

Illinois State Bar Association
2005 High School Mock Trial Invitational



**ILLINOIS STATE
BAR ASSOCIATION**

*Dunn, Berry, dePriest, on behalf of themselves
and all others similarly situated*

v.

U.S. Transportation Safety Bureau

Definitions:

Class Action Law Suit - Enabling the many to sue as one; a lawsuit brought by a representative member of a large group of people on behalf of all members of the group.

Selectee list - Passengers who require additional security scrutiny

No-fly list - Passengers, within the selectee list, who prompt a more extensive security check, who may be denied boarding.

Declaratory Relief - Statutory remedy where no financial relief is sought, but the rights and status of the parties are adjudicated

Injunctive Relief - A court order prohibiting someone from doing a specific act or commanding someone to undo some wrong or injury.

Stipulations:

1. All plaintiffs have been certified as legitimate participants in the class action suit.
2. The class action has been certified.
3. For purposes of this mock trial scenario plaintiffs are seeking only declaratory and injunctive relief (not financial damages).
4. There is no federal immunity issue; the government has chosen to respond to the allegations in the class action.
5. All plaintiffs currently appear on the "Selectee" list and are not on the "No Fly List."

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF ILLINOIS

Bentley T. Dunn, Kim L. Berry, Burke S. dePriest,)
on behalf of themselves and all others similarly situated,)
Plaintiffs)
v.) *Case No. _____*
) *COMPLAINT -*
U.S. Transportation Safety Bureau,) *CLASS ACTION*
Defendant)

Preliminary Statement

1. Plaintiffs file this class action on behalf of themselves and similarly situated individuals to challenge the National Transportation Safety Bureau's administration and management of the "No-Fly list" and "Selectee" list, lists distributed to commercial airlines and security personnel with directives to detain and question any traveler whose name matches or is similar to one on the No-Fly or Selectee lists.

2. Defendants, through implementation of the "No-Fly List" and "Selectee" List, have caused hundreds, possibly thousands, of innocent travelers to be detained, questioned and searched, with no rational or explanation as to how or why the individuals have been placed on the respective lists. Travelers have no resources through which to clear their names to avoid future possibility of detention, questioning and searches, creating emotional trauma and social stigma.

3. All plaintiffs in this action are innocent travelers with no links to terrorist or criminal activities. All have names similar or identical to names on the "No-Fly List" and/or "Selectee" List, but pose no threat to aviation security. Each has been subjected to numerous, continued, extensive searches and questioning when traveling by air and have suffered humiliation, embarrassment and public ridicule.

4. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and a class of similarly situated individuals under the Due Process Clause of the Fifth Amendment and the Search and Seizure Clause of the Fourth Amendment. Defendants should be required to maintain the No-Fly and or "Selectee" list in an accurate manner that does not result in stigmatization, interrogation, delay, enhanced searches, detention, and/or other travel impediments for innocent passengers. Defendants should also be required to give Plaintiffs and other passengers the opportunity to clear their names so that they are no longer subjected to such unconstitutional treatment in the future.¹

¹ Preliminary Statement language is based largely on language in the American Civil Liberties Union of Washington complaint, which is attached to this mock trial problem as informational/educational material. The ISBA Standing Committee on Law-Related Education gratefully acknowledges and thanks the ACLU for permission to use their materials in developing this mock trial scenario.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that Defendants' maintenance, management, and dissemination of the No Fly and Selectee Lists are unconstitutional under the Fourth and Fifth Amendments to the United States Constitution.
2. Require Defendants to remedy immediately the due process and Fourth Amendment defects in the maintenance, management, and dissemination of the No Fly and Selectee Lists.
3. Grant such other and further relief as the Court deems just and proper.

Respectfully Submitted:

Attorneys for Plaintiffs

For the Plaintiffs - Bentley T. Dunn

1. My name is Bentley T. Dunn. I am a graduate student at Lincoln University in Illinois. My undergraduate studies concentrated in the fields of International Policy and Political Science. I have been working toward a J.D. and Ph.D. in International Diplomacy with a goal of working for the United States Government in an embassy. I have taken classes on international law, diplomacy, international relations, and international mediation and dispute resolution.

2. I am 23 years old. I was born in Springfield, Illinois and have lived here all of my life. My parents are both from England. They became citizens of this country in the early 1950's when they came to this country as small children.

3. I speak four languages, including English. I am fluent in French, German and Spanish. I also have some knowledge of Portuguese and Russian, probably enough to read a document and translate accurately but not speak them fluently.

4. I have never been arrested. I have never even gotten a traffic ticket. I am an honor student now and have been since early high school. I did write a rather vehement article protesting the current administration's international and environmental policies that was published in our college newspaper. If my article prompted the addition of my name to the list, then the government must be getting ready to really start cracking down on civil liberties.

5. Prior to the start of my senior year in 2002, I had traveled both in the United States and internationally with absolutely no problems at all. I think I may have had a bag searched once at the international terminal in London because I had indicated I had spent time on a farm and there were mad cow concerns. I think they wanted to be sure all my shoes were clean of any residue from walks in the country. After a brief search and a few warnings about mad cow disease, I proceeded. I think the entire bag search lasted about 5 minutes. During this search, I never felt humiliated or threatened in any way. In fact, the people conducting the search seemed quite friendly and were even somewhat apologetic.

6. The Homeland Security Act was enacted in November of 2002. During the 2002 and 2003 academic years, I had the opportunity to intern at a large international law firm in London, England. During two semesters spent in England, I flew between Chicago and London at least 20 times to return home for family visits, holidays, business related activities and other trips.

7. At first, there were routine checks of baggage, and the usual security checks. I always arrived at the airport with plenty of time to spare so I didn't need to worry about missing a flight. Then, sometime late in 2002, the searches started getting longer and the security checks seemed much more personal. The security staff started treating me very different than they had in the past. One security officer told me that my name was on a government list that indicated I might be a terrorist threat. I was shocked and felt sick to my stomach. I asked the security person any number of questions about how my name might have gotten on the list, how I could get off the list, how long I'd been on the list and things like that. The security guard was apologetic but absolutely refused to give any information. When I pressed the guard, the police were called. I was completely humiliated. The police were kind, and tried to be supportive when they realized

that I was not a terrorist threat, but nonetheless, were unable to give any of the information I asked about how to address this terrible mistake. It wasn't until later than it occurred to me that the more questions I asked the more suspicious I may have appeared to be?

8. On no fewer than fifteen occasions, I felt publicly humiliated when various security staff have pulled me roughly aside and announced rather loudly that my name was on a watch list, which, as they said, meant I was a threat to national security. Twice I've missed my flight to London. One of those flights I missed was to meet with the United States Embassy Office of Personnel for a summer internship interview. When I called and explained the problem, they didn't offer to reschedule the interview. I did hear from one of the officers at the Embassy that they were disappointed that my interview had to be cancelled, as I was the primary candidate for the internship position, which was filled by their second choice. I feel this really set me back both financially, and my résumé will now not have that choice position reflected. I can't really tell people I was the first choice but didn't get the job because I'm considered a threat to national security, can I?

9. I know about the Homeland Security Act and all the activities and actions that were taking place to secure the United States from further terrorist attacks. It certainly never occurred to me that I would be the one terrorized by my own government.

10. One of my greatest concerns is that the Constitution and the Bill of Rights are being ignored. I mean; there are people out there who may be profiled by the government and that would be an infringement of the First Amendment. I've almost memorized that wonderful document...the First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Could this selectee or no-fly list be an infringement on someone's freedom of speech or freedom of religion or the exercise of those freedoms? Can the government try to block this case and not allow us to petition the government for a redress of grievances? I hope not. That's not what this country is about. And what about that phrase saying that we should be able to petition the government for a redress of grievances? That's what I tried to do repeatedly and got absolutely nowhere. We may be able to petition the government, but we sure get no response!

11. Anyhow, the searches became more frustrating and more routine. Each and every time I flew, my name would scan into the airline computer and a warning would be given. My name was on either the infamous "no-fly" list or the selectee list, created by the U.S. Government and distributed to all airlines. The lists contain names of those people whom the Transportation Security Bureau deems to be threats. How my name got on that list, I do not know. How anyone's name is listed, no one knows. It's very secretive. No one has adequately responded to any of my requests for clarification or removal of my name.

12. After my initial problem with the searches, each time I flew, I had to produce a driver's license, with photo, as well as my passport. I needed to also carry with me a letter from the University and another letter from the law firm in London, explaining my internship and my

work history with them. I also began carrying a record of each and every time I had been searched and ultimately approved for flight, hoping that this would alleviate the problem.

13. At no time was I ever told that there were ways to address the problem. Even when I asked direct questions on how to address this problem, I was given no e-mail address, phone number, address, name or any information as to how to remove my name from the list. In fact, all my questions were answered very evasively with very little eye contact. I felt as though I'd been convicted of a horrible crime, and I had no idea what that crime might have been.

14. I started doing some research on my own and found the website for the National Transportation Safety Bureau and e-mailed them with my questions. No response was received, so I wrote them a letter. No response was received. I contacted my regional FBI office and they could offer no ideas on how to proceed. I contacted my Congressional Representative, whose office responded with the suggestion that I e-mail the National Transportation Safety Bureau. It's been a frustrating and frightening experience. I would compare this to those poor folks whose identities are stolen and their credit ratings are ruined. It takes them years to correct the situation. It's going to take me years as well, I'm sure.

15. I am an innocent, law abiding citizen, loyal to this country from birth, who's goal is to spend my life in the diplomatic field to make this country even better, and I am now considered by my own government to be a potential terrorist. Not only do I feel frustration and fear; I am also concerned that all the work I've undertaken during my education may be fruitless due to this smear on my reputation. What government office is going to hire me to do diplomatic work when my name appears on a terrorist watch list? Do I have some sort of record now? I can't seem to find out how extensive the list is, or how the government utilizes it, or how I got on the list, or how I can get off.

16. My name has even been mentioned in the media. How the local newspaper found out about all the problems I've been having is a question I'd really like answered. I've had to answer repeated questions at airports and now, because of the adverse publicity from the article in which I'm named, I've been questioned by my friends, family, neighbors, school personnel. I feel as if I'm constantly being evaluated by everyone I meet who realizes they recognize my name from the press article. I honestly think that the government is leaking the information to the press to help flush out some of the actual terrorists. They probably feel that, if the media can help them "keep an eye" on folks, all the better.

16. I think that one of the main reasons I am filing this suit is that one of these searches took place in front of my mother and father, with my fellow classmates who were traveling with me on a trip abroad, all witnessing the allegations. Since that time I have felt stigmatized. My classmates wonder what I must have done and are still asking questions about the security check, months after it happened. My parents are hurt and confused, their pride in me somehow tarnished by all of this worry. This one incident was an extended detention, during which I felt I could not leave the room in which I had been placed, for a period of time that exceeded one hour. My parents were separated from me and were detained in another room. My classmates were left with no explanation of my whereabouts, but had seen me escorted away with my arm held by a security officer.

17. I believe I have been subjected to numerous unconstitutional searches and my right to due process of law has been completely ignored. I mean, doesn't the Constitution mean anything anymore? I often wonder what the Founding Fathers would think of what's going on these days? They worked so hard to create a document that would protect the people and now this is happening to far too many innocent people.

18. I was shocked when I found out that my name was on a government watch list, selectee or no fly, or both. I was even more shocked, confused and angry that there seems to be no way to get my name off the list. This lawsuit isn't about canceling the list, or even making it public. All I want, personally, is to have an effective recourse for those of us to find that we are unfairly placed on this list. I need to clear my name. My future career may depend on this. I've already suffered a career setback by not getting the embassy internship in London. I don't want anything worse to happen in the future that could jeopardize all the hard work I've done throughout my school years.

19. I don't know if there is a person out there named Bentley T. Dunn who may be a threat. If they are, then they should be subjected to strict security measures and should not be allowed on flights. However, there has to be some way to differentiate between the innocent and the potentially dangerous person.

20. I have been asked to indicate if I have ever missed a flight due to the questioning and searches. The answer is yes, twice so far; and at least once a flight was delayed while the security guards concluded their questioning of me. I was allowed to get on the plane that time, with all the passengers glaring at me.

For the Plaintiffs - Kim L. Berry, Air National Guard

1. My name is Kim Berry. I am 26 years old and was born and raised in Springfield, Illinois. My parents have lived all their lives in Springfield. My grandparents lived all their lives in Springfield. We are a good, solid American family with old-fashioned, Midwestern values. I currently work as a reporter with the Lincoln County News & Review and have worked there for the past 8 years. What I'm best at is research. My nickname is "the mole." I think that's because I can get information that others seem to have had trouble obtaining, whether its through in person interviews, or through written solicitations for information, or via internet searches. I'm tenacious. I don't give up. I am as polite as can be, but I absolutely won't take no for an answer.

2. I also am a soldier in the Air National Guard, stationed in Springfield, Illinois. I am also a graduate of Lincoln University. I am on the government's so called selectee list. I know this because every time I have tried to fly, whether it be for business, personal or military reasons on public air transportation, I undergo rigorous and unreasonable questioning by airport officials and sometimes even security guards and police.

3. This questioning has happened on a regular basis, prior to every flight and even at airports where I transfer flights, since late 2002. It makes me feel like less of a person somehow to be pulled aside and have my ticket marked with some secret code; either a large NF or S. Obviously these letters indicate I'm on either the no-fly list or the selectee list we've all heard about.

4. I understand that there are basic security needs that need to be met and that public safety and national security are key factors in the creation of the selectee and no-fly lists and the policies that adhere to them. It is understandable that security of the masses is high on the government's list of important things to accomplish. However, having said that, there are surely ways to go about creating and maintaining a list that would ensure that the rights of the innocent are protected.

