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FLYING WHILE ARAB— RACIAL PROFILING AND AIR TRAVEL SECURITY

ELLEN BAKER

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I. INTRODUCTION

SINCE SEPTEMBER 11, “the phrase ‘Flying While Arab’ has begun to seep into the national dialogue, an echo of the long-standing African American complaint of being stopped

merely for 'Driving While Black.'"¹ Even prior to the destruction of the World Trade Center and the attack on the Pentagon, various publications and organizations expressed concern about possible disparate treatment of Arab Americans and Arabs as a result of racial profiling² in airport security procedures mandated by the Federal Aviation Administration (FAA).³ This concern was bolstered by complaints filed by Arab Americans and Arabs who felt they were singled out by these procedures.⁴ However, general public awareness of possible racial profiling of Arabs by the airline industry was low. When racial profiling was in the news, it was generally in the context of alleged disparate treatment of African Americans and Hispanic Americans by law enforcement agencies, and to a lesser degree, by the United States Customs Service. Any intimation of racial profiling in these contexts, or any context, was generally viewed as a bad thing. Post September 11, extensive media coverage of the justifiable public concern for airline safety and the treatment of some Arabs as they resumed flying has changed this perception.⁵

¹ Ken Ellingwood & Nicholas Riccardi, *Racial Profiling – Arab Americans Enduring Hard Stares of Other Fliers*, L.A. TIMES, Sept. 20, 2001, at A1. "Driving while black" is the phrase used to describe the use of pretextual traffic stops by the police that disproportionately target black males. See, e.g., David A. Harris, *The Stories, The Statistics, and The Law: Why 'Driving While Black' Matters*, 84 MINN. L. REV. 265 (1999).

² For purposes of this paper, racial profiling is defined as the use of race or ethnicity, in combination with other factors or solely, or the use of a combination of factors that has a disparate impact on individuals of a given race or ethnicity to single out an individual. This definition seems to fit the circumstances that have given rise to complaints in both the "Driving While Black" and "Flying While Arab" contexts.

³ See, e.g., Michael J. AuBuchon, *Choosing How Safe Is Enough: Increased Antiterrorist Federal Activity and Its Effect on the General Public and the Airport/Airline Industry*, 64 J. AIR L. & COM. 891, 903-06 (1999); Press Release, American Civil Liberties Union, *Profiling of Fliers Raises Racial Issue* (Sept. 26, 1997), available at <http://www.aclu.org/news> (last visited Oct. 30, 2002); Neil A. Lewis, *Arab-Americans Protest 'Profiling' at Airports*, N.Y. TIMES, Aug. 11, 1997, at A12; Donna Abu-Nasr, *Arab and Muslim Americans Say Profiling Discriminates Against Them*, ASSOC. PRESS, July 17, 1997, available at 1997 WL 4875401; *Civil Rights Issues Facing Arab Americans in Michigan*, Michigan Advisory Committee to the U.S. Commission on Civil Rights, May 16, 2001, available at <http://www.usccr.gov/pubs/misac2/main.htm> (last visited Oct. 30, 2002) [hereinafter *Civil Rights Issues*]; Donna Smith, *Passenger Profiling: A Greater Terror Than Terrorism Itself?*, 32 J. MARSHALL L. REV. 167 (1998).

⁴ See, e.g., 1998-2000 Report on Hate Crimes and Discrimination Against Arab Americans 23-28 (Hussein Ibish ed., American-Arab Anti-Discrimination Committee 2001) [hereinafter *1998-2000 Report*].

⁵ See, e.g., Ellingwood & Riccardi, *supra* note 1; Stuart Taylor Jr., *The Case for Using Racial Profiling at Airports*, NAT'L J., Sept. 22, 2001, available at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm> (last visited Oct. 30, 2002);

Racial profiling of Arabs, especially in the context of air travel security, is a hot topic. And, perhaps, in a post-September 11 America, the view of racial profiling as an anathema has changed, at least in the limited context of airline safety.⁶

This Comment examines the issue of racial and ethnic profiling of Arabs and Muslims in the context of air travel security. In general, it explores the idea that before the terrorist attacks on September 11, it was difficult to prove that racial profiling was a factor in airline security procedures. Post-September 11, the legal and public climate makes the situation much more difficult. For the foreseeable future, the viable legal options available to Arab Americans and Arabs are limited even if airline security procedures do have a disparate impact on them. Part II looks at how racial profiling concerns were handled prior to September 11, particularly noting that despite a lot of rhetoric and numerous complaints, little substantive change was made in airport security procedures and, most notably, the issue has not been litigated. Part III addresses the very real escalation in racial profiling concerns post-September 11, surveying the public policy and legal justifications for allowing racial profiling in the context of airline security. Part III also examines the implications of the increased security procedures mandated by the FAA and the recently passed Aviation and Transportation Security Act.⁷

John Stossel, *Rethinking Racial Profiling – How the Attacks Have Changed Views*, ABCNEWS.COM, Oct. 4, 2001, http://abcnews.go.com/sections/2020/2020/2020_011002_racialprofiling_stossel.html; Edmund Sanders, *Attacks Prompt Calls for More Passenger Profiling*, L.A. TIMES, Sept. 15, 2001, at A1; *Airlines, Passengers Confront Racial Profiling*, CNN.COM, Oct. 3, 2001, at <http://www.cnn.com/2001/TRAVEL/NEWS/10/03/rec.airlines.profiling/index.html> [hereinafter CNN Report]; Catherine Donaldson Evans, *Terror Probe Changes Face of Racial Profiling Debate*, FOXNEWS.COM, Oct. 1, 2001, <http://www.foxnews.com/story/0,2933,35521,00.html>; Frank J. Murray, *Profiling by Airlines Gets Public Support*, WASH. TIMES, Nov. 1, 2001, at A1.

⁶ See, e.g., Orlander Brand-Williams, et.al., *Court Sidesteps Racial Profiling*, DETROIT NEWS, Oct. 2, 2001, available at <http://www.detnews.com/2001/nation/0110/02/a01-308482.htm>.

⁷ Aviation & Transportation Security Act, Pub. L. No. 107-071, 115 Stat. 597 (codified as amended in scattered sections of 49 U.S.C.). This Act, among other things, takes airport security screening out of the hands of the airlines. 49 U.S.C.S. § 44935 (2002).

II. PRE-SEPTEMBER 11 – PASSENGER PROFILING OR RACIAL PROFILING?

“Discriminatory application of airline security procedures against Arab Americans, American Muslims—or any other group—is unacceptable in a free society.”⁸

Prior to September 11, the major focus of complaints regarding potential racial profiling in air travel security procedures was on the use of profiles to identify potential terrorists. The essence of these complaints and concerns was that passengers of Arab descent were singled out for enhanced security procedures far more often than passengers of other races. So, an initial question comes to mind: Is the use of profiles to screen passengers merely a non-discriminatory security procedure or is it disguised racial profiling? There is no clear answer to this question. The issue has never been litigated. Is this because the problem is real, but the legal environment makes it clear that winning a discrimination suit will be extremely difficult, or is there another explanation?

A. PASSENGER PROFILING OR RACIAL PROFILING?

Passenger profiling was first introduced into airline security procedures in the late 1960s as a part of security measures mandated by the FAA in response to increasing hijackings of passenger aircraft.⁹ The theory was that potential hijackers could be identified by a list of personal attributes, i.e. a “profile” that cumulatively suggests a person is likely to be a terrorist.¹⁰ If a person fit the “profile,” his or her carry-on luggage was subjected to x-ray or other search procedures.¹¹ This practice was discontinued in 1972 because it was deemed ineffective.¹² Instead, secur-

⁸ Prepared Remarks by U.S. Transportation Secretary Rodney E. Slater White House Briefing for 8th Annual Meeting of Muslim-American Council Washington, D.C., May 7, 1999, available at <http://www.dot.gov/affairs/1999/5799sp.htm> [hereinafter Slater Remarks].

⁹ Jamie L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 852 (2000).

