

**OVERSIGHT HEARING ON PASSENGER SCREENING
AND AIRLINE AUTHORITY TO DENY BOARDING**

HEARING
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE
ONE HUNDRED EIGHTH CONGRESS

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OVERSIGHT HEARING ON PASSENGER SCREENING AND AIRLINE AUTHORITY TO DENY BOARDING

THURSDAY, JUNE 24, 2004

U.S. SENATE,
SUBCOMMITTEE ON TRANSPORTATION, TREASURY AND
GENERAL GOVERNMENT, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 2 p.m., in room SD-138, Dirksen Senate Office Building, Hon. Richard C. Shelby (chairman) presiding. Present: Senators Shelby, Specter, Murray, and Kohl.

OPENING STATEMENT OF SENATOR RICHARD C. SHELBY

Senator SHELBY. Good afternoon. The subcommittee will come to order.

Today, the subcommittee is holding an oversight hearing to examine whether the Federal Government has instituted policies to limit an airline from denying transport or requiring additional security screening to individuals who may be unsafe or dangerous. The Federal Aviation Act allows air carriers the right of permissive refusal, which is defined as the ability to refuse to transport a passenger or property the carrier decides is a potential risk to safety or security. The Federal aviation regulations authorize the pilot in command of the aircraft to discharge this right of permissive refusal on behalf of the air carrier in light of his final authority and responsibility for the operation and safety of the flight.

Despite this clear authority, however, there seems to be some question about the ability of an airline to remove passengers based on a perceived threat. At the January 27, 2004, hearing of the National Commission on Terrorist Attacks Upon the United States, a former airline executive testified that, and I will quote, "most recently, after 9/11, 38 of our captains denied boarding to people they thought were a threat. Those people filed complaints with the Department of Transportation. We, the airline, were sued, and we were asked not to do it again."

If this were the case, I am concerned that we may be jeopardizing aviation security by placing unnecessary restrictions on pilots and crew to take actions to protect passengers on the plane. If this Nation has learned anything since terrorists set their sights on destroying us, it is this: terrorists will learn a system, identify the weaknesses of that system, and then exploit the weakness to inflict harm.

I believe that we must balance an individual's civil liberties with an airline pilot's right to ensure the safety and security of the flight. But in trying to reach that balance, I want to ensure that we have not established policies or practices that will have a chilling effect on the willingness of the pilot in command to exercise his authority to safeguard the crew and all of the passengers.

The Transportation Security Administration checkpoint is not, and should not be, considered the last line of defense to assure the security of a flight by clearing passengers for boarding. The pilot and the crew of an aircraft, and even the passengers, are an important layer in keeping our aviation system secure. We should not forget that Richard Reid, that would-be shoe bomber, was thwarted by other passengers and crew during the flight.

Removal of a passenger must be the final decision, I believe, of the pilot. The last thing we should do is undermine the authority of the pilot to deny boarding or require additional screening to any passenger or group of passengers who has a reasonable suspicion of a threat to a safe flight.

I want to thank my colleague, and member of the subcommittee here, Senator Specter, for raising this issue with me. I believe it is important that we hold this hearing today to highlight the issue to learn more about it and to provide clarity on what should be the lines of authority in this manner.

This afternoon, we have two panels of witnesses. On the first panel, I would like to welcome Mr. Jeff Rosen, general counsel of the Department of Transportation, and Mr. Tom Blank, Associate Administrator for Policy at the Transportation Security Administration.

On the second panel, we will hear from Mr. Michael Smerconish, Ms. Peggy Sterling, vice president of American Airlines, and Ms. Christy Lopez, Relman and Associates.

Senator Specter, do you have an opening statement?

Senator SPECTER. Well, thank you very much, Mr. Chairman, and I begin by thanking you, especially, and your staff, for scheduling this hearing in the midst of very heavy responsibilities by the Appropriations Committee at this time to move ahead with our bills and your Subcommittee on Transportation.

This issue arose when a question was raised by Commissioner John Lehman of the 9/11 Commission, former Secretary of the Navy, when he asked National Security Counselor Condoleezza Rice at a 9/11 hearing, "Were you aware that it was the policy, and I believe remains the policy today, to fine airlines if they have more than two young Arab males in secondary questioning because that is discriminatory?"

Dr. Rice commented that she did not have any knowledge on that subject.

And then one of the witnesses on the public record in the 9/11 hearing, Mr. Edmond Soliday, formerly Vice President for Safety for United Airlines, said, among other things, that "if I had more than three people of the same ethnic origin in line for additional screening, our system would be shut down as discriminatory."

I had contacted ranking officials in the Department of Transportation and the Transportation Security Administration, who assured me that that was not the case, but it seemed to me that this

issue was of sufficient importance to take a little time of our subcommittee.

Michael Smerconish, who is a lawyer and a talk show host in Philadelphia, and in the interest of full disclosure, a long-term friend of mine, had noted Commissioner Lehman's statement and had commented on it publicly, and there is an enormous amount of interest in the Philadelphia region on this subject, as illustrated by a great many comments which he has had to a very widely heard program.

And as the chairman has noted, we have very heavy responsibilities on national security, and we also have responsibilities not to engage in ethnic and racial profiling, and there needs to be an element of cause, no matter what a person looks like, before they are detained.

But this is a matter of critical importance daily. Tens of thousands of people are boarding airlines every day where this is of keen security interest, and our Nation prides itself on elevating civil rights.

COMMISSIONER JOHN LEHMAN

I am sorry that Commissioner Lehman could not be here, but the leaders of the Commission have urged the commissioners not to appear on hearings. Frankly, it is a little surprising since they were on the Sunday talk shows. I tried to reach Chairman Kean to get a clarification of it, but have not been able to do so yet. But we have Commissioner Lehman's statement, and have the essential questions really before the subcommittee.

And the issue really is whether political correctness has gone too far in the case of aviation security or are we correctly avoiding the pitfalls of unfairly profiling individuals based partly on their ethnicity so that these Senate hearings have a great effect on sensitizing people on all sense. A lot of people pay attention to what we do here. Even though we do not have absolute answers, the airing will make everyone more sensitive, which I think will help security, and everyone will be more sensitive, which will help an appropriate recognition of civil rights.

Thank you, Mr. Chairman.

Senator SHELBY. Senator Specter, I just want to make sure I heard this right. For example, let us say I came from somewhere in the Middle East, and there were ten of us in a group. We were all huddling together and they would check three of us and let the other seven go, although there might be a reasonable, common-sense suspicion of the whole group? In other words, they have a numerical limit and cannot look at everyone in a group? I hope that is not what the policy is.

Senator SPECTER. Well, that is what Mr. Soliday said. "If I had more than three people of the same ethnic origin in line for additional screening, our system would be shut down as discriminatory."

Senator SHELBY. That is crazy.

Senator SPECTER. I hasten to add that the Federal authorities responsible here have said that is not the case, and that is—

Senator SHELBY. We will find out.

Senator SPECTER. That is why we have hearings.

Senator SHELBY. We welcome our panel today. Your written statements will be made part of the record.

Mr. Rosen, we start with you.

STATEMENT OF JEFFREY A. ROSEN, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

Mr. ROSEN. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee, Senator Specter, thank you for the opportunity to testify today regarding the Department of Transportation's policies regarding the ability of an airline to deny transport or to require subsequent security screening to an individual who may be deemed unsafe or dangerous.

As you observed, the Department has submitted a written statement, and I appreciate that this statement will be included in the record. So I will keep my oral remarks comparatively brief.

In that regard, I would first like to go directly to the question of whether the Department of Transportation has had a policy to "fine airlines if they have more than two young Arab males in secondary questioning because that is discriminatory," as some have claimed. And the answer is that the Department has never had any such policy.

Senator SHELBY. What is the policy? Do you want to explain that? If that is not the policy, what is the policy?

Mr. ROSEN. The DOT's actual policies on nondiscrimination have been set out in writing and are available on the Department's website. They fully describe the Department's approach for the screening process before that responsibility was transferred to the Transportation Security Administration, and they do not in any way instruct airlines to refrain from subjecting multiple individuals of the same ethnicity to secondary screening. So I would like to start there, that the purported policy, which was reported in a small number of media outlets, is simply a myth.

The second point I would like to make today is that whatever steps the DOT has taken or not taken with regard to airline screening and transport are based upon applicable Federal laws and not on any political correctness. Under one Federal law, 49 U.S. Code Section 44902, a carrier may properly refuse to transport a passenger that presents a safety or security risk.

However, any airline decision to refuse to transport must comply with other laws as well. A number of Federal statutes specifically prohibit discrimination by air carriers. The most specific and most recently adopted provision, which is 49 U.S. Code Section 40127 states, and I will quote, "An air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry."

Within the last year, DOT's Aviation Enforcement Office concluded investigations generated by a number of complaints by passengers against four major carriers to resolve allegations not about secondary screening, but complaints that the passengers were removed from or denied boarding on certain flights following the September 11 terrorist attacks because of their perceived ethnic or religious background. The upshot of those eventually was that DOT's Aviation Enforcement Office and the air carriers concluded mutually agreed upon settlements, whereby the particular carriers did

not admit to any discriminatory conduct, but agreed to refrain from any future violations of Federal antidiscrimination statutes and to provide civil rights training to their employees to appropriately balance the security and civil rights concerns.

What does that mean in terms of the training? That, in essence, Mr. Chairman, that both sets of laws need to be adhered to, not just one or not just the other.

Under the settlement agreements, the airlines were not fined for, nor instructed to refrain from, subjecting multiple individuals of the same ethnicity to secondary security screening. There are no quotas. To the contrary, the Aviation Enforcement Office has never sought to fine an airline for having more than two young Arab males in secondary questioning, notwithstanding the fact that a number of complaints raising this issue have been received by that office.

That brings me to my third and final point, which is this: there need not be any inconsistency between our Nation's longstanding civil rights laws and the security of our national air transportation system which has been and remains a priority for DOT. President Bush has publicly stated his opposition to racial profiling and emphasized his "profound belief that no American should be judged by appearance, by ethnicity or by religious faith."

Only last month, Attorney General Ashcroft publicly stated, and I will quote, "Al Qaeda is seeking recruits who can portray themselves as native Europeans."

Since the tragic events of September 11, security measures implemented at airports and by airlines have been greatly improved. The additional security measures were first established by the Department of Transportation itself and subsequently by the Department of Homeland Security's Transportation Security Administration.

PREPARED STATEMENT

There should be no doubt whatever that Secretary Mineta and the entire Department of Transportation remain fully committed to the security measures necessary to protect our country.

That concludes my remarks, and I would be pleased to try to answer any questions you may have.

[The statement follows:]

PREPARED STATEMENT OF JEFFREY A. ROSEN

My name is Jeffrey A. Rosen, and I am the General Counsel of the Department of Transportation (DOT). I am pleased to have the opportunity to testify today about the Department's compliance and enforcement efforts to ensure that the civil rights of air travelers are respected by the airlines that we regulate. I understand from Chairman Shelby's invitation letter that the committee is interested in examining the Federal Government's policies regarding the ability of an airline to deny transport or require subsequent security screening to an individual who may be deemed unsafe or dangerous.

In that regard, I have been told of statements about a purported policy of DOT "to fine airlines if they have more than two young Arab males in secondary questioning because that's discriminatory." (This statement was made by Secretary Lehman of the National Commission on Terrorist Attacks Upon the United States in questioning Condoleezza Rice, the National Security Advisor to the President, and was repeated in certain media articles in the Philadelphia Daily News and elsewhere.) At the outset, I want to lay that issue to rest once and for all: the Department of Transportation has never had any such policy. Likewise, the Department

has never fined an airline on the ground that it subjected multiple individuals of a particular race or ethnicity to additional security screening.

In discussing this issue, it would be useful first for the committee to recall the respective roles and responsibilities of the governmental and private sector entities that play a role in airline security and related issues. First is the Department of Homeland Security's Transportation Security Administration (TSA), which Congress has tasked with developing airline security requirements as well as hiring, training, deploying, and managing the security screener workforce at commercial airports across the country, a responsibility once borne by the air carriers. In addition, TSA's Office of Civil Rights and the Department of Homeland Security's Office for Civil Rights and Civil Liberties have authority to investigate discrimination complaints from passengers who allege they have been discriminated against by TSA screening personnel. TSA assumed responsibility for civil aviation security on February 17, 2002.

Second are the airlines, which are responsible for implementing transportation security procedures mandated by the Federal Government and continue to be major partners in the effort to improve security. Under Federal law, 49 U.S.C. § 44902, a carrier may properly refuse to transport a passenger that presents a safety or security risk. Prior to a passenger boarding an aircraft, the decision to refuse to transport the passenger because of safety or security reasons may be made by any airline staff designated by the carrier as having that authority. Under FAA rules, 14 CFR 91.3, the pilot in command of the aircraft is the final authority as to the operation of that aircraft, including any decision to refuse to transport a passenger.

Third is DOT's Office of the General Counsel, which has the responsibility to investigate security-related complaints alleging discriminatory treatment by air carrier personnel (e.g., pilots, flight attendants, gate agents or check-in counter personnel) pursuant to the specific statutory provisions in Title 49 that prohibit discrimination in air transportation. Whereas generally civil rights matters are handled by the Justice Department, Congress has conferred upon DOT administrative authority for civil rights enforcement activities concerning aviation. Within DOT, the Deputy General Counsel and the Assistant General Counsel for Aviation Enforcement and Proceedings have been delegated the authority to investigate and pursue enforcement cases against airlines, including those involving unlawful discrimination. To ensure impartiality, the neither the General Counsel nor the Secretary directly participate in the commencement or litigation of these administrative proceedings, but pursuant to the Department's regulations, the General Counsel serves as the legal advisor to the Secretary in enforcement cases that ultimately may have to be decided by the Secretary (or his delegate) after an adjudicatory hearing.

DOT's responsibility in this regard is set out in Federal law. Although an airline has the legal authority to refuse to transport an individual that it decides is unsafe, Federal law prohibits any airline decision to refuse to transport, whether it be the decision of the pilot or other airline staff such as a gate agent, that is based on the person's race, color, national origin, religion, ethnicity, or sex. A number of Federal statutes administered by DOT specifically prohibit discrimination by air carriers. The most specific and most recently adopted provision, 49 U.S.C. § 40127, states that "an air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." That provision was enacted on April 5, 2000, in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). Another provision that has been in effect for decades and was originally part of the Civil Aeronautical Board's authority since 1938, 49 U.S.C. § 41310, prohibits "an air carrier or foreign air carrier" from subjecting anyone to "unreasonable discrimination" on flights between the United States and foreign points. A different long-standing statute since 1938, 49 U.S.C. § 41702, requires that U.S. carriers provide "adequate interstate air transportation", which has been interpreted within DOT to prohibit invidiously discriminatory practices on the part of U.S. carriers generally in their interstate operations.

In the months following the September 11, 2001 terrorist attacks, DOT provided the airline industry with four separate guidance documents to assist in complying with Federal laws prohibiting discrimination against individuals because of their race, color, religion, ethnicity, or national origin. These guidance documents described fully the Department's policies with respect to nondiscrimination in the screening process prior to the takeover of that responsibility by TSA. Nowhere in any of these guidance documents on this subject is an instruction to airlines to refrain from subjecting multiple individuals of the same ethnicity to secondary screening. All of the Department's guidance on this subject is available on the Department's website at <http://airconsumer.ost.dot.gov>.

Members of the public who feel they have been the subject of discriminatory actions or treatment by air carriers potentially may bring a private civil rights action in the courts for damages and injunctive relief under 42 U.S.C. § 1981 which prohibits discrimination in the making and enforcement of all contracts, including contracts to fly on commercial air carriers. In addition, or alternatively, they may file a complaint with DOT's Aviation Enforcement Office pursuant to the specific provisions of Title 49 that I discussed earlier.

Between September 11, 2001, and May 30, 2004, the DOT's Aviation Enforcement Office received 221 complaints involving allegations of security-related civil rights violations, a significant increase from prior years. Most of these complaints alleged that an individual was unlawfully selected for additional security screening prior to boarding at the security checkpoint or the gate area. Of those 221 complaints, 70 involved allegations that passengers were removed from flights or denied boarding because, or primarily because, the passengers are, or were perceived to be, of Arab, Middle Eastern, or South Asian descent and/or Muslim. In most of the removal and denied boarding cases DOT's Aviation Enforcement Office received, it determined that a carrier did not violate the law or that there was insufficient evidence to conclude that a carrier was in violation of the law. However, the office did find evidence of what appeared to be civil rights violations in 18 post-September 11 complaints, such as a situation where a passenger was denied boarding by an airline despite having been approved by a Federal law enforcement officer for boarding. As a result, the Office instituted more in-depth investigation of several major air carriers based on these complaints. Prior to September 11, 2001, there were only a few complaints filed with the Department asserting that a passenger was denied boarding or removed from a flight and none of these incidents involved a violation of the civil rights laws DOT enforces.

