TAMI Hypothetical – Part 2

**JOHN DOE**
Flies LGA-ORD (LaGuardia – O’Hare)
June 2004

**AIRLINE**
Creates a PNR (“Passenger Name Record”)

**COMMERCIAL DATA VENDOR**
Provides match data

**Terrorism Screening Center (TSC)**
Provides “no fly” list

**National Counterterrorism Center (NCTC)**
Provides “stripped” version of aggregated dataset - known & suspected terrorists

**Transportation Security Administration (TSA)**
Finds a “possible” match while testing Secure Flight program
DHS/TSA Justifications

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[Except 552(e) was made 552(f) by section 1802(b) of Pub. L. 99–570 but corresponding change was not made to 552a(a)(1)]
Challenge

(1) If we write rules that don’t dynamically call the actual statute (the way we wrote the “deadbeat dad” rule), we can’t tell that the law has changed.

(2) If we do call the law dynamically, how do we address scrivener’s errors?
<table>
<thead>
<tr>
<th>5 USC § 552a</th>
<th>Is a</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 USC § 552a</td>
<td>Popular Name</td>
<td>Privacy Act</td>
</tr>
<tr>
<td>5 USC § 552a</td>
<td>Regulates (applies to)</td>
<td>Privacy Act: Agency[^1]</td>
</tr>
<tr>
<td>Privacy Act: Agency</td>
<td>Definition</td>
<td>5 USC § 552(e)[^2]</td>
</tr>
<tr>
<td>5 USC § 552</td>
<td>Popular Name</td>
<td>Freedom of Information Act</td>
</tr>
<tr>
<td>Freedom of Information Act</td>
<td>Acronym</td>
<td>FOIA</td>
</tr>
<tr>
<td>5 USC § 552(f)(1)</td>
<td>Defines</td>
<td>FOIA: Agency</td>
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<td>Privacy Act: Agency</td>
<td>Includes</td>
<td>FOIA: Agency</td>
</tr>
<tr>
<td>FOIA: Agency</td>
<td>Is</td>
<td>Executive Branch</td>
</tr>
<tr>
<td>Executive Branch</td>
<td>Includes</td>
<td>Executive Department</td>
</tr>
<tr>
<td>Executive Branch</td>
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<td>Military</td>
<td>Is</td>
<td>Department of Defense</td>
</tr>
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<td>Includes</td>
<td>Government Corporation</td>
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<td>Executive Branch</td>
<td>Includes</td>
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<td>Executive Branch</td>
<td>Includes</td>
<td>Independent Regulatory Agency</td>
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<tr>
<td>FOIA: Agency</td>
<td>Definition also</td>
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<td>FOIA: Agency</td>
<td>Includes</td>
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<td>5 USC § 551(1)</td>
<td>Defines</td>
<td>Agency3</td>
</tr>
<tr>
<td>Agency3</td>
<td>Is</td>
<td>Authority of US Government</td>
</tr>
<tr>
<td>Agency3</td>
<td>Is not (excludes)</td>
<td>Congress</td>
</tr>
<tr>
<td>Agency3</td>
<td>Is not (excludes)</td>
<td>US courts</td>
</tr>
<tr>
<td>Agency3</td>
<td>Is not (excludes)</td>
<td>US territorial government</td>
</tr>
<tr>
<td>US Territorial Government</td>
<td>Is</td>
<td>Puerto Rico</td>
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[^1]: “Agency” is used by other statutes with other definitions.
[^2]: This is an error. 5 USC § 552(e) was moved to 5 USC § 552(f) in 1999.
(3) If we call a rule that references other rules, we need to dynamically call them, too.

(4) If the law uses a word or phrase that has a legal meaning but doesn’t provide that meaning (i.e., “US territorial government”), how do we recognize that? How do we dynamically find the meaning (i.e., find and interpret 48 USC that has sections on the territories)?
DHS/TSA Justifications

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**6 USC § 111(a): “There is Established a Department of Homeland Security, as an executive department of the United States within the meaning of title 5.”**
Challenge

(5) If the Government’s justification may contain a law, do we have to anticipate every possible answer in advance (i.e., identify everything that could be an “agency”)?
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**5 USC § 552a(a)(5):** “the term ‘system of records’ means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual”
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FR Vol 70, No 119 pp. 36321
"Data are retrievable by the individual's name or other identifier, as well as non-identifying information."