¹⁰ *Id.*

¹¹ *Id.*

¹² Gregory T. Nojeim, *Aviation Security Profiling and Passengers' Civil Liberties*, 13-SUM AIR & SPACE L. 3, 6 (1998). See also Smith, *supra* note 3, at 171. “In fact, in 1972, the last year airport security personnel used profiles in this country, there were 28 hijackings.” *Id.*

ity checkpoints were established at airports and all carry-on luggage was x-rayed.¹³

Although subjecting all passengers to the security checkpoints and the attendant x-ray of carry-on luggage had the desired effect of virtually eliminating hijackings,¹⁴ a new problem arose, the planting of bombs on passenger airplanes by terrorists. After the explosion of TWA flight 800 on July 17, 1996, amid calls for increased safety procedures, the White House Commission on Aviation Safety and Security was established.¹⁵ Among their recommendations was a proposal for the reintroduction of passenger profiling, this time in automated form.¹⁶ The FAA went to work developing an automated system and many airlines began doing manual profiling while awaiting the automated system.¹⁷

Since 1998, the airline industry has been using an automated passenger profiling system, Computer Assisted Passenger Screening (CAPS), developed by the FAA.¹⁸ Prior to boarding a plane, data is collected on all passengers and used to make a determination as to whether any passenger poses a potential security risk.¹⁹ If selected by CAPS, the passenger is "subjected to heightened security procedures."²⁰ CAPS also randomly selects passengers to be subjected to these additional security procedures.²¹

When CAPS was introduced, the FAA's stated intent was that the additional security procedures would apply only to selectees' checked luggage, most likely bag matching or some sort of technological examination for explosives.²² However, as many of

¹³ Nojeim, *supra* note 12, at 6.

¹⁴ *Id.*

¹⁵ Smith, *supra* note 3, at 173.

¹⁶ *Id.* at 174. There is some irony in the fact that the explosion that caused the reintroduction of the controversial passenger profiling was later found to have likely been caused by a defective fuel tank design, not a terrorist attack. Rhee, *supra* note 9, at 857.

¹⁷ Nojeim, *supra* note 12, at 4.

¹⁸ *Civil Rights Issues*, *supra* note 3. This system is currently also referred to as the Computer-Assisted Passenger Prescreening System (CAPPS). Press Release, DOT, DOT Investigates Passenger Security Screening's Impact on Minorities (June 4, 2001) [hereinafter DOT Press Release].

¹⁹ *Civil Rights Issues*, *supra* note 3.

²⁰ *Id.*

²¹ DOT Press Release, *supra* note 18.

²² Report by the Department of Justice to the Department of Transportation on the Civil Rights Review of the Proposed Automated Passenger Screening Sys-

those who spoke against CAPS feared,²³ these procedures reportedly went far beyond this stated intent. Some selectees had their luggage manually searched, sometimes to the point of completely unpacking the bags and sometimes in front of other passengers.²⁴ They were asked questions by ticket agents and other security personnel that go far beyond those asked of other passengers.²⁵ In some reported cases, these searches and questions took so long that selectees missed flights.²⁶ When airline officials and employees were asked why certain individuals were singled out, national origin was implicated in the response.²⁷

tem, U.S. Dept. of Justice, Oct. 1, 1997, *available at* <http://www.usccr.gov/pubs/misac2/app.htm> [hereinafter DOJ Report]. This report explicitly stated that:

Depending on the destination of the passenger (domestic or foreign) and the availability of advanced technology at particular airports, the additional security measure applied to selectees typically will involve one of the following: bag matching (the requirement that checked luggage be flown only if it is determined that the passenger who checked the luggage has boarded the airplane); examination by a certified explosive detection system (EDS); or examination using other advanced technology (such as an explosive detection device or a trace detector).

Id.

²³ See, e.g., Nojeim, *supra* note 12, at 5. "Other security measures [that could be applied] include: asking passengers personal questions about their travel; having their luggage sniffed by trained dogs; removing the contents of . . . luggage and examining each item in front of other passengers' escorting the passenger through the airport 'for security reasons' in full view of other passengers" etc. *Id.*

²⁴ 1998-2000 Report, *supra* note 4, at 24-8. An elderly Arab-American couple was detained by a Delta Airlines agent at the Brussels International Airport. *Id.* at 27. Their luggage was unpacked and inspected manually. *Id.* At the Barranquilla Airport in Colombia, an American permanent resident of Saudi origin was questioned by an American Airlines agent. *Id.* at 25. After consulting with his supervisor, the agent told him that his luggage would be inspected. *Id.* A two-hour manual search of his luggage was conducted in full view of other passengers. *Id.*

²⁵ *Id.* at 24-8. At the Frankfurt International Airport in Germany, an Arab American was questioned by a United Airlines security officer. *Id.* at 28. He was asked questions such as "whom he saw in Egypt, who his relatives are in Egypt, on which airline he flew to Egypt, and how long he lived in the United States." *Id.*

²⁶ *Id.* at 24-8. At the Dulles International Airport in Virginia, an Arab man travelling to Aruba for a medical conference had his passport and plane ticket taken by an American Airlines representative. *Id.* at 25. He was delayed so long that he missed his flight and the first day of his medical conference. *Id.*

²⁷ *Id.* at 24-8. An Arab man detained at Dulles International Airport in Virginia was told by an American Airlines supervisor that "the reason for this incident was his national origin." *Id.* at 25. At Charlotte Airport in North Carolina, a Syrian woman returning home after visiting her family in the United States was selected by a British Airways agent to have her luggage searched. *Id.* at 25. A British Airways manager said she was selected because she was Syrian. *Id.*

The criteria used by CAPS to select passenger are confidential²⁸ and government officials have staunchly maintained that they "are not based on the race, ethnicity, religion or gender of passengers."²⁹ In 1997, the U.S. Department of Justice (DOJ) reviewed the selection criteria and determined that they did not "discriminate unlawfully against passengers."³⁰ Nor did the selection criteria include passenger traits such as names or mode of dress that might be directly associated with race, ethnicity, or religion.³¹ The bottom line opinion of the DOJ was that CAPS would not have a "disparate impact on any group of passengers."³²

However, Arab advocacy groups maintain that the use of passenger profiling does disparately target Arabs and Arab Americans.³³ According to the American-Arab Anti-Discrimination Committee (ADC),³⁴ twenty-four percent of the complaints received annually by the ADC legal staff are about airline profiling.³⁵ The ADC position is that "profiling, even under the best circumstances, provides an opportunity for the prejudices and stereotypes held by law enforcement and other officials to be expressed through discriminatory application of profiles. At worst, they are simply a recipe for bigoted behavior."³⁶

²⁸ Abu-Nasr, *supra* note 3. Although the criteria are supposed to be secret, some of them have been revealed. See, e.g., Nojeim, *supra* note 12, at 5. The criteria include such information as whether the ticket was purchased with cash or a credit card; whether the ticket was purchased immediately before departure or in advance; who the passenger is traveling with; whether the passenger is renting a car at the flight destination; where the flight originates and its ultimate destination; the passenger's ultimate destination; and whether the flight is round trip or one-way. *Id.*

²⁹ See, e.g., DOT Press Release, *supra* note 18; Kathleen Koch, *Passenger Profiling Beefed Up at Airports*, CNN.COM, Nov. 8, 2001, at <http://www.cnn.com/2001/TRAVEL/NEWS/11/08/rec.passenger.profiling/index.html> (stating that U.S. Transportation Secretary Norman Mineta insists that CAPS does not use race).

³⁰ *Id.*; see also DOJ Report, *supra* note 22.

³¹ *Id.*

³² *Id.*

³³ See, e.g., 1998-2000 Report, *supra* note 4; Abu-Nasr, *supra* note 3; Nojeim, *supra* note 12.

³⁴ The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization founded in 1980 by former U.S. Senator James G. Abourezk. 1998-2000 Report, *supra* note 4, at 3. Its purpose is to defend the rights of and promote the heritage of Arab Americans. *Id.* It is "the largest Arab-American grass roots organization in the United States." *Id.*

³⁵ *Id.* at 24.

³⁶ *Id.* As one ADC spokesperson succinctly stated: "Profiling has become just a fancy word for racism or stereotyping." Keith L. Alexander, *Profiling of Fliers Raises Racial Issue*, USA TODAY, Sept. 26, 1997, at 1A.

B. IF RACIAL PROFILING IN AIRLINE SECURITY IS SO PREVALENT,
WHY HASN'T IT BEEN LITIGATED?

Despite all the concern expressed and all the complaints that have been logged, the issue of racial profiling of Arabs in the context of airline security generated little litigation prior to September 11. Only two suits have been filed and neither created any definitive case law.³⁷ In 1991, the American Civil Liberties Union (ACLU) sued Pan Am World Airways for allegedly subjecting passengers of Middle Eastern descent to increased security measures "based on their race and national origin."³⁸ Pan Am denied the allegations and the suit went away when Pan Am became insolvent.³⁹ In 1997, Hassan Abbass, a U.S. citizen of Arabic descent, filed suit against U.S. Airways for alleged "discriminatory security screening."⁴⁰ Mr. Abbass' suit was settled out of court.⁴¹

Perhaps the reason for this dearth of litigation is that, as is amply demonstrated in related case law, the legal climate is not conducive to victory. The legal debate over CAPS suggested that its use and the attendant security procedures violate certain constitutional rights of the selectees, including the Fourth Amendment protection against unreasonable searches and the Fifth and Fourteenth Amendment provisions for equal protection. Strong doubt was expressed that these procedures would find support in the courts.⁴² However, all the arguments presented

³⁷ This conclusion is based on an extensive search of legal literature on WestLaw and of public information available on the Internet.