Generally, the Department's Aviation Enforcement Office pursues informal enforcement action (e.g. asks the carrier to change its policy or procedure or warns the carrier about potential formal enforcement action if similar complaints continue to be received) when it believes that an airline policy or procedure unlawfully discriminates or is not in compliance with the law in other respects. However, if the Office concludes that informal action would not solve the problem, it may issue a cease and desist order and assess civil penalties. However, the Aviation Enforcement Office can only take such action through a mutually-agreed settlement of a case or after an adjudicatory proceeding—an oral evidentiary hearing on the record before an administrative law judge from DOT's Office of Hearings, at which the airline may present evidence and cross-examine witnesses in order to defend itself, if it chooses to do so.

Within the last 7 months, the Aviation Enforcement Office has concluded investigations of numerous complaints by passengers against four major carriers to resolve allegations that the passengers were removed from or denied boarding on flights following the September 11, 2001, terrorist attacks because of their perceived ethnic and/or religious background. In each of the four investigations, the Office concluded that there was credible evidence that, but for the passengers' ethnicity or religion or perceived ethnicity or religion, some passengers would most likely not have been removed. For example, as I mentioned, in some incidents, Federal law enforcement officers cleared the passengers before the flight departed, but the flight crew would not allow the individuals to re-board that flight. Instead, they placed the individuals on the very next flight without additional security screening.

DOT's Aviation Enforcement Office concluded its investigations of the complaints against these four carriers with mutually-agreed settlements whereby those carriers did not admit any discriminatory conduct, but agreed to refrain from future violations of Federal anti-discrimination statutes and to provide civil rights training to their employees. Under the settlement agreements, the airlines were not "fined" for, nor instructed to refrain from, subjecting multiple individuals of the same ethnicity to secondary security screening. To the contrary, the Aviation Enforcement Office has never sought to fine an airline for having "more than two young Arab males in secondary questioning," notwithstanding the fact that a number of complaints raising this issue have been received.

The laws that are relevant to these issues are not foolish or misguided. It has been asserted by some that aviation security is somehow undermined by screening individuals who are not male, who are not Middle Eastern, but who may be senior citizens or children. But within the last 2 months, the Attorney General of the United States and the Director of the FBI warned Americans in a national press conference of "a clear and present danger to America" by al Qaeda during this summer. In his remarks, Attorney General John Ashcroft reported that "al Qaeda attracts Muslim extremists among many nationalities and ethnicities." Attorney General Ashcroft also indicated that "al Qaeda is seeking recruits who can portray

themselves as native Europeans”, and who will travel with families to defeat our security measures. President Bush spoke publicly about “the unfairness of racial profiling”, and in September 2002 stated his “profound belief that no American should be judged by appearance, by ethnicity, or by religious faith.” Secretary Mineta and other administration officials know that current security practices not only comply with the law, but are in fact are designed to follow the President’s clear and emphatic directive to his administration—protect the American people from the threat of terrorism.

There need not be any inconsistency between our Nation’s longstanding civil rights laws and the security of our national air transportation system, which has been and remains a priority for DOT. Since the tragic events of September 11, security measures implemented at airports and by airlines have been greatly improved. DOT initiated and the Department of Homeland Security has continued and strengthened a comprehensive, layered strategy for aviation security incorporating intelligence, screening, regulation, inspection, enforcement, and education. Secretary Mineta and the entire Department of Transportation remain fully committed to all the security measures necessary to protect our country.

Senator SHELBY. Mr. Blank.

STATEMENT OF THOMAS BLANK, ASSISTANT ADMINISTRATOR, OFFICE OF TRANSPORTATION SECURITY POLICY, TRANSPORTATION SECURITY ADMINISTRATION, DEPARTMENT OF HOMELAND SECURITY

Mr. BLANK. Good afternoon, Mr. Chairman and members of the subcommittee. I am pleased to appear before you today to provide some brief remarks concerning TSA’s relationship with the airlines and their flight crews in situations where an individual who may be considered a security risk is denied transport.

We understand questions have been raised by the 9/11 Commission concerning situations where an air carrier refused transportation to individuals who were denied boarding or removed from a flight due to security concerns. Immediately following the attacks of 9/11, there were some instances where individuals or groups of people were removed from flights after the crew became uncomfortable with or suspicious of their actions. Following such a traumatic event, some crew members may have misinterpreted passengers’ behavior, resulting in complaints that individuals were removed from aircraft without specific reason other than the fact that they made the flight crew uncomfortable, and the Department of Transportation has since established a redress process to prevent that from happening in the future.

As noted by Mr. Rosen, DOT has the sole responsibility for investigating security-related discrimination complaints alleging discriminatory treatment by air carrier personnel. However, TSA’s Office of Civil Rights and the Department of Homeland Security’s Office of Civil Rights and Civil Liberties have authority to investigate discrimination complaints from passengers who allege that they have been discriminated against by TSA screening personnel.

TSA, created by the Aviation and Transportation Security Act, has responsibility for the security of all modes of transportation. In the aviation sector, we are responsible for the day-to-day Federal security screening operations for passengers and baggage at our Nation’s airports, as well as airport physical security and for air carrier security programs.

We accomplish our mission using a threat-based, risk-managed approach rooted in analysis of intelligence about threats to civil aviation security. Let me be clear about this point. Concerns about security do not justify illegal discrimination against passengers.

TSA security standards are not based on race or ethnicity, nor do they permit or encourage racial or ethnic profiling. In June 2003, the Department of Justice issued its guidance regarding the use of race by Federal law enforcement agencies, which DHS and TSA have adopted as policy.

As you heard from my colleague at DOT, the pilot in command of an aircraft is charged with the final authority for safe operation of his or her aircraft. Under TSA's mandated air carrier security program, the pilot in command serves as the in-flight security coordinator and, as such, TSA recognizes his or her authority to make decisions regarding on-board security incidents. In a situation where a member of the crew, be it a pilot or flight attendant, believes that a passenger may pose a risk to the safe operation of the aircraft, it is the responsibility of the pilot in command to determine whether or not that passenger will be transported. Furthermore, U.S. code and TSA regulations give air carriers the authority to refuse to transport a passenger that presents a safety or security risk.

TSA becomes directly involved in the resolution of passenger removal incidents, especially those that require diversion of an aircraft in flight. For example, if the pilot in command decides that a passenger is acting in a suspicious manner, the airline may make an operational decision to divert the flight. TSA receives notice that the aircraft is diverting through our Transportation Security Operations Center, known as the TSOC, in Herndon, Virginia. TSOC watch personnel continually monitor the Domestic Events Network, an open line of communication managed by the FAA which broadcasts information on evolving incidents to coordinating agencies in real time.

After gathering information on the nature of the incident, current status of the flight and the airport the flight is diverting to, TSOC personnel contact local TSA officials at the diversion airport. These officials contact appropriate personnel and agencies to respond.

In a case where a passenger is removed as a result of a security incident, TSA officials cooperate with the air carrier's ground security coordinator, law enforcement agencies and other Government agencies to determine whether or not the removed passenger does, in fact, pose a threat to civil aviation security. TSA's role in clearing a passenger consists of performing any necessary rescreening of the passenger and their belongings and a recheck of the passenger's name against Government watch lists if deemed necessary.

Additionally, information on these incidents is received within 24 hours at TSA headquarters, where it is reviewed daily by the Agency's executive leadership. It is determined whether or not the incident requires additional follow-up actions such as contact of the air carrier's management by a TSA principal security inspector to gather more information on the circumstances of the event, and we routinely review what behavior concerned the pilot in command and flight crew enough to divert or refuse to fly an individual. We will contact the air carrier if we feel the pilot in command's decision was not warranted.

If the passenger is eventually cleared for transport, it is the responsibility of the air carrier to arrange for continued travel. Please keep in mind that even if TSA and other officials determine the passenger is not a risk to aviation security, the air carrier still may elect not to transport the individual. Again, the air carrier does have the authority to refuse transport to the passenger if they believe the individual presents a threat to the safety or security of the flight.

TSA does not have authority to challenge the pilot in command's decision. If it is determined that the actions of the pilot in command were improper and a passenger was wrongfully removed, the responsibility for any disciplinary action against that individual or other crew or other members of the crew would rest with the air carrier. As noted by my colleague from DOT, regulatory oversight of the actions of the air carrier and its employees, with respect to civil rights complaints against air carriers, rests with DOT.

TSA considers the pilot in command and crew to be an important part of a layered security system. Though a passenger has been cleared by TSA security screening procedures, this does not overrule the recognized authority of the air carrier to determine whether someone flies or not. The more layers of security that are in place to prevent an attack, the more effective the security will be. As a result, TSA believes the pilot in command's authority to refuse transportation to a passenger believed to present a risk to the safety or security of the flight is sound.

Given the vast responsibilities placed upon the pilot in command for safe operation of the flight, we do not believe it would be wise to dilute his or her authority. We do realize that in a system with thousands of flights and approximately 1.8 million passengers daily, occasionally, complaints will arise. Again, as a double check, during our daily review of incidents, TSA's executive leadership does look for instances of unwarranted responses to incidents so that necessary follow-up actions can be taken with the air carrier or the information shared with DOT. In our view, the best way to prevent these incidents is to continually train crew members to be alert for security issues from all passengers regardless of appearance or ethnicity.

PREPARED STATEMENT

Thank you for the opportunity to appear before the subcommittee today, and I would be pleased to answer any questions you may have.

[The statement follows:]

PREPARED STATEMENT OF THOMAS BLANK

Good afternoon, Mr. Chairman, Senator Murray, and members of the subcommittee. I am pleased to appear before you today to provide a few brief remarks concerning TSA's relationship with the airlines and their flight crews in situations where an individual who may be considered a security risk is denied transport.

I understand questions have been raised by the 9/11 Commission concerning situations where an air carrier refused transportation to individuals who were denied boarding or removed from a flight due to security concerns. Immediately following the attacks of 9/11, there were some instances where individuals or groups of people were removed from flights after the crew became uncomfortable with or suspicious of their actions. Following such a traumatic event, some crewmembers may have overreacted to passengers' behavior, resulting in complaints that individuals were

removed from aircraft without specific reason other than the fact that they made the flight crew uncomfortable—and the Department of Transportation has since established a redress process to prevent that from happening in the future.

As noted previously by Mr. Rosen, DOT has the sole responsibility for investigating security-related discrimination complaints alleging discriminatory treatment by air carrier personnel. However, TSA's Office of Civil Rights and the Department of Homeland Security's Office of Civil Rights and Civil Liberties have authority to investigate discrimination complaints from passengers who allege they have been discriminated against by TSA screening personnel.

TSA, created by the Aviation and Transportation Security Act, has responsibility for the security of all modes of transportation. In the aviation sector, we are responsible for the day-to-day Federal security screening operations for passengers and baggage at our Nation's airports, as well as airport physical security and for air carrier security programs. We accomplish our mission using a threat-based, risk-managed approach rooted in analysis of intelligence about threats to civil aviation security.

Let me be clear about this point—concerns about security do not justify illegal discrimination against passengers. TSA's security standards are not based on race or ethnicity, nor do they permit or encourage racial or ethnic profiling. In June, 2003, the Department of Justice issued its Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, which DHS, and TSA adopted as policy.

As you have heard from my colleague at DOT, the pilot-in-command of an air carrier aircraft is charged with the final authority for safe operation of his or her aircraft. Under TSA's mandated air carrier security program, the pilot-in-command serves as the Inflight Security Coordinator, and as such, TSA recognizes his or her authority to make decisions regarding onboard security incidents. In a situation where a member of the crew, be it a pilot or flight attendant, believes that a passenger may pose a risk to the safe operation of the aircraft, it is the responsibility of the pilot-in-command to determine whether or not that passenger will be transported. Furthermore, U.S. Code and TSA regulations give air carriers the authority to refuse to transport a passenger that presents a safety or security risk.

TSA becomes directly involved in the resolution of passenger removal incidents, especially those that require diversion of an aircraft in flight. For example, if the pilot-in-command decides that a passenger is acting in a suspicious manner, the airline may make an operational decision to divert the flight. TSA receives notice that the aircraft is diverting through our Transportation Security Operations Center, known as the TSOC, in Herndon, VA.

TSOC watch personnel continuously monitor the Domestic Events Network, an open line of communication managed by the FAA, which broadcasts information on evolving incidents to coordinating agencies in real-time. After gathering information on the nature of the incident, current status of the flight, and the airport that the flight is diverting to, TSOC personnel contact local TSA officials at the diversion airport. These officials contact appropriate personnel and agencies to respond.

In a case where a passenger is removed as a result of a security incident, TSA officials cooperate with the air carrier's Ground Security Coordinator, law enforcement agencies, and other government agencies to determine whether or not the removed passenger does in fact pose a threat to civil aviation security. TSA's role in clearing a passenger consists of performing any necessary re-screening of the passenger and their belongings, and a re-check of the passenger's name against government watch lists if deemed necessary. Additionally, information on these incidents is received within 24 hours at TSA headquarters, where it is reviewed daily by the agency's executive leadership. It is determined whether or not the incident requires additional follow-up actions, such as contact of the air carrier's management by a TSA Principal Security Inspector to gather more information on the circumstances of the event. And, we routinely review what behavior concerned the pilot-in-command and flight crew enough to divert or refuse to fly an individual. We will contact the air carrier if we feel the pilot-in-command's decision was not warranted.

If the passenger is eventually cleared for transport, it is the responsibility of the air carrier to arrange for continued travel. Please keep in mind that even if TSA and other officials determine the passenger is not a risk to aviation security, the air carrier still may elect not to transport the individual. Again, the air carrier does have the authority to refuse to transport the passenger if they believe the individual presents a threat to the safety or security of the flight.

TSA does not have authority to challenge the pilot-in-command's decision. If it is determined that the actions of the pilot-in-command were improper and a passenger was wrongfully removed, the responsibility for any disciplinary action against that individual or other members of the crew would rest with the air carrier. As noted by my colleague from DOT, regulatory oversight of the actions of the air carrier and

its employees with respect to civil rights complaints against air carriers rests with DOT.

TSA considers the pilot-in-command and crew to be an important part of a layered security system. Though a passenger has been cleared by TSA security screening procedures, this does not overrule the recognized authority of the air carrier to determine whether someone flies or not. The more layers of security that are in place to prevent an attack, the more effective the security will be. As a result, TSA believes the pilot-in-command's authority to refuse transportation to a passenger believed to present a risk to the safety or security of the flight is sound. Given the vast responsibilities placed upon the pilot-in-command for safe operation of the flight, we do not believe it would be wise to dilute his or her authority. We do realize that in a system with thousands of flights and approximately 1.8 million passengers daily, occasionally complaints may arise. Again, as a double check, during our daily review of incidents, TSA's executive leadership does look for instances of unwarranted responses to incidents so that any necessary follow-up actions can be taken with the air carrier or the information shared with DOT. In our view, the best way to prevent these incidents is to continually train crewmembers to be alert for security issues from all passengers, regardless of appearance or ethnicity.

Thank you for the opportunity to appear before the subcommittee today, and I would be pleased to answer any questions you may have.

Senator SHELBY. Thank you for your testimony.

We have been joined by Senator Murray, and she has an opening statement.

STATEMENT OF SENATOR PATTY MURRAY

Senator MURRAY. Thank you very much, Mr. Chairman, for the accommodation. I apologize for being late, and I appreciate your fitting me in at this point.

The topic of today's hearing really goes to the very heart of the tension that we experience every day between the need for transportation security and the need to protect our civil liberties. We face this challenge of protecting all travelers and all of their rights in modes beyond aviation, including trains, ferries, buses and automobiles. If we have learned anything since the attacks on September 11 and the attempted attack by the shoe bomber, it is that we must have multiple overlapping systems of security to ensure our safety. Everyone—the passenger, flight attendant, the gate agent, the pilot, the air marshals, and most importantly, our TSA personnel—must keep their eyes open and be alert for any signs of danger.

I, for one, do not want to take away any security tools from any person of responsibility, especially pilots, when it comes to maintaining aviation security. So the question is: does empowering pilots to exclude certain passengers make us any safer? Well, I think we have to look at the facts.

Are passengers being excluded because they have ties to terrorist organizations? To my knowledge, we know of no cases where a pilot has excluded an individual with known ties to any terrorist organization.

