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## Airline Terrorism: The Effect of Tightened Security on the Right to Travel

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# AIRLINE TERRORISM: THE EFFECT OF TIGHTENED SECURITY ON THE RIGHT TO TRAVEL

HEATHER E. RESER

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## I. INTRODUCTION

AT ONE TIME, airline travel was reserved for the wealthy and the businessman.<sup>1</sup> Today, commercial air travel is a mainstay of modern society.<sup>2</sup> In fact, approximately "1.5 million passengers board 22,000 flights daily on U.S.-based carriers."<sup>3</sup> In one year alone, "[o]ver 450 million passengers board 6.5 million flights annually at American Airports."<sup>4</sup> Yet, for those with the means and desire to take advantage of the popularity and the availability of air travel, this ease of access creates an opportunity for terrorist groups. Airline deregulation and the resulting competition has made it possible for practically anyone to board a commercial airliner for either a domestic or an international flight. Therefore, there is ample opportunity for terrorist attacks on both domestic and international travelers.<sup>5</sup>

Recent terrorist attacks, including Pan Am Flight 103, the bombing of the World Trade Center in New York City, and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, have made the threat to American citizens very real. Public opinion polls reveal that almost sixty percent of Americans surveyed said that they are "very concerned that terrorists will commit acts of violence in the [United States], for instance, and 33% say they are somewhat concerned."<sup>6</sup> Even though the National Transportation Safety Board recently made public its find-

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<sup>1</sup> See Sanford L. Dow, *Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward*, 58 J. AIR L. & COM. 1149 (1993).

<sup>2</sup> See *id.*

<sup>3</sup> Jayne Clark, *Crash Makes Frequent Flyer Think Twice*, PITTSBURGH POST-GAZETTE, July 28, 1996, at F1.

<sup>4</sup> Dow, *supra* note 1.

<sup>5</sup> See *id.* at 1149-50.

<sup>6</sup> Gerald F. Seib, *Terrorism Fear Running Deep, U.S. Poll Finds Effect of Oklahoma Crisis Exceeds Other Attacks; Clinton Rating Rises*, WALL ST. J., Apr. 27, 1995, at A4.

ings that the crash of TWA Flight 800 was the result of mechanical failure, this has done little to quell these concerns.<sup>7</sup>

The commercial aviation industry in particular has felt the impact of such attacks. Historically, commercial aircraft have been targets of terrorism. In 1931, an aircraft in Peru was hijacked, marking the first recorded incidence of terrorism involving an airplane.<sup>8</sup> The first act of terrorism against an United States air carrier occurred on November 1, 1955. An United Airlines jet exploded eleven minutes after takeoff when a dynamite bomb detonated in a baggage compartment, killing thirty-nine passengers and five crew members.<sup>9</sup> Worldwide, between 1949 and 1990, there were ninety-five documented explosions aboard commercial aircrafts, resulting in over 2100 deaths.<sup>10</sup> Furthermore, it is clear that the threat continues today. Recently, an Ethiopian airliner was hijacked by a group of intoxicated terrorists who refused to allow the aircraft's pilot to land the airplane in order to refuel.<sup>11</sup> The aircraft eventually ran out of fuel and crashed into the Indian Ocean, killing 123 people.<sup>12</sup>

In response to this growing threat to American citizens and the public concern that has increased exponentially, the government and the aviation industry have begun to take measures to prevent further tragedy. These measures, in the form of new legislation and new regulations, have tightened security and imposed new travel restrictions in the aviation industry.<sup>13</sup>

With the increased security and restrictions placed on travel, the recognized constitutional right to travel is restricted. The United States Supreme Court has recognized a right to inter-

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<sup>7</sup> See United States Department of Transportation, Fact Sheet-FAA Actions on Aviation Safety and Security Relating to the TWA 800 Accident (Dec. 8, 1997) (News Release).

<sup>8</sup> See Humphrey G. Dawson, *Civil Aviation, Hijacking and International Terrorism: An Historical and Legal Review*, 15 INT'L. BUS. LAW. 57, 58 (1987).

<sup>9</sup> See REPORT OF THE PRESIDENT'S COMMISSION ON AVIATION SECURITY AND TERRORISM, at 160 (1990).

<sup>10</sup> See *Foreign Airport Security: Hearing Before the Committee on Foreign Affairs*, 101st Cong. 197-98 (1989).

<sup>11</sup> See *3 Hijackers Drunk as Jet Crash-Lands: Witnesses Tell Terror on Ethiopian Plane*, CHI. TRIB., Nov. 25, 1996, at 3.

<sup>12</sup> See *id.*

<sup>13</sup> See Todd S. Purdum, *Clinton Signs a Wide-Ranging Measure on Airport Security*, N.Y. TIMES, Oct. 10, 1996, at B3; James Ott, *Security Rates "Top Priority:" Terrorism Threat Drive Administration Plan for Bomb Detectors, Staffing and a Security "Partnership"*, AVIATION WK. & SPACE TECH., Sept. 16, 1996, at 36.

state and international travel.<sup>14</sup> Furthermore, airlines have a duty to provide service to those who pay for such services.<sup>15</sup>

However, despite recognition of this right to travel, limitations on the right have been upheld. For example, restrictions may be placed on the right to travel when national security concerns are at issue.<sup>16</sup> Furthermore, as aviation has become an increasingly "popular" target of terrorists, certain restrictions aimed at reducing this threat have been upheld as well.<sup>17</sup>

While government restrictions on the right to travel are carefully scrutinized, self-initiated airline restrictions are not carefully policed. As a result, the aviation industry tends to have unchecked discretion in decisions that restrict an individual's right to travel.<sup>18</sup> This Comment contends that the government and the aviation industry alike must strike a delicate balance between the constitutional right to travel and the necessity for increased security.

Other measures can be taken to protect air travel that can achieve all-important objectives: protecting United States citizens, keeping the aviation industry financially viable, and protecting the right to travel. Terrorism has severely taxed the resources of the airlines. In order to keep airlines financially viable, it will be shown that efforts to protect American citizens must be a partnership between the airline industry and the government.<sup>19</sup> Until recently, the financial burden has been placed, for the most part, on the airline industry.<sup>20</sup> However, new legislation recently passed calls for more of a partnership between government and the aviation industry.<sup>21</sup> Thus, in order to both keep the airlines financially viable and protect American citizens, this "partnership" must be implemented and expanded.

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<sup>14</sup> See *Haig v. Agee*, 453 U.S. 280, 306 (1981) (recognizing an international right to travel); *Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969) (recognizing a right to interstate travel).

<sup>15</sup> See 49 U.S.C. § 1374(a) (1988) (requiring provision of "safe and adequate service").

<sup>16</sup> See *Haig*, 453 U.S. at 309 (holding that passport revocation of individuals threatening and carrying out activities that threatened national security was appropriate).

<sup>17</sup> See 49 U.S.C. § 1511 (1994).

<sup>18</sup> See Katherine Warner, *You Can't Get There From Here: Travel Restrictions and the Airlines*, 58 J. AIR L. & COM. 345, 366-67 (1992).

<sup>19</sup> See Ott, *supra* note 13, at 36.

<sup>20</sup> See *id.*

<sup>21</sup> See Purdum, *supra* note 13, at B3.

Furthermore, new technology becomes available with increasing speed.<sup>22</sup> However, as technology is not the only answer, human effort must be accorded the proper focus. Therefore, the bottom line is that until some of the new technology is available and in place, tightened security must continue with a watchful eye toward protection of the right to travel.