5 USC § 552a(a)(5): “the term ‘system of records’ means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual"
Challenge

(6) What if an agency is arguing that it’s not covered by this law?

(1) If it argues that the system is not under its control?

(2) If it argues that the records are not retrieved by an identifying particular?
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**FR Vol 70, No 119 pp. 36320**
“(a) Individuals traveling within the United States by passenger air transportation on certain domestic flights completed in June 2004”

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- **Assume “individuals” included**

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- **FR Vol 70, No 119**
  - pp. 36320
  - “(a) Individuals traveling within the United States by passenger air transportation on certain domestic flights completed in June 2004”
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(7) The US Government does not have a list of its citizens. How do we decide if an agency is right when it decides that there are or are not “individuals” in its system?
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The SORN appears at FR Vol 70, No 119 pp. 36319-24

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Challenge

(8) When an agency says that it has published an appropriate SORN, how do we:

(1) Check to see if there is a SORN at the Federal Register volume and page number given?

(2) Check to see if the SORN is about the correct subject?
DHS/TSA Justifications

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5 USC § 552a(e): “Each agency that maintains a system of records shall (1) maintain in its records only such information about a person as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute…”

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Meets SORN Requirements by Explicitly describing
- The legally authorized purpose for collecting

Transportation Security Administration (TSA)
- Finds a “possible” match while testing Secure Flight program
- The SORN appears at FR Vol 70, No 119 pp. 36319-24

DHS/TSA Justifications

John Doe
- Flies LGA-ORD (LaGuardia – O’Hare)
- June 2004

Airline
- Creates a PNR (“Passenger Name Record”)

Commercial Data Vendor
- Provides match data

Terrorism Screening Center (TSC)
- Provides “no fly” list

National Counterterrorism Center (NCTC)
- Provides “stripped” version of aggregated dataset - known & suspected terrorists
5 USC § 552a(e): “Each agency that maintains a system of records shall (1) maintain in its records only such information about a person as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute…”

FR Vol 70, No 119 p. 36320: “Authority for maintenance of the system: 49 USC § 114, 44901, 44903”

Meets SORN Requirements by Explicitly describing

The legally authorized purpose for collecting

required to be accomplished by statute…"

The data is about covered “individuals”

The data is used in a “System of Records”

an “agency” covered by this law

The SORN appears at FR Vol 70, No 119 pp. 36319-24

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John Doe Flies LGA-ORD (LaGuardia – O’Hare) June 2004

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Transportation Security Administration (TSA) Finds a “possible” match while testing Secure Flight program
Challenge

(9) The statutes cited are quite large. How do we find the relevant subsection if the agency doesn’t provide it in the SORN?
5 USC § 552a(e): “Each agency that maintains a system of records shall (1) maintain in its records only such information about a person as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute…”

49 USC § 114(a): “The Transportation Security Administration Shall be an administration of The Department of Transportation

FR Vol 70, No 119 p. 36320: “Authority for maintenance of the system: 49 USC § 114, 44901, 44903”

Meets SORN Requirements by Explicitly describing the legally authorized purpose for collecting

Permitted to Collect and Match this Information Covered by Privacy Act 5 USC § 552a

Covered Because DHS is an “agency” covered by this law

The data is used in a “System of Records”

The data is about covered “individuals”

Transportation Security Administration (TSA) Finds a “possible” match while testing Secure Flight program

The SORN appears at FR Vol 70, No 119 pp. 36319-24

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DHS/TSA Justifications

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AIRLINE
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COMMERCIAL DATA VENDOR
Provides match data

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Finds a “possible” match while testing Secure Flight program
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FR Vol 70, No 119 p. 36320:
“Authority for maintenance of the system:
49 USC § 114, 44901, 44903”

5 USC § 552a(e): “Each agency that maintains a system of records shall (1) maintain in its records only such information about a person as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute…”

The data is used in a “System of Records”
The data is about covered “individuals”
[Except 6 USC § 203(2) transferred TSA to the Department of Homeland Security in 2003.]