5. But, the government must also follow the laws of this land. There's the Constitution and the Bill of Rights out there protecting us from illegal or unreasonable searches and seizures, and providing for the due process of law. I think somewhere along the line, the government has overstepped its boundaries and has become overzealous, and has breached some of our Constitutional rights.

6. The current confused status of the no-fly lists is a clear indication that the government believes that an all-inclusive policy is far better than a narrow, more focused one. The watch lists probably hundreds, if not thousands, of innocent Americans who would never think about doing anything to harm another individual or the government. It is quite evident to me and to the others who have joined in this lawsuit that the government has no respect for us as individual, innocent citizens of this country. I don't question the need for watch lists, selectee or no-fly lists, I do question the way those lists are maintained and the accuracy of the information that is distributed. It seems that the government is completely satisfied with the shoddy work that went into creating and maintaining the lists.

7. The press is reporting that there are two lists that the government has created. The first is the real no-fly list. If your name is on that list, you just plain don't fly. There's another list that's known as the "selectee" list. Those on this broader list are the ones routinely subjected to extra screening before being allowed to board. Federal law enforcement groups and intelligence agencies contribute names to the list, which is administered by the Transportation Security Administration, under the auspices of the Homeland Security Bureau.

8. I found a press release from the government that stated that the Transportation Security folks have admitted that the computer technology used by some of the airlines, or even human input error, can confuse people on the actual no-fly list with passengers who have similar names. That should be easy to fix, right? Just update the list and correct the spellings, or re-key the name so it matches whatever identification is presented at the airport. But, that's where the snag seems to really kick in.

9. This is where the computer operators, or ticket agents, have been told to refer the passenger to a law enforcement official, who should be able to check identification and possibly call the FBI. That's basically saying that people are guilty until they are proven innocent, it seems.

10. Speaking of press releases and newspaper articles, my hometown newspaper ran a story that must have been leaked from somewhere in the airport or through law enforcement personnel that headlined "local national guard on terror watch list" with a photo of me being searched at the airport. The article caused immeasurable problems for me and is a breach of editorial ethics. After reading that "Kim Berry has become what none of us wants to be; a person who "appears to be" a threat to our safety and security" I felt sick. That line insinuates that I actually am a threat to our safety and security. I've received calls from friends and family, people I went to school with, and complete strangers, all wondering what on earth I was doing. It wasn't easy to explain. I've also received hate mail and my home has been egged twice and rocks have been thrown through my car windows when it was parked in front of my house. This is the worst kind of slander or libel I can think of. Through no fault of my own, I've been tagged as a terrorist, and the media is doing nothing but making matters worse.

11. I've heard that the Transportation Security Bureau is taking so much heat through these lawsuits that they are considering outsourcing the computer logs to companies to run airport registration programs for the government. I wonder if terrorists could be the ones running any of those outsourcing companies? This seems like an idea that hasn't been thought through, but one that puts a Band-Aid on the wound.

12. One would think that if lists like these are created, then there should be policies in place to assure the rights of the innocent. There is absolutely no recourse for those of us who are so obviously placed on the no-fly list in error, or if our names happen to match someone who rightly belongs on that list. I've produced all necessary information, driver's license, passport, and military identification whenever I travel.

13. I've been stopped time after time, while traveling in my military uniform, and have been pulled aside by uniformed security officers in front of my friends, family and superior officers, all of whom have vouched for me. It seems that the problem is worse when I'm in uniform. It's almost ironic, in my capacity as a member of the National Guard, it's my sworn duty to uphold the laws of this country and to serve, protect and defend...and it's as though the security and police see me as some sort of traitor to my country who is abusing the uniform that I so proudly wear. I am not a terrorist. I would never do anything to hurt this country or our citizens. It is my firm belief that I have been bypassed for promotions within the National Guard due to the stigma of having my name on the list and because of that photo of me in the local paper. I know for a fact that there is a notation in my file regarding my name being on the list as I received notification. Other members of the guard who joined after I did, with fewer hours of service, with less education, have received promotions and awards. I've received none since the no-fly list troubles began. Not one.

14. The no-fly list has been the subject of intense media scrutiny, thankfully. I mean, thankfully that the media is paying attention to our problems, not that my name is appearing. Maybe with this legal case, and the media on the alert, the government will start to do something to clear up these problems.

15. I have to wonder...and I'm sure everyone else who sits through these unnecessary and very uncomfortable interrogations wonders...if the government is spending money, time and effort on harassing the innocent by detaining and interrogating individuals who the government has admitted are innocent, when will the funding run out? Will there be the necessary money to actually track down the real terrorists? One has to wonder, and worry.

16. I also wonder if there is a person named Kim Berry who really has done something suspect? And I spend hours wondering what that suspicious activity might have been.

17. It seems as though the "big brother" that Orwell predicted in his "1984" novel, has come to be. It just took another 20 years to really get up and rolling.

18. I have been asked to indicate if I ever missed a flight due to the problems I've had. The answer is no, but that's not what this case is about. It's not about inconvenience. It's about the Constitution, fairness, and the United States Government being accountable and responsible. It's about earning a good name and being able to keep it. It's about being innocent until proven guilty. It's about the loss of integrity and the lack of promotion and financial advancement. It's about the loss of trust in our government.

19. Because of my travel problems, I've read document after document, article after article, and the government is in denial. I don't think they have the expertise or control to create and maintain a quality, fair computer program that is safe from intrusion by hackers, mischief-makers or terrorists. This is a computerized list that has been created by a governmental bureaucracy that consistently breaches the constitutional rights of United States citizens who deserve to travel lawfully, without undue harassment, inside this country and internationally.

20. No one in the Transportation Safety arena seems overly concerned that hundreds if not thousands of honest, law-abiding citizens are undergoing extensive delays and searches and are experiencing increased instances of frustration and embarrassment due to this governmental intrusion into their lives.

21. I've found no effective way for these individuals to remove their names from the computer lists and be able to move freely about the country and the world, as is their right.

22. There's a very basic question that needs to be answered. Fair or not, legal or not, are these lists making us any safer or are they a fairy tale? Are they improving security or are they a massive breach of constitutional rights and a waste of government resources?

For the Plaintiffs - Burke S. dePriest, Social Worker

1. My name is Burke dePriest and I am a 38-year-old social worker. I was born in Taylorville, Illinois and currently live in Springfield, Illinois where I am working with a number of volunteer organizations to coordinate services for the homeless. I am married and have two small children, ages 3 and 5.
2. My job has, during the past five years or so, called for me to travel extensively to social service training seminars throughout the Midwest. I train other social workers on innovative and progressive social service programs. Flights are usually from Chicago or St. Louis to a number of U.S. destinations. I used to travel extensively to Europe while on an educational sabbatical a few years ago, and I started experiencing some very frightening activities by airport officials. At that time I was doing research on social programs sponsored by foreign governments in various countries. This travel and research was paid for by a federal grant. I have also travelled to, with my brother the priest, disadvantaged countries that now have terrorist ties to offer humanitarian aid. I wonder if this has caused me problems. If this is so, why doesn't my brother have the problem with airport security?
3. I joined in this lawsuit because I feel that my reputation has been seriously marred by the continued interrogations and detainments I've undergone when traveling by air over the past two years and all efforts to amend or correct this situation have failed miserably. On no fewer than 35 occasions, when accompanied by members of my family, co-workers, and even my brother who happens to be a priest, I have been separated from the group I'm with, taken to interrogation or questioning rooms and have been made to feel like a criminal. I have been treated terribly by customs officials during international flight check-ins with verbal threats of indefinite detention when I tried to come home from a vacation in Europe.
4. How does one explain to one's children that the police are good and will keep you safe, and then their parent is taken away from them with no explanation? This actually happened to me when I was traveling with my spouse and our children. My name called up a computer code that alerted the security at the airport and two police officers and an airport security guard surrounded me within minutes. With no explanation I was separated from my family and taken to a small room where I was asked to produce personal identification and was asked a series of questions. The questions all had to do with past travels, where I was going, when I was returning, what I was going to be doing during our trip, and things like that. They all seemed rather non-specific and I don't know how the answers to those questions would help in determining my status as an honest individual or someone intent on doing harm.
5. After approximately 30 minutes of questioning, during which time I am sure that additional computer checks were done, I was released with no comment and no apologies. My children were sobbing when I found my family in the waiting area. It took weeks to convince them that police and firemen are our friends, not people that drag you away from your family for no reason. After the questioning, I noticed that all copies of my ticket and the return ticket had been marked with a large red "S," which prompted the same questioning process on my return trip.

6. Almost everyone knows the phrase "innocent until proven guilty," but try explaining that to your friends, family and other witnesses to your humiliation after being searched and interrogated in front of them. Once I made the mistake of trying to logically discuss this issue with the airline personnel who had stopped me because I was on the No-Fly list. That was obviously the wrong thing to do. Upon boarding the plane, the steward made an inappropriate remark about allowing dangerous people on board, which was overheard by others in the flight crew and at least one passenger who eyed me and insisted on being let off the plane, which caused delays and even more embarrassment to me. Again, how does anyone explain that sort of treatment to one's children? The media had a field day with that in the papers as well. At least the airlines and security personnel had the sense to keep my name confidential and no photos appeared, but I know that I'm the one they were talking about in the headline that read "possible terrorist allowed on board airliner; other passengers balk and walk." I didn't sleep for weeks after that incident, which is why I've joined in this suit. If it has to come out that I'm on the no-fly or selectee list, I want to be the one to go public and try to control some of the damage. I don't want to be tagged as a possible terrorist. I'm not. I love this country and all it represents. The media is calling us crybabies and chronic complainers. I'd honestly rather be seen as a complainer than as a possible terrorist.

7. Why am I on this list? I don't know, and that's one of the questions I hope this lawsuit will answer. I am trying not to take this too personally, but it's hard not to. I have an uncle whose name is also Burke dePriest, but his middle initial is A. Uncle Burke has been stopped and searched as well. As has my cousin, Burke M. dePriest. Burke is an old family name that's been carried by our family through generations with great pride. The first Burke dePriest fought for the Union in the Civil War. It seems obvious that someone out there named Burke dePriest is under suspicion and the government has listed every possible Burke dePriest on their watch list.

8. I suppose my particular name may be on the no-fly list because when I was in college, I was arrested during a campus sit-in protesting the firing of some university personnel for no good reason. While that can in no way be considered a terrorist activity, and hundreds if not thousands of people are arrested for civil disobedience every year. This is absolutely the only reason I can think of that my name might have been added to the list. Chilling, isn't it? Isn't this country about freedom and liberty?

9. One could reason that it's all right to be on such a list, if there is even a glimmer of a possibility that one would be a danger to the safety or security of this country and its citizens. However, that glimmer of a possibility should be balanced by an explicit procedure for getting those who are innocent off the list. But there is obviously not such a procedure at this time, though I have been assured that there will be in the near future. I am not going to hold my breath.

10. What really maddens me about all this is that my name is on a government watch list and I have been singled out as some kind of suspect, but the government won't tell me why, and won't tell me what I can do to clear my name. Secret lists like this sure don't make me feel any safer. In fact they have only made me feel fear and confusion.

11. Add to this the complication that my name is now appearing in the media, through some awful leak to the press. I've been singled out at the airport and now in the newspaper. Where will it end? I feel as though everyone I meet who recognizes my name pulls back and starts to watch me very carefully, they become guarded and sometimes rude. I'm a social worker familiar with human behaviors and I know the damage that this kind of stress can put on a family. I want this fixed. I want a normal life for my family. I don't want my professional life harmed. I am not a terrorist.

12. It is also a great concern to me that I have no clue what may happen next...due to me being on some governmental watch list. Can this possibly carry over into other aspects of my life, other than travel? I think I'm right to worry about this because I've been the target of some recent letters to the editor published in the local media. In my profession, negative comments can be not only cruel but can kill any reputation I have as a professional. One letter in particular mentioned not only my name, but where I work. I have grave concerns about this kind of negative publicity, and I can't even really respond to the allegations because the letter was published with the name withheld. Where's the fairness in that? If I respond with another letter to the editor then I only dignify the allegations and may cause even greater problems for myself. I'm living a very frustrating life these days.

13. I remember in college, and even as far back as junior high school, we had to study the U.S. Constitution and the Bill of Rights. These are very important, defining rights given or reserved to the people by the U.S. Constitution, and in particular, the Bill of Rights. These rights still include no unreasonable search and seizure and the right to due process. They also include the right to confront witnesses against you...and so far as I've experienced, I have had no right to confront the person or persons or the government who included my name on that no-fly list.

14. The result of the media coverage on the airport security systems hasn't alleviated the problems we've been experiencing. In fact, the coverage makes me believe that the computer systems and information that is being used borders on the ridiculous. I've read that the computer system used to generate the name matching is so dated as to be almost useless. The computers read the name that's input and a process kicks in that strips all vowels from the name and sorts the remaining letters, sometimes using only the first three or four letters. The list that results could include a broad range of names that sound alike, or just have the first three consonants in common. If this type of computer system is utilized routinely, then the problem is going to expand and grow, making the no-fly lists virtually useless.

14. And, speaking of the press, now that the case has been filed, the plaintiffs are being ridiculed for whining about the brief delays we've experienced. That's another problem now. Not only are we scrutinized at the airports, we've been publicly held up to ridicule by the media because we spoke out about the unfairness of the situation. The press has found that few have missed flights due to the questioning and searches and that seems to make us a bunch of chronic complainers with nothing to complain about. They miss the whole point of the case. It's about the Constitutional protections we are all guaranteed as citizens of this country. And when the article appeared in the local paper actually naming me as one of the people on the list, I could have cried. It is one of the most frustrating things. Having a problem that can't be solved. Trying to get help and being ignored. Being perceived as something I am not.

