

# THE PRACTICAL NOMAD

EDWARD HASBROUCK

1130 Treat Avenue, San Francisco, CA 94110, USA

phone +1-415-824-0214

edward@hasbrouck.org

<http://hasbrouck.org>

[The Practical Nomad: How to Travel Around the World](#) (4<sup>th</sup> ed. 2007)

[The Practical Nomad Guide to the Online Travel Marketplace](#) (2001)

<http://www.practicalnomad.com>

## **Proposed Rules for the “Secure Flight Program” (Docket TSA-2007-28572)**

### **Testimony of Edward Hasbrouck before the Department of Homeland Security, Transportation Security Administration Washington, DC, 20 September 2007**

My name is Edward Hasbrouck. I have more than 15 years of travel industry experience with airline reservations. I’m an author, a consumer advocate, and a consultant to the Identity Project ([www.PapersPlease.org](http://www.PapersPlease.org)).

The starting point for this rulemaking *should* be the First Amendment “right of the people . . . to assemble”, and Article 12 of the International Covenant on Civil and Political Rights (ICCPR), which sets the standards for freedom of movement as a protected right.

As a treaty to which the U.S. is a party, the ICCPR takes precedence over Federal statutes, and has also been given effect through the Airline Deregulation Act of 1978, which requires the TSA to “consider the public right of freedom of transit”, a right defined by the ICCPR. All Federal agencies have been ordered by Presidential Directive to familiarize themselves with, and act in accordance with, the ICCPR. And the government of the U.S., in its reports on compliance with the ICCPR, has certified to the United Nations Human Rights Committee that all such agencies do, in fact, consider the ICCPR in relevant rulemakings – as the TSA has entirely failed to do in this case.

The central defect of this proposal is the TSA’s failure to recognize that freedom of assembly and movement are *rights*. I and the Identity Project will address this in more detail in our written comments, but an analysis of the impact of the proposed rules on these rights must be conducted, and an opportunity provided for comment on that analysis, before any rules are finalized.

The core of the proposed rule, obscured by the euphemistic language of “screening”, is a two-fold requirement for would-be air travellers to obtain *permission* from the government before they can travel.

First, they would have to obtain a government-issued travel document. Nothing in the proposed rules, or any other Federal regulation, entitles anyone to such a document. Passports and drivers’ licenses, for example, can be withheld for many reasons that do not constitute grounds for denial of freedom of movement. But under the proposal, if no government agency chooses to issue

you with such a credential, or if you don't qualify for one, you can't fly. If you don't already have such a document, obtaining one can take a month or more, during which time you can't fly.

Second, airlines – common carriers required by law to transport all passengers -- would be forbidden to allow anyone to board a flight unless and until the airline requests and receives explicit, per-flight, per-passenger permission in the form of a “clearance” or “matching” message.

These requirements would be enforced through a rule requiring would-be travellers, on demand, to display identity documents and to provide information to private, unregulated, commercial third parties: airlines and perhaps also their agents and contractors.

The certainty that airlines will retain all of this information in perpetuity – in order to maximize the marketing and other commercial value of this government-coerced informational windfall – renders meaningless any restrictions on which of this data is retained, or for how long, by the government itself. In the absence of any restrictions on the use or retention of this data by airlines, the data involuntarily obtained from travellers would become the sole legal property of the airlines, which they could keep forever, use, sell, or “share” with anyone, anywhere, for any purpose.

The proposal would require would-be travellers to display their ID whenever the TSA orders. But since the orders will be given to the airlines, in secret, members of the public will have no way to verify whether a demand for ID or refusal of transportation is actually based on government orders. And since the TSA refuses to say how travellers can verify the *bona fides* of people who demand ID in airports, or what redress they have when such demands are made under false pretenses, the proposed rules would leave travellers at the mercy of any identity thief who claims to be an airline contractor and demands, “Your papers, please!”

Many travellers are self-employed freelancers and sole proprietors, and the proposal would have a significant financial impact on a substantial number of these individual “small economic entities” who have to delay air travel until they can obtain prerequisite documents, or are unable to travel because they don't qualify for any acceptable documents, government agencies don't choose to issue such documents, or they don't receive “clearance” to board flights. The costs of the proposal would also include the value of their lost liberties, and the billions of dollars worth of informational property they would be forced to “give” to airlines.

The proposed rules don't say who would make the decisions of whether or not to issue travel documents or grant permission to board, what criteria or procedures they would use in making those decisions, or how those denied travel documents or denied permission to board a flight would be able to obtain judicial review of decisions to deny them their rights of assembly and movement. They fail to satisfy any of the criteria established by the ICCPR for administrative regulations burdening freedom of movement.

The TSA should withdraw the proposed rules entirely. Instead of making decisions by secret, unreviewable administrative fiat about whether to allow us to exercise our rights, why not give existing legal process a try? If you want to obtain information, ask a judge for a warrant or a subpoena. If you think you have sufficient information to justify an order restricting someone's liberty, submit it to a judge with a motion for a restraining order or an injunction.

Edward Hasbrouck  
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