Are passengers being excluded because of their race or ethnicity? We do have some data on that. Since September 11, the DOT has received roughly 70 complaints from individuals who believe they were wrongly excluded from their flights due to their race or ethnicity. Of those cases, the DOT has found that airlines did indeed exclude them solely because of their race roughly one-third of the time.

What ended up happening to passengers who were removed from their flights? Well, in a great many cases, the airlines that excluded those individuals simply booked them on later flights. In fact, many of the passengers who were rebooked onto later flights were then seated in the first class cabin, putting them even closer to the cockpit door than they were on their original flight. So the captains that first excluded these individuals did not keep them from flying, they simply kept them from flying on their flight.

Looking at those facts, it is clear that this is not the most efficient or effective way to enhance security. The real solution to this problem is for all people involved—the pilots, the flight attendants, all airline passengers—to have a much greater degree of comfort that there are not people on the plane seeking to do them harm.

So we have to ask: is the Department of Homeland Security doing an adequate job of ensuring that people who do pose a risk never get close to the boarding gate in the first place? And, sadly, the answer is no. Immediately after September 11, I was chair of the Transportation Subcommittee, when we were asked to fund the initial investments in the Transportation Security Administration. At that time, we began to make significant initial investments in the so-called CAPPS II Screening Program. CAPPS II was supposed to be the computer-based filtering system through which the TSA would consult multiple databases to determine which passengers require additional scrutiny. This system, we were told, would be extremely comprehensive, while protecting the privacy rights of all passengers.

Earlier this year, the General Accounting Office testified that the Transportation Security Administration is woefully behind in the development and deployment of the CAPPS II program. When concerns about this program were brought to the Homeland Security Subcommittee, on which I serve, language was inserted in the 2004 appropriations bill to ensure that eight very reasonable tests would be met before the TSA spent money to deploy the program.

To date, despite all of the initial encouraging representations, the program has only met one of these eight tests, and the development and deployment dates for the CAPPS II system could not be more certain. Similarly, the TSA has done a poor job of screening out all potentially dangerous items at their security checkpoints. As was the case when the screening function was handled by the FAA, the DHS has teams that secretly seek to penetrate the security checkpoint at airports. While I cannot go into the specific findings resulting from those efforts, here is how the DHS Inspector General put it:

Federal screening checkpoints and private screening checkpoints “performed equally poorly”. Perhaps if the TSA was doing a better job at its core responsibilities, there would be less uneasiness over individual passengers who have cleared those checkpoints. If the TSA was doing a better job, there would be less of a need to pay attention to the process by which pilots have, rightly or wrongly, excluded passengers.

I hope, Mr. Chairman, that this hearing shines a light on the best ways to improve security throughout our aviation system and to ensure that we are protecting passengers and protecting their rights at the same time.

Thank you very much, Mr. Chairman.

Senator SHELBY. Thank you, Senator.

We have been over some of this ground earlier in our opening statements and, Mr. Rosen and Mr. Blank, you went over them, but I am going to go over it again just for clarity.

At the 9/11 hearings, a former senior airline executive testified, "If I had more than three people of the same ethnic origin in line for additional screening, our system would be shut down."

FEDERAL POLICIES AFFECTING SECURITY SCREENING

Mr. Rosen, do you know, for the record, if the Department of Transportation or any other Federal Government entity has ever implemented a strategy or policy that calls for the use of a quota system that restricts the number of foreign or ethnic passengers that could be subjected to secondary screening at one time?

Mr. ROSEN. Mr. Chairman, I am not aware of any Government agency that has adopted such a policy.

Senator SHELBY. First of all, it is not your policy.

Mr. ROSEN. I was going to say I can tell you for certain—

Senator SHELBY. Or it is not the Department of Transportation's policy.

Mr. ROSEN. That is correct.

Senator SHELBY. And you are not aware of any other policy.

Mr. ROSEN. That is correct, Mr. Chairman.

Senator SHELBY. So you are saying, basically, that you are not aware of a quota system that would limit the number of individuals that an airline can deny boarding if the pilot deems those individuals a threat to the security and safety of the flight.

Mr. ROSEN. You are correct, Mr. Chairman.

Senator SHELBY. Mr. Rosen, under what circumstances would a pilot in command of an aircraft be justified in refusing to transport a passenger he or she decides might be detrimental to the security of aircraft and its passengers while at the same time assuring the airline that it will not be subject to punitive action from the DOT or whomever?

Mr. ROSEN. Mr. Chairman, there are a wide variety of circumstances under which a pilot would be justified in refusing to transport an individual.

Senator SHELBY. Give us several that you can think of.

Mr. ROSEN. If a passenger behaves in a suspicious manner or there is some individualized suspicion to believe that a passenger is a safety or security risk, then the pilot can deny boarding to the passenger. Examples include a passenger making cell phone calls at an airport and overheard making troublesome comments about airport or airline security, a passenger bringing something on board an aircraft that would be inappropriate, and a passenger taking pictures of the plane. Further, if there is specific intelligence that has been conveyed, for which there are then matching identifying characteristics, then the pilot can act based on this information.

I think it is difficult, in the abstract, to identify all of the circumstances, but certainly pilots have the discretion where, if there is a threat to safety or security, that they can refuse to transport a passenger.

Senator SHELBY. Do you believe that the pilot has to have that discretion?

Mr. ROSEN. I think it is important that we have multiple layers in the system and that the law is set up so that the pilot has that discretion, and so I am in favor of adhering to the law.

Senator SHELBY. Sure. Do you believe fining the airline for the pilot's exercise of discretion is detrimental to the security of the flying public if it was done for something like this?

Mr. ROSEN. Well, Mr. Chairman, I think, as is often the case, these things come down to the individual circumstances. There are many instances where the pilot's exercise of discretion is appropriate and should not be second guessed, even if he or she is later proven to be mistaken.

Senator SHELBY. Yes.

Mr. ROSEN. But there are laws that prohibit the decision from being made on the basis of race, sex, national origin, color, religion, an ancestry, and I think we would not want pilots simply saying, "I do not want to fly anybody of this particular ethnic group or this particular race."

Senator SHELBY. Sure. Well, neither would we.

Where would you draw the line, Mr. Rosen, between individual rights and the right of the flying public, us to be safe and secure? Is that a case-by-case basis or what?

BASIS FOR REFUSALS TO TRANSPORT A PASSENGER

Mr. ROSEN. Well, I think, Mr. Chairman, as I alluded to earlier, there are at least two sets of laws that are in play here. There are the laws that give the pilot this authority to make the final decision as to the individuals permitted on the aircraft, and there are the civil rights laws that are applicable. And so, on the one hand, you certainly do not want to have a quota system that would inhibit the pilot from taking action that was justified simply because the quota had been exceeded.

Senator SHELBY. That is right.

Mr. ROSEN. And on the other hand, you do not want to have a system that amounts to what is just pure racial profiling.

Senator SHELBY. Arbitrary racial—

Mr. ROSEN. That would be extremely offensive to people. You hope that people will be treated as individuals and that you will have individualized suspicion of them through a set of circumstances, through intelligence or other information sources, that would let some sort of rational decision be made, even if it is not ultimately correct. The decision must at least be rational.

Senator SHELBY. Mr. Blank, since the Department of Transportation Security Administration has been charged with this responsibility, that is, security, do you know of any instances where airline passengers are selected on the basis of any criteria other than randomness or suspicious behavior?

Mr. BLANK. No, I do not.

Senator SHELBY. Mr. Rosen, has any airline been fined, to your knowledge, for selecting more than two people of the same ethnicity for a secondary screening?

Mr. ROSEN. Plainly, no.

Senator SHELBY. After 9/11, what specific policy or guidelines did the Department issue with respect to the screening and treatment of, for example, Arab, Middle Eastern, South Asian or Muslim passengers that you could identify?

Mr. ROSEN. Well, as I mentioned in my prepared remarks, Mr. Chairman, the Department of Transportation, shortly after September 11, put out four guidance documents, again, which are all on the website and all available. This was in the period before TSA had been created and that responsibility was transferred. But I think if you look at those guidelines, they are addressed, in a sense, to different recipients—to airlines, to the, at that time, to the screeners, as well as an announcement to the public and particularly concerned civil rights communities—so that they are overlapping guidances, in some sense, basically, what the law is and what kinds of considerations should be taken in effect, similar to what we have been talking about. Certainly, no quota is identified in any of those documents.

Senator SHELBY. Has the Department issued any written guidance that would limit the number of passengers of certain races or ethnicity that an airline can screen or question for safety or security?

Mr. ROSEN. No.

Senator SHELBY. Mr. Blank, should airport screeners be considered as the last line of defense to protect the flying public against terrorists?

Mr. BLANK. No, I do not think so. I would say that they are a critical layer of defense—

Senator SHELBY. Very much.

Mr. BLANK [continuing]. In airline and civil aviation security. But there are many layers out there that begin inside the cockpit with armed pilots, hardened doors, trained flight crew, Federal air marshals on board, enhanced airport security programs, screeners, limited access doors and so forth.

Senator SHELBY. Do you believe, Mr. Blank, that the pilot in command should have the authority to refuse to transport a passenger he or she decides is or might be detrimental to safety?

Mr. BLANK. Yes, I do. I think that is one additional layer of security.

Senator SHELBY. Senator Murray.

Senator MURRAY. Thank you very much, Mr. Chairman.

Mr. Rosen, Mr. Blank, you have both been very forthright in your statements that, contrary to Secretary Lehman's assertions, your agencies do not have a policy to fine airlines based on the number of individuals from a certain ethnic group that are subject to enhanced screening or security measures. As far as we can tell, a lot of the confusion that surrounds this assertion emanates from testimony, as was alluded to by Edmond Soliday, former Vice President of Safety at United Airlines, before the 9/11 Commission. And as was said, his testimony, that "A visitor from the Justice Department told me if I had more than three people of the same ethnic origin in line for additional screening, our system would be shut down as discriminatory."

Have either of you gentlemen had any contact with the Justice Department regarding that specific assertion or its accuracy?

Mr. BLANK. No, Senator, I have not.

Senator SHELBY. Mr. Rosen.

Mr. ROSEN. I have not either, Senator. But I would say that the Department of Justice has put out its own public statements against racial profiling.

JUSTICE DEPARTMENT AUTHORITY

Senator MURRAY. To either of your knowledge, what authority, if any, does the Justice Department have in this area?

Mr. ROSEN. Well, the Department of Justice, of course, administers Title II of the Civil Rights Act of 1964, but as to how that would apply in this area I think would be beyond my expertise today to address. I do know that with regard to the authorities that DOT has, the DOT may work with the Department of Justice to seek injunctive relief in the courts in appropriate cases. In addition, there is a provision in the U.S. Code that makes knowing and willful violations of Federal aviation statutes subject to criminal action by the Department of Justice. I think, beyond that, I could not say much more today, Senator.

Senator MURRAY. Can you answer under what circumstances the Justice Department would be communicating with an airline on this matter?

Mr. ROSEN. No, I would not be aware of any such circumstance.

Senator MURRAY. To either of your knowledge, has anyone followed up with Mr. Soliday to find out precisely what the Justice Department official was doing and under what authority?

Mr. ROSEN. Not to my knowledge, Senator.

Mr. BLANK. Not to my knowledge.

Senator MURRAY. Let me change subjects, then.

Mr. Blank, as I mentioned in my opening statement, the flying public has been waiting for your agency to deploy the so-called CAPPS II program, and I believe that Mr. Smerconish, who is going to be testifying on the next panel, is going to point something out that all of us who fly already know, that the current system for choosing passengers for enhanced screening does not appear to be very logical or effective.

The CAPPS II system, we were told, was to replace all of that, and unfortunately the GAO tells us that your agency is unable to meet seven of the eight basic tests that Congress has required of you before deploying the system. Can you tell us, today, what the principal hindrances are that you are experiencing in getting CAPPS II up and running.

Mr. BLANK. Well, there are a number, and I will address it this way. The CAPPS II program is under review within the administration. And we have heard the concerns of the privacy and civil liberty communities and are not going to move forward with the passenger prescreening program until we have satisfied those concerns and that we feel that they have been properly addressed.

But we do believe that a prescreening program is critical to the layered approach DHS has taken to aviation security, and we look forward to continuing to work with the Congress and external stakeholder groups on getting it developed and seeing if we ultimately want to make any changes in our approach as a result of this continued review inside the administration.

Senator MURRAY. Can you give us any estimate of a time-line when you expect this to happen?

Mr. BLANK. I cannot because that would be affected by the outcome of the review. If we decide to make any changes or change priorities, that would affect the time line. So I am afraid I cannot do that.

Senator MURRAY. So it may be some time. What interim steps are you taking before that is deployed?

Mr. BLANK. Well, I think the interim steps go to the layers of security, and I listed a number of those. Of course, we do continue to use the CAPPS I system, but it has been compromised. We do not think that means that it is of no value at all. We do have a "no fly" list that we compare names to, as we look forward to the complete stand-up of the Terrorist Screening Center. The list that we will use to compare passenger names to will become far more robust.

So, in the interim, we think we have something that is continuing to improve until we get CAPPS II on-line.

Senator MURRAY. Thank you very much.

Thank you, Mr. Chairman.

Senator SHELBY. Senator Specter.

DOT INVESTIGATION OF COMPLAINTS

Senator SPECTER. Mr. Rosen, you commented about one matter where there was a consent decree entered into between the Department of Transportation and the airline. What were the essential facts of that matter?

Mr. ROSEN. Well, Senator, that is perhaps more complex than I can fully summarize for you. There were actually four investigations that the Department's Aviation Enforcement Office investigated, and they involved multiple incidents and probably a larger number of complaints.

As I should clarify, the way that office functions, it does not simply accept that if a person files a complaint that it must be accurate and valid. It investigates those complaints, talks to witnesses, talks to the participants and so forth. So the Department's Aviation Enforcement Office conducted four investigations that resulted in settlements, although the settlements are, in many respects similar to one another.

Senator SPECTER. Four separate investigations involving four separate airlines.

Mr. ROSEN. That is right. But in many ways, the settlements are similar to one another. They are not identical, but they are similar. So the underlying facts are varied, since there are multiple investigations of incidents involved.

Senator SPECTER. Well, take one of the investigations and tell us what the underlying facts were.

Mr. ROSEN. Well, Senator, I do not mean to be evasive about this, but because these cases were resolved in mutually agreed-upon settlements, the facts were not determined through an administrative law judge or ultimately by the Department or reviewing courts.

The Aviation Enforcement Office presented the facts in one instance in a complaint and then in the other instances in discus-

sions with the carriers, and the carriers, in some instances, did not agree with those facts, but ultimately there was agreement as to a resolution.

In terms of the individual facts, I am not sure that it is easy, in a forum like this, to try to re-litigate them, nor have I prepared at the level of being able to discuss the particulars of the cases.

Senator SPECTER. Mr. Rosen, I do not understand your response. We want to know what kind of a situation led to an investigation and an assertion by the Department that there was inappropriate conduct. I know it was denied by the defendants, and it was settled without a concession on liability. Did any of those cases involve a situation where there was someone with a Muslim or Arab appearance?

Mr. ROSEN. Well, yes, and they also involved complaints, in some instances, of individuals who had been denied boarding because they were perceived to be of Arab descent or Muslim but were actually individuals who were of Hispanic or Indian descent or, in one instance, I think, Italian.

Senator SPECTER. Well, were there factors which led the airlines to exclude the individual beyond their ethnic appearance?

Mr. ROSEN. Well, the—

Senator SPECTER. Mr. Rosen, could you provide the details for us in writing. It seems to me that this is a pretty fundamental question, when you have only a few cases, for you to be prepared to answer specifically. And I do not want to take any more of the subcommittee's time here, but I would like to know what the facts were which led you to an investigation and to assert that there was inappropriate conduct which required some settlement, albeit with a denial of liability.

Mr. ROSEN. All right, Senator. I mean, as I think would be implicit, the Aviation Enforcement Office believed that there was credible evidence of discrimination in some number of the incidents that it was investigating.

Senator SPECTER. Well, Mr. Rosen, it is not implicit, and credible is a matter of evaluation, and we would like to know what the facts were—what were the facts as you saw them. That way we can come to a determination as to whether there was the appearance of racial profiling. We would like to know that.

Mr. ROSEN. Senator, if you would like to know more detailed information about the particular incidents that were being investigated, of course, we can provide that to you. I am just not able, today, to walk through each incident and discuss the evidence.

Senator SPECTER. Okay. I will accept that. Just provide us with what the facts were.

[The information follows:]

The Enforcement Complaint that DOT's Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office) filed against American Airlines (American) on April 25, 2003, provides specific examples of incidents which led the U.S. Department of Transportation (DOT) to believe that passengers were removed from or denied boarding on flights following the September 11, 2001, terrorist attacks because of their perceived ethnic and/or religious background. That complaint, which is being provided for the record of this hearing, includes sworn declarations from 10 passengers alleging civil rights violations by American Airlines in 11 incidents. These sworn declarations provide detailed information of the specific incidents upon which DOT's Enforcement Office relied to file the formal complaint against American.