15. I don't want the lists tossed out, or cancelled; I just want them to be more accurate. I also believe there should be a procedure in place for those who are mistakenly on the lists to have their names removed, after a determination has been made that the person is no threat. And, that procedure should be made accessible to the public so they know they have redress.

Defense witness - Airport Security officer, Murphy Roberts

1. My name is Murphy Roberts. I'm 54 years old and have spent my entire professional career as a security officer at O'Hare International Airport. I have a high school education and went to junior college to study security operations and received my associate's degree. I also served in the United States Army as a military police officer from 1969 through 1976, serving two tours of duty. I have an honorable discharge and received medals for distinguished service in Viet Nam.
2. I am married and have two children and one grandchild. I live in suburban Cook County, near O'Hare International Airport, and have all of my life. I am proud of my country and of the job that I am doing to keep this airport safe.
3. I received training from the O'Hare International Airport Security Team in how to respond to ticket counter calls regarding the no-fly or selectee lists. That training took about a day and a half and involved mediation skills and anger management to deal with people who might get angry at any delay that may be caused due to the extra security measures in place. We were also trained on how to identify false ID document or those that may have been tampered with. I've never seen any during my work at the airport, but some others on the staff have. I do not know if this training was sanctioned or developed by the National Transportation Safety Bureau. The notebook each of the officers received, which contains internal protocol procedures, was stamped with the NTSB logo, but I don't know if NTSB or the O'Hare Security Office created the documents inside. I can tell you that every page is marked with a "confidential" stamp and we had to sign a document stating that we would show the notebooks to no one. We have to check the notebooks out of the security office when we come on duty and return them when we leave work.
4. As a security officer, I am often called to ticket counters when a customer's name appears on what are being called the no-fly list or the selectee list. Both lists prompt a call to security. Usually, the ticket agent is able, quite quickly and efficiently, to confirm the actual identity of the individual and the customer is processed with only a very short delay. Other customers, for a number of reasons, take longer to process.
5. Often those customers have failed to provide adequate identification that can prove that they are not the same "John Doe" as that listed on one of the government's lists. That is when the customer is routinely asked to step aside or come with one of the security personnel to a secure area for additional questions. Everyone on our staff at the airport has been trained to do this as discreetly and as politely as possible, offering assurances that the customer is not being detained or arrested, but that certain questions must be answered appropriately if they are to be allowed to fly. We explain quite clearly that the government's list and the policies in place must be adhered to with no opportunity for override or avoidance.
6. With the media coverage of terrorism so prevalent, we usually have no problems with the customers. They may grumble a bit at the delay, but we work as quickly as possible to assure them that this is routine and won't take long. And it usually doesn't. It is extremely rare for one

of these alleged searches and seizures to take longer than an extra five to ten minutes. That's not a long time to wait, given the importance of national security.

7. It is routine for us to request a photo identification with additional personal documentation to ensure that the person who is in front of us is actually who they say they are. The computer system can cross-check the information we input to see if the person's driver's license, social security card, passport, state identification or other ID is valid. We reserve the right to search the person and any and all luggage they may be carrying or checking onto the airplane. If any of these documents or searches produces even the hint of a question, we must detain the person for further questioning, which usually doesn't take all that long.

8. I can say in all honesty that I have only experienced two or three airline customers who underwent a more extensive interrogation and detainment that lasted a bit longer than fifteen minutes. That, as it turned out, was because our computers went off line.

9. And the fact that the people on the list can't use the curbside check-in? I'm sorry, when did that become a constitutional right?

10. These people are complaining that we're stepping on the toes of the Constitution and the Bill of Rights. I fought hard for this country. I did two tours of duty in Viet Nam. I'm proud as can be to be an American and I'll do whatever I am able to do, until the day I die, to protect this country and our citizens from terrorists or any other criminal element that might work to harm our nation. We have a heritage to protect. That heritage includes our laws.

11. While I am not privy to how the no-fly list is created, or how it is maintained, I have the utmost faith in our government's efforts to protect us all.

12. What I am able to tell you is how our security procedure alerts us. When a passenger makes or changes an airline reservation, the computer or reservation system is alerted. When the passenger checks in for a flight, that same computer system alerts the check-in personnel if the person is considered an acceptable risk, an unknown risk or an unacceptable risk.

13. If the person is indicated to be an acceptable risk, they proceed through normal screening and onto the flight.

14. If the person is an unknown risk, they are subjected to additional screening at the security checkpoint and are either cleared or not cleared. If they are not cleared, they are detained and must undergo more extensive questioning and more intensive searches.

15. If a person is indicated as an unacceptable risk, law enforcement personnel are to be alerted and additional screening is undertaken. If they are not cleared to the satisfaction of the law enforcement personnel and the airport security officer on hand, they are detained and may not be allowed to fly.

16. These processes and criteria seem more than fair to me. If the system slows folks down, it's for a very good reason.

17. Because I'm proud of the job I do, I welcome the opportunity to discuss the precautions the airports and our national government have taken to assure the safety of the general public. That's why I took the time to discuss this very serious matter with a reporter who approached me while I was on duty and asked about our computer checking system. I checked with my supervisor who said it was ok and took a few moments to show the reporter how the security system functioned. I breached no airport rules. The reporter had a list of names for me to run as samples. Common names, like Abraham Lincoln and George Washington. Then, just to test the system, the reporter gave me three or four additional names to run. As it turns out, some of those names were those of the ~~defendants~~ plaintiffs. The alert sounded and I discussed with the reporter how we would handle this type of alert. Unfortunately, the reporter only wrote about the plaintiffs in this case and completely disregarded the information I provided about the importance of airport security.

18. We have to face the fact that our society has change. And so have the rules. Even if I recognize you as a neighbor or friend or family member, all the same rules would apply. I would stop and search and question my own mother if her name came up on the computer. And, if she didn't cooperate with questioning or produce adequate documentation that we require for her to fly, she wouldn't get on the plane. I would even go so far as to say that I would not hesitate to call for back up if a family member or friend didn't understand and cooperation with the rules we have to abide by these days. It's hard to do. I hate working the International flights because they seem to prompt more questions and processing takes longer and the travelers are sometimes tired and cranky. It takes a lot out of our airport personnel to do this day in and day out, but we know how important it is and we all do it.

19. If we don't, we can be fired. There was an instance where a security person allowed a friend whose name prompted a security check to pass through and board the plane without checking for additional identification. That person no longer works for the airport authority. I have a family that I care about. I like thinking that what I do protects them as well as the other citizens of this country.

20. I don't want this to sound like I'm just worried about job security and that's the only reason I follow the rules. I follow the rules because I think they are important and keep us safe.

Defense witness - National Transportation Safety Bureau Representative, Hallsten Potter

1. My name is Hallsten Potter. I am currently employed as a regional operations director for the National Transportation Safety Bureau. My office is located at O'Hare International Airport in Chicago. I have held this position for the past three years. Prior to being appointed as operations director, I was director of security operations at O'Hare Airport.

2. I have a masters degree in political studies, with a minor in criminal justice. I had originally thought of going into police forensics work, but decided that the hours would take time away from my family. I am married and have a one-year old child.

3. I have had extensive training in counter terrorism policies and procedures that the Homeland Security Act calls for in all areas of public transportation in this country. I pass that training along to the security personnel at the airport and they, in turn, implement the policies that the government wants implemented. If these passengers think they're undergoing an extensive security check, they should undergo a background check for a national security job. In order to be certified for the job I currently hold, I underwent all sorts of security screenings, background checks, fingerprinting and more. I had to have sworn affidavits from employers, relatives, neighbors, all attesting to my worthiness for this job. It's all part of the process, and that's how I think these passengers should view what they've been through...a simple part of the process for guaranteeing national security.

4. Under the Freedom of Information Act, the National Transportation Safety Bureau has provided responses to numerous questions posed by the plaintiffs and their attorneys. There are valid reasons why some of the questions were not answered or for redacting some information. We quite simply cannot and will not provide information on how many names are on the list or what prompts names to be added to the list. That could create a breach in national security. I can and will testify that the names are entered for good reason.

5. I can also state that we are aware that there are allegations of false positives; however, the need for national security and airline safety far outweighs any perceived need for a knee jerk reaction to simply remove names because security measures are perceived as being inconvenient.

6. It would be irresponsible and could pose a national security threat to announce to one and all any criteria we use to place names on the lists. If such a criteria were to be made public, there would be corresponding ways and means in place for suspected individuals to avoid detection.

7. Each airline check-in desk is equipped with a computer that contains security information, including any people who may be a threat to security. Our policies call for us to confirm that the person in front of the airline personnel is actually the person on the computer. We must ask for various forms of identification and must confirm that the person being processed for the flight is not a threat. To be absolutely sure, we must, especially when there are long lines, ask the passenger to accompany one of the security agents to an area away from the check-in area; but that is simply to allow other passengers access to the check-in. It is not because we want the specific passenger in question whose name has been flagged to be embarrassed or humiliated in any way. In fact, it seems that many of the problems these people

are having are the direct result of their own actions. I can state with conviction that my agency does not leak these names. It would compromise the value of the lists. I will also say that the lists, while created by the government, are maintained and administered by the airlines. They must be able to access biographical data in order to identify possible name matches. The commercial airlines work cooperatively with local law enforcement. So, as the list of people and entities with access to the list expands, so does the possibility of leaks and compromises to the system.

8. We are doing our best, given the technology and information we receive from the various governmental agencies. I certainly won't rule out the possibility that mistakes have been made. There is a great opportunity when developing a database such as this that human error may occur in the compilation and transfer of information. I do, however, feel very secure that there is an absolute need for the no-fly list. There's no question of that, and I don't believe that has even been raised by the plaintiff's in this case. They acknowledge the fact that there is a need.

9. In order to ensure that any name we receive to be placed on that watch list is going to pull up whenever that potential threat tries to board a plane, we have to expand the possibilities to include any intentional misspellings or other errors in entering the data that may occur. To expand that possibility we have a number of possible key entry systems. Airlines have some discretion in what computer system they utilize, but we encourage them to use one of three:

10. The first is based on a name-recognition called **Soundex**, which uses techniques developed over 100 years ago. The Soundex system was invented to analyze names from the 1890 census. In its simplest form, it takes a name, strips out vowels and assigns codes to somewhat-similar-sounding consonants, such as "c" and "z."

11. Also recommended for use is a method we've used successfully in security areas for around 40 years. This method was designed specifically for airlines and does something similar to the Soundex system. It strips down to consonants and pulls up names that have the same consonants in the same order.

12. A third technique sometimes used by airlines hunts for matches based on the first few letters of surnames.

13. Right now, we are undertaking a review of the allegations that there are errors in the system. But some of those perceived errors are intentional safety apparatus to ensure that even a hurried airline ticket agent will receive a warning prompt if the last name of the person in question even remotely resembles someone on the lists.

14. This review will take time, and it will take funding. The system we are creating will be able to compare a passenger's full name, address, telephone number and date of birth against commercial and governmental databases. There is the possibility that we will be able to have photographs of the actual no-fly person entered into the system so matches can be confirmed with more accuracy.

15. The new system should significantly reduce the vast majority of the false positives we've experienced. It is impossible to say when this updated system will be in place. We are doing our very best to work as quickly and as efficiently as possible, given the technology we have at our disposal and the various privacy issues involved.

16. I will say that the system currently in place offers all or most of this personal information and it is often up to the person at the airport desk who makes a decision whether to believe the data. These airline security and desk personnel are supposed to be trained to recognize false identification documents, documents that may have been tampered with, and to make a determination, based on the documents presented by the customer, if that person may be a match. If any questions arise, they have been trained to call airport security or local law enforcement.

17. It's been said that the best offense is a good defense, or is it the best defense is a good offense...either way, that's what we are trying to do; create a good defense as well as a good offense to combat terrorism in this country. This is our homeland; these are our people. Our people and our homeland deserve the best protection we can offer. When people like Plaintiff Bentley Dunn arrive with a massive file to defend their right to fly, alarms go off, not only from our computers but from our personnel as well. Someone who feels the need to travel with so many references and supporting documentation appears to be more than a little suspicious. They call attention to themselves and create the very problems they are complaining about.

18. I would suggest that the people who have experienced problems with the no-fly list come to the airport with the required identification so they can breeze through the process. It's as simple as that. There are numerous websites, mostly hosted by our airlines that outline exactly what you will need to have in the way of appropriate identification. Usually this means a simple photo I.D., not an arsenal of paperwork.

19. By the way, past travel outside of this country may, and that is a very definite may, cause airport security personnel to question people on the no fly or selectee list more vigorously as we have found that individuals involved in plotting against this country are incredibly mobile and have access and contacts with people on a global scale and tend to travel great distances to maintain those contacts. Sometimes they travel to throw us off their trail or confuse us as to their real or ultimate destination. So, when a simple social worker has a record of travel to countries on our list of possible problem states, that travel in and of itself can prompt some questions. If I were standing security at an airport and a passport stamped with some of countries currently on our watch list came under my scrutiny, I think my personal alarm might go off and I'd ask some in depth questions just so I could sleep at night.

20. With the security procedures currently in place, the selectee and no fly lists, the U.S.A. has experienced no catastrophic air incident, so the system is working. In fact, I'll go so far as to say that we have experienced no significant attempts to breach airport security since these lists have been expanded.

