

# Essay

## Challenges to Inclusion on the “No-Fly List” Should Fly in District Court: Considering the Jurisdictional Implications of Administrative Agency Structure

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### *Introduction*

Alex Harris likes to travel with his family. In fact, Alex’s family, who live in New York City, recently took a trip to London. Upon their return to John F. Kennedy International Airport from London, however, Alex Harris and his family were placed in a holding room because Alex’s name matched a name on the “No-Fly List.” “Look at him,” Alex’s mother shouted during the detainment, “He’s clearly not a terrorist. He’s 7!”<sup>1</sup> Over two hours later, airport officials decided that Alex Harris was not a federal terrorist and permitted Alex and his family to leave the airport’s holding room.

Alex’s story highlights just one problem in the government’s administration of the No-Fly List, which includes the names of thousands of individuals who allegedly pose a risk of terrorism or air piracy. As a result of their placement on the list, No-Fly List passengers are either subjected to additional screening by the Transportation Security Administration (“TSA”) or prevented from flying alto-

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<sup>1</sup> See Joe Sharkey, *Mistakes on Terrorist Watch List Affect Even Children*, N.Y. TIMES, Sept. 9, 2008, at C6.

gether.<sup>2</sup> As of 2007, the No-Fly List consisted of more than 540 pages and included the names of people who were dead, elderly, and even of international dignitary distinction.<sup>3</sup>

Aside from its ineffective administration and inaccurate composition, the No-Fly List presents another critical problem that has not received much attention in the media—the inability of persons to challenge in federal district court their likely inclusion in the secret database.<sup>4</sup> Citing a jurisdictional statute, courts have held that No-Fly List passengers are precluded from filing suit against TSA in federal district courts because Congress has granted exclusive jurisdiction over such challenges to the courts of appeals.<sup>5</sup>

Banning challenges to the No-Fly List from district courts is extremely detrimental to the viability of passengers' claims. Because TSA will not publicly disclose any information about the No-Fly List,<sup>6</sup> passengers lack a factual record on which to base their suits. Additionally, without the ability of passengers to subpoena the government for documents relating to the creation of or their subsequent inclusion on the No-Fly List, or to present evidence to a jury as to why the passengers should not be in the secret database—such as their lack of criminal histories or ties to terrorist organizations—the facts surrounding the No-Fly List remain undisclosed and difficult to determine.<sup>7</sup> If TSA is allowed to harbor all factual information regarding the No-Fly List and its related policies and procedures, there can be

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<sup>2</sup> See *Green v. TSA*, 351 F. Supp. 2d 1119, 1121 (W.D. Wash. 2005) (describing the “No-Fly List” as including both individuals who are prohibited from flying altogether and those who are permitted to fly but must be selected by air carriers for additional screening).

<sup>3</sup> See Daniel Schorn, *Unlikely Terrorists on No Fly List*, CBS NEWS, June 10, 2007, <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624.shtml>.

<sup>4</sup> Because TSA will not publicly disclose any information about who is included on the No-Fly List, see *infra* notes 30–31 and accompanying text, this Essay refers to a passenger's inclusion on the list as likely or possible rather than definite.

<sup>5</sup> See, e.g., *Gilmore v. Gonzales*, 435 F.3d 1125, 1131–33 (9th Cir. 2006) (citing 49 U.S.C. § 46110(a) (2006)); *Green*, 351 F. Supp. 2d at 1125 (same); see also *infra* Part III.B.

<sup>6</sup> See *Green*, 351 F. Supp. 2d at 1122 (“For security reasons, the TSA will not divulge the specific security measures followed by air carriers when they encounter an individual identified on the No-Fly List.”); Declaration of Lee S. Longmire ¶ 9, *id.* (No. C04-763 Z) (establishing via the testimony of TSA's Assistant Administrator for Operations Policy that TSA does not publicly disclose the No-Fly List or the selection criteria for placing passengers on the list).

<sup>7</sup> Passengers lack the ability to subpoena the government or present evidence to a jury because their suits are confined to the courts of appeals. See *Ibrahim v. DHS*, 538 F.3d 1250, 1256 (9th Cir. 2008) (explaining that federal appellate courts, unlike district courts, do not have the ability to take evidence); Richard D. Freer & Wendy Collins Perdue, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 845 (4th ed. 2005) (“An appeal does not include a new trial—it is a review of what happened in the trial court. Thus, there are no juries and the appellate court does not take evidence.”); Bob Egelko, *Court Rules Those on No-Fly List Should Get*

no independent check of administrative agency power. Moreover, such a discouraging situation leaves No-Fly List passengers with only one viable course of action: to challenge the constitutionality of the No-Fly List itself. Such constitutional challenges, however, have been unsuccessful.<sup>8</sup>

Recently, a procedural ruling by the Court of Appeals for the Ninth Circuit provided a new pathway for Alex and his family to protect their rights from infringement by administrative agencies. In a two-to-one decision, the court in *Ibrahim v. DHS*<sup>9</sup> considered the organizational structure of the administrative agencies responsible for the No-Fly List and held that the special jurisdictional statute that had previously been understood to prevent passengers from gaining access to federal trial courts had been misinterpreted.<sup>10</sup> Based on a new reading of the jurisdictional statute, the Ninth Circuit thus held that would-be passengers could ask federal district courts to decide whether their likely inclusion in the nation's secret antiterrorism database violates their rights. This Essay maintains that *Ibrahim* was correctly decided and should be adopted by courts across the country.