³⁸ Nojeim, *supra* note 12, at 7.

³⁹ *Id.*

⁴⁰ *Id.* See also Michael Higgins, *Looking The Part*, 83-NOV A.B.A. J. 48 (1997). On May 24, 1997, before boarding their flight to St. Martin, Mr. Abbass and his wife were selected from a line of approximately 200 passengers for extra security measures. They were walked through metal detectors, their luggage was searched, and their bags had florescent-green tags saying "Positive I.D." attached to them. *Id.* They were told by airline workers that they were selected because "there are these guidelines and you meet the guidelines." *Id.* The Abbasses filed a \$4 million civil rights suit against U.S. Airways saying they were selected because Mr. Abbass is Arab-American. *Id.*

⁴¹ Nojeim, *supra* note 12, at 7.

⁴² See, e.g., Rhee, *supra* note 9, at 860-63 (arguing that it was "unlikely that the courts would approve of CAPS or the use of profiling, even though the [administrative search] doctrine was developed partly for airline searches"); Nojeim, *supra* note 12 (arguing that passenger profiling and the associated searches violate civil liberties); Smith, *supra* note 3, at 172-92 (outlining various constitutional issues surrounding the use of passenger profiling). A third constitutional theory, based on discriminatory violation of the right to travel, might also be used but is beyond the scope of this paper. See Rhee, *supra* note 9, at 860-61; Heather E. Reser,

seem to ignore the precedents set in the “driving while black” and other related case law.⁴³ The courts have established that such security procedures, although administered by private airline employees, are state actions and the employees are state actors because “private airline employees are no different than public officials when conducting a search.”⁴⁴ In essence, the actions of the private airline employees are no different than those of a policeman or a customs official or other government employees and their actions will likely be judged in court by the same standards.

1. *Unreasonable Search and the Fourth Amendment*

One immediately obvious way to state a claim that an airline security search was motivated by race is to assert a Fourth Amendment claim that the search was unreasonable.⁴⁵ Airline passengers do have a privacy interest in their luggage and personal possessions that is covered by the Fourth Amendment.⁴⁶ However, the claimant immediately hits two barriers that seem to be insurmountable – the administrative search doctrine and the unanimous Supreme Court ruling in *Whren v. United States*.⁴⁷

The courts have evolved an administrative search doctrine that permits certain searches, such as those conducted in the interests of air travel security, without triggering Fourth Amendment protection.⁴⁸ This doctrine provides for:

Airline Terrorism: The Effect of Tightened Security on the Right to Travel, 63 J. AIR L. & COM. 819 (1998).

⁴³ In this paper, “driving while black” is used as shorthand for any law enforcement situation outside the airport security context in which racial profiling is deemed to be an issue. The arguments also ignore the difficulty claimants have merely getting their claims heard by the court. The plaintiff must first establish standing and this has proved to be difficult, especially where equitable relief in the form of an injunction is sought. Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 343. The Supreme Court set the standard for establishing standing in such cases in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The *Lyons* court held that the likelihood of the plaintiff suffering another injury was too speculative to meet the standing requirement. *Id.* at 108. This holding has been used to dismiss several racial profiling cases seeking injunctive relief. For a more in-depth discussion of this ruling and other standing issues in racial profiling cases, see Trende, *supra*, at 342-50.

⁴⁴ Rhee, *supra* note 9, at 863. See also Smith, *supra* note 3 at 177-78.

⁴⁵ Trende, *supra* note 43, at 350.

⁴⁶ Rhee, *supra* note 9, at 861.

⁴⁷ *Whren v. United States*, 517 U.S. 806 (1996).

⁴⁸ Rhee, *supra* note 9, at 861. “[S]earches conducted as part of a general regulatory scheme, done in furtherance of administrative goals rather than to secure evidence of a crime, may be permissible under the Fourth Amendment

Nonconsensual warrantless searches without probable cause or individualized suspicion . . . when conducted pursuant to a regulatory program calculated to further a manifestly important governmental interest under circumstances where the program is reasonably tailored to further the governmental interest and where the intrusion on personal privacy or security is relatively slight in comparison to the interest served by the program.⁴⁹

The courts have recognized a compelling reason for airline security searches.⁵⁰ Such searches are part of a "regulatory scheme to keep dangerous people and items off of aircraft."⁵¹ The courts view this as a high priority administrative function that justifies some level of intrusive behavior.⁵² They have consistently found that the searches performed at the security checkpoints in airports are "reasonably tailored" and that a sufficient balance between the "intrusion on personal privacy" and the "interest served by the program" has been maintained.⁵³

Although the cases of record have dealt only with searches at security checkpoints, it is safe to assume that the courts would be quick to apply the same rationale to searches conducted as the result of a selection by CAPS. "As long as the potential passenger has submitted to the airport security process and the security personnel conduct a physical search . . . that is no more intrusive than necessary to achieve the objective of air safety, such search must be viewed as a reasonable part of airport security procedures."⁵⁴

Even if a claimant were able to find a way to defeat the applications of the administrative search doctrine, the decision in *Whren*⁵⁵ effectively blocks any claim that the search was unreasonable because it was motivated by race.⁵⁶ Justice Scalia stated

without a particularized showing of probable cause." *Id.* (quoting *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998)).

⁴⁹ *People v. Heimel*, 812 P.2d 1177, 1180 (Colo. 1991).

⁵⁰ *Rhee*, *supra* note 9, at 864.

⁵¹ *Rhee*, *supra* note 9, at 864.

⁵² *Rhee*, *supra* note 9, at 864.

⁵³ *See, e.g.*, *Rhee*, *supra* note 9, at 864; *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1242-43 (9th Cir. 1989); *United States v. Cyzewski*, 484 F.2d 509, 513 (5th Cir. 1973); *United States v. Davis*, 482 F.2d 893, 908-12 (9th Cir. 1973).

⁵⁴ *People v. Heimel*, 812 P.2d 1177, 1182 (Colo. 1991).

⁵⁵ In this case, the petitioners, who were black, contended that police officers might use the race of a vehicle's occupants to decide which vehicle to stop. *Whren v. United States*, 517 U.S. 806, 810 (1996). They contended that the Fourth Amendment test applied to traffic stops should be whether a reasonable police officer would have made the stop for the reason given. *Id.*

⁵⁶ *Trende*, *supra* note 43, at 350.

that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."⁵⁷

2. *Disparate Impact and Equal Protection*

Given Justice Scalia's words above, any litigation over an airport search allegedly motivated by race will likely be relegated to an Equal Protection claim. Here again, a claimant is faced with an uphill battle because the legal climate surrounding such claims makes it difficult to prevail.⁵⁸

According to the Equal Protection Clause, the government is not permitted to "make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the Laws."⁵⁹ Race is one of the suspect classifications that will trigger analysis under this clause.⁶⁰ Under an Equal Protection analysis, racial discrimination can be found in the words of the law or in the effect of the law.⁶¹ The Supreme Court has held that if a law has "a discriminatory effect on persons belonging to a suspect classification, the law is subject to strict scrutiny and can be upheld only if it is closely tailored to fulfill a compelling governmental purpose."⁶²

In extending the administrative search doctrine to air line security searches, the courts have established that ensuring security in air travel is a sufficiently "compelling governmental purpose."⁶³ Even if they had not, few could rationally argue that keeping a terrorist from blowing up a plane full of innocent

⁵⁷ *Whren*, 517 U.S. at 813. Justice Scalia added that the Supreme Court is "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Id.*

⁵⁸ *Trende*, *supra* note 43, at 350.

⁵⁹ U.S. CONST. amend. XIV, § 1.

⁶⁰ *Rhee*, *supra* note 9, at 862 (citing *Hernandez v. Tex.*, 347 U.S. 475, 482 (1954)).

⁶¹ *Rhee*, *supra* note 9, at 862 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) and *Rogers v. Lodge*, 458 U.S. 613, 625 (1982)). "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with . . . an unequal hand, . . . to make unjust and illegal discriminations between persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the constitution." *Yick Wo*, 118 U.S. at 373-74.