## II. RESPONSE TO INCREASED TERRORIST THREATS TO AVIATION

Commercial airlines have ushered in an era of unprecedented movement between the people of our nation and other nations alike.<sup>23</sup> This movement has been accompanied by a dramatic increase in terrorist attacks on both domestic and international flights. Most recently, in 1988, 270 died when Pam Am Flight 103 was bombed.<sup>24</sup> Government response has been on both an international and domestic level, with changes coming regularly.

### A. HISTORICAL BACKGROUND

#### 1. *International Response*

The transportation industry, and particularly the airline industry, has historically attracted terrorist attacks. As a result, the international community has come to terms with the aviation industry's vulnerability.<sup>25</sup> Therefore, the world has seen the international community take measured steps toward the protection of the industry.<sup>26</sup>

Piracy was the earliest form of terrorist attack against international transportation.<sup>27</sup> At the time, there was an understanding in the international community that pirates should be captured and brought to justice in the nation with territorial jurisdiction in each particular instance.<sup>28</sup>

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<sup>22</sup> See David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1 (1996).

<sup>23</sup> See Laurie M. McQuade, *Tragedy as a Catalyst for Reform: The American Way?*, 11 CONN. J. INT'L L. 325, 327 (1996).

<sup>24</sup> See Aphrodite Thevos Tsairis, *Lessons of Lockerbie*, 22 SYRACUSE J. INT'L L. & COM. 31 (1996).

<sup>25</sup> See R.I.R. Abeyratne, *Attempts at Ensuring Peace and Security in International Aviation*, 24 TRANSP. L.J. 27, 28 (1996).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*; see also Gary N. Horlick, *The Developing Law of Air Hijacking*, 12 HARV. INT'L L.J. 33, 65 (1971).

<sup>28</sup> See Abeyratne, *supra* note 25, at 29.

The year 1968 has been recognized as “the beginning of the modern era of international terrorism.”<sup>29</sup> The years following saw an unprecedented increase in hijackings, bombings, and other terrorist activity.<sup>30</sup> Hijacking, or “air piracy,” became a serious threat to international air safety.<sup>31</sup> The international community was forced to address this growing problem, and in doing so, developed a system that would govern “the protection of passengers traveling beyond their own country’s borders.”<sup>32</sup> The result has been an ongoing attempt to establish “uniform rules of international travel.”<sup>33</sup>

a. The Warsaw Convention

The Convention for the Unification of Certain Rules Relating to International Transportation by Air was signed in 1929.<sup>34</sup> This international treaty’s purpose was to protect the airline industry at a time when injury or loss was thought to be a result of imperfect airline technology, rather than advanced bomb technology.<sup>35</sup> Although the Warsaw Convention dealt more with the economic protection of the aviation industry in the event of an accident and is outdated in its treatment of innocent passengers, it is the first example of international cooperation in the airline industry. Later, the international community would have to deal with the terrorist attacks that were occurring with more and more frequency.

b. The Hague Protocol

The Hague Protocol modified the Warsaw Convention.<sup>36</sup> Signed in 1955, the main objectives of the Hague Protocol were to increase the limit of damages that passengers could recover,

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<sup>29</sup> Shirleyce Manning, *The United States’ Response to International Air Safety*, 61 J. AIR L. & COM. 505, 507 (1996) (citing JEFFERY D. SIMON, *THE TERRORIST TRAP: AMERICA’S EXPERIENCE WITH TERRORISM* 97 (1994)).

<sup>30</sup> See Grant Wardlaw, *State Response to International Terrorism: Some Cautionary Comments*, in CURRENT PERSPECTIVES ON INTERNATIONAL TERRORISM 206-07 (Robert O. Slater & Michael Stohl eds., 1988).

<sup>31</sup> See Manning, *supra* note 29, at 507.

<sup>32</sup> McQuade, *supra* note 23, at 327.

<sup>33</sup> *Id.*

<sup>34</sup> Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (codified at 49 U.S.C. § 40105 (1996)) [hereinafter Warsaw Convention].

<sup>35</sup> See N.J. Strantz, *From Technology to Teamwork: Aviation Security Reform Since Pan Am Flight 103*, 3 ALB. L.J. SCI. & TECH. 235, 240 (1993).

<sup>36</sup> See LAWRENCE B. GOLDBIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 6 (1988).

provide for costs of litigation, and make the Warsaw Convention applicable to agents of commercial air carriers.<sup>37</sup>

c. The Geneva Convention on the High Seas

The Geneva Convention on the High Seas was the first international attempt to equalize the rules applying to piracy at sea and in the air.<sup>38</sup> As in the earlier days, the Convention placed responsibility on the various nations to "co-operate" to the fullest extent in the containment of piracy either by prosecution or extradition.<sup>39</sup> Additionally, the Convention modified its definition of piracy to include piracy by aircraft for the first time.<sup>40</sup>

d. The Tokyo Convention

The Tokyo Convention was the first substantial effort at dealing with terrorism in the air, and resulted in the first international treaty addressing hijacking.<sup>41</sup> The provisions of the treaty were primarily concerned with jurisdiction over criminal acts committed in the air.<sup>42</sup>

Although the Tokyo Convention did "get the ball rolling," it has endured harsh criticism. Most of the criticism centers around the Convention's failure to list any offenses that state parties are required to suppress or to impose any obligations involving the prosecution or extradition of offenders.<sup>43</sup> In other words, a Contracting State under the Convention is not required to punish an offender upon leaving the aircraft. Instead, the state must set the offender free and let such an individual to proceed to any destination if the State does not choose to extradite or prosecute.<sup>44</sup>

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<sup>37</sup> See *id.*

<sup>38</sup> See Abeyratne, *supra* note 25, at 29.

<sup>39</sup> See *id.* at 30.

<sup>40</sup> See HENRY REIFF, *THE UNITED STATES AND THE TREATY LAW OF THE SEA* 86-87 (1959).

<sup>41</sup> See *The Conventions on Offenses and Certain Other Acts Committed on Board Aircraft*, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter *Tokyo Convention*]; see also Abraham Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part I: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381 (1974); Haro F. Van Panhuys, *Aircraft Hijacking and International Law*, 9 COLUM. J. TRANSNAT'L L. 1 (1970).

<sup>42</sup> See JOSEPH J. LAMBERT, *TERRORISM AND HOSTAGES IN INTERNATIONAL LAW—A COMMENTARY ON THE HOSTAGES CONVENTION* 1979, at 51 (1990).

<sup>43</sup> See *id.*

<sup>44</sup> See Abeyratne, *supra* note 25, at 30.



As a result, the Tokyo Convention left much to be desired with regard to the international legal system. None of the contracting nations made any attempt to make aircraft hijacking illegal under its laws.<sup>45</sup> As a result, many nations had no provision for harsh punishment of such an offense, much less a provision for extradition or prosecution.<sup>46</sup> It was clear that the international community would have to continue to try to improve on the existing law with regard to terrorist attacks directed at the commercial aviation industry.

e. The Hague Convention

The Hague Convention defined the offense of hijacking, or "unlawful seizure of an aircraft" as

[a]ny person who on board an aircraft in flight:

(a) [u]nlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act commits an offense.<sup>47</sup>

Therefore, since the act must be committed by a person on board an aircraft that is "in flight," this definition excludes offenses committed by individuals not on board the aircraft in flight. As a result, individuals sabotaging an aircraft but remaining on the ground are not included in this definition. The Hague Convention, therefore, seems to suffer the same inadequacies as the Tokyo Convention. Thus, although the Hague Convention continued to move toward the goal of clearly defining and punishing offenses against the commercial aviation industry, it was clear that significant improvement was still required.

f. The Montreal Convention

The Montreal Convention, signed into law in 1971, is perhaps the best effort to contain the growing international terrorism

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<sup>45</sup> See *id.* at 42.