Parts I and II of this Essay begin by providing background information about the No-Fly List, including the context in which the list was created, the administrative agencies responsible for its maintenance and enforcement, and the consequences of one agency's nondisclosure policy regarding the list. Part III of this Essay then discusses, through administrative agency procedures and related case law, the legal remedies available to passengers mistakenly included on the No-Fly List. Thereafter, Part IV of this Essay explains in detail the Ninth Circuit's rationale in the landmark decision of *Ibrahim*. To conclude, Part V of this Essay suggests that federal courts across the country should adopt the Ninth Circuit's interpretation of the jurisdictional statute in *Ibrahim* because the interpretation correctly incorporates agency organization into its reading, provides a legal pathway for passengers to protect their rights from infringement by federal administrative agencies, and maintains the fundamental system of checks and balances created by the federal Constitution.

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to *Take Case to Court*, S.F. CHRON., Aug. 19, 2008, at B2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/19/BA2212DEQU.DTL>.

<sup>8</sup> See *infra* note 59 and accompanying text.

<sup>9</sup> *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008).

<sup>10</sup> *Id.* at 1254–56.

*I. September 11th and the Creation of the “No-Fly List”*

On September 11, 2001, the United States suffered the worst terrorist attack in the nation’s history when nineteen terrorists affiliated with al-Qaeda hijacked four commercial passenger jet airliners.<sup>11</sup> As part of coordinated suicide attacks, the hijackers intentionally crashed the airliners into the Twin Towers of the World Trade Center in New York City and into the Pentagon in Washington, D.C., killing approximately three thousand civilians.<sup>12</sup> In the days after the national tragedy, the country committed itself to protecting its citizens from future terrorist attacks.<sup>13</sup> One such commitment involved safeguarding inbound and outbound flights and domestic airports through a new security program.

Shortly after the attacks, Congress enacted the Aviation and Transportation Security Act (“TSA Act”)<sup>14</sup>, which conferred the duty of airline security to TSA, an agency now under the Department of Homeland Security (“DHS”).<sup>15</sup> As part of the new directive, TSA was given a number of responsibilities. One of its most significant duties was 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.”<sup>16</sup> In other words, TSA was required to work with other federal agencies to implement an information-sharing network for transportation security purposes.

Pursuant to such an order, TSA was also given the power to establish procedures for notifying appropriate government officials and 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

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<sup>11</sup> See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1–14 (2004) [hereinafter 9/11 COMMISSION REPORT], available at <http://www.9-11commission.gov/report/911Report.pdf>.

<sup>12</sup> See *id.* at 1–46; *9/11 by the Numbers*, N.Y. MAG., Sept. 16, 2002, at 54, available at <http://nymag.com/news/articles/wtc/1year/numbers.htm>; David E. Sanger, *A Nation Challenged: The President; Bin Laden Is Wanted in Attacks, “Dead or Alive,” President Says*, N.Y. TIMES, Sept. 18, 2001, at A1.

<sup>13</sup> See generally 9/11 COMMISSION REPORT, *supra* note 11.

<sup>14</sup> See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.); see also 49 U.S.C. § 44903(b) (2006).

<sup>15</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.) (moving TSA to under the authority of DHS).

<sup>16</sup> 49 U.S.C. § 114(h)(1).

airline or passenger safety.”<sup>17</sup> When such an individual is identified, TSA is responsible for “notify[ing] appropriate law enforcement agencies, prevent[ing] the individual from boarding an aircraft, or tak[ing] other appropriate action with respect to that individual.”<sup>18</sup> Further expanding the power of TSA, the TSA Act also authorized the agency to undertake any additional prophylactic measures relating to aircraft security.<sup>19</sup>

In carrying out its broad statutory authority to ensure airport security, TSA can issue Security Directives, or mandates requiring regulated aircraft operators to adopt certain security programs, without providing notice or the opportunity for comment.<sup>20</sup> Indeed, under its broad authority to identify and prevent passengers who pose a threat to transportation from boarding an aircraft,<sup>21</sup> TSA issued, without notice and comment procedures, the Security Directives that created the infamous “No-Fly List.”<sup>22</sup>

The No-Fly List identifies two groups of individuals: those who are prevented from flying altogether and those who must be “selected” by air carriers for additional screening before they are permitted to fly.<sup>23</sup> Individuals in both groups technically can pose a risk to aviation safety but to different degrees of certainty. Thus a person mistakenly included on the No-Fly List could be subject to a number of consequences, ranging from the additional screening of a carry-on

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<sup>17</sup> *Id.* § 114(h)(2); see Declaration of Lee S. Longmire, *supra* note 6, ¶ 7 (stating that TSA Security Directives prescribe the procedures to be followed, and specific security measures to be taken, by air carriers when individuals identified on the No-Fly List seek to board an aircraft).

<sup>18</sup> 49 U.S.C. § 114(h)(3)(B); see also U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: SECURE FLIGHT DEVELOPMENT AND TESTING UNDER WAY, BUT RISKS SHOULD BE MANAGED AS SYSTEM IS FURTHER DEVELOPED 9 (2005), available at <http://www.gao.gov/new.items/d05356.pdf> (“Passengers on the no-fly list are denied boarding passes and are not permitted to fly unless cleared by law enforcement officers.”).

<sup>19</sup> See generally Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); 49 U.S.C. § 44903(b).

<sup>20</sup> See 49 U.S.C. § 114(l)(2)(A) (“Notwithstanding any other provision of law or executive order . . . if the Under Secretary determines that a regulation or security directive must be issued immediately in order to protect transportation security, the Under Secretary shall issue the regulation or security directive without providing notice or an opportunity for comment and without prior approval of the Secretary.”); 49 C.F.R. § 1544.305(b) (2006) (“Each aircraft operator required to have an approved aircraft operator security program must comply with each Security Directive issued to the aircraft operator by TSA, within the time prescribed in the Security Directive for compliance.”); see also *Green v. TSA*, 351 F. Supp. 2d 1119, 1124 (W.D. Wash. 2005) (upholding Security Directive authorizing the No-Fly List without notice and comment as valid exercise of TSA’s mandate to protect transportation security).