⁶² *Rhee*, *supra* note 9, at 863 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

⁶³ *See, e.g.*, *People v. Heimel*, 812 P.2d 1177, 1182 (Colo. 1991); *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1242-43 (9th Cir. 1989); *United States v.*

people is not a compelling purpose. As discussed above in the Fourth Amendment analysis, the courts are highly likely to find CAPS and the associated security procedures to be sufficiently "tailored." There is nothing in the language of the FAA regulations that explicitly details the use of race as a criteria, so the claimant is left with the difficult problem of showing some type of disparate impact of the law that is attributable to race. And, even if disparate impact can be shown, the claimant must prove that the disparate impact is the result of racial animus to prevail.⁶⁴

The FAA has consistently maintained that race is not one of the criteria used by CAPS in the selection process.⁶⁵ Even if it were, it is unlikely that the inclusion of race as a factor in a passenger profile would necessarily lead to finding of impermissible discrimination. In the "driving while black" jurisprudence, courts have found that race may be included as a factor as long as it is not the only factor.⁶⁶ In two cases, *United States v. Martinez-Fuerte*⁶⁷ and *United States v. Brignoni-Ponce*,⁶⁸ the Supreme Court found that race may be considered in selecting who to stop at border checkpoints.⁶⁹ In *United States v. Weaver*,⁷⁰ the court acknowledged that race was a factor in the decision to stop and search a young black male but did not find this use of race

Cyzewski, 484 F.2d 509, 513 (5th Cir. 1973); *United States v. Davis*, 482 F.2d 893, 908-12 (9th Cir. 1973).

⁶⁴ *Trende*, *supra* note 43, at 350-51 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely [sic] because it has a racially disproportionate impact." *Washington*, 426 U.S. at 239.

⁶⁵ *See, e.g.*, DOT Press Release, *supra* note 18; Koch, *supra* note 29.

⁶⁶ *Trende*, *supra* note 43, at 357. Not all courts accept the use of race in a profile but the weight of authority is supportive. *Id.* For cases that disfavor the use of race, *see City of St. Paul v. Uber*, 450 NW.2d 623 (Minn. Ct. App. 1990); *Lowery v. Commonwealth*, 388 S.E.2d 265 (Va. Ct. App. 1990); *State v. Barber*, 823 P.2d. 1068 (Wash. 1992).

⁶⁷ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

⁶⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

⁶⁹ In *Martinez-Fuerte*, the Court stated that "even if it be assumed that such referrals [to the secondary checkpoint] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." *Martinez-Fuerte*, 428 U.S. at 564 n.17. In *Brignoni-Ponce*, the court found that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor." *Brignoni-Ponce*, 422 U.S. at 886-87.

⁷⁰ *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992).

violated his constitutional rights.⁷¹ And in *United States v. Coleman*,⁷² the court stated explicitly that “ethnic background and, similarly, race are not features which can alone justify an investigative stop, they are one factor which may be taken into account, together with other pertinent circumstances.”⁷³ These findings are substantially duplicated in a number of other jurisdictions.⁷⁴ Given that the CAPS profiles are known to include other factors⁷⁵ that are arguably relevant to determining whether a passenger is a potential terrorist, the inclusion of race would not seem to create an Equal Protection violation.

Without the “smoking gun” of race, the claimant is left with proving some type of disparate impact in the administration of the law that is motivated by intentional discrimination. The courts seem to have set a very high standard for a showing of disparate impact⁷⁶ and the defense has a very strong counter argument. As previously mentioned, the initial DOJ study of the CAPS profile criteria found that there was no disparate impact on Arabs⁷⁷ and other studies have apparently corroborated this finding.⁷⁸

⁷¹ *Id.* at 394. The DEA agent who stopped Weaver admitted that he did so because he was a poorly dressed young black male who was “walking rapidly, almost running down the concourse.” *Id.* at 392. The court found that using race was a permissible factor in view of his behavior and the fact that the agent knew that black Los Angeles gangs were bringing cocaine into the area. *Id.*

⁷² *United States v. Coleman*, 450 F. Supp. 433 (E.D. Mich. 1978).

⁷³ *Id.* at 439 n.7. The DEA agent testified that he stopped Coleman at the airport because he was coming from Los Angeles, he appeared to have no luggage, and he was black. *Id.* at 435.

⁷⁴ See *Trende*, *supra* note 43, at 356; *United States v. Harrington*, 636 F.2d 1182 (9th Cir. 1980); *United States v. Collins*, 532 F.2d 79 (8th Cir. 1976); *United States v. Richard*, 535 F.2d 246 (3d Cir. 1976); *United States v. Stone*, 73 F. Supp. 2d 441 (S.D.N.Y. 1999); *State v. Dean*, 543 P.2d 425 (Ariz. 1975); *State v. Barber*, 823 P.2d 1068 (Wash. 1992).

⁷⁵ Nojeim, *supra* note 12, at 5.

⁷⁶ See, e.g., *Trende*, *supra* note 43, at 350-54; John Gibeaut, *Marked for Humiliation*, 13-FEB NBA NAT'L B.A. MAG. 20, 21 (1999); Elisabeth R. Calcaterra & Natalie G. Mitchell, Note, *Subtracting Race From The “Reasonable Calculus”: An End to Racial Profiling? United States v. Montero-Comargo*, 208 F.3d 1122 (9th Cir. 2000) *Cert. Denied Sub Nom.*, 6 MICH. J. RACE & L. 339, 346-47 (2001).

⁷⁷ DOJ Report, *supra* note 22.

⁷⁸ Slater Remarks, *supra* note 8. These results are not particularly surprising as CAPS reportedly selects passengers at random as well. DOT Press Release, *supra* note 18. In 2000, the Department of Transportation began another study to determine if CAPS was disproportionately selecting Arabs and Muslims for additional scrutiny. *1998-2000 Report*, *supra* note 4, at 23-24; see also DOT Press Release, *supra* note 18 (announcing the first passenger survey of the study.) The results of this study have not been published to date.

To establish a claim of disparate impact, the plaintiff must demonstrate that similarly situated individuals of a different race were not treated the same way.⁷⁹ In essence, an Arab selectee must show that similarly situated non-Arab passengers could have been selected but were not. Such a showing generally depends on the availability of statistics to support the allegation.⁸⁰ Such statistics are difficult to obtain since there is likely no record of instances in which a passenger could have been selected but was not. And to get access to any records, the plaintiff has to cross a huge discovery barrier.⁸¹ The Supreme Court has held that discovery will not be allowed unless the plaintiff can show that similarly situated individuals were treated differently – a true Catch-22.⁸²

Even if statistical evidence is available, it is likely not enough to make the requisite showing of intentional discrimination.⁸³ Even fairly compelling statistics that CAPS selected Arabs in significant percentage over passengers of other races would probably not survive a summary judgment motion.⁸⁴ In *McCleskey v. Kemp*, the Supreme Court found that a statistical study showing a disparate application of the death sentence based on the defendant's race was not sufficient to show purposeful discrimination.⁸⁵ More recently, in *United States v. Armstrong*,⁸⁶ the Supreme Court found a study showing that all persons prosecuted for crack offenses were black was insufficient to demon-

⁷⁹ *United States v. Armstrong*, 517 U.S. 456 (1996).

⁸⁰ Gibeaut, *supra* note 76, at 21 (citing *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053 (N.D. Ill. 1998) as one example).

⁸¹ Calcaterra & Mitchell, *supra* note 76, at 346.

⁸² *Armstrong*, 517 U.S. at 552. The plaintiff might try to use anecdotal evidence such as interviews with other passengers to make such a showing but courts have not been favorable to that approach. See *Trende*, *supra* note 43, at 352 (citing *Brown v. Ellendale Police Dept.*, No. 97-54-SLR, 1999 U.S. Dist. LEXIS 5053 (D. Del. Mar. 31, 1999)). In *Brown*, the court found that the plaintiff's anecdotal evidence of other racially motivated traffic stops was not sufficient to show a disparate impact on black drivers and granted summary judgment to the defendant. *Brown*, 1999 U.S. Dist. LEXIS, at *9.

⁸³ Calcaterra & Mitchell, *supra* note 76, at 347; *Trende*, *supra* note 43, at 351-54.

⁸⁴ *Trende*, *supra* note 43, at 352-353 (citing *Armstrong*, 517 U.S. at 456 and *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

⁸⁵ *McCleskey*, 481 U.S. at 279. "At most, the . . . study indicates a discrepancy that appears to correlate with race . . . [but it] does not demonstrate a constitutionally significant risk of racial bias." *Id.* at 312-313; see Calcaterra & Mitchell, *supra* note 76, at 347.