<sup>46</sup> See *id.*

<sup>47</sup> The Convention for the Multilateral Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133; see also S.Z. Feller, *Comment on "Criminal Jurisdiction Over Aircraft Hijacking,"* 7 ISRAEL L. REV. 207, 211 (1992); I.D. Johnston, *Legislation,* 5 NEW ZEALAND L. REV. 8, 307 (1973); Sami Shubber, *Aircraft Hijacking Under the Hague Convention 1970—a New Regime,* 22 INT'L & COMP. L.Q. 687, 725 (1973).

problem.<sup>48</sup> It addressed the shortcomings of both the Tokyo Convention and the Hague Convention. Its objectives are best described as follows:

The primary aim of the Montreal Convention was to arrive at a generally acceptable method of dealing with alleged perpetrators of acts of unlawful interference with aircraft. In general, the nations represented at the Montreal [Convention] agreed that acts of sabotage, or violence and related offenses interfering with the safety and development of international civil aviation constituted a global problem which had to be combated collectively by concerned nations of the international community. A multilateral international convention had to be adopted which extended both the scope and efficacy of national legislation and provided the legal framework for international co-operation in the apprehension, prosecution and punishment of alleged offenders.<sup>49</sup>

The Montreal Convention took significant steps toward remedying the shortcomings of its predecessors. Notwithstanding this effort, some problems remained. Thus, it is clear that although much work has been done with regard to international treaties defining terrorist acts, there is more to be done.

g. The Bonn Declaration

In 1978, the leaders of the governments of Canada, France, the federal Republic of Germany, Italy, Japan, the United Kingdom of Great Britain and Ireland, and the United States signed the Bonn Declaration.<sup>50</sup> The purpose of the declaration was to give the contracting nations the ability to act against nations who either refused to punish or even encouraged terrorist acts against commercial aircraft.

The Bonn Declaration, unlike the prior attempts to control international terrorism, attempted to add a punitive element directed at nations not complying with extradition or prosecution

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<sup>48</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 115 [hereinafter Montreal Convention].

<sup>49</sup> Abraham Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention*, 14 COLUM. J. TRANSNAT'L L. 268, 278-79 (1975).

<sup>50</sup> The Bonn Agreement on Hijacking of 1978, 17 I.L.M. 1285 (1985) [hereinafter Bonn Declaration]. See Mark E. Fingerman, *Skijacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations*, 10 CAL. W. INT'L L.J. 123, 142 (1980); Hartmut Brosche, *The Arab Oil Embargo and the United State Pressure Against Chile; Economic & Political Coercion & the Charter of the United Nations*, 7 CASE W. RES. J. INT'L L. 3 (1974).

requests. Unfortunately, the agreement was not well-represented, which presented problems of compliance on the part of non-contracting nations. A solution might include elements of the Bonn Declaration and its predecessors, with a greater representation of the international community. Until such an agreement is reached, problems will remain with regard to the punishment of persons committing offenses against the commercial aviation industry.

## 2. *Domestic Response*

The United States government is responsible for those treaties and agreements that govern international travel. In addition, a "domestic system of controls and regulations for airline safety" is in place as well.<sup>51</sup> Although the Department of Transportation currently governs the system, responsibility for the safety of American citizens travelling on commercial airlines has historically been shared by government and the aviation industry. Notwithstanding government involvement, much of the financial burden has been placed on the airlines.

The United States government's response to terrorism, particularly that directed at the aviation industry, has taken two forms. First, the government created the Federal Aviation Administration (FAA). The FAA bears much of the responsibility for the safety of American citizens flying commercial airlines. Second, legislation has been passed periodically in an attempt to deal with terrorism aimed at U.S. citizens.

Much of this legislation has immediately followed terrorist attacks aimed at or affecting U.S. citizens. For instance, following the bombing of Pan Am Flight 103, Congress enacted the Aviation Security Act of 1990.<sup>52</sup> The Aviation Security Act was signed by the President on November 16, 1990, and was designed to enhance civil aviation by providing increased security from terrorism and other criminal acts against passengers of American air carriers.<sup>53</sup>

The FAA, working under the authority of the Department of Transportation, is the government agency responsible for "promoting safe air travel and enforcing security measures affecting

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<sup>51</sup> McQuade, *supra* note 23, at 332.

<sup>52</sup> See Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066.

<sup>53</sup> See 14 C.F.R. §§ 107, 108 (1990).

aircraft and air terminals.”<sup>54</sup> The administrator of the FAA has the power to carry out those duties and powers of the Secretary of Transportation that relate to aviation safety.<sup>55</sup>

As international and domestic terrorist attacks have risen throughout the years, the FAA’s focus has turned toward improving security measures on both international and domestic flights. Procedures have been implemented that require any domestic air carrier flying overseas to first obtain FAA approval.<sup>56</sup> In order to obtain such approval, a carrier must implement a program designed to protect its passengers from “acts of criminal violence and air piracy.”<sup>57</sup> These programs must encompass procedures including passenger and baggage screening, airport security, the hiring of law enforcement officers, implementation of an x-ray screening system, employee training, implementation of an explosive detection system to be utilized on international flights, and implementation of a security program designed to deal with bomb threats.<sup>58</sup> The FAA made the screening programs mandatory fixtures at American airports beginning in 1973.<sup>59</sup>

As a result of a finding that the security procedures implemented thus far were inadequate, the FAA established more specific regulations in 1986 designed to afford greater protection.<sup>60</sup> The regulations, entitled the Air Carrier Standard Security Program, mandate that every carrier, with the approval of the relevant airport, enact heightened security measures at airports designated “extraordinary security airports.”<sup>61</sup>

Congress passed various additional acts of legislation with regard to terrorism, usually coming on the heels of a terrorist attack. For example, following the bombing of Pan Am Flight 103, the government took an even closer look at airport security and airline bomb detection measures. Shortly after the bombing, a commission was formed to evaluate the government’s avia-

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<sup>54</sup> Act of Sept. 5, 1961, Pub. L. No. 87-197, §§ (i)-(h), 75 Stat. 466 (current version at 49 U.S.C. § 472 (i)-(m), (o) (1994)); *see also* ROBERT BURKHARDT, *THE FEDERAL AVIATION ADMINISTRATION* 25 (1967).

<sup>55</sup> *See* 49 U.S.C. § 106(g)(A) (1994).

<sup>56</sup> *See* 14 C.F.R. § 108 (1991).

<sup>57</sup> *Id.* § 108.7(a)(1).

<sup>58</sup> *See id.* §§ 108.18, 129.25(e).

<sup>59</sup> *See id.*

<sup>60</sup> *See In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 37 F.3d 804, 813 (2d Cir. 1994), *cert. denied sub nom.*, *Pan Am World Airways v. Pagnucco*, 513 U.S. 1126 (1995).