<sup>21</sup> See generally 49 U.S.C. §§ 114(h)(1)–(3).

<sup>22</sup> See Declaration of Lee S. Longmire, *supra* note 6, ¶ 7.

<sup>23</sup> See *id.*

bag to being prevented from flying in a domestic airport, depending on which group the person is listed under on the No-Fly List.<sup>24</sup> The TSA Security Directives that created the No-Fly List also created the procedures to be used and the security measures to be followed by air carriers when persons identified on the No-Fly List seek to board an aircraft.<sup>25</sup>

Despite such enforcement authority, TSA has no power to choose which individuals are included on the No-Fly List.<sup>26</sup> Rather, it is the Terrorist Screening Center (“TSC”), an agency under the Federal Bureau of Investigation (“FBI”), that compiles and maintains the watch list as part of its mission of “consolidating the federal government’s approach to terrorist screening and providing for the appropriate and lawful use of terrorist information in screening processes.”<sup>27</sup> More specifically, TSC maintains the Terrorist Screening Database, which serves as the government’s master database of “known and suspected terrorists,”<sup>28</sup> and exports its data to the No-Fly List, which is later *administered* by TSA.<sup>29</sup> Although such a distinction may seem negligible, the TSC’s maintenance of the No-Fly List and agency placement under the FBI is the key to allowing passengers to challenge their inclusion on the No-Fly List in a trial court.

## II. Consequences of TSA’s Non-Disclosure Policy

Before the legal remedies available to potential No-Fly List passengers are explained, it is important to understand why passengers who believe they are included on the secret watch list are at a disadvantage in bringing suit against TSA. To ensure transportation secur-

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<sup>24</sup> See Declaration of Joseph C. Salvator ¶ 7, *Ibrahim v. DHS*, No. CV-06-005450WHA (N.D. Cal. May 22, 2006) (explaining that passengers “selected” by air carriers must undergo additional security screening prior to boarding an aircraft although passengers on the No-Fly List are prohibited from flying altogether); *Ibrahim v. DHS*, 538 F.3d 1250, 1256 (9th Cir. 2008) (describing plaintiff’s claim that because her name was on the No-Fly List, she was “stigmatized, humiliated, and subjected to interrogations, delays, enhanced searches, detentions, travel impediments, and . . . actual physical arrest”).

<sup>25</sup> See Declaration of Lee S. Longmire, *supra* note 6, ¶¶ 5–8; see also 49 C.F.R. § 1544.305(a).

<sup>26</sup> See Memorandum in Opposition to Petitioner’s Emergency Motion, *Gray v. TSA*, No. 05-2024, 12 (1st Cir. Sept. 27, 2005) (“[I]t is not TSA but another agency within the government that makes the determination that an individual poses or is suspected of posing a risk to airline safety, and therefore should be placed on a security watch-list.”); Soumya Panda, *The Procedural Due Process Requirements for No-Fly Lists*, 4 PIERCE L. REV. 121, 123 (2005).

<sup>27</sup> Declaration of Joseph C. Salvator, *supra* note 24, ¶ 9.

<sup>28</sup> See, e.g., Federal Bureau of Investigation, Terrorist Screening Center, <http://www.fbi.gov/terrorinfo/counterrorism/tsc.htm> (last visited Feb. 10, 2009).

<sup>29</sup> See Declaration of Joseph C. Salvator, *supra* note 24, ¶ 9.

ity, TSA does not disclose any identifying information of individuals on the No-Fly List because, in its opinion, publicly disclosing the procedures utilized to maintain and administer the watch list would allow terrorists to identify weaknesses in the air carrier system.<sup>30</sup> In other words, TSA will neither confirm nor deny if a person is on the No-Fly List.<sup>31</sup> One court has rationalized that “[r]equiring the government to reveal whether a particular person is on the watch lists would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned.”<sup>32</sup> Furthermore, TSA justifies such a policy as a statutory exemption from the Freedom of Information Act (“FOIA”).<sup>33</sup>

As a consequence of TSA’s strict nondisclosure policy regarding the No-Fly List, passengers have no factual information based on which they can substantiate their claims of erroneous inclusion on the No-Fly List in a court of law. Furthermore, because Congress has authorized TSA to issue Security Directives, such as the No-Fly List,

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<sup>30</sup> See 49 U.S.C. § 114(r)(1) (2006) (“[T]he Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . .”); 49 C.F.R. § 1520.5(a)(3) (2006) (“In accordance with 49 U.S.C. § 114(s), SSI [Sensitive Security Information] is information obtained or developed in the conduct of security activities . . . the disclosure of which TSA has determined would . . . [b]e detrimental to the security of transportation.”); 49 C.F.R. § 1520.15(a) (2006) (“[N]otwithstanding the Freedom of Information Act . . . SSI are not available for public inspection or copying, nor does TSA . . . release such records to persons without a need to know.”); Panda, *supra* note 26, at 125.

<sup>31</sup> TSA also prohibits aircraft operators from revealing any information about the No-Fly List. See 49 C.F.R. § 1544.305(f) (2006) (“Each aircraft operator that receives a Security Directive . . . must [r]estrict the availability of the Security Directive . . . and information contained [therein] to those persons with an operational need-to-know [and] [r]efuse to release the Security Directive . . . and information contained [therein] to persons other than those with an operational need-to-know without the prior written consent of TSA.”).

