

NOV 22 2021

“Freedom to Travel Act of 2021” introduced in Congress

On the 20th anniversary of the creation of the Transportation Security Administration, the [Freedom to Travel Act of 2021 \(H.R. 6030](#), “To protect the right to travel by common carrier”), has been [introduced](#) in the U.S. House of Representatives by Rep. Paul Gosar (R-AZ) and referred to the Committee on Transportation and Infrastructure and the Committee on Homeland Security.

If enacted into law, the [Freedom to Travel Act](#) would be the most significant step toward bringing the TSA within the rule of law since the creation of the TSA [20 years ago this week](#) with the enactment of the Aviation and Transportation Security Act (ATSA) in 2001. It would rein in the TSA’s ability to substitute secret, extrajudicial edicts for court orders restricting American’s rights, and would remove key barriers that have stood in the way of judicial review of TSA actions and legal redress for those whose rights have been violated.

The 20th anniversary of the creation of the TSA is an apt moment for Congress to step back from the post-9/11 panic that drove the enactment of the ATSA, take a deep breath, consider what it has actually wrought, and begin to restore the historic right to travel that the TSA has been steadily chipping away at for the entire 20 years of its existence.

The [Freedom to Travel Act](#) would create no new rights, but would codify in Federal law an explicit right to travel by common carrier. Courts have recognized such a right, but have often struggled to find an explicit source for it or to assess its significance.

Given that human rights are inherent in our humanity and don’t depend on any statute or text, it shouldn’t be surprising that they aren’t always grounded in explicit statutory language. But ambiguity as to the source of the right to travel and the obligations of common carriers has made it easier for courts to brush off complaints of violations of that right as not having stated a cognizable claim, a claim that involves a fundamental (rather than a less significant) right, or a claim for which the courts have the power to grant redress.

The [Freedom to Travel Act](#) would apply to interstate common carriers in all modes of passenger transportation: airlines, railroads including Amtrak, interstate buses, and ferries.

A common carrier, by definition, has a duty to transport all would-be passengers, but the US Department of Transportation has been lax in enforcing that obligation. The [Freedom to Travel Act](#) would create an explicit new Federal cause of action against any common carrier, person, or Federal agency that denies or refuses transportation by common carrier to any individual except on the basis of (1) failure to pay the fare or comply with the conditions of carriage in the carrier’s published tariff, (2) failure or refusal to submit to an administrative search limited to a search for weapons, explosives, or incendiary devices likely to pose a threat to the safety of the conveyance, passengers, or crew; or (3) an order from a court of competent jurisdiction.

The [Freedom to Travel Act](#) would not prohibit the TSA from keeping a “No-Fly List” of individuals who have been barred by court order from travel by air. No-fly orders could be issued by judges, under existing criteria and procedures, as conditions of release pending trial, as conditions of probation or parole, or as restraining orders or injunctions. Requirements for surrender of passports and geographic restrictions on travel are routinely included in each of these types of court orders.

But the [Freedom to Travel Act](#) would stop the TSA from trying to claim, as it has done throughout its existence, that authority to maintain a No-Fly List based on court orders (just as the list of arrest warrants maintained by the FBI in its National Crime Information Center database is based on court orders and not on FBI decisions) implicitly grants the TSA authority to [issue its own secret, extrajudicial no-fly orders by putting names on the no-fly list](#) without petitioning any court for a no-fly order.

The [Freedom to Travel Act](#) would also remove several of the [most important obstacles](#) that, in lawsuit after lawsuit, have frustrated attempts to hold the TSA accountable or to have courts review whether TSA actions comport with the U.S. Constitution and other laws.

The [Freedom to Travel Act](#) would create a private right of action for violations of the right to travel by common carrier, with victims entitled to recover modest statutory damages of between \$1000 and \$10000 (enough to prevent courts from finding that, although a right was violated, there was no cognizable “damage”) as well as attorney’s fees.

The [Freedom to Travel Act](#) would prohibit the TSA from converting its “security” checkpoints into general law enforcement checkpoints or pretexts for dragnet searches (for drugs, cash, etc.) by codifying that the only administrative search to which travelers can be required to submit must be “limited to a search for weapons, explosives, or incendiary devices.”