<sup>61</sup> *Id.*

tion security policies.<sup>62</sup> Following the report of the President's Commission on Aviation Security and Terrorism, President Bush signed the Aviation Security Improvement Act into law.<sup>63</sup> The 1990 President's Commission Report included recommendations and criticisms of almost every facet of the then-existing airline security system. The report called for "greater emphasis on long-term strategic thinking and anticipation of terrorist actions, rather than mere operational reaction to such events."<sup>64</sup>

Furthermore, the report urged that the research and development effort should be "more focused and higher profile."<sup>65</sup> The report called for the use of bilateral and multilateral agreements to "determine and set standards, conduct periodic security assessment, and impose sanctions against foreign airports guilty of noncompliance."<sup>66</sup> Finally, the report called for a "zero tolerance" policy towards terrorism.<sup>67</sup>

The Aviation Security Improvement Act of 1990 incorporated many of the recommendations of the President's Commission. Since the introduction of the Act, no confirmed terrorist acts of the magnitude of Pan Am Flight 103 have been directed at an U.S. aircraft.

Despite the coverage of these programs, it is important to avoid complacency. Although the Act can certainly be viewed as a step in the right direction, there are still significant breaches in security at domestic airports. Furthermore, certain international airports are still lacking in the security measures that have been deemed necessary to the protection of both American and foreign citizens.<sup>68</sup> For example, the airport in Athens, Greece is considered by many to be one of the most dangerous airports in the world. In fact, the following years would see an unprecedented increase in terrorism, particularly that directed at United States citizens.

Following a rash of non-aviation terrorist attacks, the Clinton administration responded with the Omnibus Counter-Terrorism

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<sup>62</sup> See Strantz, *supra* note 35, at 243.

<sup>63</sup> See Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066.

<sup>64</sup> 136 CONG. REC. 16470-78 (1990) (statement of Sen. Lautenberg).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 16478.

<sup>67</sup> Aviation Security Improvement Act of 1990, *supra* note 63.

<sup>68</sup> See Pressler Concerned About TWA Crash Issues, AVIATION DAILY, July 22, 1996, at 110.

Act of 1995.<sup>69</sup> The \$2 billion measure was a result of the increasing acts of terrorism directed at American citizens as well as concerns that security measures at airports were inadequate.<sup>70</sup>

Although there were not any attacks directed at aircraft, there seems to be a notion that terrorism is inextricably linked to foreign citizens, and that by tightening security with regard to the aviation industry, particularly domestic security, that this will afford some protection to American citizens. Recent events, such as the Oklahoma City Bombing, the Atlanta Olympic Park bombing, and the acts of the Unabomber have perhaps opened eyes to the very real specter of domestic terrorism.

The legislation contained provisions authorizing the hiring of 1000 new federal law enforcement personnel nationwide, an increase in the federal penalties for terrorist crimes, and even a provision allowing United States citizens to sue foreign nations for personal injuries caused by terrorist acts.<sup>71</sup>

More recently, the Clinton Administration pushed through an aviation bill that includes a range of new baggage-scanning, passenger-screening, and counter-terrorism measures as part of a "program of stepped-up surveillance at airports."<sup>72</sup> The bill, a result of the findings of the Gore Commission, entitled the Federal Aviation Administration Reauthorization Act, provides for fifty-four baggage screeners to detect explosives, 114 new dog teams to sniff out suspicious baggage, and the use of computer training and testing to instruct baggage inspectors at the nation's busiest airports.<sup>73</sup> The bill further authorizes airlines to upgrade existing computer systems, giving them the ability to better profile passengers with data from existing government lists of suspected terrorists or terrorist traits.<sup>74</sup>

The legislation has good intentions; this much is clear. But this last provision seems almost comical, as one cannot imagine that this can be a realistic vision. The fight against terrorism could be viewed as a technology race, and so far terrorist groups continue to nip at the heels of government change. In other

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<sup>69</sup> S. 735, 104th Cong. (1995). Interestingly enough, the legislation was proposed right before the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995.

<sup>70</sup> See Marcy Gordon, *Senate Passes Anti-Terrorism Bill*, COURIER J., June 8, 1995, at A5.

<sup>71</sup> See *id.*

<sup>72</sup> Purdum, *supra* note 13, at B3.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

words, improved technology on the government's part only encourages the same on the part of terrorist groups, and they have kept up thus far. Therefore, it leads one to wonder whether such provisions are merely means by which the government is trying to soothe American citizens' fears, instead of being a means of attaining a solution.

### III. IMPLICATIONS OF TIGHTENED SECURITY ON THE RIGHT TO TRAVEL

#### A. THE CONSTITUTIONAL RIGHT TO TRAVEL IS RECOGNIZED

Transportation systems, and commercial airlines in particular, have traditionally attracted terrorist attacks. The tightening of security at airports both in the United States and abroad has the goal of discouraging these attacks, but the security measures taken both on the international and domestic levels have another effect: they limit a United States citizen's right to travel.

There exists in the United States a citizen's constitutional right to travel.<sup>75</sup> This right may only be limited in certain circumstances.<sup>76</sup> Therefore, it is important to strike a delicate balance between concerns for the safety of American citizens and this constitutionally recognized right.

##### 1. *Right to International Travel*

Passports have long been necessary for international travel. In *United States v. Laub* the United States Supreme Court held that the passport has since early days been recognized as a "document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers."<sup>77</sup>

Passports, though considered a great convenience for travel, have not always been required for leaving or entering the United States. During the War of 1812, a "travel-control" statute was passed, which required citizens crossing "enemy territory" to carry a passport.<sup>78</sup> Restrictions in essentially the same form were imposed during the Civil War.<sup>79</sup> Although similar legislation

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<sup>75</sup> See *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

<sup>76</sup> See Warner, *supra* note 18, at 346.

<sup>77</sup> 385 U.S. 475, 481 (1967); see also *Kent*, 357 U.S. at 120-21; *Urtetiqui v. D'Arbel*, 34 U.S. (9 Pet.) 692, 699 (1835).

<sup>78</sup> See Warner, *supra* note 18, at 353.

<sup>79</sup> See *id.*

was passed from time to time, regulation of passports was not solidified until 1952.<sup>80</sup> The 1952 legislation mandated that after a prescribed proclamation by the President, it is "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport."<sup>81</sup>

There are several instances in which restrictions on international travel have been challenged.<sup>82</sup> The line of cases documenting these challenges seems to diverge into two distinct lines. One challenges restrictions on who may travel, and the other challenges restrictions on where one may travel.

In *Kent v. Dulles* plaintiff's application for a passport was denied on the grounds that he was a Communist, that he had "a consistent and prolonged adherence to the Communist Party line," and that he refused to sign an affidavit stating whether or not he was a member of the Communist Party.<sup>83</sup> The case came to the Supreme Court after the District of Columbia Circuit Court upheld a State Department regulation that mandated passport denial to members or supporters of the Communist Party.<sup>84</sup>

In *Kent* the United States Supreme Court first discussed the essential nature of the right to travel, holding that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment . . . . Freedom of movement is basic in our scheme of values."<sup>85</sup> In holding that a passport could not be denied on ideological grounds and that *Kent* was thus wrongfully denied a passport, the Court for the first time identified two situations in which passport denial would be appropriate. The Court held that refusal of passports would be appropriate when:

First, questions pertinent to the citizenship of the applicant and his allegiance to the United States [exist]. . . . [or] [s]econd,

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<sup>80</sup> See Pub. L. No. 82-414, 66 Stat. 190 (1952) (codified as amended at 8 U.S.C. § 1185) (1994)).

<sup>81</sup> 8 U.S.C. § 1185(b) (1997).

<sup>82</sup> See *Haig v. Agee*, 453 U.S. 280 (1981); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Flynn v. Rusk*, 219 F. Supp. 709 (D.D.C. 1963) *rev'd*, 378 U.S. 500 (1964); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958); *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1958), *rev'd*, 357 U.S. 116 (1958).

<sup>83</sup> 357 U.S. at 118.