<sup>32</sup> *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005). TSA has also argued that publicly disclosing the procedures that air carriers follow in enforcing the lists would jeopardize passenger safety because terrorists would be able to discover weaknesses in the system and evade the system’s safeguards. See Declaration of Lee S. Longmire, *supra* note 6, ¶ 9.

<sup>33</sup> Exemption 3 of FOIA provides that FOIA’s disclosure requirements do not apply to matters “specifically exempted from disclosure by statute . . . provided that the statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3) (2006). 49 U.S.C. § 114(s)(1)(C) authorizes TSA, notwithstanding 5 U.S.C. § 552 (FOIA), to “prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the [TSA] decides that disclosing the information would . . . be detrimental to the security of transportation.” 49 U.S.C. § 114(s)(1)(C). This information is called “sensitive security information,” 49 C.F.R. § 1520.5(a), and courts have held that 49 U.S.C. § 114(s) is a statute of exemption as contemplated by exemption 3 of FOIA. See, e.g., *Tooley v. Bush*, No. 06-306 (CKK), 2006 U.S. Dist. LEXIS 92274, at \*60–67 (D.D.C. Dec. 21, 2006); *Gordon*, 390 F. Supp. 2d at 900.

without providing notice or the opportunity for comment,<sup>34</sup> No-Fly List challengers lack administrative information about how the agency creates the secret antiterrorism database and why certain passengers' names are included on the watch list, thus hindering the challengers' ability to successfully challenge TSA's policies and procedures in a court of law. Ultimately, watch list passengers are at a disadvantage when challenging their likely inclusion on the No-Fly List because they possess no factual or administrative record regarding their possible placement on the watch list, have no understanding of whether their likely placement on the list is based on simple error or actual information, and have no understanding of the procedures that have denied them the ability to travel by air.

### *III. Legal Remedies Available to Challenge Likely Inclusion on the No-Fly List*

Although there are a couple of legal remedies available to passengers who believe that they are mistakenly included on the No-Fly List because they are subject to enhanced searches or repeated interrogations or because they are prevented from flying out of domestic airports, such remedies are ineffective at vindicating individual rights or holding administrative agencies publicly accountable for their actions. The government's interests in national security and the protection of its citizens from another terrorist attack are indeed legitimate,<sup>35</sup> but carrying out such governmental interests and affording meaningful redress procedures to No-Fly List passengers do not have to be mutually exclusive.

#### *A. DHS TRIP Redress Program*

The first legal remedy that passengers have available to them to challenge their likely inclusion on the No-Fly List is the "Traveler Redress Inquiry Program" ("DHS TRIP"), a program established by DHS in January 2007 to resolve questions regarding passengers' possible inclusion on the list.<sup>36</sup> According to TSA's website, "[r]equests received online will be routed for redress to the appropriate DHS components . . . [which] will review the request and reach a determi-

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<sup>34</sup> See 49 U.S.C. § 114(l)(2)(A).

<sup>35</sup> See generally Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); 49 U.S.C. § 44903(b).

<sup>36</sup> See TSA, DHS Traveler Redress Inquiry Program (DHS TRIP), <http://www.tsa.gov/travelers/customer/redress/index.shtm> (last visited Feb. 10, 2009).



nation about a traveler’s status.”<sup>37</sup> Such DHS components include TSA and U.S. Customs and Border Protection, as well as the Department of State.<sup>38</sup> In making a determination about a traveler’s status, however, the appropriate DHS component will not reveal any information to the passenger except for the final decision.<sup>39</sup>

Because DHS TRIP is new, there is little information available regarding its effectiveness thus far. However, a number of considerations suggest that the program will be as ineffective as the previous redress procedure offered by TSA. First, TSA has stated that DHS TRIP is similar to the previous program for addressing complaints about the watch list screening process, which offered a clearance process only for persons who had their names confused with another name on the watch list, such as the name of a suspected terrorist, and which wrongly listed travelers insisted was more confusing and cumbersome than helpful.<sup>40</sup> Indeed, many people reported that getting off the No-Fly List via the previous redress program proved difficult or impossible because of a complete lack of information.<sup>41</sup> Meanwhile, those who are mistakenly put on the No-Fly List face consequences

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<sup>37</sup> *Id.*

<sup>38</sup> See Press Release, Department of Homeland Security, Fact Sheet: Secure Borders and Open Doors in the Information Age (Jan. 17, 2006), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0838.shtm](http://www.dhs.gov/xnews/releases/press_release_0838.shtm) (stating that “DHS and [the] State [Department] will accelerate efforts to establish a government-wide traveler screening redress process to resolve questions if travelers are incorrectly selected for additional screening” and that “near real-time data on every visa issued is sent directly to Customs and Border Protection officers at ports of entry so that they can compare electronic files of every traveler entering the United States.”).

<sup>39</sup> See *id.*

<sup>40</sup> See Panda, *supra* note 26, at 125 (explaining that, under the prior TSA clearance program, a passenger could submit to the Office of the Ombudsman a Passenger Identity Verification Form (“PIVF”) that included information concerning the passenger’s height, weight, or hair color, and TSA would then review the PIVF and determine whether the passenger was mistakenly identified); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 18, at 57; Green v. TSA, 351 F. Supp. 2d 1119, 1122 (W.D. Wash. 2005) (detailing plaintiffs’ description of ombudsman process as providing no recourse for individuals who were mistakenly associated with the No-Fly List); Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2158–59 (2006); David Armstrong, *On the “No-Fly” List? How to Fight False-Positives*, MSNBC.COM, July 10, 2008, <http://www.msnbc.msn.com/id/25612748/> (“Anecdotal reports from frequent fliers maintain that many travelers who were told they were cleared [under DHS TRIP] continue to be stopped in airports.”).