Two examples of American's alleged discriminatory conduct involve Mr. Praneet Kataria, a citizen of India and a permanent resident of Canada who wears a turban in accordance with his Sikh faith, and Mr. Henry Castellanos, a U.S. citizen of Hispanic descent with a dark complexion and a pilot for Miami Air. On December 25, 2001, Mr. Kataria was a scheduled passenger on American flight 1197 from Toronto to Chicago with a connection in Chicago on American flight 1893 to San Francisco. When approaching the jetway to board flight 1893 to San Francisco, Mr. Kataria was asked to step aside and undergo an additional security search. Mr. Kataria cooperated and the search was completed. However, the pilot of flight 1893 deplaned and advised the American agents not to allow Mr. Kataria to board the aircraft despite Mr. Kataria having been cleared by security. Mr. Kataria was rebooked and traveled on the next American flight without additional security screening. The Enforcement Office could detect no reason for American's actions from the evidence requested or provided by American except for Mr. Kataria's appearance that is likely to lead some to believe he is an Arab and/or Muslim.

In the case of Mr. Castellanos, he was a scheduled passenger on an American flight from Tucson to Miami, with a connecting flight at Dallas/Fort Worth Airport on September 19, 2001. He was traveling with two of his colleagues, Mr. David Caviness (a flight engineer also of dark complexion) and Mr. Bill Louis (a Caucasian pilot). About five minutes after Mr. Castellanos boarded his flight to Miami at Dallas/Fort Worth Airport, an American employee asked Mr. Castellanos for his identification and explained to him that the captain of the flight wanted to review his identification. Mr. Castellanos provided the American employee his driver's license and his Miami Air badge. A few minutes later, Mr. Castellanos and Mr. Caviness were deplaned but Mr. Castellanos' white colleague Bill Louis was not asked to leave the plane. The captain explained to Mr. Castellanos that a flight attendant was uncomfortable having Mr. Castellanos and Mr. Caviness on board as passengers after the events of September 11, 2001. Mr. Castellanos offered his commercial pilot's license to reassure the flight attendant that he posed no safety risk and the American captain talked to the flight attendant to no avail. The flight attendant gave the captain an ultimatum that he either remove Mr. Castellanos and Mr. Caviness or she would not fly. Mr. Castellanos and Mr. Caviness were removed and the flight departed without them. Again, based on all the evidence available to the Enforcement Office, including the fact that American did not provide a plausible explanation for the actions of its employees, it was convinced that American's treatment of Mr. Castellanos was based on discriminatory factors.

Senator SHELBY. That goes to the core questions we are trying to answer. Senator Specter, I believe, is right.

Do you have more questions?

Senator SPECTER. A couple for Mr. Blank.

Mr. Blank, when you say that the pilot has the authority to remove a passenger for acting in suspicious manner, is there any more specificity as to what constitutes a suspicious manner?

Mr. BLANK. No, there is not, but the pilot would be questioned. In the instance that a boarded passenger, having been screened by TSA, was to be deplaned or removed because the pilot wanted, two things would happen:

The TSA representative would show up at the gate and law enforcement would show up at the gate, and the pilot, and law enforcement, and TSA would have a conversation about, well, why are you doing this. And while the pilot in command would ultimately win the debate, if there was one, there are instances where the law enforcement office and the TSA representative are able to say that this suspicious behavior you detected does not rise to the level of deplaning this individual.

In addition—in addition—when every one of these incidents happens, within 24 hours, it is going to be brought to the attention of the senior leadership of TSA. We go over every incident every morning, and we are going to ask that question at our headquarters: Why was this individual deplaned? What was the suspicious behavior? And if it is not there in our records where we can

discuss inside a skiff, we will go back to that air carrier and say—

Senator SPECTER. Are you saying that the pilot has to be able to specify the suspicious activity?

Mr. BLANK. What we are trying to get to is we ask them to do that, but if a push comes to shove, the pilot in command has the authority to say this person does not fly. But that does not mean that we cannot work with our partners in the airport and go back to a carrier and say, "We are not convinced that this was a proper judgment."

Senator SPECTER. Have you ever taken action against a pilot or an airline because you concluded there was not a sufficient basis for a conclusion that there was suspicion?

Mr. BLANK. We have not, and I do not believe we have the authority to do so.

I will tell you, Senator, this does not happen very often.

Senator SPECTER. Well, with all due respect, it does not matter how often it happens, we are trying to figure out what the standards are. And it appears, at least to me, that you do not have any discernible standards.

You said, if the individual is not a risk, the captain may still refuse, and TSA cannot challenge the captain; is that correct?

Mr. BLANK. That is correct, both in law and in regulations.

Senator SPECTER. So it is totally the subjective determination by the captain, which cannot be challenged by TSA.

Mr. BLANK. That is correct, Senator.

Senator SPECTER. Well, I think it would be useful to try to work out a little more specificity as to what constitutes suspicion. In the law, there are all degrees of cause: one level of probable cause for warrant of arrest, another level of probable cause for a search warrant, and still a third level of cause for a stop and frisk, and still a fourth level of cause to the Supreme Court case this week for asking a person's name. And it seems to me that the captains ought to have some little more objective guidelines as to what is meant.

Mr. BLANK. As of right now, Senator, our purpose in reviewing those incidents and bringing them to the attention of airline corporate management would be to allow them the option to take some disciplinary action against that pilot if the suspicion was not founded on any basis in fact.

Senator SPECTER. Well, that leaves it entirely up to the airlines and does not have a real appropriate or enforcement or tough role for TSA.

Thank you, Mr. Chairman.

Senator SHELBY. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Blank, Congress and TSA have long struggled, as we know, with the issue of targeting passengers as security risks. The core of the debate is balancing passengers' privacy rights with the needs of national security. Most recently, today's Washington Post discusses the sharing of personal information between airlines in the Transportation Security Administration. The article highlights both the difficulties with sharing private information and the shortcomings of the Nation's risk assessment program CAPPS.

TSA has argued that without this personal information, the Agency would not be able to enact CAPPs II which, as we know, is the updated screening program. Glitches in this system have been well-publicized, and the GAO report published in February highlighted its many shortcomings.

Mr. Blank, how does TSA intend to develop a screening system based on personal private information that will adequately shield passengers' privacy rights?

Mr. BLANK. Well, first of all, with regard to the incident reported this morning, the Department's review of the matter is ongoing as to precisely what happened. CAPPs II is mentioned in that, so it was a priority, along with many of the other things that we have been working on since the Agency was created.

And this particular instance related to some R&D work that was being done so that we could get a concept of how we might build our CAPPs II system. So the PNR data that was provided and was used in this R&D effort with some contractors relates to that R&D and the foundation that we were trying to build. There was no actual checking of passengers' data being done.

But, clearly, the issues surrounding privacy in CAPPs II are critical ones. We recognize that. We have done two Privacy Act notices to engage the public fully in advising what we are going to do and how we would go about protecting that. A significant piece of it is information technology solutions—walls so that the data cannot be hacked into—and we do not retain the data once a flight is or we do not propose to retain it once a flight is completed. But we do have work to do on that, and we will not use CAPPs II until such time as we are assured that we can properly maintain the privacy of the information we receive.

Senator KOHL. All right. Mr. Blank, according to testimony by Admiral Stone, TSA and FAA have entered into a cooperative agreement with four private firms to develop a model to assess the security risk posed by a passenger. TSA plans to evaluate these prototypes as candidates for further use as a component of CAPPs II. These four private firms will have access to passenger name records, which can include full names, addresses, credit card numbers, e-mail addresses, and even meal preferences.

So what efforts are being made at TSA to ensure that passengers' personal information and their risk assessment information is secure in the hands of these private companies?

Mr. BLANK. As of now, we are not receiving any PNR data at TSA. The data that the Washington Post refers to and the incidents that we are talking about is a historical project. It was given in the summer of 2003, I believe it was, where some PNR data came to TSA. It was a one-time instance of PNR data being shared, and then it went out to the contractor. So those projects are over and completed. There are no continuing projects relative to CAPPs II using PNR data at this time.

And what we recently did, under the direction of the DHS privacy officer, was essentially conduct a very thorough records review to see what PNR data may have been provided to the Agency. We have completed that report, and we have provided it to the DHS privacy officer who is reviewing it for further potential action.

Senator KOHL. All right. Finally, Mr. Blank, this fall, airports can apply to the TSA to return to private security screeners. The Washington Post reports that as many as 100 airports around the country may be interested in dropping TSA screeners in favor of a private workforce. Though some think this will result in improved screening procedures, a recent report conducted by the Department of Transportation Inspector General found indications of poor performance in both TSA and private screeners.

So how is TSA working to improve the security screening process at our Nation's airports and, in your opinion, should Congress be taking any action to help move this process forward?

Mr. BLANK. Well, we are doing a number of things.

First of all, we are seeing consistent improvement. We think that some of the comparisons to the FAA system, where the airlines did the screening, and the system that we have today, we do not think that is fair or gives an accurate picture of what is going on out there.

Today, we have a highly qualified and well-trained screener workforce. And one of the things that we have had to do as a result of not getting the grades, if you will, that we want is improve our training. One way that we have done that is to take a library of threat image projections, which are software that shows the screener, for test purposes, an improvised explosive device in a bag, a gun or a prohibited item to see how often the screener can find those. In the days of the FAA, that library was 400 images. Today, it is 2,400.

In addition to that, we have finally gotten the connectivity at the airport so that the Federal security director can know how well his screener workforce is doing on those tests, so he or she can identify, I have a weak-performing screener, I have a weak checkpoint, and they can begin to take remedial actions because of better connectivity. We put an on-line learning center so that we can do more training in the context of the airport.

Now, without using specifics, what we have seen is a 70-percent improvement from where we were at the time of that IG and GAO covert testing. So we are getting better. There is work to be done. We are not there yet.

And just as a final note, one of the things we have also done is permit local covert testing. So, for a time, a Federal security director could not test his or her own system. Now, they can.

Senator KOHL. You are saying there is a very active program of oversight and a very active program in terms of improving the performance level.

Mr. BLANK. Yes, Senator.

Senator KOHL. I thank you.

Thank you, Mr. Chairman.

Senator SHELBY. I asked Senator Specter if he had any more questions, and he said, no.

I want to thank you both for your appearance here today. You are going to furnish specific information to the subcommittee in response to our questions.

Thank you very much.

We will call up the second panel now. Senator Specter is going to take over for me.

Senator SPECTER [presiding]. We will proceed now with the second panel, and the opening statements will be on the 5-minute rule.

Our first witness is Michael Smerconish, Esquire, a Phi Beta Kappa graduate of Lehigh, a law degree from the University of Pennsylvania, experienced trial lawyer, a daily talk show on a radio program in Philadelphia, a big talker of daily political commentary for KYW News Radio, a columnist for the Philadelphia Daily News. And earlier in his career, President Bush, the first, appointed Mr. Smerconish to be regional administrator of the Department of Housing and Urban Development. Married with four children.

Mr. Smerconish, I have already, in the interest of full disclosure, identified you as a longstanding friend, and we look forward to your testimony. Your full statement will, without objection, be made a part of the formal record of this subcommittee.

STATEMENT OF MICHAEL SMERCONISH, ESQ., TALK SHOW HOST, COLUMNIST

Mr. SMERCONISH. Thank you very much, Senator Specter, and thank you for this privilege. I will limit my comments, hopefully, to 5 minutes of general summary of my thoughts.

Unlike the other witnesses, I come without portfolio. To the extent that I represent anyone or anything, I guess you could say that I represent the American traveling public in a post-9/11 world. Three months ago, my wife and I flew with our four children from Atlantic City to Fort Meyers, Florida. We had e-tickets.

At the counter, a pleasant woman asked for our identification and then wanted to know which one is Michael, Jr. I pointed to my 8-year-old, and she said, "Oh, that won't work." She then explained that he had been designated for secondary screening, meaning that he would be subjected to more of a search than just the usual taking off of the shoes. I told her I would gladly take his place, and she obliged. And the fact that I could so easily negotiate someone else out of secondary screening was itself insightful.

I did not complain about the inconvenience. Instead, I cursed bin Laden under my breath, and I considered this to be my small part to play in the post-9/11 world. Well, I no longer believe that to be the case.

I have come to Washington today to say that I am concerned about the role of political correctness when it comes to airline security. My ears perked up during that 9/11 Commission hearing when John Lehman asked the question of Condoleezza Rice that has been referred to already here this afternoon. The implication of the question was stunning. So, two days later, I asked John Lehman, "What were you talking about?"

And he said to me, "The fact is that our enemy is the violent Islamic extremists, and the overwhelming number of people that one need to worry about are young Arab males and to ask them a couple of extra questions seems to me to be common sense."

Well, I wrote what Secretary Lehman had told me, and the Department of Transportation issued a written statement saying that he was wrong, and I was wrong for writing it. But by happenstance, I then found myself in the company of Herb Kelleher, the

legendary chairman and founder of Southwest Airlines. And I relayed to Mr. Kelleher that which John Lehman had told me about the role of political correctness in airline security, and he confirmed those thoughts.

I then found buried in that 9/11 Commission transcript the reference made to the testimony of Edmond Soliday, the former security chief of United. He is the individual who said that they ran the risk of being shut down as operating a discriminatory operation if they had more than three individuals of the same ethnic stripe in a line for secondary screening at one time.

Here is the bottom line. To this day, I do not know if there has ever been a quota system, per se, but I do believe John Lehman and Herb Kelleher are accurate in saying that the PC movement has intruded on safety concerns. And I am worried, Senator Specter, about the big picture and not just the quota question.

Frankly, sir, I cannot understand how we can purposely ignore the race, the ethnicity, the appearance and the religion of travelers whom we are screening when, in fact, all 19 hijackers on 9/11 had those characteristics in common.

Let me be clear. I am not saying that all individuals of Arab descent should be singled out. However, I do believe that a combination of similarities with those who wreaked havoc on this country and continue to try to wreak havoc on this country needs to be given ample consideration. Instead, not only will the DOT and the TSA not look at those factors that I have enumerated, but they fine airlines that they believe do give such consideration.

In the aftermath of 9/11, the DOT pursued enforcement actions against American and United Airlines, who lost a combined 33 employees and four airplanes on 9/11 for their alleged noncompliance with Federal statutes. This overlooked the airlines' mandated responsibility to refuse to transport a passenger who was believed to be inimical to safety.

It is mind-boggling to me, sir, that our Government, in the aftermath of 9/11, forced American and United to each pay \$1.5 million towards civil rights training, and this week, Senator Specter, it was announced that now Delta has been on the receiving end of a similar enforcement action and will be paying \$900,000. I fear that the net effect of our policies is to place law enforcement in handcuffs.

And I find it a bit ironic that arguably we have the type of logic on which I am relying to thank for the fact that the White House and the Capitol were not struck by Flight 93 on 9/11. But for the work of Jose Melendez-Perez, a U.S. Customs and Border Protection inspector at Orlando International Airport, things could have been different. You see, sir, on August 4, 2001, he refused to let into this country the 20th hijacker, Mohammed Kahtani, a Saudi national whom Mohamed Atta had come to pick up at the airport. Presumably, this is why Flight 93 had four terrorists, while the other airplanes had five.

How did he do it? I do not want to use the dreaded "P" word. Suffice it to say that he took a long hard look at the man who he said "gave him the creeps."

PREPARED STATEMENT

Here is my final thought:

In 1955, the Israeli philosopher Yishavayahu Leibowitz, complained in a letter to Ben-Gurion, Israel's first prime minister, about Palestinians killed in Israeli operations. "I received your letter, and I do not agree with you," Ben-Gurion replied. "Were all the human ideals to be given to me on the one hand and Israeli security on the other, I would choose Israeli security because while it is good that there be a world full of peace, fraternity, justice, and honesty, it is even more important that we be in it."

Thank you, Senator Specter.

[The statement follows:]

PREPARED STATEMENT OF MICHAEL SMERCONISH

Thank you very much for allowing me to speak on an issue of great interest to my radio listeners, and to myself. We are very concerned about the role political correctness plays in protecting airline security in a post-9/11 world. Time permits me to briefly provide an overview of some of the milestones that have marked my review of this issue.