<sup>84</sup> See 22 C.F.R. §§ 51.135-143 (1991); *Kent v. Dulles*, 248 F.2d 600, 605 (D.C. Cir. 1957), *rev'd*, 357 U.S. 116 (1958).

<sup>85</sup> 357 U.S. at 125-26.



[when] the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States [exists].<sup>86</sup>

As a result, it is clear from the line of cases preceding *Kent* that passports may be refused to an individual based on *who* they are only in limited situations.

The second line of cases deals with restrictions on where one may travel. In *Zemel v. Rusk* the Court considered the constitutionality of "area restrictions."<sup>87</sup> Until 1961, passports were not required for travel anywhere in the Western Hemisphere.<sup>88</sup> At that time, the United States broke diplomatic relations with Cuba, eliminated Cuba from the area for which passports were not required, and declared all U.S. passports to be invalid for travel to Cuba unless such travel was under the authority of the Secretary of State.<sup>89</sup> An exception was to be granted to any "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests."<sup>90</sup> Zemel had a valid passport and applied to the State Department to have the passport validated for travel to Cuba.<sup>91</sup> After his request was continually denied on grounds that his reasons for traveling to Cuba did not fall within the limited exceptions discussed above, Zemel brought suit challenging the restriction.<sup>92</sup> Zemel's complaint alleged that, *inter alia*, two federal statutes, the 1926 Passport Act and the Immigration and Nationality Act of 1952 mandated that his request be granted.<sup>93</sup>

In affirming the district court's dismissal of the suit, the United States Supreme Court discussed at length the 1926 Passport Act and precedent authorizing the State Department to impose area restrictions.<sup>94</sup> The Court then distinguished *Kent v. Dulles*, holding:

It must be remembered . . . that the issue involved in *Kent* was whether a citizen could be denied a passport because of his polit-

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<sup>86</sup> *Id.* at 127.

<sup>87</sup> 381 U.S. 1 (1965).

<sup>88</sup> *See id.* at 3.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 4.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 10-11.

ical beliefs or associations. In finding that history did not support the position of the Secretary of State in that case, we summarized that history 'so far as material here'—that is, so far as material to passport refusals based on the character of the particular applicant. In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.<sup>95</sup>

The Court further noted that although it held in *Kent* that the right to travel was a right that could not be deprived without due process, "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."<sup>96</sup>

*Haig v. Agee*, decided in 1981, is the most recent case in which a court has considered the right to travel doctrine, and perhaps represents a third line of cases based not on who you are or where you are going, but based on what you are going to do.<sup>97</sup> In *Haig*, Agee, an American citizen and a former employee of the Central Intelligence Agency, publicly proclaimed that he would begin a campaign to expose Central Intelligence Agency employees.<sup>98</sup> After engaging in actions that resulted in the identification of alleged undercover agents, Agee's passport was revoked based on a regulation authorizing revocation of a passport where an American citizen's activities "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."<sup>99</sup> Agee brought suit, and the district court and a divided court of appeals held that the regulation exceeded the statutory powers of the Secretary of State.<sup>100</sup>

The Supreme Court reversed the lower courts' rulings, holding that "[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation."<sup>101</sup> The Court, in discussing the history of passport regulation, found that the broad language of the statutes coupled with the holdings in *Kent v. Dulles* and *Zemel v. Rusk* gave the Secretary of

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<sup>95</sup> *Id.* at 13.

<sup>96</sup> *Id.* at 14.

<sup>97</sup> 453 U.S. 280 (1981).

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See* Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980), *aff'd sub nom.*, Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980), *rev'd*, 453 U.S. 280 (1981).

<sup>101</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964)).

State the "power to deny a passport for reasons not specified in the statutes."<sup>102</sup> The Court distinguished *Kent v. Dulles*, finding that "[t]he *Kent* court had no occasion to consider whether the Executive had the power to revoke the passport of an individual whose *conduct* is damaging the national security and foreign policy of the United States."<sup>103</sup> Therefore, the court stated that "when there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States."<sup>104</sup> The court thus concluded that while the right to travel does have limitations, it is an important right that will be disturbed only when issues of national security and foreign policy are at stake.

## 2. *Right to Interstate Travel*

The right to international travel is well established, yet there are limitations on this right. As a result, the right may be limited, as seen in the discussion above. However, there are significantly fewer limitations to the right to interstate travel that will withstand constitutional challenge.

The right to interstate travel has long been recognized.<sup>105</sup> The United States Supreme Court in *United States v. Guest* held 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 . . . . Although the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from

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<sup>102</sup> *Id.* 453 U.S. at 290. The Court found that this was particularly so in the context of foreign policy and national security. *See id.*

<sup>103</sup> *Haig*, 453 U.S. at 304.

<sup>104</sup> *Id.* at 309. The Court also quoted a previous holding, emphasizing that "while the Constitution provides against invasions of individual rights, it is not a suicide pact." *Id.* at 309-10 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

<sup>105</sup> *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Slaughter-House Cases*, 21 U.S. (16 Wall.) 36 (1871); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1881); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Certainly, this is by no means an exhaustive list, but a mere sampling.

any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.<sup>106</sup>

Although not a right specifically delineated in the United States Constitution, the right to interstate travel derives from the Privileges and Immunities Clause of Article IV of the Constitution, having also been attributed to the Privileges and Immunities Clause of the 14th Amendment and the Commerce Clause.<sup>107</sup>

A long line of cases has further established the right to interstate travel as well.<sup>108</sup> *Toomer v. Witsell* announced the "peculiar evil test."<sup>109</sup> In *Toomer* a South Carolina statute required non-residents to pay license fees for commercial shrimp fishing that were 100 times greater than those fees that residents paid.<sup>110</sup> The United States Supreme Court held that the statute was invalid under the Privileges and Immunities Clause of Article IV, § 2, of the United States Constitution.<sup>111</sup> The Court reasoned that the state failed to show a reasonable relationship between the alleged danger represented by non-citizens and the severe discrimination suffered by them.<sup>112</sup> In so holding, the Court noted that the purpose of the Privileges and Immunities Clause "is to outlaw classifications based on the fact of non-citizenship unless

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<sup>106</sup> *Guest*, 383 U.S. at 757-58.

<sup>107</sup> See *State Parochialism, and Right to Travel, and the Privileges and Immunities Clause of Article IV*, Note, 41 STAN. L. REV. 1557 (1989).

<sup>108</sup> See *Shapiro*, 394 U.S. at 629-31 (holding that statutory provision denying welfare assistance to residents of state or district who have not resided within their jurisdiction for at least one year violated the right to interstate travel); *Guest*, 383 U.S. at 745 (conspiracy to deprive African-Americans of right to travel to and from state and to use state's interstate commerce facilities and instrumentalities constituted an offense under statute pertaining to conspiracy against rights of citizens, since right to travel from one state to another is constitutionally protected); *Edwards*, 314 U.S. at 169 (holding that a California law prohibiting indigent people from traveling into the state violated the right to interstate travel); *Slaughter-House Cases*, 83 U.S. at 36 (holding that the Fourteenth Amendment's Privileges and Immunities Clause merely forbade state infringement of the rights of national citizenship); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (holding that a tax on persons leaving the state by paid transportation violated the right to interstate travel).

<sup>109</sup> 334 U.S. 385 (1948).

<sup>110</sup> See *id.* at 395.

<sup>111</sup> See *id.* at 399.