<sup>41</sup> See Anita Ramasastry, *An Appeals Court Opens the Door to Judicial Review of the “No Fly” List: A Promising Step Toward Providing Passengers with Due Process*, FINDLAW.COM, Sept. 11, 2008, <http://writ.news.findlaw.com/ramasastry/20080911.html>; Sharkey, *supra* note 1. Furthermore, because individual airlines check the watch list at present, air passengers experience differences in how their names could be flagged, thereby delaying them. See Mickey McCarter, *Secure Flight Finally Set to Take Off Soon*, HOMELAND SECURITY TODAY, Sept. 10, 2008, <http://hstoday.us/content/view/5101/149/>.

ranging from minor inconveniences to being prohibited from flying out of domestic airports.

Second, trying to figure out how or if one is on the No-Fly List involves running through a bureaucratic maze, for only the administrative agency that placed a name on the list can remove it.<sup>42</sup> For instance, “TSC [does not] take responsibility for names placed on the list by a law enforcement or intelligence agency.”<sup>43</sup> In addition, civil liberties groups have argued that the No-Fly List is far too broad, is riddled with errors, and lacks meaningful safeguards.<sup>44</sup> In December 2005, the director of TSA’s Redress Office admitted that over 30,000 people had wrongly matched names on the list since September 11, 2001.<sup>45</sup> With the government expecting 31,980 people a year to file reports, backlogs thus seem inevitable.<sup>46</sup>

#### B. Federal Courts

With the unpredictability of the administrative agency redress process, a number of plaintiffs have taken a different route to challenging their potential inclusion on the secretive No-Fly List: bringing suit in a court of law. Such lawsuits are governed by a special review statute, 49 U.S.C. § 46110(a), which grants *exclusive* jurisdiction of final “orders” of TSA to the federal courts of appeals. In pertinent part, § 46110(a) provides,

[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security . . . or the Administrator of the Federal Aviation Administration . . . ) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.<sup>47</sup>

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<sup>42</sup> See Ryan Singel, *How to Get off a Government Watch List*, WIRED.COM, Apr. 16, 2007, <http://www.wired.com/politics/onlinerights/news/2007/04/watchlist2>.

<sup>43</sup> See Posting of Ryan Singel to Wired Blog Network, <http://blog.wired.com/27bstroke6/2007/08/reporter-visits.html> (Aug. 30, 2007, 15:04:51 EST) (“Reporter Visits Terror Watch List Center, Prevented from Seeing Map of Targets in America”).

<sup>44</sup> See Egelko, *supra* note 7.

<sup>45</sup> See Ramasastry, *supra* note 41.

<sup>46</sup> See Posting of Ryan Singel to Wired Blog Network, [http://blog.wired.com/27bstroke6/2007/01/unified\\_but\\_unc.html](http://blog.wired.com/27bstroke6/2007/01/unified_but_unc.html) (Jan. 5, 2007, 17:05:27 EST) (“Unified (but Uncomprehensive) Watchlist Redress System Announced”).

<sup>47</sup> 49 U.S.C. § 46110(a) (2006). 49 U.S.C. § 46110(c) further states that “[w]hen the peti-

Accordingly, if a challenged policy is an “order” issued by TSA within the meaning of the statute or, in other words, “provides a definitive statement of [TSA’s] position, has a direct and immediate effect on the day-to-day business of the party asserting wrongdoing, and envisions immediate compliance with its terms,”<sup>48</sup> then the plaintiff can only file suit in the federal courts of appeals.<sup>49</sup>

Most courts have held that the No-Fly List is an “order” of TSA, and thus challenges to possible inclusion on the secret watch list are barred under § 46110(a) from any court other than federal courts of appeals. For example, in *Green v. TSA*,<sup>50</sup> the district court held that it lacked jurisdiction under § 46110(a) to decide a suit challenging the constitutionality of the implementation and maintenance of the No-Fly List.<sup>51</sup> Explaining that the Security Directives creating the No-Fly List “provide a definitive statement of the TSA position and have a direct and immediate effect on persons listed on the No-Fly List, barring travel on commercial aircraft,” the district court classified the No-Fly List as an “order” of TSA, which precluded the court from hearing the case under § 46110(a).<sup>52</sup> The plaintiffs’ only remedy, the district court explained, was thus in the court of appeals.<sup>53</sup> Furthermore, in *Thomson v. Stone*,<sup>54</sup> the district court held that the statutes and regulations governing TSA’s security and screening procedures at the airport were an “order” of TSA within the meaning of § 46110(a), and thus “jurisdiction is solely with the court of appeals.”<sup>55</sup>

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tion is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.” 49 U.S.C. § 46110(c).

<sup>48</sup> *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998) (quotation omitted).

<sup>49</sup> See generally *Foster v. Skinner*, 70 F.3d 1084 (9th Cir. 1995) (holding that the district court lacks jurisdiction over pilot’s allegations of specific mistreatment regarding Federal Aviation Administration’s (“FAA”) revocation and reinstatement of flight privileges since the statute vests exclusive jurisdiction in court of appeals to review claims regarding final agency actions by FAA, National Transportation Safety Board, or Department of Transportation); cf. *Bd. of Supervisors v. McLucas*, 410 F. Supp. 1052 (D.D.C. 1976) (finding that the Secretary of Transportation’s decision to allow operation of certain supersonic aircraft in United States is an “order” within the meaning of 49 U.S.C. § 1486 and is reviewable exclusively by the court of appeals).

<sup>50</sup> *Green v. TSA*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005).

<sup>51</sup> *Id.* at 1125.

<sup>52</sup> *Id.* at 1124–25.