5 USC § 552a(e): “Each agency that maintains a system of records shall (1) maintain in its records only such information about a person as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute…”

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[Except 6 USC § 203(2) transferred TSA to the Department of Homeland Security in 2003.]
Challenge

(10) Variant of Challenge 1: The law is still there, but it refers to an entity that was changed by a different law.
DHS/TSA Justifications

| JOHN DOE |
| Flies LGA-ORD (LaGuardia – O’Hare) |
| June 2004 |

| AIRLINE |
| Creates a PNR ("Passenger Name Record") |

| COMMERCIAL DATA VENDOR |
| Provides match data |

| 5 USC § 552a(e): “Each agency that maintains a system of records shall (1) maintain in its records only such information about a person as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute…” |

FR Vol 70, No 119 p. 36320: “Authority for maintenance of the system: 49 USC § 114, 44901, 44903”

49 USC § 114(a): “The Transportation Security Administration Shall be an administration of The Department of Transportation”

[Except 6 USC § 203(2) transferred TSA to the Department of Homeland Security in 2003.]

49 USC § 44901(a): “The Undersecretary of Transportation for Security shall provide for the screening of all passengers . . . that will be carried aboard a passenger aircraft”

| The data is about covered "individuals" |

| The SORN appears at FR Vol 70, No 119 pp. 36319-24 |

| Required to Publish a “System of Records Notice” (SORN) |

| Meets SORN Requirements by Explicitly describing the legally authorized purpose for collecting |

| Transportation Security Administration (TSA) Finds a “possible” match while testing Secure Flight program |

| DHS is an "agency" covered by this law |

| The data is used in a “System of Records” |

| Covered because |

| Permitted to Collect and Match this Information |

| Covered by Privacy Act 5 USC § 552a |

| Authority for maintenance of the system: 49 USC § 114, 44901, 44903” |

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DHS/TSA Justifications

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49 USC § 114, 44901, 44903”

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[Except 6 USC § 203(2) transferred TSA to the Department of Homeland Security in 2003.]

49 USC § 44901(a): “The Undersecretary of Transportation for Security shall provide for the screening of all passengers . . . that will be carried aboard a passenger aircraft”

49 USC § 44903(j)(2)(A): “The Secretary of Transportation Shall ensure that the Computer-Assisted Passenger Prescreening System, Or any successor system – (i) is used To evaluate all passengers Before they board An aircraft”
Challenge

(11) How do we put all of these things together to conclude that the purpose is authorized?

(12) Even harder, how do we decide that this data is “relevant and necessary” to the authorized purpose?
DHS/TSA Justifications

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Permitted to Collect and Match this Information

Required to Publish a "System of Records Notice" (SORN)

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Finds a "possible" match while testing Secure Flight program

The SORN appears at FR Vol 70, No 119 pp. 36319-24

Meets SORN Requirements by Explicitly describing

The legally authorized purpose for collecting

The three sources of data
The SORN appears at FR Vol 70, No 119 pp. 36319-24

Required to Publish a “System of Records Notice” (SORN)

Covered by Privacy Act
5 USC § 552a

Covered Because
DHS is an “agency” covered by this law

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5 USC § 552a(e): “Each agency that maintains a system of records shall… (4)...publish in the Federal Register …a notice of the existence and character of the system of records, which notice shall include … (I) the categories of sources of records in the system”
**DHS/TSA Justifications**

**JOHN DOE**
Flies LGA-ORD (LaGuardia – O’Hare) June 2004

**AIRLINE**
Creates a PNR (“Passenger Name Record”)

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Provides match data

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Provides “stripped” version of aggregated dataset - known & suspected terrorists

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**FR Vol 70, No 119, p. 36320:**
“Categories of Records in the System: (a) . . . (PNRs) For certain . . . flights completed in June 2004 provided By aircraft operators . . . ; (b) Information obtained From the Terrorist Screening Center about individuals Known or reasonably suspected to be . . . related to Terrorism; . . . (e) commercial data purchased . . . for The purpose of comparing such data with June 2004 PNRs”

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**5 USC § 552a(e):**
“Each agency that maintains a system of records shall… (4)… publish in the Federal Register . . . a notice of the existence and character of the system of records, which notice shall include . . . (l) the categories of sources of records in the system”

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**Transportation Security Administration (TSA)**
Finds a “possible” match while testing Secure Flight program

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The SORN appears at FR Vol 70, No 119 pp. 36319-24

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Meets SORN Requirements by Explicitly describing

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The three sources of data
5 USC § 552a(e): “Each agency that maintains a system of records shall…(4)... publish in the Federal Register a notice of the existence and character of the system of records, which notice shall include…(i) the categories of sources of records in the system”