21. I realize these lists may cause some delays and discomforts, but what is that in comparison to the overwhelming grief family and friends would have to endure for a lifetime if a preventable tragedy actually occurred? National security has to be paramount. These are

dangerous times. I think everyone will admit that. Even our most beloved President, Abraham Lincoln, suspended the writ of *habeas corpus*² during the Civil War years for the sake of national security. I'm not saying the administration has gone that far, but I am saying that national security is of the utmost importance as is keeping American families safe.

² Writ of *habeas corpus* is most commonly used for testing the legality of detention or imprisonment. It does not address whether parties are guilty or innocent.

Defense witness - U.S. Homeland Security, Illinois Office Supervisor, M. Downey Johnson

1. My name is M. Downey Johnson, I serve as Illinois Office Supervisor for the United States Homeland Security Office. I have held this position for three years.
2. I have a Ph.D. in Politics and Government from the Independence School of International Studies in Washington, D.C., where I graduated with honors. I also have a law degree, with a concentration in Constitutional Law. I have served as an Assistant to the Under Secretary of Defense and have worked on various governmental programs in the defense area for the past 10 years. I have top-secret clearance, which means I underwent an extensive background investigation far more rigorous than any of the searches these individuals have experienced.
3. I also served in the Air National Guard and have 6 years of active service, having served during the Gulf War. I love my country and would never do anything to hurt it or its citizens. It's my sworn duty as both an officer of the court and as an employee of the Homeland Security Office to preserve, protect and defend the United States and its Constitution.
4. ~~As a lawyer~~ As a person with a degree in law, I am vastly familiar with the United States Constitution and these are nothing but a bunch of nuisance customer service complaints, not Constitutional infringements on anyone's right to due process or their right to privacy or due process or travel. The indication that we are performing unreasonable search and seizures is preposterous. These are not unreasonable. And, we have seized no one and nothing that is not amply deserving of such seizure. These citizens are absolutely innocent until proven guilty. I contend that the Homeland Security Bureau and the National Transportation Safety Bureau are without fault in this complaint with regard to any of the constitutional issues brought fourth.
5. One would think, given the state of the world, that these few individuals would be a little more patient and understanding. We are doing our utmost to protect the masses in this endeavor from an ever-broadening range of horrific possibilities, especially in the transportation area. I know that if I were standing security at an airport and a passport was in front of me with stamps indicating travel to some of the countries currently on our watch list, I'd ask a lot of questions.
6. When the President of the United States issued the Executive Order establishing the Office of Homeland Security he used his authority the best way he knew how, to coordinate a comprehensive set of plans to protect this country. That Executive Order specifically contained provisions to coordinate efforts to protect transportation systems within the United States, including railways, highways, shipping, ports, waterways, airports and civilian aircraft, from terrorist attack. One of the best ways to do just that is to work with the various agencies of the government to create a list of potential threats and make sure those individuals are stopped from causing harm, within the framework of our system of laws, and that includes every Constitutional right and privilege.
7. This is dangerous litigation. If the plaintiffs win, then the no-fly list and the selectee list could be scrapped and become a footnote to our nation's history. They could be dumped completely. I don't want to think about the potential for catastrophe this could allow.

8. The plaintiffs all admit that the searches they underwent were uncomfortable, but very few of those people missed their flight. I'd far rather roll my eyes and survive a search, than take the risk of flying on a jet that had no security check of passengers. Wouldn't these people rather endure a few minutes of security checking and inconvenience than risk their lives flying on planes full of people who might be terrorists?

9. Wouldn't each and every person on that no-fly list, rightly or wrongly, prefer a few moments of perceived indignity than risking the lives of so many innocents out there we are sworn to protect? I personally feel that I would be willing to wait, and experience delays and what they are calling indignities if I knew that the process was saving lives and protecting our national security. Our government has always done its best to protect its citizens and that's why national security allows for this process to provide the best protection for all of our citizens.

10. Wouldn't each and every person on that no-fly list rather suffer a bit of inconvenience by not using curbside check in, or kiosk checks, or would they rather pamper themselves and risk the lives of the people on the flights who will be able to walk right onto those airplanes without appropriate checks? And, quite honestly, the more some of these people struggle with the system and complicate the searches by complaining and producing irrelevant information that is not asked for to support their innocence, the longer the searches will take. And, when they cannot understand that they personally are not being targeted, but someone, somewhere with a name similar to their may be a very real threat, they add to the problem. When the government is able to locate the real problem person, a photo ID will adequately address the issue. Wasn't it Shakespeare who wrote something about being suspicious of people who "doth protest too much?"

11. Would future litigation expand into the billions if the United States Government failed to protect and allowed potential threats to our national security to use our airlines as a means for future terrorist acts against this country?

12. Let's imagine for one second that the no-fly list, as imperfect as these people think it is, has stopped one person from boarding an airliner with the intent to harm. I would ask for a modicum of patience and understanding. We are doing our best to address a broad range of threats out there, and we are using the technology at hand to the best of our ability. Now is not the time to tie the hands of the government. We are doing our utmost to protect every person it is possible for us to protect.

13. There have been allegations of governmental secrecy and conspiracy theories. People think we're targeting people who express doubts about public policy and place them on these lists as a way of getting back. That's a load of nonsense and there is absolutely no credence to those allegations. There are established guidelines for placing individual names on the two lists in question; however, those guidelines are highly confidential and could, if released, cause a breach in national security. In fact, the fact that the lists are confidential actually protects these people in other ways. I don't know how the media is getting the names of the people on the lists, but I know this information is not being released by us. If these people wouldn't call attention to themselves, the process would work much better and be that much more confidential and unobtrusive.

14. While national security concerns prohibit me from going into procedures in depth, I can tell you that the selectee list is a broad-based listing of potential threats to national security. The no-fly list is a far shorter list of those we have deemed to be likely threats to national security. Those on the no-fly list usually don't get onto an airplane without an extensive search and comprehensive questioning, which is reasonable and fair. We would be absolutely negligent if we did not take every precaution to keep our skies safe. If we didn't undertake this action, we would be leaving ourselves open for litigation that could tie our hands for years.

15. The plaintiffs complain about the computer system. That person has no clue how sophisticated the system is. If this government can put a person on the moon, and fly to an International Space Station, we can certainly administer a computer system that searches out terrorists. NASA had time to develop their criteria; they underwent intensive testing, all without the public scrutiny we've experienced. We just need time to make the systems work the way they need to work to protect the world from the evil that's out there.

16. If our security measures are cumbersome to the innocent, imagine what they must be like for the guilty or those with criminal intent? They must realize that if we are willing to filter the information on every passenger, they have a far greater threat of being stopped from doing their deadly mischief. If these procedures slow down or stop even one attempt on American lives, I'm willing to support the process.

17. And then there's the fact that all of the plaintiffs keep on flying, even when they know they'll be facing these challenges. Does that imply that they consent to the searches and questions? I think so. I mean, the airlines inform them that they will need a photo ID to check-in...so they must know that the rules haven't changed...and they keep on showing up to face the challenges they say they hate so much. Really, they're all freely and voluntarily traveling by air, no one is forcing them to fly. So, they're consenting when they purchase their tickets to undergo this scrutiny.

18. And, again, we do not release these names to the public or to the media. The very fact that these people are willing to file suit must mean they don't dislike the media attention all that much. They have all gained a certain amount of notoriety that they may really be enjoying. All the name calling, egg throwing, prank phone calls and hate mail don't cancel out the good these lists are doing. They are protecting the citizens of this country on the ground and in the air.

EXHIBIT I - Newspaper Article - Springfield Banner

Local National Guard and Other Locals on Terror Watch List, by McClelland Green

Local National Guard soldier Kim L. Berry of Springfield, Illinois, has been detained time and time again at airports in this country and in others, friend or foe, all because Kim's name is "similar" to someone's on the terror watch list developed and maintained by the U.S. Government. Kim (photo at right)³, a 26 year old Reservist recently activated for duty, and a reporter for the Lincoln County News & Review, has not responded to requests for interviews. It is believed that Berry is considering joining in a national class action lawsuit that will sue the government for alleged misconduct in subjecting private citizens to numerous, continuous, extensive searches and questioning when traveling by air. Plaintiffs will declare that they have suffered humiliation, embarrassment and public ridicule.

This reporter went to the airport during off hours and asked security personnel, who asked to remain anonymous, to run a series of names through their computers to see if any matches could be found. This reporter provided names including Abraham Lincoln, George Washington, my own name, and those of our editor, political cartoonist and others in my immediate family. None prompted a security alert. Then I asked the security personnel to enter the name of Kim L. Berry and the alarm was raised. Not loudly, or overtly, but there was a flashing light on the screen that security personnel must address prior to allowing a passenger in question to pass security and actually fly on the airline.

This is what happens to Kim Berry every time. Kim is asked to provide additional identification, in the form of a driver's license, or other photo I.D. Sometimes additional security must be called. Not because of anything Kim Berry does. No. According to most sources, Kim Berry is a good, upstanding member of our community who just happens to have a name that matches someone who isn't so good or upstanding.

If there is, according to security personnel at the airport, even the slightest hint that someone on the "no fly" list, as they call it, could be a risk to the other passengers, then they will take whatever precautions they feel appropriate. In Kim Berry's world, this means that airport officials and/or security may arrive to question; police may be called to question; federal agents may be called to question; the list seems endless. And this means that everyone around Kim Berry is also questioning. Who is this person, what have they done, why are they being singled out for all this averse attention? Kim Berry has become, time and time again, the center of attention at the airport. Kim Berry has become what none of us what to be, a person who "appears to be" a threat to our safety and security.

There are times, according to the current administration, when national security must override the rights and protections we are used to in this country. Kim Berry is learning this the hard way fairly or unfairly, legally or illegally, justly or unjustly. If there is any chance that Kim Berry could pose a threat, there is a vigilant computer out there tapping it's proverbial finger on Kim's medal of valor.

³ No photo will be used for mock trial purposes.

Other local personages currently experiencing problems include Bentley T. Dunn, an incredibly gifted graduate student at Lincoln University in Illinois. Dunn's undergraduate studies concentrated in the fields of International Policy and Political Science. Dunn is currently working toward a J.D. and Ph.D. in International Diplomacy with a goal of working for the United States Government in an embassy. With a wealth of courses taken on international law, diplomacy, international relations, and international mediation and dispute resolution, one wonders how such a stellar student could be included on such a list? Is Dunn suspected of undertaking this course of study in order to launch a professional career in international espionage? Or, like Berry and others no doubt will claim, is Dunn innocent of any and all wrongdoing?

And then there's Burke dePriest 38-year-old social worker who also is a tireless volunteer with local charitable organizations. dePriest coordinates services for the homeless and trains other social workers on how to implement progressive social service programs. dePriest has supposedly been stopped on no fewer than 35 occasions, when accompanied by family members, co-workers, and even a brother who is a priest, all of whom supposedly reacted with distaste and embarrassment, causing dePriest to feel somewhat less than social. dePriest, like the others mentioned in this article, have all declined to be interviewed. They do not respond to phone calls. Based on unnamed sources, but confirmed by many, some community leaders seem to think that dePriest may be sympathetic to some of the causes behind the current spate of terrorist attacks because of past trips to underprivileged countries currently on the US terrorism watch list.

Are they threats to national security? Are they victims of an overzealous government doing, rightly or wrongly, anything it can to keep us safe? Only time, and a potentially very expensive pending lawsuit will tell.

EXHIBIT II - Letter to the Editor

Your paper recently ran a brief article mentioning as an aside that some people are being denied their rights to fly on an airplane because their names appear on the government's no-fly list. Since when has it been a constitutional right to fly? No one is telling people like Kim Berry he or she can't fly. If Berry and the others aren't threats to our national security, then they could easily prove it by supporting our government rather than holding it up to ridicule and costing us taxpayers more money by filing some frivolous class action lawsuit. The people in your recent article are obviously simply trying to get some free attention for their liberal social programs. I say these class action suit participants should all sit at their airports and think long and hard about this wonderful country and all the great things our government does on a daily basis to keep us all safe and sound and free of threats from terrorism. Inconvenience to one's social schedule shouldn't be cause to clog our courts.

Name withheld

EXHIBIT III

Memo to File

Kim L. Berry, Air National Guard
Unit 424
Springfield, Illinois
06042003

Service No 123-44-5678

K.L. Berry was detained at airport due to status on federal no-fly or selectee list. Local media published story headlined "local national guard on terror watch list" with a photo of Berry in uniform being searched.

Cautionary classification.

cc: Office of Personnel Management

This memorandum to file was discussed with Officer Berry in my presence on June 4, 2003.

Signed: Sherman Underwood, JAG Officer

Exhibit IV Bentley T. Dunn's Arsenal of Identification⁴

Sample text of copied letter to government officials--all letter contained the same language:
Letters were addressed to the following offices:

- FBI (Washington DC)
- US Embassy (Washington DC, Chicago and London)
- U.S. Attorney General (Washington DC)
- Department of Justice (Washington DC)
- Homeland Security (Washington DC)
- Congressional Representative (Washington DC and Illinois offices)
- National Transportation Safety Bureau (Washington and Illinois offices)

I am shocked and disturbed at the treatment I, a United States citizen by birth, have experience at airports in this country and other under the control of this country, when I attempt to "fly the friendly skies." I have been subjected to repeated search, seizures, detainments, and have even missed flights because I am told that my name appears or is connected to the no-fly list. I am not a terrorist. Why would anyone think that I could possibly hurt the country I so love. My parents taught me to be a respectful, law-abiding citizen and that is what I am. My name may be similar to someone else's who may be a terrorist, but I am not. I have devoted my life to serving this country by being a good student and creating a good future for myself and those around me. Please remove my name from the selectee and/or no fly list. I will be happy to provide any and all additional information you may require to put this matter to rest. To that end, I have enclose copies of:

1. Illinois Driver's License
2. Passport
3. Voter's Registration Card
4. Library Card
5. Old student identification card
6. Employee personnel badge (photo)
7. Record of travel and searches
8. Letter from London law firm
9. Letter from University
10. Social Security Card
11. Insurance cards
12. Copies of letters to government officials:
13. Photo copies of parental citizenship documents
14. Family photographs
15. International Student Identification Card
16. International Drivers License

⁴ Students may only produce as evidence materials provide in this mock trial packet. No additional materials will be allowed.

