

## **B457. "Permissible Limits" National Law Journal (May 17, 2004), p. 23.**

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Using the rhetorical overkill that is an integral part of the American judicial system, the American Civil Liberties Union (ACLU) recently filed a class action in U.S. district court in Seattle. The suit claims that the secret "No Fly List" that the federal government maintains has proven to be "humiliating" and "frightening" for innocent Americans. The ACLU demands that the Transportation Safety Administration (TSA) improve the list so that those who are on it by mistake can readily clear their names—a reasonable demand. The ACLU also wants the government to disclose who is on the list and to make it "transparent"—an absurd idea, which would allow terrorists to learn if they are on the list and take steps to avoid being listed, rendering the list largely useless.

The case was filed on behalf of seven people who have been inconvenienced by the list. The ACLU makes it sound as if this is a huge number and an indication of the new security measure's overall ineffectiveness. The total number of people listed is not known, but it is clearly sizeable. Thus, if the list contains, say, 150,000 names, an error rate of less than 0.0047% is not unreasonable.

The seven plaintiffs claim that they have been humiliated because they have been screened in airports by hand rather than electronically, an indignity the terrorists have imposed on millions of Americans who wear a bra with some wires in it, have metal parts in their limbs or just wear a belt with an oversized buckle. Some of the ACLU seven also faced delays in receiving their boarding passes. Altogether, nothing much to get that worked up about.

I am all in favor of finding an efficient way for individuals who are on the list in error to get off it. However, this is easier said than done, in part because the same civil libertarians adamantly oppose making means of identification more reliable. The typical means of identification used by the TSA are driver's licenses. However, one can acquire them on the streets for a small fee or order them from Web sites such as [www.phonyid.com](http://www.phonyid.com). They can even be obtained from many states by presenting "breeder documents" (such as baptismal records). In short, they are about as easy to falsify as the ID cards students use to get into bars.

The main reason driver's licenses provide such poor means of identification is that they are still issued basically in the same manner as before Sept. 11, 2001. But back then, they were merely driver's licenses—not de facto national ID cards to be used for homeland security. Each state follows its own procedures. And no state is capable of checking to see if an applicant has received a license elsewhere. This enables people to get several licenses and turn over the "surplus" to terrorists. (Some of the Sept. 11 hijackers held multiple licenses from states including Virginia, Florida, California, Arizona and Maryland). Many states do not use the online validation processes to verify that the applicant for a driver's license is not using someone else's Social Security number and identity.

The dreaded national ID card

Why has so little been done to shore up the ways in which we identify people, which would help in ensuring that the No Fly List and other such lists would include the bad guys but leave innocent citizens alone? In part because the federal government loves to mandate things for states to do but not provide the necessary funding; this causes bills-introduced in the House and Senate to fix the system—to go nowhere. Another reason is that a coalition of civil libertarians, ranging from the ACLU to Phyllis Schlafly's Eagle Forum, have opposed any

and all such measures, claiming that driver's licenses are being turned into Soviet-like domestic passports-a form of much feared national ID cards.

It is far from clear that the right to privacy includes a right to anonymity. This is especially true when one traverses a public area or voluntarily enters a controlled area. The government is not compelling people to fly. If they enter those parts of the airport that are controlled, they are aware that they will have to identify themselves. People cannot have an unlimited expectation of privacy that includes a refusal to identify themselves properly in such an area. Unless one believes that people have the right to present a false ID, let the civil libertarians support the introduction of reliable means of identification; the small confusion on the No Fly List and other such lists would be significantly cut, making mistakes easier to remedy.

The Constitution does not bar searches and seizures, but only mandates that they be reasonable. And what is reasonable has clearly changed since Sept. 11, 2001. Having No Fly Lists, Watch Lists and other such security measures, and keeping the ways they are composed confidential, is reasonable. So are reliable means of identification, which one would be expected to present only when one voluntarily enters areas controlled for security purposes.

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