<sup>112</sup> See *id.* at 398.

there is something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed."<sup>113</sup>

One of the more recent in this line of cases, and perhaps that which best represents the Court's current position on the issue of the right to interstate travel, is *Shapiro v. Thompson*.<sup>114</sup> In *Shapiro*, the states of Connecticut and Pennsylvania and the District of Columbia denied the applications of several individuals for assistance under the various welfare assistance programs available.<sup>115</sup> The applications were denied pursuant to state law, on the ground that the applicants had not lived in the state for a minimum of one year before their application was filed.<sup>116</sup> The United States Supreme Court held the statutes unconstitutional. In affirming the district courts' findings, the Court held that

[t]his Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.<sup>117</sup>

The Court restated the test still utilized today when it held that "in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be *necessary to promote a compelling governmental interest*, is unconstitutional."<sup>118</sup> Thus, it appears that any invasions into the constitutionally protected right to interstate travel will be carefully at strictly scrutinized by the courts.

### 3. *Limitations to the Recognized Right to Travel*

As shown above, there are some acceptable limitations on the constitutional right to travel. In the context of international travel, it is clear that there are several limitations to the recognized right. First, there are two instances where a passport may be refused: (i) when questions exist as to the citizenship and allegiance of the applicant, and (ii) when questions exist as to whether the applicant was engaging in illegal conduct.<sup>119</sup> Furthermore, limitations on where an individual may travel will be

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<sup>113</sup> *Id.*

<sup>114</sup> 394 U.S. 618 (1969).

<sup>115</sup> *See id.* at 622-23.

<sup>116</sup> *See id.* at 623.

<sup>117</sup> *Id.* at 629.

<sup>118</sup> *Id.* at 634 (emphasis added).

<sup>119</sup> *See Kent v. Dulles*, 357 U.S. 116, 127 (1958).

upheld where such limitations are based on foreign policy grounds affecting all citizens.<sup>120</sup> Finally, the limitation will be upheld in the context of international travel where there is a "substantial likelihood of 'serious damage' to national security or foreign policy as a result of the passport holder's activities in foreign countries."<sup>121</sup>

Courts will scrutinize limitations on interstate travel more closely. There are two "tests" of sorts utilized by the courts. The "peculiar evil" test mandates that when an important state interest exists, a state statute that assigns certain persons to a class being discriminated against will be upheld if there is a sufficiently close relationship between the means and the ends obtained.<sup>122</sup> In the more frequently used test, a state or jurisdiction must show that such a limitation is "necessary to promote a compelling governmental interest" in order to place limitations on the right to interstate travel.<sup>123</sup> Therefore, since the right to travel, both domestically and abroad, is a zealously guarded right, any limitations will be examined carefully.

## B. THE CONSTITUTIONALLY RECOGNIZED RIGHT TO TRAVEL AND THE AVIATION INDUSTRY

Air travel, once a luxury of which only the wealthy and business class could partake, has exploded into practically every segment of the population today. Virtually anyone can purchase a commercial airline ticket, board an airplane, and travel to any number of domestic and international locations. With the increasing popularity of air travel and the fast-paced society in which we live, access to air travel is essential in modern society.

### 1. *Airlines Have a Duty to Provide Service to Customers*

Commercial airlines have a duty that arises from both statutory as well as common law to provide service to all paying customers, as well as a duty to protect the safety of their paying customers.<sup>124</sup> Therefore, as a regulated industry, airlines are statutorily limited as to the restrictions that may be placed on

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<sup>120</sup> See *Zemel v. Rusk*, 381 U.S. 1, 13 (1965).

<sup>121</sup> *Haig v. Agee*, 453 U.S. 280, 309 (1981).

<sup>122</sup> See *Toomer v. Witsell*, 334 U.S. 385, 396-398 (1948).

<sup>123</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

<sup>124</sup> See *Austin v. Delta Air Lines, Inc.*, 246 So. 2d 894 (La. Ct. App. 1971) (airline employee's refusal to sell ticket to customer she reasonably believed to be intoxicated was not inappropriate under the circumstances).

their service in a discriminatory manner.<sup>125</sup> However, for the purposes of this discussion, the only context in which such limitations are relevant is the regulations that allow airlines to discriminate on security grounds.

## 2. *An Airline's Ability to Restrict Travel*

Airlines may restrict travel as a result of security concerns. The threat of terrorist activity clearly falls within these security concerns.<sup>126</sup> As incidences of both domestic and international terrorism have increased exponentially throughout the 20th century, such restrictions have become necessary. Although airline restrictions may not be as extensive as government restrictions, their effect is often the same.<sup>127</sup> Airline restrictions have the effect of directly affecting the right to travel, as well as indirect effects that are primarily economically based. Therefore, careful examination is warranted of limitations imposed by the aviation industry in order to maintain the delicate balance between the right to travel and the protection of air travelers.

### a. Direct Effects of Travel Restrictions

As a heavily regulated industry, commercial airlines answer primarily to the FAA, the government agency charged with its supervision. Recent increases in terrorist attacks directed at airlines has prompted the FAA to promulgate new regulations aimed at preventing such acts.<sup>128</sup>

However, there are some direct effects of the new regulations that arguably affect the right to travel. First, airlines now require passengers to provide photo identification that match the airline tickets held.<sup>129</sup> Furthermore, stringent security measures in airports may cause delays that preclude travelers from reaching destinations on time, or in some cases, at all.

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<sup>125</sup> See 49 U.S.C. § 1374(a) (1988) (requiring provision of "safe and adequate service"); *Id.* § 1374(c) (prohibiting discrimination against physically disabled passengers); *Id.* § 1511 (allowing airlines to deny transportation to passengers after determining that such passenger poses a potential safety threat).

<sup>126</sup> See *id.* § 1511; see also *Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975) (holding that an airline will not incur liability for denying services to a known criminal); *Austin*, 246 So. 2d at 897.

<sup>127</sup> See Warner, *supra* note 18, at 367.

<sup>128</sup> See Purdum, *supra* note 13, at B3.

<sup>129</sup> See 14 C.F.R. § 108.13 (1997).

b. Indirect Effects of Travel Restrictions

The security measures taken by the aviation industry have several indirect effects that restrict travel as well. Historically, airlines themselves have been burdened with many of the costs associated with ensuring safe passage for their paying customers. As security costs rise, ticket prices also rise, as airlines are forced to shift security costs to customers in order to maintain profitability.<sup>130</sup> Additionally, airlines may close routes into countries where the risk of danger and the cost of insuring safety, particularly with regard to insurance, outweighs or eliminates profit.<sup>131</sup>

Finally, since responsibility for implementation of security measures lies primarily with the airlines, there is a potential for an abuse of discretion as airlines try to determine which passengers pose safety risks.<sup>132</sup> Unlike European air carriers, United States carriers have historically assumed "all domestic security costs, including the training and equipment for personnel at airport security checkpoints, air cargo, and baggage inspection, airport access systems, and secured area protection at airports."<sup>133</sup> These increased costs continue to frustrate reforms and to drain profit margins in the commercial aviation industry. Clearly, the aviation industry's limited funding prevents them from battling more adequately funded terrorist groups.<sup>134</sup> Therefore, it is important that all of the factors are considered so that the airlines remain financially viable, passengers are protected from potential terrorist attacks, and the right to travel is not limited to an unacceptable degree.

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<sup>130</sup> See Warner, *supra* note 18, at 368.

<sup>131</sup> See *id.*; see also Emma Tucker and Neil Buckley, *The Gulf War: Airlines Cancel or Avoid the Worst Spots*, FIN. TIMES, Jan. 29, 1991, at 4.

<sup>132</sup> See Warner, *supra* note 18, at 368-69.