EXHIBIT V

For Immediate Release
Office of the Press Secretary
October 8, 2001

Executive Order Establishing Office of Homeland Security
Executive Order
Establishing the Office of Homeland Security and the Homeland Security Council

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Establishment. I hereby establish within the Executive Office of the President an Office of Homeland Security (the "Office") to be headed by the Assistant to the President for Homeland Security.

Sec. 2. Mission. The mission of the Office shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The Office shall perform the functions necessary to carry out this mission, including the functions specified in section 3 of this order.

Sec. 3. Functions. The functions of the Office shall be to coordinate the executive branch's efforts to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States.

(a) National Strategy. The Office shall work with executive departments and agencies, State and local governments, and private entities to ensure the adequacy of the national strategy for detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or attacks within the United States and shall periodically review and coordinate revisions to that strategy as necessary.

(b) Detection. The Office shall identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States. The Office also shall identify, in coordination with the Assistant to the President for National Security Affairs, priorities for collection of intelligence outside the United States regarding threats of terrorism within the United States.

(i) In performing these functions, the Office shall work with Federal, State, and local agencies, as appropriate, to:

(A) facilitate collection from State and local governments and private entities of information pertaining to terrorist threats or activities within the United States;

(B) coordinate and prioritize the requirements for foreign intelligence relating to terrorism within the United States of executive departments and agencies responsible for homeland security and provide these requirements and priorities to the Director of Central Intelligence and other agencies responsible collection of foreign intelligence;

(C) coordinate efforts to ensure that all executive departments and agencies that have intelligence collection responsibilities have sufficient technological capabilities and resources to collect intelligence and data relating to terrorist activities or possible terrorist acts within the United States, working with the Assistant to the President for National Security Affairs, as appropriate;

(D) coordinate development of monitoring protocols and equipment for use in detecting the release of biological, chemical, and radiological hazards; and

(E) ensure that, to the extent permitted by law, all appropriate and necessary intelligence and law enforcement information relating to homeland security is disseminated to and exchanged among appropriate executive departments and agencies responsible for homeland security and, where appropriate for reasons of homeland security, promote exchange of such information with and among State and local governments and private entities.

(ii) Executive departments and agencies shall, to the extent permitted by law, make available to the Office all information relating to terrorist threats and activities within the United States.

(c) Preparedness. The Office of Homeland Security shall coordinate national efforts to prepare for and mitigate the consequences of terrorist threats or attacks within the United States. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) review and assess the adequacy of the portions of all Federal emergency response plans that pertain to terrorist threats or attacks within the United States;

(ii) coordinate domestic exercises and simulations designed to assess and practice systems that would be called upon to respond to a terrorist threat or attack within the United States and coordinate programs and activities for training Federal, State, and local employees who would be called upon to respond to such a threat or attack;

(iii) coordinate national efforts to ensure public health preparedness for a terrorist attack, including reviewing vaccination policies and reviewing the adequacy of and, if necessary, increasing vaccine and pharmaceutical stockpiles and hospital capacity;

(iv) coordinate Federal assistance to State and local authorities and nongovernmental organizations to prepare for and respond to terrorist threats or attacks within the United States;

(v) ensure that national preparedness programs and activities for terrorist threats or attacks are developed and are regularly evaluated under appropriate standards and that resources are allocated to improving and sustaining preparedness based on such evaluations; and

(vi) ensure the readiness and coordinated deployment of Federal response teams to respond to terrorist threats or attacks, working with the Assistant to the President for National Security Affairs, when appropriate.

(d) Prevention. The Office shall coordinate efforts to prevent terrorist attacks within the United States. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) facilitate the exchange of information among such agencies relating to immigration and visa matters and shipments of cargo; and, working with the Assistant to the President for National Security Affairs, ensure coordination among such agencies to prevent the entry of terrorists and terrorist materials and supplies into the United States and facilitate removal of such terrorists from the United States, when appropriate;

(ii) coordinate efforts to investigate terrorist threats and attacks within the United States; and

(iii) coordinate efforts to improve the security of United States borders, territorial waters, and airspace in order to prevent acts of terrorism within the United States, working with the Assistant to the President for National Security Affairs, when appropriate.

(e) Protection. The Office shall coordinate efforts to protect the United States and its critical infrastructure from the consequences of terrorist attacks. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) strengthen measures for protecting energy production, transmission, and distribution services and critical facilities; other utilities; telecommunications; facilities that produce, use, store, or dispose of nuclear material; and other critical infrastructure services and critical facilities within the United States from terrorist attack;

(ii) coordinate efforts to protect critical public and privately owned information systems within the United States from terrorist attack;

(iii) develop criteria for reviewing whether appropriate security measures are in place at major public and privately owned facilities within the United States;

(iv) coordinate domestic efforts to ensure that special events determined by appropriate senior officials to have national significance are protected from terrorist attack;

(v) coordinate efforts to protect transportation systems within the United States, including railways, highways, shipping, ports and waterways, and airports and civilian aircraft, from terrorist attack;

(vi) coordinate efforts to protect United States livestock, agriculture, and systems for the provision of water and food for human use and consumption from terrorist attack; and

(vii) coordinate efforts to prevent unauthorized access to, development of, and unlawful importation into the United States of, chemical, biological, radiological, nuclear, explosive, or other related materials that have the potential to be used in terrorist attacks.

(f) Response and Recovery. The Office shall coordinate efforts to respond to and promote recovery from terrorist threats or attacks within the United States. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) coordinate efforts to ensure rapid restoration of transportation systems, energy production, transmission, and distribution systems; telecommunications; other utilities; and other critical infrastructure facilities after disruption by a terrorist threat or attack;

(ii) coordinate efforts to ensure rapid restoration of public and private critical information systems after disruption by a terrorist threat or attack;

(iii) work with the National Economic Council to coordinate efforts to stabilize United States financial markets after a terrorist threat or attack and manage the immediate economic and financial consequences of the incident;

(iv) coordinate Federal plans and programs to provide medical, financial, and other assistance to victims of terrorist attacks and their families; and

(v) coordinate containment and removal of biological, chemical, radiological, explosive, or other hazardous materials in the event of a terrorist threat or attack involving such hazards and coordinate efforts to mitigate the effects of such an attack.

(g) Incident Management. The Assistant to the President for Homeland Security shall be the individual primarily responsible for coordinating the domestic response efforts of all departments and agencies in the event of an imminent terrorist threat and during and in the immediate aftermath of a terrorist attack within the United States and shall be the principal point of contact for and to the President with respect to coordination of such efforts. The Assistant to the President for Homeland Security shall coordinate with the Assistant to the President for National Security Affairs, as appropriate.

(h) Continuity of Government. The Assistant to the President for Homeland Security, in coordination with the Assistant to the President for National Security Affairs, shall review plans and preparations for ensuring the continuity of the Federal Government in the event of a terrorist attack that threatens the safety and security of the United States Government or its leadership.

(i) Public Affairs. The Office, subject to the direction of the White House Office of Communications, shall coordinate the strategy of the executive branch for communicating with the public in the event of a terrorist threat or attack within the United States. The Office also shall coordinate the development of programs for educating the public about the nature of terrorist threats and appropriate precautions and responses.

(j) Cooperation with State and Local Governments and Private Entities. The Office shall encourage and invite the participation of State and local governments and private entities, as appropriate, in carrying out the Office's functions.

(k) Review of Legal Authorities and Development of Legislative Proposals. The Office shall coordinate a periodic review and assessment of the legal authorities available to executive departments and agencies to permit them to perform the functions described in this order. When the Office determines that such legal authorities are inadequate, the Office shall develop, in consultation with executive departments and agencies, proposals for presidential action and legislative proposals for submission to the Office of Management and Budget to enhance the ability of executive departments and agencies to perform those functions. The Office shall work with State and local governments in assessing the adequacy of their legal authorities to permit them to detect, prepare for, prevent, protect against, and recover from terrorist threats and attacks.

(l) Budget Review. The Assistant to the President for Homeland Security, in consultation with the Director of the Office of Management and Budget (the "Director") and the heads of executive departments and agencies, shall identify programs that contribute to the Administration's strategy for homeland security and, in the development of the President's annual budget submission, shall review and provide advice to the heads of departments and agencies for such programs. The Assistant to the President for Homeland Security shall provide advice to the Director on the level and use of funding in departments and agencies for homeland security-related activities and, prior to the Director's forwarding of the proposed annual budget submission to the President for transmittal to the Congress, shall certify to the Director the funding levels that the Assistant to the President for Homeland Security believes are necessary and appropriate for the homeland security-related activities of the executive branch.

Sec. 4. Administration.

(a) The Office of Homeland Security shall be directed by the Assistant to the President for Homeland Security.

(b) The Office of Administration within the Executive Office of the President shall provide the Office of Homeland Security with such personnel, funding, and administrative support, to the extent permitted by law and subject to the availability of appropriations, as directed by the Chief of Staff to carry out the provisions of this order.

(c) Heads of executive departments and agencies are authorized, to the extent permitted by law, to detail or assign personnel of such departments and agencies to the Office of Homeland Security upon request of the Assistant to the President for Homeland Security, subject to the approval of the Chief of Staff.

Sec. 5. Establishment of Homeland Security Council.

(a) I hereby establish a Homeland Security Council (the "Council"), which shall be responsible for advising and assisting the President with respect to all aspects of homeland security. The Council shall serve as the mechanism for ensuring coordination of homeland security-related activities of executive departments and agencies and effective development and implementation of homeland security policies.

(b) The Council shall have as its members the President, the Vice President, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, the Secretary of Transportation, the Director of the Federal Emergency Management Bureau, the Director of the Federal Bureau of Investigation, the Director of Central Intelligence, the Assistant to the President for Homeland Security, and such other officers of the executive branch as the President may from time to time designate. The Chief of Staff, the Chief of Staff to the Vice President, the Assistant to the President for National Security Affairs, the Counsel to the President, and the Director of the Office of Management and Budget also are invited to attend any Council meeting. The Secretary of State, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Energy, the Secretary of Labor, the Secretary of Commerce, the Secretary of Veterans Affairs, the Administrator of the Environmental Protection Bureau, the Assistant to the President for Economic Policy, and the Assistant to the President for Domestic Policy shall be invited to attend meetings pertaining to their responsibilities. The heads of other executive departments and agencies and other senior officials shall be invited to attend Council meetings when appropriate.

(c) The Council shall meet at the President's direction. When the President is absent from a meeting of the Council, at the President's direction the Vice President may preside. The Assistant to the President for Homeland Security shall be responsible, at the President's direction, for determining the agenda, ensuring that necessary papers are prepared, and recording Council actions and Presidential decisions.

Sec. 6. Original Classification Authority. I hereby delegate the authority to classify information originally as Top Secret, in accordance with Executive Order 12958 or any successor Executive Order, to the Assistant to the President for Homeland Security.

Sec. 7. Continuing Authorities. This order does not alter the existing authorities of United States Government departments and agencies. All executive departments and agencies are directed to assist the Council and the Assistant to the President for Homeland Security in carrying out the purposes of this order.

Sec. 8. General Provisions.

(a) This order does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies or instrumentalities, its officers or employees, or any other person.

(b) References in this order to State and local governments shall be construed to include tribal governments and United States territories and other possessions.

(c) References to the "United States" shall be construed to include United States territories and possessions.

Sec. 9. Amendments to Executive Order 12656. Executive Order 12656 of November 18, 1988, as amended, is hereby further amended as follows:

(a) Section 101(a) is amended by adding at the end of the fourth sentence: ", except that the Homeland Security Council shall be responsible for administering such policy with respect to terrorist threats and attacks within the United States."

(b) Section 104(a) is amended by adding at the end: ", except that the Homeland Security Council is the principal forum for consideration of policy relating to terrorist threats and attacks within the United States."

(c) Section 104(b) is amended by inserting the words "and the Homeland Security Council" after the words "National Security Council."

(d) The first sentence of section 104(c) is amended by inserting the words "and the Homeland Security Council" after the words "National Security Council."

(e) The second sentence of section 104(c) is replaced with the following two sentences: "Pursuant to such procedures for the organization and management of the National Security Council and Homeland Security Council processes as the President may establish, the Director of the Federal Emergency Management Bureau also shall assist in the implementation of and management of those processes as the President may establish. The Director of the Federal Emergency Management Bureau also shall assist in the implementation of national security emergency preparedness policy by coordinating with the other Federal departments and agencies and with State and local governments, and by providing periodic reports to the National Security Council and the Homeland Security Council on implementation of national security emergency preparedness policy."

(f) Section 201(7) is amended by inserting the words "and the Homeland Security Council" after the words "National Security Council."

(g) Section 206 is amended by inserting the words "and the Homeland Security Council" after the words "National Security Council."

(h) Section 208 is amended by inserting the words "or the Homeland Security Council" after the words "National Security Council."

GEORGE W. BUSH
THE WHITE HOUSE,
October 8, 2001.

EXHIBIT VI - U.S. Bill of Rights, excerpted

Amendment I - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV - Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall 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.

Section. 2. omitted for mock trial purposes.