By codifying these rights explicitly in Federal law, the [Freedom to Travel Act](#) would make it much harder for law enforcement officers to claim “[qualified immunity](#)” for actions that violate these rights, on the grounds that these rights are not “clearly established law.”

Perhaps the most technical but one of the most significant provisions of the [Freedom to Travel Act](#) would remove the TSA from the scope of [49 U.S.C. § 46110](#). This obscure but powerful section of Federal law strips Federal District Courts of jurisdiction over challenges to any TSA “order,” and allows for “review” of those administrative orders (including no-fly orders, orders to submit to search, orders to show ID, etc.) by Circuit Courts only under extraordinarily deferential procedures. The rubber-stamp procedures for review of TSA orders mandated by [49 U.S.C. § 46110](#) require appellate judges to accept the “facts” as alleged by the TSA and the selection of evidence made by the TSA in constructing the record it provides the Court of Appeals, without adversary fact-finding. “Judicial review” of TSA orders under these procedures has proven, time after time, to be a sham.

Another technical provision of the [Freedom to Travel Act](#) would waive “sovereign immunity” with respect to TSA staff and contractors and other Federal agents who violate individuals’ right to travel. This unambiguous waiver of sovereign immunity would spare those seeking redress for the denial of their right to travel from an arcane argument that [has divided the Circuit Courts of Appeal](#) as to whether TSA staff or contractors are within the scope of an exception to an exception to sovereign immunity that would protect them from lawsuits and liability for even deliberate, malicious violations of individual rights.

Finally, the [Freedom to Travel Act](#) would repeal [49 U.S.C. § 44902\(b\)](#), which purports to grant airlines permission — contrary to their duty as common carriers — to refuse to transport any “passenger or property the carrier decides is, or might be, inimical to safety.”

Airlines have no competence or authority to impose restrictions on the right to travel, and should not be deputized by the government to make such decisions.

Repeal of [49 U.S.C. § 44902\(b\)](#) would not mean that airlines would be required to transport dangerous passengers or cargo or to ignore what they think might be threats to safety.

What it means is that, like anyone else who observes what they think might be evidence of a crime, airlines would be required to call the police to deal with it, rather than encouraged or immunized by Federal law to take vigilante action against would-be passengers.

There is ample law enforcement presence at every airport served by a scheduled airline, and police have ample authority to arrest or detain anyone they reasonably suspect of a crime. We can think of no scenario that would call for airline staff to prevent a particular person from boarding a flight but would not give police a lawful basis to detain them.

[49 U.S.C. § 44902\(b\)](#) pertains only to decisions to refuse to transport airline passengers and air cargo, which by definition are made on the ground, before a plane takes off. So repeal of [49 U.S.C. § 44902\(b\)](#), would have no effect whatsoever on the authority of the pilot-in-command and the rest of the crew to deal with exigent in-flight threats.

The No-Fly List has often been described as a list of people the government considers so dangerous as to justify preventing them from exercising their right to travel by air, but not dangerous enough to arrest or detain (even under the loose standards for police detention). The [Freedom to Travel Act](#) would correct this injustice. It would subject decisions to deprive individuals of their right to travel to the same substantive and procedural standards as decisions with respect to the exercise of all other rights.

“Reports that Americans with no criminal backgrounds have been placed on the secretive No Fly List by the FBI and the Department of Homeland Security (DHS), preventing them from air travel, are deeply troubling. There are over 81,000 individuals on the No Fly List, including 1000 American citizens, none of whom were notified or ever given a hearing. Absolutely no due process is provided to American citizens who are being stripped of a fundamental right.

According to a [statement](#) by Rep. Gosar on the introduction of the [Freedom to Travel Act](#):

Every American citizen is entitled to due process and to be told of any allegations against them and reasons for being placed on the No Fly List. The people listed should have a right to an independent tribunal to review the good faith factual basis for the listing. Currently, there is no meaningful legal redress.