<sup>133</sup> 135 CONG. REC. H5768 (daily ed. Sept. 20, 1989) (statement of Rep. Oberstar).

<sup>134</sup> Although terrorist groups may seem poor, as they are either unable or unwilling to raise the traditional armies with which they might achieve their objectives, such groups have funding that enables them to continually wreak havoc in the air as well as on the ground. It is also important to consider that terrorist groups do not need extensive funding. A terrorist need only place the bomb on the plane; it is the security that is so expensive, and this is where terrorist groups gain a major advantage.



#### IV. ADDITIONAL MEASURES THAT CAN BE TAKEN TO BALANCE SECURITY INTERESTS AND THE RIGHT TO TRAVEL

Following the bombing of Pan Am Flight 103, significant legislation was passed in hopes that future tragedies could be avoided. More recently, changes in airport security followed the downing of TWA Flight 800. Additionally, international treaties were revised to reflect changing security needs.

Much of this change focuses on technology. As a result, available technology limits the extent to which such change can be implemented. Furthermore, history shows that tragedy is a catalyst for security reform.<sup>135</sup> Therefore, perhaps implementation of a program of ongoing technology improvements might more efficiently accomplish change.

Intangible components of the aviation security system remain unaddressable by endless amounts of legislation and regulation. Thus far, aviation security concentrated on improving the external framework of the security system.<sup>136</sup> However, legislation and regulation cannot address the intangible elements of the system, such as teamwork, public involvement, and a "game plan" based on a common vision.<sup>137</sup> One commentator argues that

[T]he black letter of the law has not stopped a terrorist bombing. Legislation is an effective means of clarifying our objectives, and statutes do provide us with a structure within which to operate, but if our laws are too vague to understand, impossible to implement, unfair in their application, or unknown to those they govern, then they are no more than an expensive waste of wordsmithing. . . . Like regulated standards, technology is only as good as the persons who physically implement it at the airport. Its effectiveness will always depend on the intangible, human element. . . .<sup>138</sup>

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<sup>135</sup> Much airline and airport security legislation has followed terrorist acts. One particularly evident example of this is the legislation that followed the bombing of Pan Am Flight 103. See Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (codified in various sections of 49 U.S.C. app. and 22 U.S.C.); Airport Technology and Research Act of 1989, H.R. 2365, 101st Cong.; Aviation Security Act of 1989, H.R. 1659, 101st Cong.

<sup>136</sup> See Strantz, *supra* note 35, at 252; Nancy J. Strantz, *Aviation Security and Pan Am Flight 103: What Have We Learned?*, 56 J. AIR L. & COM. 413 (1990).

<sup>137</sup> See Strantz, *supra* note 35, at 252-53.

<sup>138</sup> *Id.* at 253-55.

More recently, the focus of aviation security reform has seemed to shift more to the intangible elements discussed above. Current aviation reform is expanding to a broader sharing of responsibility by everyone involved in aviation security, instead of placing the burdens on the airline industry. However, there is much work to be done, and in order to adequately protect the safety of American citizens, prevent unacceptable infringement into the constitutionally recognized right to travel, and keep the airlines financially viable, this "partnership" of sorts must continue to grow.

#### A. THE FEDERAL AVIATION ADMINISTRATION REAUTHORIZATION ACT

On October 9, 1996, President Clinton signed into law the FAA Reauthorization Act (H.R. 3539).<sup>139</sup> The Act extends for two years funding authority for FAA capital programs, and more importantly, makes statutory changes affecting airports, airlines, and other industry segments.<sup>140</sup> The provisions of the legislation directly impacting security measures are a result of the commission headed by Vice-President Al Gore, which recommended sweeping changes and increased funding to airport and airline security.<sup>141</sup>

##### 1. *The Gore Commission Recommendations*

The White House Commission on Aviation and Security, headed by Vice-President Al Gore, was formed with the intent of making recommendations with regard to the improvement of airport and airline security.<sup>142</sup> The committee was formed in response to the possibility that the downing of TWA Flight 800 was a result of a terrorist attack, as well as the general feeling that American airports were not as secure as they should be.<sup>143</sup>

The Commission recommended twenty specific actions to improve near-term security.<sup>144</sup> The pricetag: \$429.4 million.<sup>145</sup> The Commission report recommended increased funding to improve the screening of checked and carry-on baggage, provide

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<sup>139</sup> H.R. 3539, 104th Cong. (1996); see *Clinton Signs FAA Bill, Touts Security, Family Provisions*, AVIATION DAILY, Oct. 10, 1996, at 62.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

<sup>142</sup> See Ott, *supra* note 13, at 36.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

canine teams, further FAA security research, expand the FAA workforce, improve vulnerability assessments of U.S. airports, expand and improve passenger profiling, provide better screener training, and purchase passenger portals and document scanners.<sup>146</sup>

## 2. *Provisions of the Legislation*

On its face, the Federal Aviation Administration Reauthorization Act of 1996 simply reauthorizes programs of the FAA.<sup>147</sup> But the Act does far more than this. An entire section of the legislation is devoted to aviation security, and is a product of the Gore Commission Recommendations.<sup>148</sup>

First, the Act provides funding for a study to determine who can best bear the responsibilities for the security activities conducted at airports in the United States.<sup>149</sup> The study will examine where Federal funds can best further security activities, and determine whether further legislation is needed for any transfer of responsibility for aviation security.<sup>150</sup>

In addition, the legislation mandates that the FAA should certify those companies providing security screening and promulgate uniform standards for such companies.<sup>151</sup> The Act further authorizes another study to determine ways in which weapons and explosives might better be detected.<sup>152</sup> Furthermore, the legislation contains provisions that mandate baggage match to passengers and criminal history records checks.<sup>153</sup> Finally, the legislation provides for substantial funding for all of this, and more.<sup>154</sup>

Although the above legislation is by no means exhaustive, the Act appears to react to increased acts of terrorism directed toward American citizens. The United States Senate concluded in its findings that

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<sup>146</sup> See *id.* This list is by no means exhaustive, but provides a sampling of the sweeping changes recommended by the Gore Commission, and for the most part, implemented in the FAA Reauthorization Act that was signed into law recently.

<sup>147</sup> See H.R. 3539, 104th Cong. (1996).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

- (1) there has been an intensification in the oppression and disregard for human life among nations that are willing to export terrorism;
- (2) there has been an increase in attempts by criminal terrorists to murder airline passengers through the destruction of civilian airliners and the deliberate fear and death inflicted through bombings of buildings and the kidnapping of tourists and Americans residing abroad; and
- (3) information widely available demonstrates that a significant portion of international terrorist activity is state-sponsored, -organized, -condoned, or -directed.<sup>155</sup>

While the legislation seems to strike a blow to terrorism, one has to wonder if this is simply another means to soothe fears and that perhaps the solution lies elsewhere.

#### B. NEW TECHNOLOGIES ARE BECOMING AVAILABLE

New and improved technology that can be used to combat the threat of terrorist attacks on commercial air craft is becoming available almost every day. For instance, the InVision CTX 5000 automatically detects small amounts of all classes of explosives, with a high degree of accuracy, and a low false alarm rate.<sup>156</sup> The new CTX-5000 uses the technology of medical CT scans to map objects inside luggage from several different angles. It combines these views to create cross-sectional images, analyzing them to identify potential explosive materials.<sup>157</sup>

"The CTX-5000 is the only detection system to have passed the FAA's certification test."<sup>158</sup> As a result, the United States recently purchased fifty-four of these new machines, which will be installed in airports around the country.<sup>159</sup> Furthermore, the government has an option to purchase more at a later date.<sup>160</sup>

However, although the new technology that becomes available at an amazing pace appears helpful in the fight against terrorism, this enthusiasm should be balanced with a more sobering thought. History shows that terrorist groups have been able to "keep up" with the government's technology advancement. Therefore, it is important to consider the utility of large

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<sup>155</sup> *Id.*

<sup>156</sup> See *InVision Receives FAA Contract for Minimum of 54 and Up to 100 InVision CTX 5000 SP Explosives Detection Systems*, BUS. WIRE, Dec. 26, 1996.