Section. 3. omitted for mock trial purposes.

Section. 4. omitted for mock trial purposes.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

EXHIBIT VII

***** AIRLINE CHECKIN REQUIREMENTS *****

All passengers must provide positive identification is required at time of checkin.

At most airports, passengers are required to present a boarding pass or priority verification card as well as government-issued photo identification (such as a driver's license or passport) at the primary security checkpoint.

In order to ensure that your travel experience is uncomplicated, customers should obtain a boarding pass or priority verification card before proceeding through the primary security checkpoint at every airport.

***** AIRLINE SECURITY CHECKPOINT REQUIREMENTS *****

To proceed through Security Checkpoint, you will need your government-issued photo ID* and either a Boarding Pass or Security Document.

*Customers under 18 years of age are not required to show government-issued photo ID

***** RECOMMENDED ARRIVAL TIMES *****

Domestic Travel (except departing Hawaii or U.S. Virgin Islands), No Baggage to Check	60 minutes (1 hour)
Domestic Travel (except departing Hawaii or U.S. Virgin Islands), Checking Baggage	90 minutes (1 1/2 hours)
International Travel	180 minutes (3 hours)

** Assume this is standard language supplied by all airlines when purchasing tickets.

Statutes

28 USC §1331. Federal question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §2201. Creation of remedy. In a case of actual controversy within its jurisdiction, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2202. Further relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Venue is appropriate pursuant to **28 USC §1391(e)**

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

- (1) a defendant in the action resides,
- (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
- (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

Mock Trial 2005 - Legal Principles **AMENDED**

1. When more than one claim is involved, you should consider each claim separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all of the exhibits received into evidence, regardless of who may have produced them. If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the party making that claim or contention.

2. The defendants are presumed to be not liable throughout every stage of the trial. This presumption is not overcome unless, from all the evidence in this case, you are convinced by a preponderance of the evidence that they are liable. The phrase “preponderance of the evidence” means whether, considering all the evidence in the case, the proposition ~~on which the Defendant has the burden of proof~~ is more probably true than not true.

3. The fact that a governmental entity or agency is involved as a party must not affect your decision in any way. A governmental agency and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

4. In this case, the Plaintiffs claim that the Defendants, while acting “under color” of legal authority state law, intentionally deprived the Plaintiffs of their rights under the Constitution of the United States. The Defendants may be liable if you find that the Plaintiffs were deprived of their constitutional rights (Due Process and Equal Protection) and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision that was the proximate cause of the deprivation of the Plaintiffs’ constitutional rights. Whether a custom or policy exists is for you to determine.

5. The Plaintiffs claim that while the Defendants were acting under color of legal authority of the U.S. Transportation Safety Bureau, they intentionally violated the Plaintiffs’ constitutional rights not to be seized without probable cause or subject to unreasonable searches.

6. In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence.

- First, that the Defendants intentionally committed acts that violated the Plaintiffs’ constitutional rights not to be seized without probable cause or subject to unreasonable searches.
- Second, that in so doing the Defendants acted “under color” of ~~the~~ legal authority. ~~of the State of Illinois.~~
- Third, that the Defendants’ acts were the proximate or legal cause of damages sustained by Plaintiffs.

7. The first aspect of this claim is that the Plaintiff was seized without probable cause. In that regard, you are instructed that under ~~the law of the State of Illinois~~ color of legal authority, a

law enforcement official has the right to seize or arrest a person without warrant whenever the person reasonably believes that such person has committed a misdemeanor offense in the presence of an officer.

8. In this case, the Defendants have stipulated or agreed that the Defendants acted “under color” of ~~state law~~ legal authority and you should, therefore, accept that fact as proven.

9. The second aspect of the Plaintiff’s claim is that the Defendant intentionally deprived the Plaintiffs of their Fourth Amendment constitutional right to be free from an unreasonable search. The Constitution protects every citizen against “unreasonable” searches; and, ordinarily, this means that a search warrant must be obtained from a judicial officer before the search is made. There are, however, exceptions.

10. One such exception is a search conducted by consent. If a person freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct the search to the extent of the consent given. Another exception is recognized in emergency situations in which a law enforcement officer, if the officer has a reasonable and good faith belief that there is a serious threat to the officer’s safety or the safety of someone else, may make a safety inspection for the purpose of protecting the well-being of the officer and others. The Plaintiffs have the burden of proving by a preponderance of the evidence that the search was unreasonable.

11. In a claim based on a violation of due process of the Fifth and Fourteenth Amendments, the first step is to determine whether the claimant has been deprived of an interest in life, liberty, or property. An interest in liberty may include the loss of a significant freedom or action or the denial of a freedom provided by the Constitution or statute. Restrictions on the right to travel that lack due process may implicate such a liberty interest.

12. If the claimant has been deprived of life, liberty, or property, the second step is to determine how much process is due. If plaintiffs have proven their *prima facie* case, then the actions of the government can only be upheld ~~must be judged by a strict scrutiny standard, meaning that the law or practice can be upheld~~ if there is a compelling or overriding purpose based on the balancing of the following factors: (1) the importance of the individual interest involved, (2) the strength of the governmental interest at stake, and (3) the risk that procedures used will lead to erroneous decisions. Due process rights are subject to waiver. If an individual waives his/her rights to a governmental deprivation of liberty, such waiver must be voluntary and knowing to be valid.



**ILLINOIS STATE
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TO: ALL MOCK TRIAL PARTICIPANTS
RE: 2005 High School Mock Trial Update

NOTE: Paragraph numbers on page 11 have been corrected.

Q. Does the fact that the Bill of Rights is labeled as an exhibit indicate that for this particular competition witnesses will be allowed to testify about their legal opinions or should such arguments be reserved for the closing arguments?

A. As far as witnesses are concerned, none are lawyers so none can give a "legal opinion;" however, the lawyers can use the amendments they deem appropriate in their arguments. Witnesses should be familiar with the language of the particular amendments that their statements discuss.

PLEASE NOTE: Defense witness M. Downey Johnson's affidavit, Paragraph 4 has been amended to read: "As a person with a degree in law, I am vastly familiar..." As noted above, none of the witnesses should be considered lawyers and none may give legal opinions.

Q. Does the third witness (dePriest) miss any flights as a result of the detainment?

A. No flights are missed by witness dePriest.

Q. The detainment and questioning, can we assume a search was Conducted on DePriest? Dunn and Kim refer to searches specifically (the second only in the article) so we aren't sure if we can assume dePriest was actually searched (statement says detained)

A. In paragraph 6 of dePriest's statement, he/she states, "Almost everyone knows the phrase "innocent until proven guilty," but try explaining that to your friends, family and other witnesses to your humiliation after being **searched** and interrogated in front of them." Yes, you may assume that dePriest also experienced a search due to being on the government's list.

Q. Are we reading correctly that the Law Test is back as a part of the overall score again?

A. Yes, the law test team average scores will be added into the overall score.

Q. Is there any accidental conflict between Stipulation 5 and the testimony of the plaintiffs that they were, indeed, on a no-fly list? Or is this just the plaintiff witnesses using the terms "selectee" and "no-fly" interchangeably?

A. The stipulation is correct and overrides any inconsistencies in witness affidavits.

Q. Is the Bill of Rights hearsay? Are Exhibits V (Executive order establishing the office of homeland security) and VI (excerpts of the Bill of Rights) admissible?

A. No, the Bill of Rights is not hearsay. It is a primary legal source that should be used in presenting the case. The Executive Order establishing the office of homeland security may be used by either side, by any witness, as all would have access to this document.

Q. Do the plaintiffs need to prove damages beyond that their constitutional rights were violated? For example, do the plaintiff's have to prove irreparable damages, i.e. loss of reputation, in order to get injunctive relief?

A. For purposes of this problem, no actual damages need be proven, just that a constitutional right was violated.

Q. Page 40 says that there is a stipulation that the defendants acted "under color of state law" but that is not included in the stipulations on page 1. Furthermore the defendants are a federal agency not a state agency. Is this a mistake?

A. The legal principles have been amended. Please refer to amended copy attached.

Q. In regards to the strict scrutiny standard on page 40, paragraph 12, does the defense have to prove that their procedures are narrowly tailored if plaintiff can prove a constitutional violation, or is it the plaintiffs burden to show that the defendant's actions could be more narrowly tailored?

A. This is a burden of proof question. The plaintiffs have to prove their case by preponderance of the evidence. The defense must prove that their procedures are narrowly tailored. The plaintiffs must prove that the government's procedures are not narrowly tailored. The factors enumerated in paragraph 12, page 40, are to be balanced by the judge (as this is a bench trial) in deciding the case.

Q. Are the plaintiff's also suing under the 14th Amendment as well as the 4th and 5th Amendments?

A. No. The suit is brought under the 4th and 5th amendments.

Q. Legal principle #4 on page 39 says that the defendant had to intentionally violate plaintiffs' rights. Does that mean that if the violation was an unintended by-product of the Homeland Security Act the plaintiffs cannot win?

A. No.

Q. According to paragraph 11 of the legal principles, page 40, an interest in liberty is loosely defined as a freedom provided by the constitution or statute. Where are we to derive, from the materials, the freedom to travel?

A. For the purposes of this problem, the right to travel exists. This is a liberty interest.

Q. In the "Legal Principles" section, (#5 & #11), it references that the claim is under color of state law, thus invoking the 14th Amendment; however, I don't see any reference to a state issue or state law, but rather 2 constitutional claims (4th & 5th Amendments) and a national law (re Homeland Security), leaving the 14th Amendment issue as a red herring?

A. This is really a strategy question and is up to teams to determine.

Paragraph 17 of Murphy Robert's affidavit should be amended to read:

17. Because I'm proud of the job I do, I welcome the opportunity to discuss the precautions the airports and our national government have taken to assure the safety of the general public. That's why I took the time to discuss this very serious matter with a reporter who approached me while I was on duty and asked about our computer checking system. I checked with my supervisor who said it was ok and took a few moments to show the reporter how the security system functioned. I breached no airport rules. The reporter had a list of names for me to run as samples. Common names, like Abraham Lincoln and George Washington. Then, just to test the system, the reporter gave me three or four additional names to run. As it turns out, some of those names were those of the ~~defendants~~ plaintiffs. The alert sounded and I discussed with the reporter how we would handle this type of alert. Unfortunately, the reporter only wrote about the plaintiffs in this case and completely disregarded the information I provided about the importance of airport security.

Q. The defense witness M. Downey Johnson, does the M. stand for a position or status or is it a professional name that he/she goes by, M. being his/her first name and Downey being the middle name?

A. M. is a first initial and does not designate a title, position or status.

Revisions made February 16, 2005

Exhibit III now states: "K.L. Berry was detained at airport due to status on federal no-fly or selectee list. Local media published..."

Exhibit VII now includes as a footnote: "Assume this is standard language supplied by all airlines when purchasing tickets."

Q. At a regional, in at least 2 trials students stood up and said, "Objection, your honor. Counsel is overtime." This was during the cross-examination of a witness. In at least one of the trials, a student sat behind the evaluators next to the timers and as the evaluators were completing their comments, the student leaned over and commented to the evaluators that they should count off point here and there for going overtime. My understanding is that the evaluators may deduct points for going over time; however, a student objecting to such is not a legal objection and not appropriate. And speaking to the evaluators about it is not appropriate either. Correct? Would you clarify for all of us so teams know what is and is not appropriate and when?

A. The current mock trial handbook that contains the rules states that "An attorney may object any time the opposing counsel has violated the *Rules of Evidence* (emphasis added). Further down the page (pp 24) it states that "Judges are instructed to deduct points for inappropriate objections." If a team exceeds its time limit during any given segment of the trial and the judge has not authorized a time extension, it should be noted on the time sheet. The time sheet should be given to the presiding judge at the conclusion of the trial, at which time the timekeeper may draw attention to the overage. The judge and evaluators may take this infraction into consideration in scoring. Exceeding specified time limits is **not** an appropriate objection; the matter should be dealt with at the conclusion of the trial. All such timing matters should be presented to the presiding judge at the conclusion of the trial, prior to debriefing and before score sheets are completed. It is never appropriate for student timekeepers to advise presiding judges or scoring judges on how to mark their scores.

Mock Trial 2005 - Legal Principles **AMENDED**

1. When more than one claim is involved, you should consider each claim separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all of the exhibits received into evidence, regardless of who may have produced them. If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the party making that claim or contention.

2. The defendants are presumed to be not liable throughout every stage of the trial. This presumption is not overcome unless, from all the evidence in this case, you are convinced by a preponderance of the evidence that they are liable. The phrase "preponderance of the evidence" means whether, considering all the evidence in the case, the proposition ~~on which the Defendant has the burden of proof~~ is more probably true than not true.

3. The fact that a governmental entity or agency is involved as a party must not affect your decision in any way. A governmental agency and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

4. In this case, the Plaintiffs claim that the Defendants, while acting "under color" of legal authority state law, intentionally deprived the Plaintiffs of their rights under the Constitution of the United States. The Defendants may be liable if you find that the Plaintiffs were deprived of their constitutional rights (Due Process and Equal Protection) and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision that was the proximate cause of the deprivation of the Plaintiffs' constitutional rights. Whether a custom or policy exists is for you to determine.

5. The Plaintiffs claim that while the Defendants were acting under color of legal authority of the U.S. Transportation Safety Bureau, they intentionally violated the Plaintiffs' constitutional rights not to be seized without probable cause or subject to unreasonable searches.