⁸⁶ *Armstrong*, U.S. 517 U.S. at 456.

strate a disparate impact.⁸⁷ Even expert testimony interpreting a series of videotapes of police stops has been deemed inadequate.⁸⁸ Indeed, very few cases exist where statistical evidence was found to be sufficient. In *Yick Wo v. Hopkins*,⁸⁹ the plaintiff presented evidence that all Chinese petitioners were denied the right to operate their home businesses while other non-Chinese petitioners were given permission. The Supreme Court found this to be adequate to demonstrate a disparate impact with intentional discrimination.⁹⁰ However, this holding likely came about because the government had no rationale other than race for closing down the Chinese-owned businesses.⁹¹

3. *The Issue That Wasn't?*

Alternatively, perhaps there was little litigation because the problem was not as egregious as the legal pundits feared. It is noteworthy that the *End Racial Profiling Act of 2001*⁹² does not even mention racial profiling in the airline security context,⁹³ nor was the issue raised in any of the congressional testimony

⁸⁷ *Id.* at 470.

⁸⁸ *Washington v. Vogel*, 880 F. Supp. 1542 (M.D. Fla. 1995), *aff'd*, 106 F.3d 415 (11th Cir. 1997). The court stated that "the jury could not reasonably draw any conclusions, relevant to [the plaintiffs], from the fact that greater than 60% of stops on existing videotapes were of blacks." *Id.* at 1544-45.

⁸⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁹⁰ *Id.* at 374.

⁹¹ The Court noted that "[n]o reason whatever, except the will of the supervisors, is assigned" and that "[n]o reason [for the disparate impact] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong." *Id.* at 374.

⁹² *End Racial Profiling Act of 2001*, H.R. 2074, 107th Cong. (2001).

⁹³ The text of the Act focuses mostly on racial profiling by police but does allude to racial profiling in the United States Customs Service. *Id.* The definition of racial profiling is also interesting as it seems to go against the weight of precedent set in the courts:

The term 'racial profiling' means the practice of a law enforcement agent relying, to any degree, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities . . . except that racial profiling does not include reliance on such criteria in combination with other identifying factors when the law enforcement agent is seeking to apprehend a specific suspect whose race, ethnicity, or national origin is part of the description of the suspect.

Id. § 501(5). This is the fourth time that such a bill has been introduced, and this one is likely to meet the same fate as the others. Calcaterra & Mitchell, *supra* note 76, at 348.

regarding the bill.⁹⁴ As might logically be expected, the complaints about disparate treatment were somewhat cyclical, rising during the Gulf War and when there was notable terrorist activity, and then quickly tapering off.⁹⁵ When CAPS was introduced to replace the existing manual profiling system, the relative level of complaints also tapered off.⁹⁶ Interestingly, both the Pan Am and Abbass suits were filed during the time the manual profiling system was used. Other factors that likely contributed to a decreased perception of disparate treatment were the increased “use of high-tech explosive detectors, which . . . dramatically reduced the number of hand searches of baggage and changes in airline procedures in response to suggestions.”⁹⁷ Finally, periodic reviews of the profiling procedures consistently found there was no disparate impact on those of Arab descent.⁹⁸ According to James Zogby, president of the Arab American Institute, racial profiling in airport security was “virtually eliminated” until the September 11 attacks.⁹⁹

III. POST-SEPTEMBER 11 – WHEN PASSENGER AIRLINERS BECOME WEAPONS OF MASS DESTRUCTION IN THE HANDS OF MUSLIM TERRORISTS, IS RACIAL PROFILING PERMISSIBLE?

“If you were boarding an airplane, wouldn’t you want authorities to scrutinize Arab passengers?”¹⁰⁰

United States citizens stared in horror at video clips of Arab terrorists flying two passenger airliners into the World Trade Center. They saw pictures of the Pentagon in flames as the result of another Arab terrorist attack using a passenger airliner. They learned in subsequent days of the heroic acts of passengers

⁹⁴ See, e.g., *Banning Racial Profiling: Hearing on “S. 989, the End Racial Profiling Act of 2001” Before the Subcomm. on the Constitution, Federalism & Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of U.S. Senator Russ Feingold, chairman of the Senate Comm. on the Judiciary Subcomm. on the Constitution, Federalism & Property Rights).

⁹⁵ Higgins, *supra* note 40, at 51. “The Gulf War, World Trade Center bombing and Oklahoma City bombing all led to more reports of disparate treatment.” *Id.*

⁹⁶ Slater Remarks, *supra* note 8. “As [CAPS] came on line, security-related discrimination complaints dropped rapidly—from 78 complaints in 1997, to 11 last year and 9 so far this year.” *Id.*

⁹⁷ Slater Remarks, *supra* note 8.

⁹⁸ Slater Remarks, *supra* note 8.

⁹⁹ Brand-Williams, *supra* note 6.

¹⁰⁰ Taylor, *supra* note 5.

on yet another airliner which thwarted another planned Arab terrorist attack. And they heard the news reports about a possible fifth terrorist attack that may have been foiled when the FAA grounded all aircraft. The FAA and the airlines were faced with a huge problem – establishing security procedures that would help to allay the justified fear of flying in the aftermath of this tragedy and in the face of continuing threats from the same Arab organization that was responsible for these terrorist attacks.

New security procedures were established and the public began slowly returning to the air. With this return under heightened security come reports of alleged racial profiling of passengers of Arab descent. And the alleged profiling incidents are no longer confined to selection by CAPS, but include allegations of disparate treatment at security checkpoints, at the gates, and even after boarding the plane.¹⁰¹ Are those who appear to be Arab being profiled based solely on their race? The answer to this question is likely “Yes!”, at least in some cases. Is Arab ethnicity a consideration in who is selected for additional questioning and searches? Again, the answer is likely “Yes!”¹⁰²

Is using race as a factor in security procedures necessarily wrong? Public opinion says “No” and rational arguments have been made that racial profiling, at least in the short term, is justified under the circumstances. Will a legal challenge based on disparate treatment be successful? The legal environment prior to September 11 was not conducive to success, and recent sig-

¹⁰¹ See, e.g., *Statement of Norman Y. Mineta Secretary of the Department of Transportation Before the U.S. Commission on Civil Rights*, Oct. 12, 2001, available at <http://www.usccr.gov/pubs/tragedy/imm1012/mineta2.htm> (last visited Oct. 30, 2002). In the period between September 11 and the date of his statement, the Department of Transportation received seven complaints alleging removal from flights or denial of permission to board because the persons “are, or were perceived to be, of Arab, Middle Eastern or South Asian descent and/or Muslim.” *Id.* Three additional complaints alleged discriminatory treatment at security checkpoints. *Id.*

¹⁰² See, e.g., Ellingwood & Riccardi, *supra* note 1. A security guard at the Baltimore-Washington International Airport admitted that he was looking at passengers who appeared to be Arab more closely. *Id.* “It’s hard and it’s harsh, but that’s the reality.” *Id.* Also, a pilot stated in a newspaper interview that some of his fellow pilots admitted they were checking out passengers for a “Middle Eastern kind of look.” *Id.* Even an FAA spokesperson acknowledged that some screeners may be targeting passengers that appear to be Middle Eastern. Lisa O’Neill Hill & Phil Pitchford, *New Fears Raised on Racial Profiling*, THE PRESS-ENTERPRISE, Sept. 22, 2001, at A5.

nals from the Supreme Court indicate that success post-September 11 is even less likely.

A. NEW SECURITY PROCEDURES = RACIAL PROFILING?

"Given the events of [September 11], assumptions underlying aviation security have fundamentally changed."¹⁰³

Before the FAA allowed the resumption of air travel, it mandated a number of new, stringent security measures.¹⁰⁴ These procedures include: requiring all passengers checking luggage to go to the tickets counters; increasing the number of plainclothes and uniformed security personnel and other law enforcement officers at airports; requiring screeners at the security checkpoints to use hand-screening devices for continuous random checks of passengers; adjusting CAPS profiling parameters; and increasing random security checks throughout airports.¹⁰⁵ In addition, passengers and their carry-on luggage are being screened on continuous basis at the gates prior to boarding the aircraft.¹⁰⁶ As a result, all passengers are now experiencing some heightened security and the number of passengers selected for some level of individual attention has increased.¹⁰⁷ The opportunities for perceived or real disparate treatment have also increased.