<sup>157</sup> See Laura Meckler, *Airports—Improved X-Ray Devices Can Detect Explosives*, COM. APPEAL, Dec. 28, 1996, at B3.

<sup>158</sup> *Id.*

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

expenditures on new technology, when it is highly likely that such technology will be bypassed by terrorist groups.

### C. THE NEED FOR A DOMESTIC FOCUS TO COUNTER-TERRORISM MEASURES

Until recently, the focus of counter-terrorism measures has been a decidedly international one. One only has to consider the various international treaties and even the legislation enacted in the United States to see that most measures taken to date focus on international terrorist groups. However, recent events have shown that "home-grown" terrorism is on the rise.<sup>161</sup> The bombing of the Alfred P. Murrah Building in Oklahoma City, as well as the alarming rise of anti-government militia groups are signs that domestic terrorism is on the increase. Although to date, there have been no incidences of a United States citizen committing any offense against a commercial airline, this is perhaps an area that deserves more scrutiny.

### V. CONCLUSION

Today, airline travel is an essential element of society. Therefore, it must be a safe means of travel for the approximately 450 million United States citizens who board commercial airlines at American airports annually.<sup>162</sup> However, recent events show that air travel has failed to provide passengers users with a level of safety acceptable to the public at large, the government and the industry.<sup>163</sup> The commercial aviation industry presents too many opportunities for terrorist attacks. In 1990, thirty-four "unlawful interference" incidents, or terrorist acts, on commercial airliners occurred.<sup>164</sup> Although the death rate decreased that year, the number of terrorist acts directed at commercial airliners was alarmingly high, and has only increased in the following years. One incident in particular has affected American citizens: the bombing of Pan Am Flight 103, in which 270 people were killed. Furthermore, although ruled an accident, the downing of TWA Flight 800, in which 230 lives were lost, raised concern of American citizens in particular, to an all-time high.<sup>165</sup> The

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<sup>161</sup> See Joseph B. Treaster, *The Tools of a Terrorist: Everywhere for Anyone*, N.Y. TIMES, April 20, 1995, at B9.

<sup>162</sup> See Dow, *supra* note 1, at 1149.

<sup>163</sup> See *Unlawful Incidents Up But Death Rate Down*, FLIGHT INT'L, Apr. 3, 1991, at 1.

<sup>164</sup> *Id.*

<sup>165</sup> See Mark Fischetti, *Defusing Airline Terrorism*, TECH. REV., April 1, 1997, at 38.

threat is taking its toll on American citizens in more ways than one; polls show that almost two-thirds of the American public do not feel safe flying.<sup>166</sup> Although some of this fear can be attributed to the recent downings of commercial aircraft due to mechanical failure, much of the sentiment can be attributed to the increase in terrorist activity directed at United States citizens.

It is clear that steps are being taken to correct these problems, both domestically and internationally.<sup>167</sup> Historically, the aviation industry itself has borne much of the responsibility for implementing security measures at the direction of the FAA.<sup>168</sup> However, new legislation, and particularly the recently passed Federal Aviation Administration Reauthorization Act, seems to be aimed at building the "partnership" between government and the industry that is necessary.<sup>169</sup> The legislation illustrates the need for all of the players in the industry to work together, financially and otherwise.<sup>170</sup> Such measures will take steps toward alleviating the financial burdens that airlines face and will provide for a better quality of security.<sup>171</sup>

In the wake of the heightened security that currently exists and will likely continue, a watchful eye must be maintained toward unacceptable infringements on the constitutionally recognized right to travel. Acceptable limitations may be placed on the interstate and international right to travel.<sup>172</sup> Furthermore, airlines may refuse service to passengers in limited situations.<sup>173</sup> However, because airlines are not watched as closely by the courts as the government, a potential for an abuse of discretion exists. Furthermore, the determination as to whether an individual may remain on a flight is usually left to the airlines,

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<sup>166</sup> See *We Are Too Scared to Fly, Majority of Callers Say*, ORLANDO SENTINEL, July 30, 1996, at A7.

<sup>167</sup> See Fischetti, *supra* note 165, at 38; see also Purdum, *supra* note 13, at B3.

<sup>168</sup> See Ott, *supra* note 13, at 36.

<sup>169</sup> See Purdum, *supra* note 13, at B3.

<sup>170</sup> See Ott, *supra* note 13, at 36.

<sup>171</sup> See *id.*

<sup>172</sup> See *Haig v. Agee*, 453 U.S. 280 (1981); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 618 (1969); *Zemel v. Rusk*, 381 U.S. 22 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958).

<sup>173</sup> See 49 U.S.C. § 1511 (1994) (allowing denial of transportation upon an airline's determination of a potential safety threat posed by a passenger); see also *Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975) (holding that an airline will not incur liability for denying service to a known criminal); *Austin v. Delta Air Lines, Inc.*, 246 So. 2d 894, 899 (La. Ct. App. 1971).

with only loose guidelines to limit their discretion.<sup>174</sup> Therefore, the need for the "partnership" discussed earlier is particularly evident in this context, as a means to implement a "watchdog mechanism" of sorts.

Furthermore, the economics of the situation must be considered. The costs of adding the security at airports is easily visible in the funding approved by Congress. It is the cost of the extra time spent that is often not considered. One study figured that each passenger spends thirty minutes longer than before at an airport.<sup>175</sup> The study estimated that at ten dollars per half hour, the cost is \$5 billion in one year.<sup>176</sup> When the numbers of passengers killed as a result of airline sabotage are considered, the cost of each saved life is astronomical.<sup>177</sup> Although the added security may give passengers a sense of safety, one has to wonder whether it is really worthwhile, since other resources are drained as a result, and such measures have not always proved successful.

Finally, while much progress has been made, there is still work to be done. New technology is becoming available at a rapid pace.<sup>178</sup> However, it is important to remember that technology is only part of the battle; human effort and other intangibles including teamwork and public involvement are equally important.<sup>179</sup> In order to maintain and further progress, there must be a partnership between the government and the aviation industry with the goal of providing safe air transportation for American citizens, protecting the constitutionally recognized right to travel, and keeping the commercial aviation industry profitable.

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<sup>174</sup> See Warner, *supra* note 18, at 366; Strantz, *supra* note 136, at 413; Humphrey G. Dawson, *Civil Aviation, Hijacking and International Terrorism: A Historical and Legal Review*, 15 INT'L BUS. L. 57 (1987).

<sup>175</sup> See Peter Passell, *Economic Scene; In Airline Safety, Too Much Vigilance Can Be a Bad Thing*, N.Y. TIMES, Sept. 5, 1996, at D2.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1 (1996); see also Jennifer Fron Mauer, *Bomb-Detection Costs Continue Rise on Heels of FAA Pact*, DOW JONES INT'L NEWS, Dec. 30, 1996, at 1.

<sup>179</sup> See Strantz, *supra* note 35, at 240; Strantz, *supra* note 136, at 413.