6. In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence.

- First, that the Defendants intentionally committed acts that violated the Plaintiffs' constitutional rights not to be seized without probable cause or subject to unreasonable searches.
- Second, that in so doing the Defendants acted "under color" of the legal authority. ~~of the State of Illinois.~~
- Third, that the Defendants' acts were the proximate or legal cause of damages sustained by Plaintiffs.

7. The first aspect of this claim is that the Plaintiff was seized without probable cause. In that regard, you are instructed that under ~~the law of the State of Illinois~~ color of legal authority, a

law enforcement official has the right to seize or arrest a person without warrant whenever the person reasonably believes that such person has committed a misdemeanor offense in the presence of an officer.

8. In this case, the Defendants have stipulated or agreed that the Defendants acted “under color” of ~~state law~~ legal authority and you should, therefore, accept that fact as proven.

9. The second aspect of the Plaintiff’s claim is that the Defendant intentionally deprived the Plaintiffs of their Fourth Amendment constitutional right to be free from an unreasonable search. The Constitution protects every citizen against “unreasonable” searches; and, ordinarily, this means that a search warrant must be obtained from a judicial officer before the search is made. There are, however, exceptions.

10. One such exception is a search conducted by consent. If a person freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct the search to the extent of the consent given. Another exception is recognized in emergency situations in which a law enforcement officer, if the officer has a reasonable and good faith belief that there is a serious threat to the officer’s safety or the safety of someone else, may make a safety inspection for the purpose of protecting the well-being of the officer and others. The Plaintiffs have the burden of proving by a preponderance of the evidence that the search was unreasonable.

11. In a claim based on a violation of due process of the Fifth and Fourteenth Amendments, the first step is to determine whether the claimant has been deprived of an interest in life, liberty, or property. An interest in liberty may include the loss of a significant freedom or action or the denial of a freedom provided by the Constitution or statute. Restrictions on the right to travel that lack due process may implicate such a liberty interest.

12. If the claimant has been deprived of life, liberty, or property, the second step is to determine how much process is due. If plaintiffs have proven their *prima facie* case, then the actions of the government can only be upheld ~~must be judged by a strict scrutiny standard, meaning that the law or practice can be upheld~~ if there is a compelling or overriding purpose based on the balancing of the following factors: (1) the importance of the individual interest involved, (2) the strength of the governmental interest at stake, and (3) the risk that procedures used will lead to erroneous decisions. Due process rights are subject to waiver. If an individual waives his/her rights to a governmental deprivation of liberty, such waiver must be voluntary and knowing to be valid.

Lesson written by Dan May, O'Fallon, Illinois
Lesson reviewed and coordinated by the Constitutional Rights Foundation Chicago for the
2005 Illinois State Bar Association Mock Trial program.

The Right to Travel -- Maybe You Can and Maybe You Can't

Just think: If there wasn't a right to travel...

There wouldn't have been any National Lampoon Vacation movies;
Bill and Ted would never have had their excellent adventure;
You wouldn't be going to Grandma's house for the holidays;
And you would have one less reason for studying the U.S. Constitution.

OBJECTIVES:

1. Students will read the facts, decisions and reasoning of three Supreme Court cases involving a person's right to travel.
2. Students will understand the meaning of a legal precedent and decide if precedent applies to a case.
3. Students will understand how the concept of due process applies to an individual's right to travel.
4. Students will understand the following terms: majority opinion, concurring opinion, dissenting opinion.

PROCEDURE

1. Tell students they'll be studying court cases involving due process and travel.
2. Explain to them that due process is a rule that requires a person to be treated fairly. For instance, if they were going to be suspended from school, they'd want to know the reason for the suspension. They'd also probably want to give their side of the story before the suspension was imposed. They wouldn't want to be suspended for doing something they were supposed to be able to do, like belonging to a certain political party. Fair treatment could require a number of considerations. Due process is like that. It could involve the fairness of a rule or how the rule was applied differently to you compared to others but due process means a person is entitled to be treated in a way that is expected and fair.
3. Ask students if parents place any limits on their ability to go where they want to go.
 - *Can't leave without telling them where they're going*
 - *Can't drive a car more than a certain distance from home*
 - *Have to be back by a certain time (curfew)*
 - *Don't have the money to go on a spring vacation*

4. Ask students to give examples of how our economy might be different if people couldn't travel freely.

- *Places like Las Vegas and Florida would be looking for other sources of revenue*
- *Travel agent occupation probably wouldn't exist*
- *Might have to find a job close to home*

5. Where would students look to find liberty protected by the government?

The Bill of Rights in the Constitution

6. Who settles disagreements or questions concerning individual rights?

Courts settle disagreements. The Supreme Court has the final say in cases.

7. Explain the term precedent.

A precedent is set when a court makes a decision in a case and that decision is used to guide future cases involving the same issue. For example, if a state tried to segregate public schools on the basis of race, the 1954 Brown decision would say that has already been decided. It ruled that racial segregation in schools is a violation of the equal protection clause of the Fourteenth Amendment.

8. Have students read the three cases and complete the student worksheet. If you believe your students would not be able to complete all readings and discussions in one class period, you might want to create triads (groups of three) with each student reading a different case and then have them work together to complete the written assignment. You could also conduct the lesson over two periods and have each student read each case.

9. At the conclusion of the student work, ask students the following questions.

Is there a right to travel?

What is a precedent?

What is a majority opinion?

What is a concurring opinion?

What is a dissenting opinion?

10. Make sure the students notice that none of the rulings were unanimous. Reasonable people with strong legal backgrounds disagreed about the decisions. Changing one or a few members of the Court could change the ruling in any of these decisions. The rulings were made almost four decades ago. Sometimes the passage of time alters views. Sometimes world events or changing values causes a shift in our national consciousness.

(This would be a good time to introduce the problem for the 2005 Mock Trial Challenge)

NOTE TO TEACHER: This lesson is not intended to provide a comprehensive discussion of legal issues related to the right to travel. In addition to the Due Process Clause of the Fifth

Amendment, the Court has also grounded the right to travel in the Privileges and Immunities Clause of the Fourteenth Amendment. Two cases involving this question are *Edwards v. California* 314 US 166 (1941) and *Saenz v. California* 526 US 489 (1999).

Student Materials

Student Worksheet

1. Based on your reading of the three cases, what is the legal basis for ruling that individuals enjoy a right to travel protected by the U.S. Constitution?
2. Support provided for government restriction of travel was the same in each case. What was the basis for justifying the government action?
3. Select a case as an example to best illustrate the concept of precedent and explain your selection.
4. Does the decision in *Zemel* break with precedent?

Teacher Guide

Student Worksheet

1. Based on your reading of the three cases, what is the legal basis for ruling that individuals enjoy a right to travel protected by the U.S. Constitution?

The Court considers the right to travel to be a liberty that cannot be taken without due process. It is protected by the Fifth Amendment.

2. Support provided for government restriction of travel was the same in each case. What was the basis for justifying the government action?

*The dissenting opinions of **Kent** and **Aptheker** agree with the majority opinion in **Zemel** by concluding that national security justified the government action.*

3. Select a case as an example to best illustrate the concept of precedent and explain your selection.

***Kent v. Dulles** was used by the majority to justify the ruling in **Aptheker**. It was also used by the dissent in **Zemel** as the basis for why the decision should have gone in favor of the individual and against the government. Since a precedent guides future decisions, **Kent** best illustrates the concept.*

***Aptheker** is also cited in the dissenting opinion as a basis for ruling against the government in **Zemel** so one might consider it a precedent also. Since **Aptheker** is based on the precedent set in **Kent**, **Kent** might be considered a better example to illustrate precedent.*

4. Does the decision in **Zemel** break with precedent?

*One could argue that **Zemel** presents a different set of circumstances than those in **Kent**. **Kent** dealt with the government preventing a person from doing what everyone else was allowed to do. **Zemel** kept a person from doing what no one else was allowed to do. Since the cases are different and precedent applies to cases that are similar, it did not break with precedent. One could also argue that **Zemel** provided for due process with the limitation on the liberty while the **Kent** precedent said it could not be done without with due process.*

*One could agree with the dissent in **Zemel** and say that the decision departed from the rulings of **Kent** and **Aptheker**.*

Kent v. Dulles (1958)

357 U.S. 116

Congress passed a law requiring a passport for foreign travel by citizens if a state of national emergency had been declared by the President. After the President had proclaimed a state of emergency, the Secretary of State denied passports to two different people. Rockwell Kent wanted to visit England and also travel to Helsinki, Finland to attend a meeting of an organization called the World Council of Peace. He was denied on the basis of being a Communist. Dr. Walter Briehl, a psychiatrist, also was denied a passport because of the belief he was a member of the Communist Party and supported its ideas. The denials entitled each man to appeal the decision by having a hearing. They were told they must submit an affidavit regarding whether they were, or ever had been, a member of the Communist Party. Both refused to submit the affidavit. Kent's case was decided in favor of the government and since Briehl's case involved the same issue, his was dismissed because of the ruling made in Kent's case. The Court of Appeals combined the two cases and heard their appeals together when it upheld the District Court decision.

In a 5-4 decision the Court decided the Secretary of State was not authorized by law to deny passports on the basis of membership in the Communist Party. The majority provided the following reasons.

- The broad power of the Secretary to issue passports, authorized the refusal of a passport only when the applicant (1) is not a citizen or a person owing allegiance to the United States, or (2) was engaging in criminal or unlawful conduct.
- The law does not give the Secretary authority to withhold passports to citizens because of their beliefs or associations. Any Act of Congress that would attempt to do so would raise serious constitutional questions. When Congress passed this law, it didn't give the Secretary unlimited power to withhold a passport for any reason he may choose.
- The 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. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. As a nation we believe in the idea that, outside areas of plainly harmful conduct, every person should be allowed to shape his own life as he thinks best, to do what he pleases and go where he pleases.

There were members of the Court who disagreed with the decision. Here are some of their reasons. (Dissenting Opinion)

- The legislative history of the 1918 Act provides proof that Congress meant the Secretary could deny passports to those whose travel abroad would be contrary to our national security.
- The implication is unmistakable that the Secretary was intended to exercise his traditional passport function in such a manner as would effectively add to the protection of this country's internal security.

Aptheker v. Secretary of State (1964)
378 U.S. 500

Appellants, native-born citizens and residents of the United States, are ranking officials of the Communist Party of the United States. After hearings under State Department regulations, appellants' passports were revoked under Section 6 of the Subversive Activities Control Act of 1950, which provides that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member with knowledge or notice thereof to apply for or use a passport. Appellants filed suit asking that Section 6 be declared unconstitutional as a violation of the Due Process Clause of the Fifth Amendment and that the Secretary of State be ordered to issue passports to them. A three-judge District Court denied relief.

In a 6-3 decision, the Supreme Court ruled Section 6 too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment. The majority provided the following reasons.

- The right to travel at home and abroad is an important aspect of liberty of which a citizen cannot be deprived without due process of law. This was established in the decision *Kent v. Dulles*.
- Though the underlying purpose of Section 6 is the protection of national security, the attainment of that end cannot be realized by unnecessarily infringing upon constitutional freedoms.
- Congress could have chosen less drastic means of achieving the national security objective without such a large interference with individual liberty.

There were some justices who agreed with the decision but wanted to state reasons not mentioned in the majority opinion. (Concurring Opinion)

- We noted in *Kent v. Dulles*, that "freedom of movement," both internally and abroad, is "deeply engrained" in our history. Being a Communist certainly is not a crime; and while traveling may increase the likelihood of illegal events happening, so does being alive. If, as I think, the right to move freely from State to State is a privilege and immunity of national citizenship none can be barred from exercising it, though anyone who uses it as an occasion to commit a crime can of course be punished.
- Freedom of movement, at home and abroad, is important for job and business opportunities - for cultural, political, and social activities - for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

- War may be the occasion for serious restriction of liberty. Other than that there is no way to keep a citizen from traveling within or without the country, unless there is power to detain him. And no authority to detain exists except under extreme conditions, e. g., unless he has been convicted of a crime or unless there is probable cause for issuing a warrant of arrest by standards of the Fourth Amendment. This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful - knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.

There were members of the Court who disagreed with the decision. Here are some of their reasons. (Dissenting Opinion)

- While the right to travel abroad is a part of the liberty protected by the Fifth Amendment, the Due Process Clause does not prohibit reasonable regulation of life, liberty or property. Here the restriction is reasonably related to the national security.
- The right to travel is not absolute. Congress had ample evidence that use of passports by Americans belonging to the world Communist movement is a threat to our national security. Passports were denied to Communists from the time of the Soviet Revolution until the early 30's and then again later in the 40's. The Congress had before it evidence that such use of passports by Communist Party members: enabled the leaders of the world Communist movement in the Soviet Union to give orders to their comrades in the United States and to exchange vital secrets as well; facilitated the training of American Communist leaders by experts in sabotage and the like in Moscow; gave closer central control to the world Communist movement; and, of utmost importance, provided world Communist leaders with passports for Soviet secret agents to use in the United States for espionage purposes. The denial is reasonably related to the national security. The degree of restraint upon travel is outweighed by the dangers to our very existence.
- The remedy adopted by the Congress is reasonably tailored to accomplish the purpose. It may be true that not every member of the Party would endanger our national security by traveling abroad, but which Communist Party member is worthy of trust? Since the Party is a secret, conspiratorial organization subject to rigid discipline by Moscow, the Congress merely determined that it was not wise to take the risk which foreign travel by Communists entailed. The fact that all persons in a class may not engage in harmful conduct does not of itself make the classification invalid.