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DHS/TSA Justifications

JOHN DOE
Flies LGA-ORD (LaGuardia – O’Hare) June 2004

AIRLINE
Creates a PNR (“Passenger Name Record”)

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Provides match data

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Provides “stripped” version of aggregated dataset - known & suspected terrorists

Transportation Security Administration (TSA)
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Meets SORN Requirements by Explicitly describing
The legally authorized purpose for collecting
The three sources of data

FR Vol 70, No 119, p. 36320:
“Categories of Records in the System: (a)...(PNRs) For certain...flights completed in June 2004 provided by aircraft operators...;(b) Information obtained from the Terrorist Screening Center about individuals known or reasonably suspected to be related to Terrorism; ...(e) commercial data purchased...for The purpose of comparing such data with June 2004 PNRs”

Covered because DHS is an “agency” covered by this law

The data is used in a “System of Records”

Covered

Permitted to Collect and Match this Information

Covered by Privacy Act 5 USC § 552a

‘John Doe’ Flies LGA-ORD (LaGuardia – O’Hare) June 2004

AIRLINE
Creates a PNR (“Passenger Name Record”)

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Provides match data

Terrorism Screening Center (TSC)
Provides “no fly” list

National Counterterrorism Center (NCTC)
Provides “stripped” version of aggregated dataset - known & suspected terrorists
Challenge

(13) How do we reason that the items listed in the SORN are in fact the items collected in the system?
DHS/TSA Justifications

5 USC § 552a(e): “Each agency that maintains a system of records shall... (4)...publish in the Federal Register...a notice of the existence and character of the system of records, which notice shall include... (l) the categories of sources of records in the system”

FR Vol 70, No 119, p. 36320: “Categories of Records in the System: (a) ... (PNRs) For certain ...flights completed in June 2004 provided by aircraft operators ...; (b) Information obtained from the Terrorist Screening Center about individuals known or reasonably suspected to be ...related to terrorism; ... (e) commercial data purchased ...for the purpose of comparing such data with June 2004 PNRs”

AIRLINE
Creates a PNR (“Passenger Name Record”)

JOHN DOE
Flies LGA-ORD (LaGuardia – O’Hare) June 2004

DHS/TSA
Required to Publish a “System of Records Notice” (SORN)

Privacy Act
Meets SORN Requirements by Explicitly describing
The legally authorized purpose for collecting

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The three sources of data
The three sources of data

National Counterterrorism Center (NCTC)
Provides “stripped” version of aggregated dataset - known & suspected terrorists

Terrorism Screening Center (TSC)
Provides “no fly” list

Commercial Data Vendor
Provides match data
The SORN appears at FR Vol 70, No 119 pp. 36319-24

Required to Publish a “System of Records Notice” (SORN)

Permitted to Collect and Match this Information

Covered by Privacy Act 5 USC § 552a

Covered Because

DHS is an “agency” covered by this law

The data is used in a “System of Records”

The data is about covered “individuals”

JOHN DOE
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Meets SORN Requirements by Explicitly describing
The legally authorized purpose for collecting
The three sources of data
Matching PNR’s to Commercial Data
Matching PNR’s to TSC data

DHS/TSA Justifications
DHS/TSA Justifications

5 USC § 552a(e): “Each agency that maintains a system of records shall... (4)...publish in the Federal Register ...a notice of the existence and character of the system of records, which notice shall include ... (C) the categories of records maintained in the system”

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Covered Because
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Provides “stripped” version of aggregated dataset - known & suspected terrorists

John Doe Flies LGA-ORD (LaGuardia – O’Hare) June 2004
AIRLINE

DHS/TSA Justifications

5 USC § 552a(e): “Each agency that maintains a system of records shall... (4)...publish in the Federal Register ...a notice of the existence and character of the system of records, which notice shall include … (C) the categories of records maintained in the system”

FR Vol 70, No 119, p. 36320: “Categories of Records in the System: (d) . . . (PNRs) that were enhanced with certain . . . information obtained from commercial data; (f) results of comparisons of individuals identified in PNRs to watch lists obtained from the Terrorist Screening Center

5 USC § 552a: Covered by Privacy Act

Transportation Security Administration (TSA)