Three months ago, my wife and I flew with our four children from Atlantic City to Ft. Meyers, Florida. We had E-tickets. At the counter, a pleasant woman asked for our identification, and then wanted to know "which one is Michael, Jr.?" I pointed to my 8-year-old. "Oh, that won't work," she said. She then explained that he'd been designated for secondary screening, meaning he would be subjected to more of a search than just taking off his shoes and walking through the metal detector. I told her I would gladly take his place and she obliged. (The fact that I could so easily negotiate someone else out of secondary screening was itself insightful.)

I didn't complain about the inconvenience. Instead, I cursed bin Laden under my breath, and considered this to be my small part to play in the post-9/11 world. Well, I no longer believe that to be the case.

On the return trip, I had a similar experience. Once again, my son was selected for secondary screening, and again I took his place.

Enter Secretary John Lehman. Two weeks after our return from Florida, I watched Condoleezza Rice testify before the 9/11 Commission. The media attention that day was focused upon the President's Daily Briefing (PDB) of August 6, 2001, about a month before 9/11. I was more interested in something I heard Secretary Lehman ask Dr. Rice:

"Were you aware that it was the policy . . . to fine airlines if they have more than two young Arab males in secondary questioning because that's discriminatory?"

Her reply, that she did not know the "kind of inside arrangements for the FAA," was inconsequential. Still, I wondered what in the world he was referring to. Here is what he told me:

"We had testimony a couple of months ago from the past president of United, and current president of American Airlines that kind of shocked us all. They said under oath that, indeed, the Department of Transportation continued to fine any airline that was caught having more than two people of the same ethnic persuasion in a secondary line for questioning, including, and especially, two Arabs."

I then asked him about the role of political correctness, and he said:

"That is really the source, because of this political correctness that became so entrenched in the 1990's, and continues in [the] current Administration. No one approves of racial profiling, that is not the issue. The fact is that Norwegian women are not, and 85-year-old ladies with aluminum walkers are not, the source of the terrorist threat. The fact is that our enemy is the violent Islamic extremists, and the overwhelming number of people that one need to worry about are young Arab males, and to ask them a couple of extra questions seems to me to be common sense, yet if an airline does that in numbers that are more than proportionate to their number in a particular line, then they get fined and that is why you see so many blue-haired old ladies and people that are clearly not of Middle Eastern extraction being hauled out in such numbers because otherwise they get fined."

I reported what Secretary Lehman told me in a lengthy story in the Philadelphia Daily News on April 12, 2004. That same day, I saw you, Senator Specter, at the Phillies home opener. I reported on Secretary Lehman's interview. You promised to look into the matter, and reported back soon thereafter that your staff had made

inquiries about such an alleged quota at the Department of Transportation, and had received a denial. Indeed, the DOT issued a written statement, although I did not immediately learn of it, nor did anyone at the Daily News. It said:

“In a recent column, a member of the 9/11 Commission was incorrect in telling your newspaper that the Federal Aviation Administration used a quota restricting the number of foreign passengers that could be subjected to secondary screening at one time. Despite the testimony from current and former airline executives cited in your column, secondary screening of passengers is random or behavior based. It is not now, nor has ever been based on ethnicity, religion or appearance.

“Your readers should know that the federal government has and will continue to put in place the strongest possible security screening procedures while protecting the civil rights of all passengers in our aviation system.”

I noted the words: “. . . secondary screening of passengers is random or behavior based. It is not now, nor has ever been based on ethnicity, religion or appearance.”

That concerned me. After all, the 19 hijackers on 9/11 had ethnicity, religion, and appearance in common. Why wouldn't we take those factors into account, I wondered?

The week of my interview with Secretary Lehman, I was in the company of Herb Kelleher, the legendary founder and chairman of Southwest Airlines. I told him about my conversation with Secretary Lehman. He confirmed that political correctness was playing a role in decisions as to who would be stopped for heightened scrutiny at airports. Herb Kelleher told me:

“As a matter of fact, it goes back to the Clinton Administration when the Justice Department said they were concerned about equality of treatment with respect to screening, and my understanding is that's why the random element was put in, in other words, where you just choose people at random as opposed to picking them out for some particular reason, and that of course caused a great many more people to be screened.”

Mr. Kelleher's comments fueled my interest in knowing the extent to which political correctness was compromising airline security. When I say political correctness, let me be clear that I am not limiting my interest to the presence of a quota for Arab males. I am more broadly talking about a conscious decision not to provide a heightened screening of individuals with matters in common with the 19 known hijackers.

I wondered about the basis for Secretary Lehman's questioning of Dr. Rice, and decided to review the transcripts of airline executives before the 9/11 Commission.

I found that on January 27, 2004, the Commission heard from a panel of witnesses: Edmond Soliday, former security chief for United Airlines, Andrew Studdert, former COO of United, and Gerard Arpey, CEO for American. Their testimony received no media attention. Instead, the spotlight that day was on a stunning audiotape of the voice of Betty Ong who was an attendant aboard AA Flight 11.

In his testimony, security expert Soliday told the Commission:

“Quite frankly, if you look at the record, we tested numerous things long before they were mandated. Immediately after TWA 800, we, as a company, talked with the FAA and said that we are prepared to move forward with some security measures to ramp up because we don't know what caused this. The problem is—and you can make light of it, if you like—a citizen does not have the right to search and seize. There are privacy issues and, for example, as a company who was prepared to roll CAPPS out and did roll it out long before any other company, a visitor from the Justice Department told me that if I had more than three people of the same ethnic origin in line for additional screening, our system would be shut down as discriminatory.”

Similarly, Arpey, the CEO of American, told the 9/11 Commission that when crew members had been uncomfortable with passengers on airplanes and asked that they be removed, the DOT brought an enforcement action against the airline! (“But if I could share some history with you, how that law has been applied to us is that when we have tried to deny boarding—most recently after 9/11, 38 of our captains denied boarding to people they thought were a threat. Those people filed complaints with the DOT, we were sued, and we were asked not to do it again.”) Mr. Studdert, the former COO of United, told the 9/11 Commission that he believed United had just been fined for similar behavior.

I noted that Senator Bob Kerrey, in the midst of the testimony to which I have been referring, said this:

“There’s a couple of relatively simple things that could be done prior to people getting on airplanes and I think, for political reasons, we don’t want to do it. And I think the American people want you to tell us what are those simple things. And if the politicians are afraid—the elected politicians, are afraid, we need to give them some room and give them permission to do it because I mean I see a lot of stuff being done here . . . You’ve got to figure out how to keep people off planes that are willing to die in the act of killing passengers and killing other people on the ground, because I think—I personally feel that unless you provide us with that information, it is not likely to come from anybody else.”

I must point out that James M. Loy, the Deputy Secretary of the Department of Homeland Security testified this same day before the 9/11 Commission. Secretary Lehman, in reference to the testimony I have just recounted said, “Tell me it ain’t true,” to which Admiral Loy responded “It ain’t true, sir . . .”

Still, I wondered what Messrs. Soliday, Arpey and Studdert were referring to. This caused me to do some legal research, and I was aghast at what I found.

I found that there were at least three enforcement actions initiated by the DOT’s Airline Enforcement Office in the aftermath of 9/11. On the receiving end were Continental, American, and United. On 9/11, Americans Airlines lost 17 of its personnel; on 9/11 United lost 16 of its personnel. For our DOT to pursue claims against those two airlines, I figured they must have exhibited some real egregious conduct. That was not the case.

And yet, millions of dollars were paid as a result of the actions. Each of the three airlines denied any culpability, but agreed to resolve the claims by paying money toward civil rights training. In the case of Continental, it was \$500,000.00. From United, it was \$1,500,000.00. As for American, the total was \$1,500,000.00.

So what was the conduct on the part of the two airlines that suffered incalculable losses on 9/11 that caused our DOT to essentially “fine” them? I wanted to know.

They were accused of “noncompliance with Federal statutes prohibiting air carriers for subjecting any air traveler to discrimination on the basis of race, color, national origin, religion, sex, or ancestry.” The DOT’s AEO contended that some airline passengers were treated in a manner inconsistent with statutes prohibiting discrimination.

What was the legal basis for the pursuit of the claims?

The DOT maintained that Federal law states: An airline cannot refuse passage to an individual because of that person’s race, color, national origin, religion, sex, or ancestry. 49 U.S.C. 40127(a). Similarly, 49 U.S.C. 41310 prohibits air carriers and foreign air carriers from engaging in unreasonable discrimination against individuals on flights between the United States and foreign points; 49 U.S.C. 41702 requires that U.S. carriers provide safe and adequate transportation; and 49 U.S.C. 41712 prohibits unfair and deceptive practices and, therefore, prohibits invidiously discriminatory practices on the part of U.S. carriers.

The airlines responded by saying that no passengers were removed from a flight or denied boarding under circumstances amounting to a status-based discrimination (i.e. based on a passenger’s ethnic background or national origin). And, they said that they were obligated by Federal law to “refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety,” citing 49 U.S.C. 44902(b), 14 CFR 91.3 and 49 CFR 1544.2 15(c). In addition, American asserted that the pilot-in-command must make that decision based upon the facts and circumstances presented to him or her at that time, taking into account the time constraints under which the decision must be made and the general security climate in which the events unfold. American opined that the pilot-in-command may rely without further inquiry upon the representations of other crewmembers or other responsible authorities with respect to safety and security.

Consider the case of Jihad Alshafri, a self-described “32 year-old Arab American.” Mr. Alshrafi is a naturalized American citizen of Jordanian birth. According to his Declaration, which accompanied the DOT/AEO’s Complaint, he works for a defense contractor helping to build missiles for the military, and possessed a secret-level security clearance. On November 3, 2001, he was refused entry while trying to board an American airline from Boston to Los Angeles. (Several of the enforcement cases involved travel from Boston’s Logan Airport, the point of origin of two of the 9/11 flights). In the Complaint against American, it states that Mr. Alshrafi was denied boarding after responding to a page and reporting to an American counter. There, he was greeted by an American employee and U.S. Marshall. He was told that the pilot had denied him boarding on that flight. Mr. Alshrafi informed the American employee that he had a “secret level” security clearance from the U.S. Department of Defense. He was nevertheless told he was being denied passage. (“I was calmly contesting the pilot’s decision when a state trooper arrived and asked me to move

along and to deal with him. I was humiliated to be confronted by a state trooper in full view of the crowded boarding area.” Mr. Alshafri missed his flight, but was upgraded to First Class on a later flight that day.

American’s answer suggests that there was more to the story in the eyes of the pilot at the time. First, American states, “at least one other passenger had reported what appeared to be his suspicious behavior to an American gate agent.” Additionally, American admitted, “the Federal Air Marshall advised the pilot-in-command that the passenger had been acting suspiciously and had created some kind of disturbance and that his name was similar to a name on the federal watch list.”

So, here is what was known to the pilot as he prepared to depart: (1) he was 2 months removed from the worst act of terrorism ever initiated against the United States; (2) that terrorism victimized his employer—men doing exactly what he was now doing lost their lives when their airplanes were used as weapons; (3) the point of origin of those flights was Boston’s Logan Airport, where he now sat; (4) the destination for those flights on 9/11 was Los Angeles, which is exactly where this plane was headed; (5) the hijackers on 9/11 were, to a person, young Arab males; (6) there is at least one passenger who is ill-at-ease with another passenger who is acting in what passenger No. 1 believes to be a suspicious manner; (7) the Federal Air Marshall has advised you that the passenger at issue has been acting suspiciously and has created some kind of disturbance; (8) this passenger has a name similar to one on the Federal watch list, and (9) yes, let’s not be afraid to say it, he probably resembled the 9/11 hijackers in his appearance.

Did this pilot act unreasonably in denying boarding? Hardly. It would seem to me that a pilot who is presented with those details and chooses to fly is derelict in his duty. Instead, the DOT decided this conduct was worthy of legal action—legal action against a company that paid the ultimate price on 9/11.

Secretary Norman Mineta has made clear his refusal to factor in the common characteristics of the 9/11 hijackers in looking for those who would seek to emulate them. Consider his words with CBS’ Steve Kroft on 60 Minutes, December 2, 2001:

“Kroft: Are you saying, at security screening desks, that a 70-year-old white woman from Vero Beach, Florida, would receive the same level of scrutiny as a—a Muslim young man from Jersey City?”

“Mineta: Basically, I would hope so.”

(Steve Kroft had begun the interview by stating that at the time, all 22 people on the FBI’s Most Wanted Terrorist list are Muslims! And more than half of them have the name Mohammed.)

The 60 Minutes speech was no aberration. Time and again Secretary Mineta has made clear his refusal to consider personal characteristics in the war on terrorism. In particular, I note his Statement to the U.S. Commission on Civil Rights on October 12, 2001, and his speech in Rochester, New York on that same date. Secretary Mineta was active in the aftermath of 9/11 in dictating to the airlines his view of the world. In the months after 9/11, the DOT issued several memos to the airlines, warning them against “profiling” passengers. Consider that on October 12, 2001, the DOT issued a memo titled “Carrying Out Transportation Inspection and Safety Responsibilities in a Nondiscriminatory Manner.” It read, in part:

“Use the ‘but/for’ test to help determine the justification for your actions. Ask yourself, ‘But for this person’s perceived race, ethnic heritage or religious orientation, would I have subjected this individual to additional security scrutiny?’ If the answer is ‘no,’ then the action may violate civil rights laws.”

I believe that test jeopardizes airline safety. And I point to an American hero named Jose Melendez-Perez for support of my view. This man engaged in what some would deride as “profiling”, and probably saved either the White House or U.S. Capitol Building in the process. Let me explain.

Three of the four aircraft involved in the hijackings on 9/11 had five hijackers aboard. But United Airlines Flight No. 93, a Boeing 757 that departed from Newark bound for San Francisco at 8:42 a.m., and crashed in a field in Stony Creek Township, Pennsylvania, at 10:03 a.m., had only four. Surely that was not its intended target. Presumably, it was headed for Washington, DC. Perhaps being one man shy of the other planes hijacker population is the reason why this airplane crashed. And for that, we can probably thank Jose E. Melendez-Perez.

On August 4, 2001, Melendez-Perez was a U.S. Customs and Border Protection Inspector at Orlando International Airport, Orlando, Florida. Reflecting before the 9/11 Commission on his role that day, he said:

“. . . I note that another inspector on duty that day made a comment that I was going to get into trouble for refusing a Saudi national. I replied that I have to do

my job, and I cannot do my work with dignity if I base my recommendations on refusals/admissions on someone's nationality."

At approximately 1735 hours, he was assigned the case of a Saudi national who had arrived on Virgin Atlantic No. 15 from London, Gatwick Airport. As Saudis coming through Orlando to travel to Disney World are common, he had plenty of line experience with Saudis. In this particular case, the subject was referred to secondary inspection because the primary inspector could not communicate with him and his arrival/departure form (I-94) and Customs Declaration (C-6059B) were not properly completed.

Melendez-Perez sized up the situation by noting the individual's nationality (Saudi), his grooming, dress, height, and shape. He figured the man to be military. And, he thought he was cocky. Dare I say it, he was profiling. And thank goodness he did. Keep in mind this was pre-9/11. If such an assessment occurred post-9/11, you would say, "well, of course" this is how it should be handled. But this was before those horrific events. Melendez Perez told the 9/11 Commission that the man "gave him the creeps". The man was put on a flight out of the United States.

So who was the man and what was he doing? This became clear when Melendez-Perez was questioned by Richard Ben-Veniste. It turns out that while Melendez-Perez was performing his duties at Orlando Airport on August 4, 2001, and screening a man named Mohammed Kahtani, there was someone else present at that very airport: Mohamed Atta, the presumed ringleader of the operation. Coincidence? Hardly. According to Ben-Veniste, while Melendez-Perez was questioning Mohammed Kahtani, and while Kahtani was claiming that someone was upstairs to meet him, Mohamed Atta made a telephone call from that location to a telephone number associated with the 9/11 plot. In other words, the good work of Melendez-Perez kept out of the United States the presumed 20th hijacker.

As I uncovered details like this about airport screening, I shared them with my radio audience. I also wondered aloud whether my 8-year-old son was marked for heightened scrutiny as a means of not offending those who are more appropriate for secondary screening. Meanwhile, my radio audience began supplying me with hundreds of emails telling me detailed anecdotes about their own flying experiences. Elderly women being scrutinized. Military men in uniform and with papers being scrutinized. There appeared to be no rhyme or reason to the random screening.

Here is just one, of many:

"I have been listening to your fight with the DOT. If I may tell you the story of what happened to me and my reserve unit. I am a Naval Reservist whose unit was recalled for the War on Terror. Upon our return, we flew a Delta flight into Atlanta to make a connecting flight to the Norfolk Naval Base in Virginia to be released from active duty . . .

Once I was done in Norfolk, I had a US Airways flight to Philadelphia. Again, I was pulled aside by the TSA to have myself and my carry-on bags searched. Again, I had my military id, orders, and a Government ticket."