¹⁰³ *Aviation Security Measures, Including the Screening of Passengers and Property: Before the Senate Comm. on Governmental Affairs*, 107th Cong. (Sept. 25, 2001) (statement of Monte R. Belger, Acting Deputy Adm'r, Fed. Aviation Admin.) [hereinafter Belger Statement].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The security procedures listed are the ones most likely to provide an opportunity for racial profiling. Other procedures were mandated as well. *See id.* As might logically be expected, CAPS parameters are being adjusted as more information about the attacks is obtained and in the face of new information regarding potential attacks. *The Use of Explosives Detection Technology to Screen Checked Baggage: Before the Subcomm. on Aviation of the House Comm. on Transp. & Infrastructure*, 107th Cong. (Dec. 7, 2001) (statement of Steven Zaidman, Assoc. Adm'r for Research & Acquisitions, Fed. Aviation Admin.) [hereinafter Zaidman Statement].

¹⁰⁶ Zaidman Statement, *supra* note 105.

¹⁰⁷ Sharon Cohen, *Terror Attacks Revive Concerns About Profiling*, HOUSTON CHRON., Oct. 21, 2001, at A19. Paul Takemoto of the FAA acknowledged in an interview that the number of passengers selected by CAPS and for other random procedures has increased significantly. *Id.*

The allegations of disparate treatment of Arabs in this new security regime began almost immediately.¹⁰⁸ Pilots who elected to exercise their right to evict passengers that they viewed as safety risks exacerbated the situation.¹⁰⁹ But it is not at all clear that disparate treatment is the rule, not the exception.¹¹⁰ The naturally heightened sensitivity of Arab travelers, combined with these new subjective and random security procedures, create an environment that fosters misperceptions. Although certainly not dispositive, the results of an informal survey conducted by a newspaper at two major airports in late January are interesting. Of the more than 1000 passengers observed, only between 5 and 10 percent were selected for extra inspection at the boarding gates.¹¹¹ Of those passengers selected, most were white males followed by white females.¹¹² "Although dozens of people who appeared to be of Middle Eastern descent boarded the flights, only two received extra screening."¹¹³

The FAA and the airlines are attempting to be responsive to the concerns of Arab passengers while firmly standing behind the new security procedures. In light of what it acknowledged to be "a rash of improper and insensitive searches and other im-

¹⁰⁸ *Id.* This article contains examples of the types of reported events. Shora, a male of Syrian descent, was patted down and asked to remove his shoes after passing through the security checkpoint and observed that no other passenger around him was selected for such treatment. *Id.* Bhuiya, a female of Bangladeshi descent, believed that she was selected because of her dark skin and her Muslim-style head scarf. *Id.* Ahmar Massod, an American citizen of Pakistani origin, said he was the only person asked by for identification by the police as he was in line at the Boston airport. *Id.*

¹⁰⁹ See, e.g., Stossel, *supra* note 5; CNN Report, *supra* note 5; Jonah Goldberg, *Racial Profiling? Maybe, But So What?*, ORLANDO SENTINEL, Jan. 5, 2002, at A13. In one incident, Ashraf Khan, an American citizen of Pakistani descent, was seated on a Delta flight in route to his brother's wedding. Stossel, *supra* note 5. Per Mr. Khan, the pilot asked him to leave, saying that "Me and my crew make a decision that we are not secure flying with you." *Id.* In another reported incident, Vahid Zhorehvandi, a software developer en route from Seattle to Dallas, was asked to leave his American Airlines flight. CNN Report, *supra* note 5. He claims he was told that the pilot did not "feel comfortable flying." *Id.* And, in yet another incident, Walied Shater, a Secret Service agent, was not allowed on his American Airlines flight because the pilot felt he was a security risk. Goldberg, *supra*.

¹¹⁰ See, e.g., Cohen, *supra* note 107. Civil rights organizations and some Arab groups who are monitoring the situation have seen no widespread signs of racial profiling. *Id.*

¹¹¹ Bob von Sternberg, *Racial Profiling Complaints Climb at Airports; Arab-Americans Fear They are Being Singled Out, But the Government and Airlines Say the Increased Security Checks Are Random*, STAR TRIB. (Minneapolis, MN), Feb. 3, 2002, at 23A.

¹¹² *Id.*

¹¹³ *Id.*

proper treatment of . . . Arab-Americans by airport and air carrier security personnel,” the FAA issued a policy statement, *Carrying Out Transportation Inspection and Safety Responsibilities in a Nondiscriminatory Manner*,¹¹⁴ to all those involved in the security process.¹¹⁵ This statement admonishes security personnel to be respectful and sensitive as they carry out their responsibilities.¹¹⁶ It also states quite bluntly that passengers or their property should not be subjected to “inspection, search and/or detention solely because [the passengers] appear to be Arab, Middle Eastern, Asian, and/or Muslim; or solely because they speak Arabic, Farsi, or another foreign language; or solely because they speak with an accent that may lead you to believe they are Arab, Middle Eastern, Asian, and/or Muslim.”¹¹⁷ The standard personnel involved in making safety or security determinations are directed to use is what the FAA calls the “but/for” test.¹¹⁸ “But for this person’s perceived race, ethnic heritage or religious orientation, would I have subjected this individual to additional safety or security scrutiny?”¹¹⁹

In the midst of these allegations, reports, and attempts to mitigate, the new aviation security act was passed.¹²⁰ Amongst its many provisions are two that may help remove personal subjectivity from the passenger selection process and alleviate perceptions of disparity. First, the DOT is permitted to implement “trusted passenger programs” to expedite the screening of passengers who have passed some type of yet to be determined prescreening criteria.¹²¹ Since the stated goal is to allow screening personnel to “focus on those passengers who should be subject to more extensive screening,”¹²² participants in the program will presumably be allowed to bypass some or all of the additional searches. Second, and more significantly, the DOT is instructed to expand CAPS “to evaluate all passengers before they

¹¹⁴ *Carrying Out Transportation Inspection and Safety Responsibilities in a Nondiscriminatory Manner*, Oct. 12, 2001, available at <http://airconsumer.ost.dot.gov/rules/20011012.htm> [hereinafter DOT Policy Statement].

¹¹⁵ Sternberg, *supra* note 111 (quoting from a statement by the FAA).

¹¹⁶ DOT Policy Statement, *supra* note 114.

¹¹⁷ DOT Policy Statement, *supra* note 114. However, note the use of the word “solely” in this statement.

¹¹⁸ DOT Policy Statement, *supra* note 114.

¹¹⁹ DOT Policy Statement, *supra* note 114.

¹²⁰ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

¹²¹ *Id.* §109(a)(3).

¹²² *Id.*

board an aircraft,"¹²³ not just those who check luggage. Provided the system is used at the screening checkpoints as well as at the airline reservation desks and gates, almost all subjectivity can be removed.¹²⁴

B. PUBLIC OPINION – A NECESSARY EVIL

"I don't need this kind of irony in my life."¹²⁵

After September 11, the American public generally seems to favor the use of racial profiling to potentially increase the level of safety of airline travel.¹²⁶ This attitude is illustrated in the results of several polls taken in the days immediately following the terrorist attacks.¹²⁷ Interestingly, one poll shows that African Americans, the traditional victims of racial profiling, were in favor racial profiling directed at terrorists.¹²⁸ A poll of the

¹²³ *Id.* § 136(2).

¹²⁴ Barry Steinhardt of the ACLU has stated that there is no "evidence of racial profiling by the FAA to the extent they are relying on the CAPPS system." Cohen, *supra* note 107.

¹²⁵ Garry Trudeau, *Doonesbury* © (Oct. 13, 2001), available at <http://www.doonesbury.com/strip/dailydose/index20011013.htm>. This phrase is spoken by a black man on an airplane after he has "profiled" a passenger of Arab descent as a potential terrorist.

¹²⁶ See, e.g., Taylor, *supra* note 5; Stossel, *supra* note 5; Sanders, *supra* note 5; Murray, *supra* note 5. To determine how you stand on this issue, try this test suggested by the Taylor article:

A few weeks hence, or a year hence, you are about to board a cross-country flight. Glancing around the departure lounge, you notice lots of white men and women; some black men and women; four young, casually dressed Latino-looking men; and three young, well-dressed Arab-looking men. Would your next thought be, "I sure do hope that the people who let me through security without patting me down didn't violate Ashcroft's policy by frisking any of those three guys"? Or more like, "I hope somebody gave those three a good frisking to make sure they didn't have box cutters"?

Taylor, *supra* note 5.

¹²⁷ See, e.g., Brand-Williams, *supra* note 6; Henry Weinstein, et al., *Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A1. The Brand-Williams article cites both a survey conducted by *The Detroit News* and a CNN/*USA Today*/Gallup poll. The newspaper survey found that 59% of those surveyed support "extra precaution in delaying people of Arab descent who are flying." Brand-Williams, *supra*. The poll also found that a majority support requiring people of Arab descent to "undergo special, more intensive security checks before boarding airplanes in the U.S." *Id.* A *Los Angeles Times* poll found that 68% of the people questioned approved "randomly stopping people who may fit the profile of suspected terrorists." Weinstein, *supra*.