Meets SORN Requirements by Explicitly describing
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The three sources of data
Matching PNR’s to Commercial Data
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Covered by Privacy Act

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DHS/TSA Justifications
Note

The Privacy Act doesn’t require that an agency tell what it’s doing with data internally. That’s often what people really want to know.
DHS/TSA Justifications

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June 2004

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Provides “stripped” version of aggregated dataset - known & suspected terrorists

Permitted to Collect and Match this Information

Covered by Privacy Act
5 USC § 552a

Covered Because
- DHS is an “agency” covered by this law
- The data is used in a “System of Records”
- The data is about covered “individuals”

Required to Publish a “System of Records Notice” (SORN)

Transportation Security Administration (TSA)
Finds a “possible” match while testing Secure Flight program

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Meets SORN Requirements by Explicitly describing
- The legally authorized purpose for collecting
- The three sources of data
- Matching PNR’s to Commercial Data
- Matching PNR’s to TSC data

The data is used in a “System of Records”

The data is about covered “individuals”
The SORN appears at FR Vol 70, No 119 pp. 36319-24

**JOHN DOE**
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Provides “no fly” list

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Provides “stripped” version of aggregated dataset - known & suspected terrorists

**Permitted to Collect and Match this Information**

**Transportation Security Administration (TSA)**
Finds a “possible” match while testing Secure Flight program

**Covered by Privacy Act 5 USC § 552a**

**Covered Because**

- DHS is an “agency” covered by this law
- The data is used in a “System of Records”
- The data is about covered “individuals”

**Required to Publish a “System of Records Notice” (SORN)**

**Meets SORN Requirements by Explicitly describing**

- The legally authorized purpose for collecting
- The three sources of data
- Matching PNR’s to Commercial Data
- Matching PNR’s to TSC data

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STAY TUNED

For the next episode, when…
**TAMI Hypothetical – Part 3**

**JOHN DOE**
Flies LGA-ORD (LaGuardia – O’Hare)
June 2004

**AIRLINE**
Creates a PNR (“Passenger Name Record”)

**COMMERCIAL DATA VENDOR**
Provides match data

**Terrorism Screening Center (TSC)**
Provides “no fly” list

**National Counterterrorism Center (NCTC)**
Provides “stripped” version of aggregated dataset - known & suspected terrorists

**Transportation Security Administration (TSA)**
Finds a “possible” match while testing Secure Flight program

**And Passes the data to**

**Joint Terrorism Task Force (JTTF)**

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And, then...
TAMI Hypothetical – Part 3

JOHN DOE
Flies LGA-ORD (LaGuardia – O’Hare)
June 2004

AIRLINE
Creates a PNR (“Passenger Name Record”)

TRANSPORTATION SECURITY ADMINISTRATION (TSA)
Finds a “possible” match while testing Secure Flight program

COMMERCIAL DATA VENDOR
Provides match data

TERRORISM SCREENING CENTER (TSC)
Provides “no fly” list

NATIONAL COUNTERTERRORISM CENTER (NCTC)
Provides “stripped” version of aggregated dataset - known & suspected terrorists

JOINT TERRORISM TASK FORCE (JTTF)
Seeks evidence of other clear legal violation

NY STATE DEPT. OF STATE
Website search reveals John Doe is “deadbeat dad”
We’ll also ask...
The Hidden Questions

JOHN DOE
Flies LGA-ORD
(LaGuardia – O’Hare)
June 2004

AIRLINE
Creates a PNR
(“Passenger Name Record”)

TRANSPORTATION SECURITY ADMINISTRATION (TSA)
Finds a “possible” match while testing Secure Flight program

COMMERCIAL DATA VENDOR
Provides match data

TERRORISM SCREENING CENTER (TSC)
Provides “no fly” list

NATIONAL COUNTERTERRORISM CENTER (NCTC)
Provides “stripped” version of aggregated dataset - known & suspected terrorists

Is there a SORN that permits this data to pass? Is one required?

Is there a SORN that permits this data to pass? Is one required?
Note

• As discussed in September 22 class,
  – US Code text can be found on the web in a number of places
    • Legal Information Institute
      – www.law.cornell.edu
      – Select “Constitution and Codes”
      – Select “US Code”
      – Type the cite into the boxes and press enter
  – Best source for Federal Register is probably
    • US Government Printing Office
      – http://www.gpoaccess.gov/fr/