Beyond my radio show, I have been speaking out publicly about my concern that political correctness is compromising airline security. I have published in the Philadelphia Daily News, the National Review Online and NY Post. And, I have appeared on the CNBC program Kudlow and Cramer.

The DOT has not been kind in commenting on things I have had to say. In fact, the DOT issued a strident denial of things I said on Kudlow and Cramer, and then refused to supply me with a copy of what they gave the network, regardless of the fact that it had been read on national TV. Actually, the DOT refused to share the written statement about me, with me, unless I would agree to share with the DOT future columns in advance of publication. I reminded my point of contact with the DOT that I do not work for TASS. And all it did was further heighten my suspicion about the ways in which the DOT was compromised by political correctness.

"Michael Smerconish's recent column has not received much coverage because it is wildly incorrect. There is absolutely no ambiguity about the Federal Aviation Administration's policy on airport security screening before September 11. The secondary screening of airline passengers has always been random or behavior based. The bottom line is the airlines, which were responsible for passenger screening on September 11, were never told to limit screening of passengers based on any criteria.

"Even more troubling is that Mr. Smerconish himself admits he was never told such a quota ever existed. He instead has apparently misunderstood complaints expressed about civil rights violations when some air carriers denied service—not screening—to passengers based on their ethnicity. How any legitimate journalist

could translate that into a mythical federal government screening quota is hard to fathom.”

The DOT was hung up on the quota aspect of Secretary Lehman’s questioning of Condoleezza Rice. Me, I was thinking bigger picture. I don’t know if there was ever a quota system for young Arab males. But I do know that we have a policy in this country of ignoring characteristics shared by the 19 known hijackers on 9/11, and that seem to me to be illogical.

In the aftermath of 9/11, the Nation was on pins and needles, grieving the losses sustained from the hijacking of two American jets and two United jets, and yet, our DOT was going after those airlines in the name of political correctness. That thinking, first on the part of the DOT, and now through the Transportation Safety Administration (TSA) continues today. I recently asked a TSA representative how the TSA determines who gets pulled out of line for secondary questioning. He told me this:

“TSA: Well, the secondary screening process is based on a couple of different things. If an alarm goes off when an individual goes through the security checkpoint they could be selected to go through secondary screening be able to resolve the alarm. For instance, in many cases we’ve heard people talking about shoes. A lot of people don’t want to take their shoes off—understandably—but a lot of shoes have metal in them. So when they walk through the metal detector and the alarm goes off we have to resolve that alarm to find out what the metallic object is that is setting off our alarms. So people like that can be subject to secondary screening. There is a separate group of people who are selected for secondary screening based on other things such as when did they buy their ticket, did they buy it right before the flight, or did they pay cash for their ticket, or was it a one-way ticket so there are a couple of things that come into play in secondary screening.”

I specifically asked about factoring in the appearance of the traveler himself or herself:

“TSA: Appearance doesn’t come into play—that would get into the whole profiling issue—we don’t profile—our job is to find prohibited items. It doesn’t matter size, shape, color, or what you’re wearing—we just want to make sure that the traveling public remains secure.

“MAS: In other words you don’t care whether a person appears to be of Middle Eastern extraction versus someone who appears to be Norwegian?

“TSA: No, no, it doesn’t come into play. That’s not our job. Our job is to look for prohibited items at the security checkpoint.”

I wanted to share my concerns about this policy with the Congress. So, prior to coming here today, my Congressman, James Gerlach, made it possible for me to speak with Rep. John Mica (R-FL) who is the Chairman of the House Subcommittee on Aviation. He confirmed for me the role of political correctness in airline security post-9/11:

“MICA: Well let me say this, we had the inspector general of the Department of Homeland Security test both systems and we found that, in his words, both were performing equally poorly. In fact, we have been concentrating on being politically correct. We don’t have deployed technology that would give us sort of an instantaneous look at people who were carrying explosives or dangerous weapons that’s a great concern. The performance of this TSA operation after spending billions of dollars isn’t really much better than what we had pre-Sept 11. Now we do have secured cockpit doors, we have air marshals, we have pilots being armed, but we’ve been concentrating on screening as you pointed out in those comments of little old ladies, millions of passengers who pose no threat and not going after bad guys.

“MAS: Is there anything wrong with saying that you know good police work demands that we look for folks who resemble the 19 hijackers on September 11?

“MICA: Well absolutely there is no reason we cannot profile, and do it without discrimination and some of the do-gooders and others who’ve stopped progress on those projects actually have done us great harm . . . Even as of yesterday, talking with the Secretary, Admiral Lloyd, and now Admiral Stone who’s in charge of the TSA—we’re far behind in development of those programs that really will detect bad people, the inability to do that does cause us to harass everyone else.”

I share Congressman Mica’s assessment of the problem. He correctly told me that with regard to the characteristics in common among the 19 hijackers on 9/11: “Well if you took just one of those characteristics you may be discriminating. If, in fact, you use a number of those in concert, I don’t think you are.” This is precisely my view.

I am grateful for the opportunity the opportunity to be here today and I ask you to take a long, hard look at the criteria we are using as we look for those who seek to destroy our Nation. I leave you with this thought:

In 1955, the Israeli philosopher Yishavayahu Leibowitz, complained in a letter to Ben-Gurion, Israel's first prime minister, about innocent Palestinians killed in Israeli operations. "I received your letter and I do not agree with you," Ben-Gurion replied. "Were all the human ideals to be given to me on the one hand and Israeli security on the other, I would choose Israeli security because while it is good that there be a world full of peace, fraternity, justice, and honesty, it is even more important that we be in it."

Senator SPECTER. Thank you very much, Mr. Smerconish.

We turn now to Ms. Peggy Sterling, vice president of Safety, Security and Environment for American Airlines since 2002, September. A 34-year veteran of American, she previously served as vice president of American's largest hub. A native of Arizona, she attended the University of Arizona and North Virginia.

We welcome you, Ms. Sterling, and look forward to your testimony.

STATEMENT OF PEGGY E. STERLING, VICE PRESIDENT, SAFETY, SECURITY, AND ENVIRONMENTAL, AMERICAN AIRLINES

Ms. STERLING. Good afternoon, and thank you, Senator Specter. I thank the committee for this opportunity to represent American Airlines here today and to address the issue of aviation security in the post-9/11 world.

To give some context to my statement, I would like to share with the committee a few statistics about the scope of American Airlines' operations. Every day, American Airlines, American Eagle and AmericanConnection regional carries serve more than 290,000 passengers daily on more than 4,200 flights to 230 cities in over 40 countries. In 2003, American Airlines, American Eagle, and AmericanConnection transported more than 100 million people. It is against these numbers that aviation security issues must be considered.

In today's climate, it would be unthinkable for a captain of a commercial airline flight to ignore a pre-take-off report of suspicious or threatening behavior by a passenger. The security issues associated with air travel are unique, and there is no room for error in assessing and dealing with potential threats. The concern with safety and security in the aftermath of 9/11 is particularly acute at American Airlines. More than 20 members of the American Airlines family were lost on 9/11, and the pain and the sadness of that event endures at American Airlines to this day, as well as to the rest of the country.

Just a few months later, an American flight crew was again faced with the reality of the threat of terrorism when it heroically averted a disaster over the Atlantic by thwarting a "shoe bomber."

American, and particularly its flight crews, have been impacted by the terrorism threats against the aviation industry more than any other carrier in the world. The security challenges facing American Airlines and the industry are uniquely apparent to our pilots, our flight attendants and our front-line employees. They know that while all passengers must pass through airport security before they board, preboard screening is simply one aspect of a layered security system.

Flight crew observations of passengers are an important part of the overall redundant approach to security, and flight attendants in particular are attuned to any unusual behavior. Flight crews are literally the last line of defense. As a result of the vigilance of our flight attendants, Richard Reid was prevented from igniting explosives in his shoes. In his State of the Union Address, President Bush praised the vigilance of American Airlines flight attendants who thwarted Reid. President Bush remarked that "As Government works to better secure our homeland, America will continue to depend on the eyes and the ears of alert citizens."

Notwithstanding heightened security concerns, September 11 did not lessen American's commitment to diversity and tolerance of all cultures; it intensified it. We are keenly aware that our airline brings people and cultures together from around the world. "AAers" have always taken great pride in our diverse workforce. Our personnel interact with their colleagues and customers of various nationalities and cultures daily. We enjoy serving our customers, while respecting and celebrating their differences. Our policies of nondiscrimination and respect for cultural differences have been reiterated to our employees since September 11. These efforts have been particularly directed to ensure that American Airlines' Middle Eastern and Muslim passengers and employees are treated with respect and dignity.

Just as importantly, however, we have also emphasized to our flight crews that their primary concern is, and must be, the safety of those on board and that perceived security issues must be resolved before takeoff. There is simply no room for error in this regard. We have supported our captains in making difficult decisions, including decisions to deny travel so that security issues can be resolved, and we will continue to do so.

While I am not an attorney, and do not purport to know the intricacies of the laws in this area, I can tell you that American Airlines believes that our efforts to put safety first are fully supported by the law. Congress has established a statutory framework that recognizes and mandates that a commercial airline captain is responsible for the safety and well-being of everyone on board the aircraft. This reflects the painful reality that once the aircraft takes off, it is likely more difficult to prevent a terrorist attack or a safety issue from escalating.

We certainly believe that a carrier may properly refuse to transport an individual if, under circumstances presented at the time and based upon facts as then known, it rationally and reasonably believes the passenger might pose a threat to the safety of other passengers and crew. We firmly believe that it is bad public policy to allow a carrier's decision to remove a passenger so that security concerns can be resolved to be second-guessed in the relative calm of a courtroom or of a Government office, after the fact and by those who are not responsible for the lives of everyone on board an aircraft.

Unfortunately, though perhaps not surprisingly, our efforts to ensure security have not been universally accepted. A handful of civil lawsuits alleging ethnic or religious discrimination have been filed against American Airlines out of incidents where passengers were

denied travel or subjected to additional security measures so that potential security issues could be resolved.

Additionally, in April of 2003, DOT's Aviation Enforcement Office filed a formal enforcement complaint against American Airlines. The complaint alleged that American unlawfully discriminated against passengers on 11 occasions by denying them boarding or removing them from flights because they were or were perceived to be of Arab, Middle Eastern or South Asian descent or a Muslim. Ten of the eleven incidents occurred during the fall—during the fall—of 2001, an unprecedented period of heightened security concern for American Airlines and the United States.

We believe that in these incidents our pilots were doing exactly what they were taught to do and being instructed to do by the President of the United States, Attorney General Ashcroft, the FAA and TSA, and the traveling public. Our pilots made difficult, time-sensitive decisions—

Senator SPECTER. Ms. Sterling, your time is 3 minutes over. Could you summarize, please?

Ms. STERLING. Yes, I certainly can.

With all due respect to the DOT, we think its decision to pursue an enforcement action against American exemplified the exact type of second-guessing that should be avoided.

I would also like to say one other thing, and that relates to the comment that was made earlier. I would like to address the point that I understand the committee is concerned with. We understand there is some testimony before the Kean Commission, the 9/11 Kean Commission, to the effect that the Department of Justice had indicated to another carrier that if two or more individuals from a particular ethnic group were made selectees for a particular flight, the carrier would be deemed to have acted in a discriminatory manner. We have not heard or seen anything of this nature from the DOJ, the DOT, the TSA, the Department of Homeland Security or any other Government agency.

PREPARED STATEMENT

Our policies and procedures are not based on the proposition that there are any ethnically driven limits on how many passengers from a particular flight can be subjected to heightened security scrutiny.

Thank you for the opportunity to address you.

[The statement follows:]

PREPARED STATEMENT OF PEGGY E. STERLING

Good afternoon, Mr. Chairman and members of the committee. My name is Peggy Sterling and I am Vice President, Safety, Security, and Environmental of American Airlines. I thank the committee for this opportunity to represent American here today and to address the issue of aviation security in the post-9/11 world.

To give some context to my statement, I would like to share with the committee a few statistics about the scope of American's operations. Every day, American Airlines, American Eagle, and AmericanConnection regional carriers serve more than 290,000 passengers on more than 4,200 flights to 230 cities in over 40 countries. In 2003, American Airlines, American Eagle, and AmericanConnection transported more than 100 million people. It is against these numbers that aviation security issues, must be considered.

In today's climate, it would be unthinkable for the captain of a commercial airline flight to ignore a pre-takeoff report of suspicious or threatening behavior by a passenger. The security issues associated with air travel are unique, and there is no

room for error in assessing and dealing with potential threats. The concern with safety and security in the aftermath of 9/11 is particularly acute at American. More than 20 members of the American Airlines family were lost on 9/11, and the pain and sadness of that event endures at American to this day. Just a few months later, an American flight crew was again faced with the reality of the threat of terrorism when it heroically averted a disaster over the Atlantic by thwarting the "shoe bomber."

American, and particularly its flight crews, has been impacted by the terrorism threats against the aviation industry more than any other carrier in the world. The security challenges facing AA and the industry are uniquely apparent to our pilots, flight attendants and our other front-line employees. They know that while all passengers pass through airport security before they board, pre-boarding security is simply one aspect of a layered security system. Flight crew observations of passengers are an important part of the overall redundant approach to security, and flight attendants in particular are attuned to any unusual behavior. Flight crews are literally the last line of defense. As a result of the vigilance of our flight attendants, Richard Reid was prevented from igniting explosives in his shoe. In his State of the Union Address, President Bush praised the vigilance of the American Airlines flight attendants who thwarted Reid. President Bush remarked that: "As government works to better secure our homeland, America will continue to depend on the eyes and ears of alert citizens."

Notwithstanding heightened security concerns, September 11 did not lessen American's commitment to diversity and tolerance of all cultures; it intensified it. We are keenly aware that our airline brings people and cultures together from around the world. Our personnel interact with individuals of various nationalities and cultures daily. We serve our customers while respecting and celebrating their differences. Our policies of non-discrimination and respect for cultural differences have been reiterated to our employees since September 11. These efforts have been particularly directed to ensure that American Airlines' Middle Eastern and Muslim passengers and employees are treated with respect and dignity.

Just as importantly, however, we have also emphasized to our flight crews that their primary concern is, and must be, the safety of those on board, and that perceived security issues must be resolved before takeoff. There is simply no room for error in this regard. We have supported our captains in making difficult decisions, including decisions to deny travel so that security issues can be resolved, and we will continue to do so.

While I am not an attorney and do not purport to know the intricacies of the law in this area, I can tell you that American believes that our efforts to put safety first are fully supported by the law. Congress has established a statutory framework that recognizes and mandates that a commercial airline captain is responsible for the safety and well-being of everyone on board the aircraft. This reflects the painful reality that once the aircraft takes off, it is likely more difficult to prevent a terrorist attack or a safety issue from escalating.

We certainly believe that a carrier may properly refuse to transport an individual if, under the circumstances presented at the time and based upon the facts as then known, it rationally and reasonably believes the passenger might pose a threat to the safety of the other passengers and crew. We firmly believe that it is bad public policy to allow a carrier's decision to remove a passenger so that security concerns can be resolved to be second-guessed in the relative calm of a courtroom or a government office, after the fact, by those who are not responsible for the lives of everyone onboard an aircraft.

Unfortunately, though perhaps not surprisingly, our efforts to ensure security have not been universally accepted. A handful of civil lawsuits alleging ethnic or religious discrimination have been filed against American arising out of incidents where passengers were denied travel or subjected to additional security measures so that potential security issues could be resolved. Additionally, in April of 2003, DOT's Aviation Enforcement Office filed a formal enforcement complaint against American Airlines. The complaint alleged that American unlawfully discriminated against certain passengers on 11 occasions by denying them boarding or removing them from flights because they "were, or were perceived to be, of Arab, Middle Eastern, or South Asian descent and/or Muslim." Ten of the eleven incidents occurred during the fall of 2001, an unprecedented period of heightened security concern for American Airlines and the United States.

We firmly believe that in these incidents our pilots were doing exactly what they were being instructed to do by President Bush, Attorney General Ashcroft, the FAA and TSA, and the traveling public. Our pilots made difficult, time-sensitive decisions on the basis of the facts and circumstances known to them at that moment, at all times erring on the side of safety. With all due respect to the DOT, we think its

decision to pursue an enforcement action against American exemplified the exact type of second-guessing that should be avoided. Fortunately, we were able to agree to settle the enforcement case, with no admission of liability or wrongdoing on our part and no payment of any monetary fine, by agreeing to implement enhanced security training for our pilots, flight attendants, and passenger service agents.