<sup>53</sup> *Id.* at 1125.

<sup>54</sup> *Thomson v. Stone*, No. Civ.A. 05CV70825DT, 2006 U.S. Dist. LEXIS 13200 (E.D. Mich. Mar. 27, 2006).

<sup>55</sup> *Id.* at \*14–16. In the related case of *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), the plaintiff complained about a security directive that required airline operators to enforce an identification policy mandating that airline passengers present identification or be a “selectee” for additional screening. Classifying the security directive as an “order” of TSA because TSA

Although § 46110(a) allows plaintiffs to bring suit and vindicate their rights in a court of law, there are a number of disadvantages to disbarment from bringing such suits in a federal *district* court. In a district court, or the trial court of the federal court system, individual plaintiffs can demand information from the government by subpoenaing documents regarding the composition of the No-Fly List, calling witnesses, presenting evidence on why they should not be included on the No-Fly list, and presenting their cases to a jury.<sup>56</sup> Considering that passengers lack information about the composition of the No-Fly List, it is extremely difficult for individuals to challenge their inclusion in the database without the aid of such investigatory procedures.

On the other hand, the requirement that lawsuits challenging the No-Fly List be filed solely in a court of appeals does not allow for the development of a factual record because courts of appeals cannot hear evidence.<sup>57</sup> Furthermore, there is no administrative record for the court of appeals to review because no notice-and-comment procedures are implemented and no hearing before an administrative law judge is held when a particular name is placed on the No-Fly List by an administrative agency.<sup>58</sup>

In effect, the courts of appeals thus act as a shield over the administrative agencies, protecting them from the mandatory disclosure of information that is integral to a successful challenge of the secret database. This frustrating conundrum leaves No-Fly List passengers with only one viable option: to challenge the constitutionality of the order itself.<sup>59</sup> These constitutional challenges, however, have not been

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implemented and maintained the security directive, the security directive provided a definitive statement of TSA's position by detailing the policy and the procedures by which it must be effectuated, the directive had an immediate and direct effect on the daily business of the party asserting wrongdoing, and the security directive envisioned immediate compliance, the Ninth Circuit held that § 46110(a) gave the circuit court exclusive jurisdiction over the challenge. *See id.* at 1131–33.

<sup>56</sup> *See* Egelko, *supra* note 7. Although Rule 26 of the Federal Rules of Civil Procedure would undoubtedly allow a plaintiff to subpoena pretrial the government for relevant documents in federal district court, it should be noted that the government can claim the subpoenaed documents are privileged under Rule 26(b)(5) or request a protective order under Rule 26(c). FED. R. CIV. P. 26. It is thus possible that not all documents relevant to the case will be available to the plaintiff or court even at the trial level.

<sup>57</sup> *See supra* note 7 and accompanying text.

<sup>58</sup> This was the case in *Ibrahim v. DHS*, where there was no administrative record for the Ninth Circuit to review on appeal. *See Ibrahim v. DHS*, 538 F.3d 1250, 1256 (9th Cir. 2008); *see also* 49 U.S.C. § 114(l)(2)(A) (2006).

<sup>59</sup> *See* Posting of Ryan Singel to Wired Blog Network, <http://blog.wired.com/27bstroke6/2008/08/watch-listed-1.html> (Aug. 20, 2008, 12:20:36 EST) (“Watch-Listed Fliers Can Sue, Appeals Court Rules”). Even if there were an administrative record for the court of appeals to

successful and instead have, in essence, granted administrative agencies immunity from public accountability<sup>60</sup> . . . that is, until the landmark case of *Ibrahim v. DHS*.

#### IV. *Challenging the No-Fly List in District Court: Ibrahim v. DHS*

Almost seven years after the September 11th terrorist attacks cleared the way for the creation and implementation of the No-Fly List, the Court of Appeals for the Ninth Circuit handed down the landmark decision of *Ibrahim v. DHS*, which enables individuals to file suit in federal trial courts to contest their likely inclusion on the nation’s secret antiterrorism watch list.<sup>61</sup> By taking into consideration administrative agency structure to provide a legal pathway for No-Fly List passengers to vindicate their rights, the Ninth Circuit in *Ibrahim*, unlike previous district and circuit courts, correctly interpreted the special review statute.<sup>62</sup>

*Ibrahim v. DHS* involved Rahinah Ibrahim, a doctoral student in architecture at Stanford University, who was stopped at a United Airlines counter in San Francisco in January 2005 after an employee spotted her name on the No-Fly List.<sup>63</sup> As a result, Ibrahim was prevented from boarding her flight, handcuffed in front of her fourteen year-old daughter, and held in custody for two hours before finally being released by orders of the FBI.<sup>64</sup> Ibrahim subsequently brought suit to challenge her alleged inclusion on the No-Fly List.<sup>65</sup>

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review, it is bound to be skimpy. See Florence, *supra* note 40, at 2155–59 (stating that the secrecy of administering the No-Fly List leaves many questions related to its maintenance unanswered).

<sup>60</sup> For instance, the plaintiffs in *Green v. TSA*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005), brought suit against TSA to challenge the agency’s “adoption, maintenance, dissemination, administration and management” of the No-Fly List on numerous grounds. *Id.* at 1122. The federal district court granted TSA’s motion to dismiss for lack of subject matter jurisdiction on almost all claims, however, because the “Security Directives are ‘orders’ for the purposes of § 46110(a), and the courts of appeals have exclusive jurisdiction over [p]laintiffs’ claims relating to them. Thus, to the extent these Security Directives establish a No-Fly List of persons who are prohibited from flying . . . this Court has no subject matter jurisdiction.” *Id.* at 1125 (citation omitted). Although the *Green* court did consider the plaintiffs’ Fifth Amendment Due Process claim because it concerned clearance procedures that were not “orders” within the meaning of § 46110, the court nevertheless dismissed the claim because the plaintiffs did not establish the deprivation of a liberty interest under the Fifth Amendment. *Id.* at 1125, 1130.

