is difficult to connect the implication of this right to the purpose of the airline safety and security regulations as a strong argument exists that the regulations are in no way intended to impact a person's First Amendment rights. Rather, the regulations at issue are aimed at preventing and deterring security threats to transportation facilities and passengers. Thus, these regulations can be said to have arguably, at most, an incidental or indirect effect on rights protected by the First Amendment. In cases where the regulation at issue was not specifically directed at First Amendment rights, the Court has held such regulations subject to First Amendment scrutiny only when "it was conduct with a significant expressive element that drew the legal remedy in the first place, ... or where a statute based on a non-expressive activity has the

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<sup>45</sup> U.S. CONST. Amend. I.

<sup>46</sup> *Aptheker v. Sec. of State*, 378 U.S. 500, 520 (1964) (stating that "[f]reedom of movement is akin to the right of assembly and to the right of association").

<sup>47</sup> *Thomas v. Collins, Sheriff*, 323 U.S. 516, 539 (1944) (stating that "[l]awful public assemblies, involving no element of grave and immediate danger ... are not instruments of harm which require previous identification of speakers.").

<sup>48</sup> *See Hiibel v. Sixth Judicial Dist. Court*, 124 S.Ct. 2451 (2004).

inevitable effect of signaling out those engaged in expressive activity.”<sup>49</sup> Given the indirect effect that these regulations may have on First Amendment rights, it would appear unlikely that challengers could establish the significant or substantial impact on their right to associate or petition the government that would be required to trigger First Amendment scrutiny.

## Other Pending Litigation

In addition to the lawsuit brought by Mr. Gilmore, there is pending federal litigation regarding the TSA “watch” and “no-fly” lists. The case was filed as a class action lawsuit on April 6, 2004, by a group of individuals who were detained or delayed as a result of mistakenly being included on these lists.<sup>50</sup> On November 4, 2004, the district court heard oral arguments relating to the Department of Justice’s motion to dismiss for lack of jurisdiction, however, no decision has been reached, and it remains unclear exactly how the case will proceed once the judge rules on the procedural issue. Furthermore, there is pending state litigation involving John Perry Barlow, co-founder of the Electronic Frontier Foundation and former Grateful Dead songwriter, who has filed a motion for disclosure of TSA security directives as they relate to criminal charges brought against him when contraband was discovered during a routine search of his luggage while he was boarding a flight at San Francisco International Airport.<sup>51</sup> Mr. Barlow argued that the TSA violated his Fourth Amendment right to be free from unreasonable searches and seizures, however, his motion was denied by a California Superior Court Judge and Mr. Barlow must now decide whether to appeal.<sup>52</sup>

## Conclusion

While privacy groups and other opponents of transportation security regulations regarding identification and the existence of “watch” or “no-fly lists” continue to develop and press constitutional arguments, it appears that the government is in a position to make reasonable and supportable counter arguments that protect the validity of the current regulations. Though it is still unclear precisely how the Ninth Circuit or other courts will rule, it appears unlikely that they will be able to hold the regulations unconstitutional as violations of either the First Amendment or the right to travel. The Fifth Amendment due process clause arguments, however, appear to have a greater chance of success. Nevertheless, even a favorable ruling on those grounds would not result in substantive changes to the regulations, but only the

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<sup>49</sup> *Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986); see also *Fighting Finest Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (stating that “to be cognizable, the interference with associational rights must be ‘direct and substantial’ or ‘significant’”).

<sup>50</sup> See Pl.’s Complaint in *Green v. TSA*, available at <http://www.aclu.org/Files/OpenFile.cfm?id=15424>.

<sup>51</sup> See Sarah Kehaulani Goo, *Grateful Dead Songwriter Contests TSA Search*, Wash. Post, Dec. 20, 2004, at A9.

<sup>52</sup> *Id.* see also Mary Anne Ostrom, *Grateful Dead's Former Lyricist Finds Tough Fight Against Searches*, Contra Costa Times, available at <http://www.contracostatimes.com/mld/cctimes/news/10453495.htm?1c>.

minimal publication of what is absolutely necessary to satisfy any procedural requirements established by a court.