Any listing based on legitimate, demonstrable, provable objective evidence that a person is a “terrorist” should be easy to present by any law enforcement agency. The secrecy and complete lack of neutral fact-finding is un-American and unconstitutional.

We commend Rep. Gosar for this important initiative, and we urge other members of Congress to co-sponsor the [Freedom to Travel Act](#) in the House, to introduce a Senate version of the same bill, and to move this bill forward to a hearing and vote in committee.

We agree with Rep. Gosar that, “Civil liberties shouldn’t be a partisan issue.” Legislation should be judged by the text of the proposed changes to the law, not by who proposes it. The [Freedom to Travel Act](#) deserves the support of everyone who believes in civil liberties.

 **Edward Hasbrouck**  Posted in [Freedom To Travel](#)  **6 Comments**

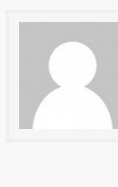
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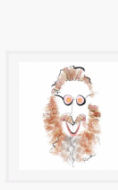
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 **Dale** - November 23, 2021 at 1:05 am
Long Overdue

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Pingback: [American Airlines: Sale on Admirals Club And Upgrade Certificates - View from the Wing](#)

 **robert roenigk** - November 27, 2021 at 7:59 am
The proposed bill seems to prohibit airlines from banning problem passengers from their flights. So-called “unruly” passengers are everyone’s problem (including fellow passengers.) Those passengers that are arrested and convicted of crimes occurring on an aircraft (physical assault, sexual assault, disabling the aircraft) have demonstrated their inability to control themselves. Perhaps they should lose their unimpeded access to future flights. The airlines currently have their own internal no-fly lists of a**holes. I probably don’t want to fly with them either.
<https://www.cnbc.com/2021/09/24/delta-wants-other-airlines-to-share-no-fly-lists-of-unruly-passengers.html>
Rather than a lifetime ban, alternative restrictions might work. Posting a cash bond or paying for an escort come to mind.

 **Edward Hasbrouck** - November 27, 2021 at 8:19 am
@robert roenigk – This bill would prohibit airlines from preventing people from flying “without a court order”. As noted in the article, this bill would not stop courts from ordering restrictions on travel — as they already do in some cases — as a condition of probation or parole for those convicted of in-flight crimes, or as part of an injunction or restraining order.

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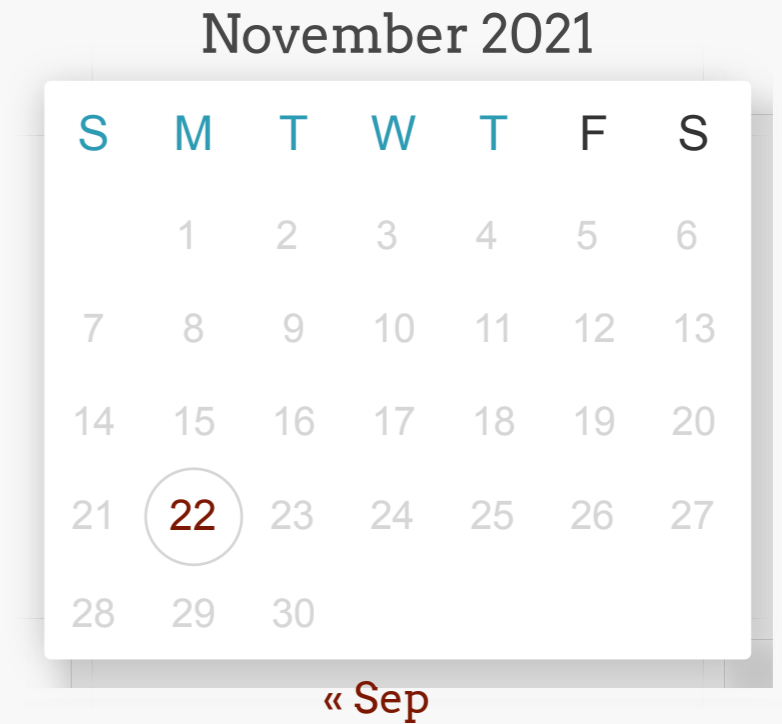
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