<sup>61</sup> *Ibrahim*, 538 F.3d at 1254–55 (finding the district court has jurisdiction to review “orders” by TSC to add names to the No-Fly List).

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* at 1253.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* at 1253–54.

The Ninth Circuit's decision in *Ibrahim* hinged on the interpretation of the jurisdictional statute, 49 U.S.C. § 46110(a).<sup>66</sup> Before the case was appealed to the appellate court, the lower court concluded that it lacked jurisdiction to consider Ibrahim's claims against the federal government because the No-Fly List was an "order" of TSA under the ambit of § 46110(a).<sup>67</sup> In addition, the lower court rejected Ibrahim's argument that § 46110(a) did not apply because TSC, rather than TSA, maintained the names on the No-Fly List.<sup>68</sup> "This argument ignores the reality of administrative-agency operations," the court opined, as "TSA, in fulfilling this Congressional mandate, may rely on outside agencies to assist with implementation of its security directives."<sup>69</sup> The lower court thus held that because TSA bore the ultimate responsibility for the No-Fly List's implementation, the case had to be filed in the court of appeals because the No-Fly List was an "order" issued by TSA.<sup>70</sup>

In a split decision, however, the majority of a three-judge panel in the U.S. Court of Appeals for the Ninth Circuit reversed the lower court's ruling.<sup>71</sup> Finding that TSC, and not TSA, is responsible for compiling the list of names ultimately placed on the No-Fly List, the Ninth Circuit held that the special jurisdictional statute, § 46110(a), did not come into play.<sup>72</sup> Rather, because TSC is an administrative agency under the FBI, which does not have a special review statute governing judicial challenges to its orders, TSC can be sued in a federal trial court unlike most other federal agencies.<sup>73</sup> The *Ibrahim* court thus concluded that "[b]ecause putting Ibrahim's name on the No-Fly List was an 'order' of an agency *not* named in section 46110, the district court retains jurisdiction to review that agency's order under the [Administrative Procedure Act]."<sup>74</sup>

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<sup>66</sup> See *id.* at 1254–56.

<sup>67</sup> *Ibrahim v. DHS*, No. C 06-00545 WHA, 2006 U.S. Dist. LEXIS 60978, at \*16–24 (N.D. Cal. Aug. 16, 2006), *aff'd in part, rev'd in part*, 538 F.3d 1250 (9th Cir. 2008).

<sup>68</sup> See *id.* at \*21.

<sup>69</sup> *Id.*

<sup>70</sup> See *id.* at \*17–20.

<sup>71</sup> See *Ibrahim*, 538 F.3d at 1256.

<sup>72</sup> *Id.* at 1254–56.

<sup>73</sup> See *id.* at 1254–55.

<sup>74</sup> *Id.* at 1255. Pursuant to 28 U.S.C. § 1331, a district court has original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States, which includes an agency's order under the Administrative Procedure Act. See 28 U.S.C. § 1331 (2006); see also *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 56 (1993).

To further support its holding, the Ninth Circuit panel also stated that its interpretation of § 46110(a) is consistent with common sense. As Chief Judge Alex Kozinski rationalized:

Just how would an appellate court review the agency’s decision to put a particular name on the list? There was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know, there is no administrative record of any sort for us to review. So if any court is going to review the government’s decision to put Ibrahim’s name on the No-Fly List, it makes sense that it be a court with the ability to take evidence.<sup>75</sup>

Lastly, despite the dissent’s opposition, the Ninth Circuit in *Ibrahim* rejected the argument that, even if the decision to put Ibrahim’s name on the No-Fly List were not an “order” of TSA, the decision was “inescapably intertwined” with that agency’s orders and therefore still reviewable under § 46110(a).<sup>76</sup> The *Ibrahim* court noted that because the statute does not mention “intertwining” in its language or structure, it would be unreasonable for the court to interpret otherwise.<sup>77</sup> In addition, the Ninth Circuit distinguished two cases where claims were found to be “inescapably intertwined” with an agency’s order and thus subject to circuit court jurisdiction because, unlike in *Ibrahim*, “an agency named in section 46110 issued the order complained of” in those cases.<sup>78</sup>

In sum, the Ninth Circuit’s procedural ruling in *Ibrahim* effectively provides a legal pathway for passengers to protect their rights from infringement by federal administrative agencies.

#### V. Adopting the Ibrahim Interpretation in Courts Nationwide

Other federal appellate courts should adopt the interpretation of § 46110(a) set forth in *Ibrahim* because the Ninth Circuit properly interpreted the jurisdictional statute based on current agency structure, exclusive appellate review strips passengers of any meaningful opportunity to be heard, and allowing for a judicial trial preserves the government’s bedrock system of checks and balances.

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<sup>75</sup> *Ibrahim*, 538 F.3d at 1256 (citation omitted).

<sup>76</sup> *See id.* at 1255–56.

<sup>77</sup> *See id.* at 1255.

<sup>78</sup> *See id.* at 1256. The court distinguished *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), and *Foster v. Skinner*, 70 F.3d 1084 (9th Cir. 1995), as cases in which the “order” complained of was issued by an agency named in § 46110(a) rather than by some other agency as was the situation in *Ibrahim*. *See Ibrahim*, 538 F.3d at 1256.