¹²⁸ Clarence Page, *Look Who's in Favor of Racial Profiling Now*, SEATTLE POST-INTELLIGENCER, Oct. 5, 2001, at B7. Of the black respondents to a Gallup poll,

Arabic community conducted by the ADC was also favorable.¹²⁹ But this favorable posture is tempered with ambivalence. In general, the people polled felt racial profiling was a necessary evil under the post-September 11 circumstances, not something to be endorsed in general. No rational American wants to treat the members of the Arabic community as second class citizens. This ambivalence is perhaps best illustrated by this series of *Doonesbury* © cartoons published in early October 2001:



71% favored "more intensive security checks for Arabs, including those who are U.S. citizens, before they boarded airplanes." *Id.* A Zogby International poll found that 54% of its black respondents "favored singling out Arab Americans for special scrutiny at airport check-ins." *Id.*

¹²⁹ Dennis Niemiec & Shawn Windsor, *Arab Americans Expect Scrutiny, Feel Sting of Bias*, DETROIT FREE PRESS, Oct. 1, 2001, available at http://www.freep.com/news/nw/terror2001/poll1_20011001.htm. In a poll of Arab Americans conducted by the *Detroit Free Press* and EPIC/MRA, 61% said extra questioning or inspections of "people with Middle Eastern features or accents" are justified. *Id.*



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These words sum up why the attitude of the American public has changed: "Racial profiling seems somehow different after Sept. 11 . . . Our communal sense of security seems to have changed our view. The consensus seems to be if there is a clear and present danger, racial profiling can be permissible."¹³⁰

C. THE ARGUMENTS IN FAVOR OF RACIAL PROFILING

While the FAA and the government are putting in place new security procedures and attempting to show that Arabs are not being mistreated in the process, they are circling around a very central issue. All of these changes are designed to catch potential terrorists. And, these terrorists, at least in face of the current

¹³⁰ *Doonesbury* (Oct. 8, 2001) © 2001 G.B. Trudeau. Reprinted with permission of Universal Press Syndicate. All rights reserved.

threats, tend to be young Arab males. So, why not admit this fact and permit some limited, judicious use of race and ethnicity in evaluating the security risk presented by a passenger?

Permitting the consideration of race when administering security procedures does not mean that all "Arab-looking people should be stopped, questioned, and searched based solely on their ethnicity."¹³¹ Race should be one of the permissible factors, at least until a foolproof security system is created.¹³² Not to do so borders on irrationality. "We are concerned about people from a particular region of the world. They tend to be young, they tend to be male. And we ought to spend most of our time looking for them."¹³³ Instead, in an effort to avoid a reasonable infringement of the civil liberties of a few, gaping holes are left that a terrorist could slip through.

Consider the following situation. Apparently two of the September 11 hijackers were flagged by CAPS because they had, among other things, reserved their tickets using a credit card but paid in cash.¹³⁴ Presumably, their checked luggage was screened as this was what was supposed to happen but neither of them was searched or questioned, probably due to Arab sensitivity about profiling.¹³⁵ Arguably, if ethnicity or national origin had been part of the criteria, all of the hijackers might have been selected.¹³⁶ If questioning and personal searches had been routine, perhaps a pattern would have been detected.¹³⁷ Perhaps American sensitivity about racial profiling actually simplified the hijackers' job.¹³⁸

Allowing the use of race in the air travel security context is not the same as condoning the use of racial profiling in other law

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¹³⁶ Amer G. Zahr, *I Guess I Fit the Profile*, MICHIGAN DAILY (U. Michigan), Jan. 14, 2002, available at 2002 WL 8293136 (quoting Pete DuPont of the National Center for Policy Analysis).

¹³⁷ Taylor, *supra* note 5.

¹³⁸ Taylor, *supra* note 5.

enforcement situations.¹³⁹ Preventing another “mass-murder-suicide hijacking” is considerably different from, and more important than, catching drug dealers or other criminals.¹⁴⁰ The stakes are much higher and the circumstances are much different.

Such profiling is not necessarily illegal discrimination. Under these circumstances, the profiling is in response to a “specific threat to commit a specific crime (more suicide hijackings) made by a specific group (the Islamic terrorists of al-Qaeda).”¹⁴¹ This type of profiling has been endorsed in federal court.¹⁴²

D. THE LEGAL CLIMATE

“Historically, the Supreme Court does not have a great record for protecting individual rights during times like these.”¹⁴³

As previously discussed, the probability of success of a racial profiling claim in air travel security procedures was low prior to September 11. Now, this probability is virtually nonexistent. If the FAA were to allow the open use of race or ethnicity in combination with other factors, rational arguments can be made, supported by Supreme Court precedent, that the FAA has a compelling interest in preventing future terrorist attacks, and using race or ethnicity is sufficiently narrowly tailored to support that interest. The Supreme Court has permitted the consideration of race in circumstances far less threatening than those facing the FAA.¹⁴⁴ To paraphrase the Court, “even if it be assumed that such [selections for heightened security procedures] are made largely on the basis of apparent [Arab] ancestry, we perceive no constitutional violation.”¹⁴⁵ “The likelihood that any given person of [Arab] ancestry is a terrorist is high enough to

¹³⁹ Koch, *supra* note 29. The article is quoting Neil Livingstone, the chairman and CEO of GlobalOptions who is a security expert. *Id.*

¹⁴⁰ Richard Lowry, *Profiles in Cowardice: How to Deal with the Terrorist Threat – and How Not To*, NAT’L REV., Jan. 28, 2002, available at 2002 WL 11777148.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* This has apparently happened in other countries. In 1986, a pregnant woman flying from Heathrow to Tel Aviv was pulled aside because pregnant women don’t usually travel alone. *Id.* It was subsequently discovered that a bomb had been planted in her carry-on bag by her Jordanian boyfriend. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Taylor, *supra* note 5.

make [Arab] appearance a relevant factor.”¹⁴⁶ Clearly, these same precedents would apply if the status quo is maintained and a claim is made that the security personnel are making subjective selections based on race.

In addition, the Supreme Court’s response to two recent cases may be indicative of how future racial profiling cases will fare in the courts.

On Oct. 1, 2001, the Supreme Court declined to grant certiorari to what is viewed to be an important racial profiling case, *Brown v. City of Oneonta*.¹⁴⁷ In this case, the black residents of the city of Oneonta sued various law enforcement agencies after officers interrogated almost all of the black males in the city.¹⁴⁸ The officers were looking for a suspect who had been described as a black male with a cut on his arm.¹⁴⁹ The Second Circuit found that even though the police were selecting people for interrogation based primarily on race and gender, “they could act on the basis of that description without violating the Equal Protection Clause” provided there was no evidence of discriminatory racial animus.¹⁵⁰ The court recognized that “question[ing] every person fitting a general description—may well have a disparate impact on small minority groups” but that a disparate impact was permissible under the circumstances.¹⁵¹ The court’s rationale is particularly interesting in view the current air travel security procedures:

If there are few black residents who fit the general description, for example, it would be more useful for the police to use race to find a black suspect than a white one. It may also be practicable for law enforcement to attempt to contact every black person who was a young male, but quite impossible to contact every such white person. If a community were primarily black with very few white residents and the search were for a young white male, the impact would be reversed.¹⁵²

¹⁴⁶ Taylor, *supra* note 5.

¹⁴⁷ Lowry, *supra* note 142.

¹⁴⁸ Lowry, *supra* note 142; see the discussion of the Brown case in the next section.

¹⁴⁹ Mark Curriden, *High Court Case May Gauge Civil Rights in Post-Attack Era*, DALLAS MORNING NEWS, Nov. 27, 2001, at 7A (quoting Thomas Baker, a law professor and specialist in Supreme Court matters).

¹⁵⁰ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

¹⁵¹ *Martinez-Fuerte*, 428 U.S. at 564 n.17.

¹⁵² *Brignoni-Ponce*, 422 U.S. at 886-87.

The analogy to searching for potential Arab terrorists among airline passengers who are predominately non-Arab is quite obvious. If a disparate impact did not trigger the Equal Protection clause in police procedures in searching for a mugger, how could it possibly do so in air travel security procedures attempting to prevent murder and mass destruction?