American will continue to support our crew members who in good faith exercise their judgment to protect the safety of our passengers and other crew members. We urge the government to strike a consistent balance between the priorities of improved security and individual civil rights. All key government agencies—DHS, DOT, TSA, and DOJ—should adopt a consistent voice regarding the government’s approach to security.

American urges the committee and Congress to support it and the entire industry in our efforts to ensure security. It is bad public policy to impose upon airlines anything more than an obligation of good faith for its efforts to protect the safety of their passenger and crews, or to allow the second-guessing of security decisions. If every decision of a pilot to require further screening of a passenger in the interest of safety could give rise to unpredictable liability or governmental investigation based on shifting notions of what is objectively reasonable, then the natural tendency would be for pilots to try to avoid being second guessed by removing a passenger for safety concerns in only the most clear-cut cases. Terrorists can act in subtle and surreptitious ways that defy clear categorization, and be intuitive reactions by crew members to behavior that is in some way unusual, different, or abnormal should not be discounted or ignored. We must guard against tying the hands of the pilots and other airline personnel who are charged with the awesome responsibility of maintaining safety in the air.

Finally, I would like to address a particular point that I understand the committee is concerned with. We understand that there was some testimony before the Kean 9/11 Commission to the effect that the Department of Justice had indicated to another carrier that if two or more individuals from a particular ethnic group were made “selectees” for a particular flight, the carrier would be deemed to have acted in a discriminatory manner. We have not heard or seen anything of this nature from the DOJ, DOT, TSA, DHS, or any other governmental agency. Our policies and procedures are not based on the proposition that there are any ethnically driven limits on how many passengers from a particular flight can be subjected to heightened security scrutiny.

Thank you again for the opportunity to be here today.

Senator SPECTER. Thank you, Ms. Sterling.

We now turn to Ms. Christy Lopez of Relman and Associates, had been senior trial attorney in the Civil Rights Division of the Department of Justice, clerked for the Supreme Court of Alaska, Justice Robert Eastaugh, a graduate of the University of California, and a law degree from Yale Law School.

Thank you for joining us, Ms. Lopez, and we look forward to your testimony.

STATEMENT OF CHRISTY E. LOPEZ, ESQ., RELMAN AND ASSOCIATES

Ms. LOPEZ. Thank you, Senator. My name is Christy Lopez. I am an attorney here in Washington, DC, and I have submitted written testimony, which I will summarize here, and I ask that my written testimony be made part of the record.

Senator SPECTER. Your full testimony will be made a part of the record.

Ms. LOPEZ. Thank you, Senator.

Since September 11, I and my firm have represented a number of individuals who have been refused transportation by a variety of airlines because of their race or ethnicity. This violates a prohibition against race-based decision-making that stems from Federal civil rights law dating back 150 years and that has been affirmed since 9/11 by a series of airline discrimination cases and DOT statements.

Upon conclusion of my remarks, Senator, I would be happy to talk more specifically about that law, including the issue you brought up with the first panel regarding objective guidelines for pilots. I assure you there are very objective guidelines, and they provide a lot of, I think, valuable guidance that the airlines should be taking more advantage of.

This long and continuing line of case law reflects our Nation's fundamental commitment to equality regardless of race, color or creed. Many of us believe that our commitment to equality is one of the best things America has to offer the world and also the glue that holds this big, sometimes cacophonous country together. This tent of equality is routinely attacked in times of war and fear, and we are here today because it is once again being questioned.

Especially because ethnic profiling by airlines would be in direct contradiction to this core American value of equality and would create a de facto second-class citizenry, I think we can all agree that it is imperative that our consideration of this issue be based not on misinformation and fear, but on the facts. And the fact is, as the cases in which I have been involved demonstrate, far from there being a tension between civil rights law and safety, adherence to civil rights laws can improve airline security.

What do I mean by this? Currently, too many refusals to transport are based on irrational discriminatory bias rather than legitimate security reasons. Pilots have ordered Arab-American passengers deplaned because of crew discomfort, while letting the deplaned persons checked luggage remain on the flight. There are many examples of airlines deplaning passengers because of their ethnicity only to let them board the next flight or fly on another airline without any further questioning or further searching of them or their belongings.

Many of the examples I will talk about are the basis of the DOT investigations, which you also asked about, Senator.

There have been many instances where airline employees have refused to transport Latinos, Indians and African-Americans because they believe they are Arab. It is equally likely that they are ignoring Arab passengers because they appear white. In the dozens of discriminatory removals of which I am aware, rarely is there even an allegation that the person had done anything suspicious or threatening.

For example, in the case of Tony Zohrehvandi, our Iranian-American client whose case is publicly cited by the DOT in its complaint against American Airlines, the airline told him that he had done nothing suspicious, and he was being refused transport solely because the crew did not want to fly with him. The fact that he was a 12-year American Airlines employee made no difference.

Just 2 months ago, three Asian employees of a large IT company were taken off their American Airlines flight after being told the crew was uncomfortable with them. American put them on a United flight instead.

Surprisingly, few, if any, airlines even require that their pilots consult with any security professional before deciding to refuse transport. In some instances, as in the case of our client, Arshad Chowdhury, individuals are personally cleared by the FBI on the scene, but airline employees are allowed to trump the FBI security

decision even though they cannot articulate any legitimate security rationale for doing so. Many pilots say they feel uncomfortable making decisions for which they have not been adequately trained, and they feel pressured to make too quick decisions because of concerns about on-time departures.

These examples, and countless others I could cite, indicate that a focus on ethnicity distracts attention from more effective security measures, which is exactly why air security experts will tell you that ethnic profiling is unsafe, as Mr. Blank and Mr. Rosen did here earlier today.

The fact is we are asking our pilots and their flight crews to make difficult and critically important decisions without providing them appropriate guidance or instruction. As a result, some of them succumb at times to illegal and unnecessary ethnic stereotyping, making decisions that are irrational from a security perspective and can be devastating to those unfairly removed.

So what I mean when I say that civil rights can help make air travel safer is that the same steps necessary to decrease this tendency to discriminate will improve security. I have set out several such recommendations more fully in my written testimony. So I will mention only a few here. The measures are simple and common-sense things, but things that the airlines are not doing; for example, communicating a consistent message that ethnic profiling is not required by safety and will not be tolerated, requiring that airline employees, including pilots, consult with security professionals before deciding to refuse transportation, and requiring that flight crews or passengers be able to articulate a legitimate security concern before airlines will agree to refuse transportation to someone.

PREPARED STATEMENT

While profiling may be a critical component of airline security, ethnic profiling is not necessary. It is illegal and is destructive to us as a Nation. It is time to move beyond questions borne of fear and misinformation and begin properly preparing airline employees to make decisions based on legitimate security criteria rather than upon ethnic bias. Once we do this, we will make our airline safer, and we will decrease incidents of discrimination.

[The statement follows:]

PREPARED STATEMENT OF CHRISTY E. LOPEZ

Good afternoon, Mr. Chairman and ranking member Murray. My name is Christy Lopez and I am an attorney with the Washington, DC civil rights law firm of Relman & Associates. Previously, I was an attorney in the United States Department of Justice's Civil Rights Division.

Since September 11, I and my firm have represented a number of individuals who have been refused transportation by a variety of airlines because of their race or ethnicity. This prohibition against ethnic-based decision making in airline transportation stems from civil rights law dating back 150 years and has been affirmed since 9/11 in a series of airline discrimination cases across the country, as well as in official statements of the Federal Government.

The central legal standard in these cases is that race, color, and other status protected by civil rights laws (e.g. gender, ethnicity, religion, national origin, or indicia thereof) may not be a motivating factor in the carrier's decision to refuse transportation, either alone or in conjunction with other factors. See, e.g., Ninth Circuit Model Civil Jury Instructions: Introductory Comment ("In order to prevail under a § 1981 claim for race discrimination, the plaintiff must prove that race was a "motivating factor"); Ninth Circuit Model Civil Jury Instruction 12.1 ("The [Civil

Rights Act of 1991] further clarified that a defendant is liable if the plaintiff shows that the discrimination was a “motivating factor” in the challenged decision or action, “even though other factors also motivated” the challenged action or decision and regardless of whether the case was one of “pretext” or “mixed motive,”) (citing, 42 U.S.C. § 2000e–2(m)); *Dasrath v. Continental Airlines, Inc.*, 228 F.Supp.2d 531, 540 (D.N.J. 2002) (“Even if some of the facts alleged could lend support to an inference that the removal decision was motivated by safety concerns, the complaints nevertheless allege clearly and specifically that the motivating factor was in fact not safety but race . . .”). See also, Department of Transportation Guidance for Screeners and Other Security Personnel (“If the answer [to the “but for” test] is “no” then the action is likely to be unjustified and violate civil rights laws.”); *Hampton v. Dillard Department Stores*, 247 F.3d 1091, 1111 (10th Cir. 2001) (approving § 1981 jury instruction providing: “‘motivating’ factor means that but for its unlawful motive, defendant would not have denied plaintiff the right to enjoy the benefits and privileges of her purchase. In other words, you must find that race was at least one of the factors which motivated [defendant’s conduct]. A motivating factor need not be the sole or exclusive reason, however, for [defendant’s] actions.”).¹

The government and numerous courts have reiterated the continuing vitality of this principle post 9/11. See, e.g., Department of Transportation Guidance for Screeners and Other Security Personnel (“It is illegal under federal law for an air carrier or its employees to discriminate on the basis of race, color, national origin, religion, sex, or ancestry.”); FAA Fact Sheet (“None of the new security measures decrease the responsibility of airports and airlines to enforce: (1) Title VI of the Civil Rights Act of 1964 and the implementing regulations, 49 CFR Part 21 and 14 CFR 271.9 and (2) 49 U.S.C. 40127, 41310 and 41702, regarding discrimination. Federal civil rights laws prohibit discrimination on the basis of a person’s race, color, national origin, religion, or sex.”); *Bayaa v. United Airlines, Inc. et al.*, 249 F.Supp.2d 1198, 1205 (C.D. Cal. 2002) (rejecting airline’s argument that State and Federal civil rights laws conflict with 49 U.S.C. § 44902 and stating that defendants’ duty under 49 U.S.C. § 44902 “does not grant them a license to discriminate.”); *Chowdhury v. Northwest Airlines Corp. et al.*, 238 F.Supp.2d 1153, 1154 (N.D. Cal. 2002) (rejecting airline’s argument that more recent statutes specifically addressing airline safety trump Federal civil rights statutes and stating “there is no apparent conflict between the federal statutes prohibiting racial discrimination and the federal law giving air carriers the discretion to refuse to carry passengers for safety reasons.”).

This long and continuing line of case law reflects our Nation’s fundamental commitment to equality regardless of race, color, or creed. Many of us believe that our commitment to equality is one of the best offerings America has for the world and that it is also the glue that holds this big, sometimes cacophonous country together. This tenet of equality is routinely attacked in times of war and fear, and we are here today because it is once again being questioned.

¹ Courts are likely to evaluate plaintiffs’ claims under 42 U.S.C. § 1981 rather than under 49 U.S.C. § 44902(b)’s “arbitrary and capricious” standard. While many courts have evaluated unfair treatment claims against air carriers using this standard, those cases, with rare exception, did not involve claims of discrimination brought under § 1981 or other laws prohibiting race discrimination. There is no reason to expect courts to deviate from the long line of cases established in every Circuit and affirmed by the Supreme Court, that § 1981 claims are evaluated, via the *Burdine* burden-shifting structure or otherwise, to determine whether the defendant’s decision was motivated by the plaintiff’s race, ethnicity, etc. See, e.g., *Simmons v. American Airlines*, 2002 WL 869930 *576 (9th Cir. 2002) (applying *Burdine* burden-shifting structure and overturning summary judgment in favor of airline because airline failed to provide sufficient evidence that it removed plaintiff pursuant to its own safety policy).

Another court very recently considered this issue directly and rejected the air carrier’s argument that § 44902’s “arbitrary and capricious” standard is an essential element of a claim for discrimination, stating instead that if plaintiff “could prove by a preponderance of the evidence that he was denied boarding on the basis of his national origin, race, or religion, then [defendant] could not avail themselves of the discretion extended to them under § 44902(b) and no review under the “arbitrary and capricious” standard would be required.” *Alshrafi v. American Airlines, Inc. et al.*, Slip. Op. No. 03–10212–WGY at 24, 28–30 (D. Mass. June 8, 2004).

It is likely that the distinction between the tests under § 44902 and § 1981 is largely academic anyway. Most courts appear to recognize that illegal discrimination is an “arbitrary and capricious” rather than “reasonable” basis for removal. See, e.g., *Alshrafi* at 24 (“actions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902”) (citing *Dasrath* at 540 n.12)). Accordingly, if plaintiffs prevail on their § 1981 claims, they will by definition defeat any argument that the airlines’ decision to refuse transport were reasonable rather than arbitrary and capricious. Moreover, as at least one circuit has made clear, as with the determination of discriminatory intent under § 1981, the trier of fact decides whether the air carrier’s refusal to transport was arbitrary and capricious or reasonable. See *Cordero v. CIA Mexicana De Aviacion, S.A.*, 681 F.2d 669 (9th Cir. 1982).

Especially because ethnic profiling by airlines would be in direct contradiction to this core American value of equality and would create a de facto second-class citizenry, I think we can all agree that it is imperative that our consideration of the issue be based not on misinformation and fear, but on facts. And the fact is, as the cases in which I have been involved demonstrate, far from there being a tension between civil rights laws and safety, adherence to civil rights laws can actually improve airline security.

What do I mean by this? Currently, too many refusals to transport are based on irrational discriminatory bias rather than legitimate security reasons. Pilots have ordered Arab-American passengers deplaned because of crew discomfort, while letting the deplaned person's checked luggage remain on the flight. There are many examples of airlines deplaning passengers because of their ethnicity only to let them board the next flight or a flight on another airline without any further questioning or further searching of them or their belongings. I am aware of many instances where airline employees have refused transport to Latinos, Indians, and African-Americans because they believe they are Arab, it is equally likely that they have ignored Arab passengers because they appear white. In the dozens of discriminatory removals of which I am aware, rarely is there even an allegation that the person had done anything suspicious or threatening. For example, in the case of Tony Zohrehvandi, our Iranian-American client whose case is cited by the DOT in its complaint against American Airlines, the airline told him that he had done nothing suspicious and was being refused transport solely because the crew did not want to fly with him. The fact that he was a 12-year American Airlines employee made no difference. Two months ago, three Asian employees of a large IT company were taken off their American Airlines flight after being told the crew was uncomfortable with them. They were put on a United flight instead. Currently, few if any airlines require that their pilots consult with security professionals before deciding to refuse transport. In some instances, as in the case of our client Arshad Chowdhury, individuals are personally cleared by the FBI on the scene, but airline employees are allowed to trump the FBI's security decision even though they cannot articulate any legitimate security rationale for doing so. Many pilots say they feel uncomfortable making decisions for which they have not been trained and that they feel pressured to make too-quick decisions because of concerns about on-time departures.

These examples and countless others indicate that a focus on ethnicity distracts attention from more effective security measures, which is exactly why air security experts will tell you that ethnic profiling is unsafe.

The fact is, we are asking pilots and their flight crews to make difficult and critically important decisions without providing them appropriate guidance or instruction. It is no wonder that some of them succumb at times to illegal and unnecessary ethnic stereotyping, making decisions that are irrational from a security perspective.