First, federal courts of appeals outside of the Ninth Circuit should adopt the *Ibrahim* interpretation of § 46110(a) because the Ninth Circuit correctly took into consideration complex agency organization and structure in construing the jurisdictional statute. The No-Fly List indeed is an order of TSC, which is solely responsible for compiling and maintaining the names on the watch-list database.<sup>79</sup> While administrative agency structure can sometimes be a bureaucratic jungle, the assignment of responsibility for the No-Fly List is clear: TSC *makes* the list, and TSA *enforces* it.<sup>80</sup> Thus the No-Fly List can only be considered an “order” of TSA to the extent that criminal laws can be considered an “order” of the police department or the country’s decision to go to war can be considered an “order” of the country’s military troops. Only by taking into consideration agency organization and structure, as did the Ninth Circuit in *Ibrahim*, can a court properly carry out Congress’s intent in passing the jurisdictional statute.

Not only is the *Ibrahim* interpretation of § 46110(a) consistent with agency structure and organization, but it also takes into consideration the lack of a factual record for the court of appeals to review.<sup>81</sup> Indeed, appellate courts are not able to consider an administrative record detailing the agency’s decision to place a passenger on the No-Fly List in any challenge thereto, and appellant passengers are denied the ability to subpoena documents or call witnesses at the appellate court level.<sup>82</sup> Such a lethal combination thus renders appellate review meaningless because a court can only evaluate the constitutionality of the passengers’ claims, which has consistently been decided in favor of the government.<sup>83</sup> Moreover, legal remedies within DHS have also proven ineffective to vindicate passenger rights.<sup>84</sup>

Impeding the ability of plaintiffs to demonstrate through the court system an injustice in the law is a dangerous prospect that should not be taken lightly. For instance, if a U.S. citizen were prevented from traveling across state lines by a law enforcement officer who falsely identified the citizen as a terrorist and subjected that citizen to interrogation and detention as a result, the citizen would likely be able to file a formal complaint against the officer, demand information about why the officer believed the citizen was a terrorist, and file

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<sup>79</sup> See *supra* Part I.

<sup>80</sup> *Id.*

<sup>81</sup> See *Ibrahim*, 538 F.3d at 1256.

<sup>82</sup> See *supra* Part III.B.

<sup>83</sup> See *supra* notes 59–60 and accompanying text.

<sup>84</sup> See *supra* Part III.A.



suit against the officer in a trial court for violation of the citizen's constitutional right to interstate travel without due process of law.<sup>85</sup> Why should that citizen's meaningful opportunity to be heard be denied when the same scenario takes place in an airport? Indeed, passengers who are falsely identified as terrorist suspects and face humiliating situations when they fly should also be afforded a meaningful opportunity to be heard.

Lastly, federal appellate courts should accept *Ibrahim's* reading of the jurisdictional statute because the principles of our Constitution, including its intricate system of checks and balances with regard to the three branches of government,<sup>86</sup> must remain in effect even at times when the country's national security is threatened. In a post-September 11th world, the judicial branch should nevertheless serve as an independent and neutral check on the power exercised by the executive branch, which includes TSA, TSC, and other administrative agencies.<sup>87</sup> By allowing individuals to demand information from administrative agencies about their likely inclusion on the No-Fly List, the federal district court can remain an effective check on the power exercised by the executive branch of government and allow individuals to vindicate their rights before a court of law. The *Ibrahim* deci-

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<sup>85</sup> See *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law . . ."); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867) (upholding the right of U.S. citizens to travel between states); see also *Bell v. Burson*, 402 U.S. 535 (1971) (concluding that a motorist's interest in his driver's license is part of the pursuit of livelihood and therefore required a meaningful hearing prior to suspension under the Due Process Clause).

<sup>86</sup> In addition to stating the powers of each of the three branches of government, the U.S. Constitution creates a system of direct checks and balances, such as the President's veto power. See, e.g., John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 512 (2001). The Framers believed that incorporating such structural provisions into the U.S. Constitution would preserve liberty by checking the power of each branch as well as of the government as a whole. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 268 (2000).

<sup>87</sup> See Peter Raven-Hansen, *Security's Conquest of Federal Law Enforcement*, in IN DEMOCRACY'S SHADOW: THE SECRET WORLD OF NATIONAL SECURITY 217, 233 (Marcus G. Raskin & A. Carl LeVan eds., 2005) ("The September 11 attacks and the threat of worse have posed a challenge which may justify the adoption of preventive measures which will transform traditional law enforcement and rewrite the rules governing military and intelligence operations at home. But under the rule of law, that transformation should be effected only by laws publicly and deliberately made by our elected representatives on full and current information, checked by courts in appropriate cases, continuously overseen by the legislature, and, to the extent consistent with legitimately protecting sources and methods and the small amount of information which is truly properly classified, reported by the media.").

sion is thus consistent not only with agency organization and common sense but also with the government's framework in general.

### *Conclusion*

Consistent with *Ibrahim*, appellate courts outside of the Ninth Circuit should allow plaintiffs to subpoena documents, introduce evidence, and present their cases before juries in federal trial courts because administrative agency structure dictates the proper interpretation of the special review statute, confining challenges to the courts of appeals prevents passengers from vindicating their rights in a court of law, and trial courts can act as independent checks on administrative agency power. Passengers should thus be able to challenge their likely inclusion on the No-Fly List in federal district courts under the *Ibrahim* interpretation of the jurisdictional statute.

Although TSA has justified its covert programs and nondisclosure policy on the grounds of national security, the No-Fly List's insulation from public challenge in effect creates another security threat by diminishing individual rights. Indeed, the preservation of the checks and balances encompassed in our Constitution, as well as the individual rights guaranteed by the Bill of Rights, is most important at a time of national insecurity. Defending against an enemy is no excuse to abandon our democratic values and due process.