The refusal of the Supreme Court to hear *Brown* was a major blow to Arab civil rights leaders.¹⁵³ They recognize that this ruling is very detrimental to their ongoing efforts to stop profiling of Arabs as potential terrorists.¹⁵⁴ Per one leader, the ruling “sends a wrong message” and “the fight is only getting harder.”¹⁵⁵

The Supreme Court recently considered *U.S. v. Arvizu*,¹⁵⁶ a case that legal experts believed would “tell us if the Constitution and the Bill of Rights is the same document it was [before September 11].”¹⁵⁷ Prior to September 11, Victoria Brambl, a lawyer representing Mr. Arvizu, thought that a victory was a strong possibility.¹⁵⁸ Post September 11, she was worried that the attacks would “make it easier for the court to loosen the reigns on law enforcement.”¹⁵⁹ She was right to worry. The Supreme Court overturned the lower court decision that favored her client.

While *Arvizu* does not deal specifically with the issue of racial profiling, the comments of Justice O'Connor during oral arguments make it interesting in this context. O'Connor said, “We live in perhaps a more dangerous age today. Are we really going to back off the totality-of-the-circumstances standard?”¹⁶⁰ [The 9th Circuit ruling] seems a little more rigid than common sense

¹⁵³ *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

¹⁵⁴ Robert J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1455 (citing *Brown v. City of Oneonta*, 195 F.3d 111,116 (2d Cir. 1999)).

¹⁵⁵ Sievert, *supra* note 156, at 1455.

¹⁵⁶ *Brown*, 221 F.3d at 333-34.

¹⁵⁷ *Id.* at 338.

¹⁵⁸ *Id.* “Defendants’ policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description *Id.* at 337. “In acting on . . . a description that included race as one of several elements—defendants did not engage in a suspect racial classification that would draw strict scrutiny.” *Id.* at 337-38.

¹⁵⁹ Brand-Williams, *supra* note 6.

¹⁶⁰ Brand-Williams, *supra* note 6.

would dictate.”¹⁶¹ This statement, together with a previous speech in which Justice O’Connor said that “some civil liberties might have to yield to the needs of security,” seems to indicate how Justice O’Connor would vote in a racial profiling case.¹⁶²

There are some other, more subtle indicators that racial profiling of Arabs might be legally permissible. The Justice Department was supposed to release a “comprehensive review of racial profiling” in October of 2001.¹⁶³ That report is now on indefinite hold with its resources devoted to the new war on terrorism.¹⁶⁴ And government spokespersons seem to be equivocating. In a September 16 interview, John Ashcroft indicated that people are not “suspects based *solely* on their race or ethnic origin.”¹⁶⁵ FBI Director Robert Mueller, in an interview the next day, said: “We do not, have not, will not target people based *solely* on their ethnicity. Period.”¹⁶⁶ The DOT, in its directive intended to instruct people involved in the security process in administering it in a nondiscriminatory fashion, made liberal use of the word *solely* when describing prohibited factors.¹⁶⁷ Is there some implicit recognition here that race may be considered as long as it is not the only consideration?

Despite this legal climate that gives lawsuits alleging racial profiling of Arabs little chance of succeeding, the first suit has been filed. The American Civil Liberties Union of Illinois filed a lawsuit in federal district court on January 16, 2002, on behalf of Sumar Kaukab, a United States citizen of Pakistani descent.¹⁶⁸ Ms. Kaukab was allegedly subjected to “repeated and increasingly invasive searches” by security personnel at O’Hare International Airport.¹⁶⁹ According to an ACLU lawyer, “[s]ecurity personnel surrounded her, detained her and sub-

¹⁶¹ Brand-Williams, *supra* note 6.

¹⁶² United States v. Arvizu, 122 S.Ct. 744 (2002), *rev’g* 232 F.3d 1241 (9th Cir. 2000).

¹⁶³ Curriden, *supra* note 149, at 1A (quoting University of Georgia law professor Eugene Wilkes).

¹⁶⁴ Curriden, *supra* note 149, at 7A.

¹⁶⁵ Curriden, *supra* note 149, at 7A.

¹⁶⁶ The totality-of-circumstances standard permits a law enforcement officer to “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them” to establish the requisite reasonable suspicion to apprehend someone. *Arvizu*, 122 S.Ct. at 750.

¹⁶⁷ Tony Mauro, *Court Weighs in on Stops at the Border*, LEGAL TIMES, Dec. 3, 2001, at 8.

¹⁶⁸ *Id.*

¹⁶⁹ Evans, *supra* note 5.

jected her to an embarrassing and degrading search simply based on her ethnicity and religion.”¹⁷⁰ The suit alleges that this search “violated the U.S. Constitution’s guarantees of freedom of religion, freedom from unlawful ethnic and religious discrimination and protection against unreasonable search and seizure.”¹⁷¹ It will be interesting to see if the case makes it much beyond this filing stage.

IV. CONCLUSION

Monte Belger, Acting Deputy Administrator of the FAA, gave a very accurate summary of the challenges in air travel security in the wake of the terrorist attacks:

The nature of the threat facing America has changed. What we faced on September 11th was a new phenomenon—hijackers taking over commercial flights for the sole purpose of turning them into human-guided terrorist bombs of massive explosive power. Given the events of [September 11th], assumptions underlying aviation security have fundamentally changed.¹⁷²

If the assumptions have fundamentally changed, perhaps it is time to make some fundamental changes. The use of race or ethnicity as a factor in deciding who should be subjected to enhanced security procedures should be openly permitted. This is not to say that every passenger who is, or appears to be, of Arab descent should automatically be subjected to those procedures. Rather, it is one factor that should be weighed, perhaps quite heavily, in the overall consideration. The weight of this factor can be altered if and when other security procedures, or the elimination of the threat, make it unnecessary.

Concern has been expressed that if we allow the events of September 11th to weaken our constitutional rights, the terrorists will have won some sort of moral victory.¹⁷³ But allowing a limited use of race in profiling terrorists for airport security purposes does not weaken our constitutional rights. The authors of the Bill of Rights did intend to provide for the equal treatment of all people under the laws of the United States when they wrote these words:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

¹⁷⁰ Evans, *supra* note 5.

¹⁷¹ Taylor, *supra* note 5 (emphasis added).

¹⁷² Taylor, *supra* note 5 (emphasis added).

¹⁷³ DOT Policy Statement, *supra* note 114.

any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁷⁴

Our legal system should, and does, protect these rights except in extraordinary circumstances. The destruction of the World Trade Center, the attack on the Pentagon, and the continuing, very real threat of more terrorist attacks create such extraordinary circumstances.

Our legal system, in interpreting the Equal Protection Clause, has found that a disparate impact based on race is permissible (and hence constitutional). The test for this permissibility is that there is a compelling governmental purpose, that whatever is causing the disparate impact is narrowly tailored to fulfill that purpose, and that the disparate impact is not motivated by racial animus. The use of race in this context is not based on racial hatred, but on a very real need to provide increased security in the face of a threat that is coming from an organization whose members are mostly of Arab descent. As one legal commentator so aptly phrased it:

In constitutional-law parlance, while racial profiling may be presumptively unconstitutional, that presumption is overcome in the case of airline passengers, because the government has a compelling interest in preventing mass-murder-suicide hijackings, and because close scrutiny of Arab-looking people is narrowly tailored to protect that interest.¹⁷⁵

Those who think this threat is not enough to justify the extreme measure of some disparate treatment of those of Arab descent to help ensure the safety of all United States citizens when they choose to fly (or, as the events of September 11 so tragically demonstrated, even as they go about their normal lives) should ponder the words of Osama Bin Laden in an ABC news interview in 1998: "They are all targets . . . every day . . . they will receive a new corpse . . ."¹⁷⁶ "We do not differentiate between those dressed in military uniforms and civilians."¹⁷⁷ They should

¹⁷⁴ Press Release, American Civil Liberties Union, ACLU of Illinois Challenges Ethnic and Religious Bias in Strip Search of Muslim Woman at O'Hare International Airport (Jan. 16, 2002), *available at* <http://www.aclu.org/RacialEquality/RacialEquality.cfm?ID=9717&c=133&Type=s>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *American Muslim Woman Files Suit Over Search at O'Hare*, CNN.com (Jan. 17, 2002), <http://www.cnn.com/2002/LAW/01/17/airport.search.lawsuit/index.html>.

consider the known al Qaeda members that are still out there, looking for an opportunity to strike again.¹⁷⁸ As Attorney General John Ashcroft so succinctly stated, there is “a clear, unmistakable threat that al-Qaeda could attack the United States again.”¹⁷⁹

¹⁷⁸ Belger Statement, *supra* note 103.

¹⁷⁹ See, e.g., Curriden, *supra* note 149, at 7A; Jarvis C. Jones, *Pitfalls of Ethnic Profiling*, 58-OCT BENCH & B. MINN. 5 (2001).