Zemel v. Rusk (1965)

381 U.S. 1

After this country had broken diplomatic relations with Cuba and the Department of State had eliminated Cuba from the area for which passports were not required, Zemel applied to have his passport validated for travel to Cuba "to satisfy [his] curiosity . . . and to make [him] a better informed citizen." His request was denied, and he filed suit in federal district court seeking a

judgment declaring that he was entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport validated for that purpose, that the Secretary of State's travel restrictions were invalid, and that the Passport Act of 1926 and 215 of the Immigration and Nationality Act of 1952 were unconstitutional. In addition, he asked that the Secretary and the Attorney General be prevented from interfering with such travel. A three-judge court denied Zemel's request.

The Supreme Court, in a 6-3 vote, ruled the government could restriction travel to Cuba without violating a person's constitutional rights. The majority provided the following reasons.

- The fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.
- The restriction here is justified by the weightiest considerations of national security.
- This case is therefore not like *Kent v. Dulles*. The issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations. In this case, 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.
- In *Kent v. Dulles*, we held 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." However, the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.
- It also cannot be forgotten that in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges. We think, particularly in view of the President's statutory obligation to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of an American citizen unjustly deprived of his liberty by a foreign government, that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.
- The right to travel within the United States is constitutionally protected. That freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole. So it is with international travel. That the restriction which is challenged in this case is supported by the considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.

There were members of the Court who disagreed with the decision. Here are some of their reasons. (Dissenting Opinion)

- We held in *Kent v. Dulles*, that the right to travel overseas, as well as at home, was part of the citizen's liberty under the Fifth Amendment. It reflected a judgment as to the peripheral rights of the citizen under the First Amendment. The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer.
- Only last Term, in *Aptheker v. Secretary of State*, we struck down a provision of the Subversive Activities Control Act of 1950 because it "too broadly and indiscriminately" restricted the right to travel. The same rule should be applied in this case.
- There are areas to which Congress can restrict or ban travel. Disease may rage in a region making it necessary to protect not only the traveler but those he might infect on his return. A theatre of war may be too dangerous for travel. Other like situations can be put. But the only so-called danger present here is the Communist regime in Cuba. The world, however, is filled with Communist thought; and Communist regimes are on more than one continent. They are part of the world spectrum; and if we are to know them and understand them, we must mingle with them. Keeping alive intellectual intercourse between opposing groups has always been important and perhaps was never more important than now.

Lesson written by Dan May, O'Fallon, Illinois
Lesson reviewed and coordinated by the Constitutional Rights Foundation Chicago for the
2005 Illinois State Bar Association Mock Trial program.

The Pendulum Swings and the Lessons of History

Have You Looked In the Rearview Mirror?

Objectives

1. Students will read and compare four historical episodes involving government treatment of individual liberties during the threat of war.
2. Students will engage in a cooperative group effort to teach each other about an individual case.
3. Students will develop critical thinking skills as they evaluate cases and make judgments about government actions.

Procedure

1. Ask students, "What is a pendulum?" Make sure everyone has a clear understanding of something that swings back and forth.
2. Provide examples with fashion to further illustrate the concept of a pendulum swinging. School dress codes were restrictive, became less restrictive followed by a trend to be more restrictive. Styles for the length of hair or length of shorts goes from short to long and back to short.
3. Ask student to define reaction. Have them give examples.
4. Explain the development of government in the United States based on reactions to government power and individual liberties. The colonists reacted to laws passed by England. They saw a swing towards an increase of British power that made the pendulum swing away from rights they thought were guaranteed to them. Then they created their own government and made the government powers restricted when it came to interfering with rights. The Bill of Rights was adopted to limit the national government's ability to interfere with certain individual rights. Ask students to provide examples. Freedom of the press, freedom of speech, feeling secure in their homes from searches (privacy) and the right to a trial by jury could be used as examples.
5. A specific example of reaction to government power would be the Fourth Amendment warrant requirement for searches and seizures. British writs of assistance allowed government officials to search anywhere they thought smuggled goods might be found. They granted a permanent authority to search and did not have to specify the place to be searched or things to be seized. An official could search whenever he felt like it for whatever he wanted to look for and wasn't responsible for any damage caused by the search. The government had no restrictions on

its ability to search. This bothered the colonists who thought they had a natural right to feel safe and secure in their homes. A government that could come in anytime, look for anything and not be held accountable for the damage done was a government beyond control. It was considered above the law. The experience of the colonists with the general writs led to the Fourth Amendment warrant requirement. It requires the government to provide good reasons for getting permission to search a specific place for specific items.

6. Apply the pendulum concept to this example. The reaction to general search warrants was to require permission for a specific place to be searched for specific items. The pendulum swung away from government power and toward individual liberty. The reaction to government searching whenever it wanted was a requirement that government obtain permission for each search and that permission could only be granted if there were good reasons to support the request. Again, the pendulum swung away from government power and towards protecting citizen's rights.

7. Tell students they will be reading four episodes that involved the United States, the threat of war, individual rights and government restrictions. Ask them to view these cases in terms of a pendulum swinging toward restricting rights or towards protecting rights.

8. Divide the class into four groups. Have each group read and report on one of the episodes. Give each student a copy of the group worksheet. Tell students to work together to complete the worksheet. Require each member of the group to provide at least one answer for the class.

9. After hearing the report from each group, ask the class to draw conclusions about government actions affecting liberties during wartime. (From the examples, one could conclude that the government tries to limit rights during the threat of war but its restrictions are viewed less favorably and lessened or reversed when the threat of war passes. Ask students if it is appropriate for government to choose this course of action).

10. As a concluding activity, ask students to discuss the meanings of following quotes.

“They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” - Benjamin Franklin

“The average man does not want to be free. He simply wants to be safe.”
- H. L. Mencken

“Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it.”

- Justice Learned Hand

After visiting Ground Zero, the former site of the World Trade Center, Supreme Court Justice Sandra Day O'Connor remarked, “We're likely to experience more restrictions on personal freedom than has ever been the case in this country.”

Student Materials

THE ALIEN AND SEDITION ACTS OF 1798

Under the threat of war with France, the Federalist Congress passed four laws in an effort to strengthen the Federal government. Known collectively as the Alien and Sedition Acts, the legislation sponsored by the Federalists was also intended to quiet political opposition from the Republicans, led by Thomas Jefferson. The Federalists held a majority of seats in Congress which gave them the ability to pass these laws.

The Naturalization Act required that aliens be residents for 14 years instead of 5 years before they became eligible for U.S. citizenship. New immigrants tended to support the ideas of the Republican candidates and this would take them a longer time to be eligible to vote. Congress then passed the Alien Act on June 25, authorizing the President to deport aliens "dangerous to the peace and safety of the United States" during peacetime. The third law, the Alien Enemies Act, was enacted by Congress on July 6. This act allowed the wartime arrest, imprisonment and deportation of any alien subject to an enemy power. President John Adams made no use of the alien acts.

The Sedition Act declared that any treasonable activity, including the publication of "any false, scandalous and malicious writing," was a high misdemeanor, punishable by fine and imprisonment. The reason for passing the law was to silence Republican criticism of the Federalists. It allowed punishment of spoken or written criticism of the government, the Congress, or the President. This could severely restrict the First Amendment freedoms of speech and press. Twenty-five men, most of them editors of Republican newspapers, were arrested and their newspapers forced to shut down because published statements, critical of the government, were judged to be in violation of the Sedition Act.

Many Americans questioned the constitutionality of these laws. Indeed, public opposition to the Alien and Sedition Acts was so great that they were in part responsible for the election of Thomas Jefferson, a Republican, to the presidency in 1800. People objected to the types of law passed by the Federalist-controlled Congress. Those convicted under the Sedition Act were pardoned (forgiven) by President Jefferson. People who had paid fines for violating the laws had their money returned to them with interest. The Republican-controlled Congress repealed the Naturalization Act in 1802; the others were allowed to expire between 1800 and 1801.

LINCOLN SUSPENDS HABEAS CORPUS (1862)

A writ of habeas corpus is a legal tool used to prevent the government from arresting and holding people without a good reason. A person who thinks the government is holding him or her without legal justification, can request a court order (writ of habeas corpus). This order requires two things. The person must be brought to court and the government must justify why the person is being held. If the judge decides the person is not being held for a good reason, the person is released.

As the Civil War started, President Lincoln faced difficult decisions in an attempt to stop the southern states from withdrawing from the United States of America. Some people thought Lincoln should take different steps to get the southern states back into the Union. Lincoln had proclaimed he would not follow parts of the Constitution in order to save the document and the country. Some publicly criticized Lincoln's belief that violating the U.S. Constitution was required to save it as a whole. With Congress not in session until July, Lincoln assumed all powers not delegated in the Constitution. Lincoln suspended civil law in territories where resistance to the North's military power would be dangerous. The military would be responsible for dealing with lawbreakers because he felt that state courts would not convict war protesters. He proclaimed that all persons who discouraged enlistments or engaged in disloyal practices would come under Martial Law and be handled by the military. Lincoln then suspended the right to habeas corpus throughout the nation. Congress retroactively approved Lincoln's suspension of habeas corpus.

People who had made remarks critical of the President and the war were arrested under military authority. The people arrested thought they had a right to express their opposition because of the First Amendment. They also thought they had the right to habeas corpus to prevent what they considered to be an unlawful detention. Among the 13,000 people arrested under martial law was John Merryman. Chief Justice Roger Taney of the Supreme Court of the United States issued a writ of habeas corpus commanding the military to bring Merryman before him. The military refused to follow the writ. Justice Taney, in *Ex parte Merryman*, then ruled the suspension of habeas corpus unconstitutional because the writ could not be suspended without an Act of Congress. President Lincoln and the military ignored Justice Taney's ruling.

Finally, in 1866, after the war, the Supreme Court officially restored habeas corpus in *Ex parte Milligan*, ruling that military trials in areas where the civil courts were capable of functioning were illegal.

WORLD WAR I

Soon after declaring war on Germany and its allies in 1917, Congress banned using the U.S. mail from sending any material urging "treason, insurrection or forcible resistance to any law." It punished offenders with a fine of up to \$5,000 and a five-year prison term.

President Woodrow Wilson warned that disloyalty "must be crushed out" of existence and that disloyalty "was . . . not a subject on which there was room for . . . debate." Disloyal individuals, he explained, "had sacrificed their right to civil liberties." Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917. During World War I, the government prosecuted more than 2,000 dissenters for opposing the war or the draft. Many judges were quick to hand out severe punishment, often 10 to 20 years in prison, to those considered disloyal.

The Espionage Act was involved in a famous civil liberties case: *U.S. v. Schenck*. The Supreme Court unanimously upheld his conviction for printing leaflets that urged Americans to resist the draft. Schenck argued his First Amendment rights were violated. The justices ruled: "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." The Court ruled against Schenck.

A year later, Congress enacted the Sedition Act of 1918, which expressly prohibited any disloyal or abusive language about the form of government, the Constitution, the flag, the uniform, or the military forces of the United States. In a series of decisions in 1919 and 1920, the Supreme Court consistently upheld the convictions of individuals who had agitated against the war and the draft despite the First Amendment clauses protecting freedom of speech.

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918. Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Franklin Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, holding in effect that every one of the individuals who had been imprisoned or deported in this era for his or her dissent had been punished for speech that should have been protected by the First Amendment.

JAPANESE-AMERICAN RELOCATION AND INTERNMENT (1942)

The relocation of Japanese-Americans into internment camps during World War II was one of the most flagrant violations of civil liberties in American history. According to the census of 1940, 127,000 persons of Japanese ancestry lived in the United States, the majority on the West Coast. One-third had been born in Japan, and in some states could not own land, be naturalized as citizens, or vote. After Japan bombed Pearl Harbor in December 1941, rumors spread, fueled by race prejudice, of a plot among Japanese-Americans to sabotage the war effort. In early 1942, the Roosevelt administration was pressured to remove persons of Japanese ancestry from the West Coast by farmers seeking to eliminate Japanese competition, a public fearing sabotage, politicians hoping to gain by standing against an unpopular group, and military authorities.

On February 19, 1942, Roosevelt signed Executive Order 9066, which forced all Japanese-Americans, regardless of loyalty or citizenship, to evacuate the West Coast. No comparable order applied to Hawaii, one-third of whose population was Japanese-American, or to Americans of German and Italian ancestry. Ten internment camps were established in California, Idaho, Utah, Arizona, Wyoming, Colorado, and Arkansas, eventually holding 120,000 persons. Many were forced to sell their property at a severe loss before departure.

The United States Supreme Court was asked to rule on the legality of the relocation order in *Hirabayashi v. United States* and *Korematsu v. United States*. Hirabayashi and Korematsu had claimed each was a victim of unconstitutional discrimination based on race. The Supreme Court upheld the legality of the relocation order.

It is interesting to note that some 3,600 Japanese-Americans entered the armed forces from the camps, as did 22,000 others who lived in Hawaii or outside the relocation zone. They fought for the United States military in World War II. The famous all-Japanese 442nd Regimental Combat Team won numerous decorations for its combat during the war.

Early in 1945, Japanese-American citizens of undisputed loyalty were allowed to return to the West Coast, but not until March 1946 was the last camp closed. A 1948 law provided for reimbursement for property losses by those interned. In 1988, Congress awarded restitution payments of twenty thousand dollars to each survivor of the camps; it is estimated that about 73,000 persons will eventually receive this compensation for the violation of their liberties.

Group Worksheet

Episode:

When did it occur?

Who were the groups involved in the conflict?

What happened between the different sides?

Why did it occur?

What rights or liberties were involved?

Provide a judgment about whether it was more important to allow the government action or more important to protect the individual right. Explain the reasoning used to make the judgment.

How did the pendulum swing in this case? Use arrows to illustrate.

During the Crisis

Restricting Liberties

Protecting Liberties

After the Crisis