So what I mean when I say that Civil Rights can help make air travel safer is that the same steps necessary to decrease this tendency to discriminate will improve security. The following steps are examples of what airlines and the government should be considering:

- Establish clear policy reflecting the long standing legal tenet that ethnicity may not be the motivating factor in a refusal to transport.
- Establish clear policy that if the carrier/decision maker believes that the concerns of another passenger or employee are illegitimate (e.g., motivated by impermissible discriminatory bias rather than by legitimate safety concern), the carrier/decision maker may not refuse transportation to the individual in question based on the concerns of the passenger or employee. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (holding that stereotyped customer preference cannot justify gender discrimination); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 298–99 (N.D. Tex. 1981) (holding that customer preference for female flight attendants did not justify gender discrimination in hiring and quoting EEOC decision rejecting defense that customer confidence in company's ability to provide security justified a male-only hiring policy: "this argument is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress.").
- Clarify process for refusing transportation of reasons of security/safety as follows:
 - Clearly delineate the appropriate lines of communication and decision making in such incidents.* For example: (i.) require that one individual, such as the ground security coordinator, take charge of coordinating the decision process; (ii.) require that airline security departments, as well as its central dispatchers, be consulted prior to any decision to refuse transport; (iii.) specify which airline employees should and may be informed of the situation and

- under what circumstances; (iv.) specify who finally determines whether to refuse transportation (e.g. dispatcher in conjunction with Captain).
- Clearly state carrier’s obligation to attempt to determine whether a passenger’s or employee’s concerns are based on legitimate security concerns or discriminatory bias.* In some instances it may be difficult to determine whether the passenger or employee has a legitimate basis for believing the subject passenger is inimical to safety. In many instances, however, even a cursory inquiry will reveal that the passenger clearly is not a threat. The policy should clarify that carriers have an obligation to make this inquiry and provide guidance regarding who should conduct the inquiry. See, e.g., *Cordero v. CIA Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (reversing summary judgment in favor of defendant and finding, “[t]here is ample evidence in the trial record from which the jury might have concluded that [air carrier] acted unreasonably in excluding [plaintiff] without even the most cursory inquiry into the complaint against him.”).
 - Provide further guidance for how to proceed once the appropriate security/law enforcement officials have cleared a “suspicious” individual.* Currently, the policy properly states that a passenger should be permitted to fly once cleared by appropriate authorities “unless clear, nondiscriminatory reasons justify refusal to transport.” The policy should clarify that airline employees must take reasonable steps to verify whether a person has been cleared and employees’ obligation to permit reasonable time for a customer to be cleared.
 - Provide appropriate guidance regarding how to proceed where a passenger or employee continues to refuse to fly with another passenger even though the carrier has determined that the individual poses no threat.* Where a carrier has determined, either via inquiry or clearance by law enforcement, that an initially “suspicious” passenger is not a safety threat, there is no legal justification to refuse transportation to the individual. The policy should inform airline employees of the proper process to follow in such situations. For example, it should explain when it is appropriate to offer the complaining passenger a seat on another flight rather than refusing to transport the falsely accused passenger and the options available when a crew member refuses to fly with a falsely accused passenger. Similarly, airline employees should be instructed that a discriminatory removal is not remedied by providing the passenger comparable service on another flight. *Alasady v. Northwest Airlines Corp.*, 2003 WL 1565944 *11 (D. Minn. 2003) (no showing that carrier can avoid liability under § 1981 by making arrangements for “a service similar to that which the defendant refused to provide”).
 - Training on Modified Policy:* In order to be effective, airlines must train relevant employees in the policy and procedure modifications discussed above. This training must:
 - Effectively and accurately convey airline’s nondiscrimination policies and procedures, as modified, to all relevant employees in a timely manner.* In furtherance of this critical element, the airline should provide training as follows: (i.) Captains & First Officers: The modified nondiscrimination training should be incorporated into Captains’ semiannual training. First Officers would have this training incorporated into their annual training; (ii.) Dispatchers: Given dispatchers’ central role in this process, they should be trained in it. In order to facilitate communication between dispatchers and airlines’ security departments, security department staff and dispatcher supervisors/directors should receive training together; (iii.) Security Department Directors and Staff: In order to affirm the security department’s central role in these decisions, security department staff should receive this training and, as noted above, it should be conducted in conjunction with dispatcher training to facilitate communication between these two groups; (iv.) Station Personnel & Flight Attendants: Station personnel, including Ground Security Coordinators, In-flight Supervisors, and Customer Service Supervisors, should receive “train-the-trainer” instruction in the modified nondiscrimination training in conjunction with other training received throughout the year. Supervisors should provide training to their subordinates (i.e. customer service agents and flight attendants).
 - Directly address concerns that adherence to civil rights laws can undermine security by discussing how the modified policies and procedures will improve the security process.* Safety and security are of paramount importance to airline employees and, to be effective, civil rights training must address this issue straightforwardly. For example, airlines can provide the principles of CAPPS and CAPPS II so that employees understand that the CAPPS “profiling” systems are effective despite their lack of reliance on race, eth-

nicity, or other protected factors. Airlines should expand their efforts to explain that terrorists, including al Qaeda, have and are expected to continue to rely on stereotyped biases in planning attacks.² In addition, employees should be instructed to consult with security personnel to assist in transportation decisions to ensure that employees know that security professionals are available to affirm the safety of any decision to transport.

- Directly address particular scenarios that occur repeatedly or are especially difficult to resolve.* To be effective, training should provide concrete instruction on dealing with recurrent problems such as passengers who express discomfort with brown-skinned passengers for reasons that appear irrational and discriminatory, or passengers who claim they are being discriminated against even where the passenger is being refused transportation for legitimate, non-discriminatory reasons.
- Effectively convey the harmful impact of this type of discrimination.* A more acute understanding of the human cost of discriminatory refusals to transport may encourage many employees to take the required steps to ensure that they and others do not discriminate against their customers. This understanding can be provided in many ways. Community organizations active in this area may be able to assist. In-person or videotaped presentations by persons who have been discriminated against can be presented.
- Be presented by a person or team of persons that: (a) can speak credibly to security concerns; (b) can provide insight on how to effectively interact with frightened passengers and employees in these situations; (c) can present the perspective of individuals who have been discriminated against by airlines.* Experts in aviation security may be in the best position to allay fears that non-discrimination laws undermine security. Experts with psychological training may be better at explaining how to defuse incidents at an early stage. As noted above, groups or individuals who have experience with discriminatory refusals to transport may be an effective way to convey the importance of adherence to civil rights laws.
- Complaint Tracking & Investigation.* Airlines should document, track, investigate and evaluate refusals to transport. Evaluations should be used to identify problem areas and modify policies and procedures where appropriate. Similarly, airlines should document, track, investigate and evaluate complaints of discrimination by customers to identify and respond to any problem areas.

While profiling may be a critical component of airline security, ethnic profiling is not necessary, it is illegal and it is destructive to us as a nation. It is time to move beyond questions born of fear and misinformation and to begin properly preparing airline employees to make decisions based on legitimate security criteria rather than upon ethnic bias. Once we do this, we will both make our airlines safer and decrease incidents of discrimination.

Thank you.

Senator SPECTER. Thank you very much, Ms. Lopez.

Mr. Smerconish, you cite the case of the rejection of an individual who “gave him,” referring to the airline personnel, “the creeps.” Was there anything more by way of specification beyond that statement that he gave him the creeps?

Mr. SMERCONISH. Well, yes, sir. Mr. Jose Melendez-Perez is the individual to whom you refer. He testified in front of the 9/11 Commission about an interaction that he had on August 4, approximately one month before 9/11. He was requested to perform secondary screening on a Saudi national at that time that we now know to be Mohammed Kahtani, and he sized him up. He sized him up in terms of his appearance, his demeanor, his physical stature. He used his street smarts I think for a lack of a better way to describe how he went about his task, and the net effect of him sizing this individual up was to decide that he was cocky, that he

² See e.g., Transcript of May 26, 2004, News Conference by U.S. Attorney General John Ashcroft and FBI Director Robert Mueller, explaining that “the face of al Qaeda may be changing,” so that operatives are seeking recruits who are or look “European,” are “of any nationality inside target countries,” and who “may travel with families to lower their profile.” Transcript available at <http://www.cnn.com/2004/US/05/26/terror.threat.transcript>.

was probably militarily trained, that he might be a hitman, and that he “gave him the creeps,” and he slowed down the process of allowing that individual to gain process into the country.

We only learned later, when there was an analysis of Mohamed Atta’s telephone records, that he was at the Orlando airport at the exact same time upstairs, presumably to pick this man up to be Hijacker No. 20.

And I am not advocating that an individual who is an Arab automatically gets cast aside and subject to some kind of a secondary screening, but I think that we are asking our individuals who were charged with protecting our borders to operate with less than all of the information if we do not permit them to at least permit ethnicity, and appearance, and religion, to the extent they know it, and country of one’s origin to be factored into the equation. It seems to me, sir, that it is an ostrich approach given that we are 19 for 19 on 9/11 with all of those common denominators.

Senator SPECTER. Ms. Lopez, what do you think of the description which Mr. Smerconish has given? Demeanor, stature, sizing them up, appearance, general sense of giving them the creeps, is that enough, in your opinion?

Ms. LOPEZ. I think the important distinction there is that in that instance it was a trained law enforcement professional. They have received the training to know how to size somebody up based on those criteria. Our airline employees, quite properly, it has been decided that they do not receive that training, which is why we simply think they should consult with the people who have received that training when they do have those sorts of concerns.

Senator SPECTER. So you think the TSA people have had the training to be able to make a judgment based upon what Mr. Smerconish has said, but the pilots do not?

Ms. LOPEZ. I think it is much more likely that they have. And, in fact, airlines themselves employ security professionals that are always available 24/7, and there is no reason that pilots cannot be at least required to talk with them. It would at least ensure that you do not have pilots who have no reason to be making these decisions.

Senator SPECTER. So your point is that the pilot would consult with those security people, and the security people backed up the pilot, that that would be an adequate test?

Ms. LOPEZ. I think it would still be subject to review later, but I think that the main goal here, which is to prevent discrimination and increase airline security, would be served because those security people would be able to ask the questions that would draw out whether there was a real security problem, and they would also be able to make sure that the pilot did not do things like take the person off, but leave their bags on or take the person off and then put them on the next flight without any more searching. It would make the system more rational, and it would I think give airline employees much more comfort, which is really the root I believe of these discriminatory decisions. They do not trust the system, and if there was more security involvement, I believe they would trust it more.

Senator SPECTER. Ms. Sterling, I am looking at a document marked as a consent order involving American Airlines. And on Page 3 one of the lines is, “The enforcement officer believes that

some passengers were denied boarding or even removed from flights because of, because or principally because of the passengers' ethnic background."

Are you familiar, at least in a general way, with this finding and determination?

Ms. STERLING. I am certainly familiar with the consent order. I would say that, based on the, and again in my earlier testimony, I believe that the removal of the passengers had nothing to do with their ethnicity. It had everything to do with what was observed to be in terms of a suspicion behavior.

Mr. SMERCONISH. Senator Specter, may I speak to that, sir?

Senator SPECTER. Sure.

Mr. SMERCONISH. You had asked earlier Mr. Rosen to speak with specificity about any one of the cases. I have read the litigation files, to the extent that they are publicly available, and I have read those 11 different complaints.

I can tell you about one of them, and I think that it displays some of the problems, and I have detailed this in my statement. It is the case of Jihad al-Shafri, a self-described 32-year-old Arab American, a naturalized American citizen of Jordanian birth. According to his declaration, which accompanied the complaint, he worked for a defense contractor helping to build missiles for the military and possessed a secret-level security clearance. November 3, 2001—so it is the fall of 2001—he was refused entry while trying to board an American Airline flight from Boston to Los Angeles. I took note of the fact that in the litigation files there were a large number of flights from Boston to Los Angeles which were subject to the enforcement action. Well, that is the same path as one of the flights on 9/11.

In the complaint against American, it states that Mr. al-Shafri was denied boarding after responding to a page and reporting to an American counter. There, he was greeted by an American employee and a U.S. marshal. He was told that the pilot had denied him boarding on the flight. He informed the American employee that he had a secret-level clearance. He was nevertheless told he was being denied passage.

"I was calmly contesting the pilot's decision when a State trooper arrived and asked me to move along and to deal with him. I was humiliated to be confronted by a State trooper in full view of the crowded boarding area." He missed his flight. He was upgraded to first class on the next plane.

Well, that is the perspective of the complaint filed by the DOT against American. Now, here is what American said, and I think it suggests that there is more to the story. American said that at least one other passenger had reported what appeared to be this man's suspicious behavior to an American gate agent. Unfortunately, that is not defined what was suspicious. Additionally, American said that the Federal air marshal advised the pilot in command that the passenger had been acting suspiciously, had created some kind of a disturbance and that his name was similar to a name on the Federal watch list.

So here is what was known to the pilot at the moment that he had to make this determination:

No. 1, he was 2 months removed from the worst act of terrorism against the United States ever;

No. 2, that that terrorism had victimized his own employer, American Airlines;

No. 3, that the point of origin of those flights was this same airport where he now sat, Logan;

No. 4, the destination of the flights on 9/11 was L.A., which is where he was headed;

No. 5, the hijackers were, to a person, young Arab males;

No. 6, there was at least one passenger who was ill-at-ease with this man and who was acting in what was described to the pilot as a "suspicious manner";

No. 7, that the Federal air marshal advised that the passenger at issue had been acting suspiciously;

No. 8, that the passenger had a name similar to one on the Federal watch list;

And, yes, No. 9, let us not be afraid to say it, that he probably resembled the appearance of some of the 9/11 hijackers.

And the question becomes, when faced with those nine criteria, was it appropriate for the Department of Transportation to come down on American Airlines with an enforcement action, to question the judgment of the pilot who, after all, not only has to be protective of security, but to get off the ground and fly that plane? And I suggest that it was not.

Senator SPECTER. Ms. Lopez, at American Airlines, did the pilot act appropriately under the circumstances which Mr. Smerconish has noted, in your opinion?

Ms. LOPEZ. If he was acting upon the first eight factors, yes. If he included the ninth, no. And that is why there is no tension between civil rights and air safety in this case.

You asked earlier what the standards are. The standard is perhaps best explained in the "but for" test, what is called the "but for" test that DOT has included in its post-9/11 statements. And they ask airline employees to question themselves, "Would I be making this decision but for this person's ethnicity?" And so all of those first eight things that the pilot thought made this person suspicious, if that is what really is at play there, that is fine.

But I think the goal here is that you do not have two people who are equally suspicious, but you only pay attention to one because he appears to be Arab, and you do not pay attention to the other one because he or she appears to be white. That would be a dangerous situation. You need to be looking for suspicious behavior.

And as Senator Shelby said earlier, terrorists will exploit any weakness they see in the system. As Mr. Smerconish said, he was concerned at how easy it was to negotiate his way out of being checked. We need to be checking people based on behavior not because they are good talkers, because of how they look or because of what we think their race or religion is.

Senator SPECTER. So you think the action would have been appropriate if they had relied on just the first eight indicators, but not the ninth?

Ms. LOPEZ. If they relied on his behavior rather than his ethnicity, yes, or the other circumstances that—

Senator SPECTER. Well, they relied on eight factors, which you think were appropriate, but one which you think inappropriate.

Ms. LOPEZ. I want to make sure I recall exactly what the eight factors were, but assuming that there was nothing illegitimate about those eight factors, I think that would be fine.

Senator SPECTER. Ms. Sterling, this may be carrying coals to New Castle, but do you think American Airlines acted properly?

Ms. STERLING. I am sorry?

Senator SPECTER. Did your company act properly?

Ms. STERLING. Absolutely.

Senator SPECTER. I thought you would say that.

We are due to have a vote shortly, so we are going to have to conclude the hearing. It has been very informative, and I thank you all for coming.

I would be glad to give you a last comment, Ms. Lopez. We will go for the ladies first and then give Mr. Smerconish the last word.

Ms. LOPEZ. I guess I would just say that when balancing this equation, civil liberties versus airline security, it is important not only to hear from security experts and airline CEOs, but also from the people who are affected by this. We did not have any of those people here today. This sort of inconvenience should not be disregarded. Sitting at the back of the bus is not an inconvenience. Being asked to move to the back of the plane, which people have been, is not an inconvenience. Being told you have a different set of rights because of the color of your skin is not an inconvenience.

Our clients have changed their names, they have changed their jobs so they travel less, they have cut their hair to look less Arab, they have cancelled vacation plans. This has a devastating effect on a large community that is a vibrant part of our country, and we need to make sure that we fully consider that when we are considering these issues of airline security.

Thank you.

Senator SPECTER. Ms. Sterling.

Ms. STERLING. Yes, I would just like to say that at American Airlines we have a policy not to discriminate. We hire a diverse workforce and pride ourselves in not placing judgment on another due to gender, race, religion or sexual preference. This goes for employees and passengers alike.

We scrutinize everyone when it comes to security and safety. I guess I do not need to bring up Timothy McVeigh, John Walker, Terry Nichols, do I? If we were to profile our passengers on their race, we would miss the terrorists disguised as the brainwashed college student from Kentucky.

Terrorism is faceless and nameless. Eradicating Osama bin Laden will only make a small dent in the fight on terrorism.

Thank you very much.

Senator SPECTER. Mr. Smerconish.

Mr. SMERCONISH. Thank you for the privilege of being here. It is time for all of us to acknowledge the fact that the 19 hijackers on 9/11 had many commonalities. The world will be a safer place when we face those facts.

In closing, may I please enter into the record hundreds of e-mails that I have received from my radio listeners and my readers at the Daily News on this issue?

Senator SPECTER. Yes, they will be made a part of the record, without objection.

[CLERK'S NOTE.—The information referred to has been retained in Committee files.]

CONCLUSION OF HEARING

Mr. SMERCONISH. Thank you, sir.

Senator SPECTER. Thank you all very much.

[Whereupon, at 3:35 p.m., Thursday, June 24, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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