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THE WATCHLIST: IMPROVING THE TRANSPARENCY, ACCURACY, EFFICIENCY, AND ACCOUNTABILITY OF THE TERRORIST SCREENING DATABASE

by

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The government's unclassified terror watchlist, the Terrorist Screening Database (TSDB), has grown dramatically, stressing government screening and counterterrorism resources. The TSDB has been criticized for lacking independent oversight and transparency in its operations, which has led some to allege it is discriminatory toward minority communities. How should the TSDB be improved to improve transparency, efficiency, and accuracy, and to decrease secrecy and perceived bias? This thesis is a policy analysis that examines the TSDB administrative processes to determine the extent to which the structure and function serve or compromise national security. It also considers the difficulties the system of redress poses for those classified as a "Known or Suspected Terrorist" by their inclusion on the watchlist. This thesis recommends that the evidentiary standard needed to list a person on the watchlist should not be changed, but the government should extend the procedures recently adopted for No Fly subjects to all citizens and lawfully admitted permanent residents who request redress of their watchlist status. Judicial oversight and fixed review periods should be added to the redress process to facilitate independent review of the government's watchlisting determinations and ensure that all information contained in the TSDB is regularly reviewed.

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ABSTRACT

The government's unclassified terror watchlist, the Terrorist Screening Database (TSDB), has grown dramatically, stressing government screening and counterterrorism resources. The TSDB has been criticized for lacking independent oversight and transparency in its operations, which has led some to allege it is discriminatory toward minority communities. How should the TSDB be improved to improve transparency, efficiency, and accuracy, and to decrease secrecy and perceived bias? This thesis is a policy analysis that examines the TSDB administrative processes to determine the extent to which the structure and function serve or compromise national security. It also considers the difficulties the system of redress poses for those classified as a "Known or Suspected Terrorist" by their inclusion on the watchlist. This thesis recommends that the evidentiary standard needed to list a person on the watchlist should not be changed, but the government should extend the procedures recently adopted for No Fly subjects to all citizens and lawfully admitted permanent residents who request redress of their watchlist status. Judicial oversight and fixed review periods should be added to the redress process to facilitate independent review of the government's watchlisting determinations and ensure that all information contained in the TSDB is regularly reviewed.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACLU	American Civil Liberties Union
BRIDGES	Building Respect in Diverse Groups to Enhance Sensitivity
CAPPS	Computer Assisted Passenger Prescreening System
CBP	Customs and Border Protection
CIA	Central Intelligence Agency
CIPA	Classified Information Procedures Act
CIR	Central Intelligence Report
DHS	Department of Homeland Security
DOJ	Department of Justice
E-Selectee	Expanded Selectee
FAA	Federal Aviation Administration
FATA	Federally Administered Tribal Areas
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FOIA	Freedom of Information Act
FPR	Fichier des Personnes Recherchées
FSPRT	Fichier des Signalements pour la Prévention et la Radicalisation à caractère Terroriste
HSPD-6	Homeland Security Presidential Directive-6
IBIS	Interagency Border Inspection System
INS	Immigration and Naturalization Service
JFK	John F. Kennedy Airport
KST	known or suspected terrorist
NAILS	National Automated Lookout System
NCIC	National Crime Information System
NCTC	National Counterterrorism Center
NGO	non-governmental organization
NSLU	National Security Law Unit
ODNI	Office of the Director for National Intelligence
OIG	Office of the Inspector General

OIP	Office of Information Policy
PIVF	Passenger Identity Verification Form
PMOI	People's Mojahedin Organization of Iran
SCRT	Central Territorial Intelligence Service
TECS	Treasury Enforcement Communications System
TIDE	Terrorist Identities Datamart Environment
TRIP	Traveler Redress Inquiry Program
TSA	Transportation Security Administration
TSC	Terrorist Screening Center
TSDB	Terrorist Screening Database
TTIC	Terrorist Threat Integration Center
VGTOF	Violent Gang and Terrorist Organization File

EXECUTIVE SUMMARY

The United States has developed and utilized terrorist watchlists for over 30 years to identify, track, and screen terrorists. At first, these watchlists evolved to meet the specific requirements of individual agency missions. The examinations of the failure to detect, deter, and defeat the 9/11 terror attacks revealed weaknesses in the design of the watchlists. As a result, the government developed new tools that linked various information systems used by law enforcement, intelligence, and homeland security organizations to a common, unclassified terror watchlist known as the Terrorist Screening Database (TSDB). This database of terrorist identities is overseen by a new bureaucratic enterprise known as the Terrorist Screening Center. Reforms of the watchlist enterprise have led to a dramatic expansion of the TSDB that now includes over one million separate identities.

The consequences of the rapidly expanding TSDB are fourfold. The guidelines and procedures governing the watchlist place too great an emphasis on the judgment of individual agents for the watchlisting of persons without independent oversight. The growth of the number of persons on the watchlist has created a system that is difficult to administer, which has led to the inclusion of inaccurate and sometimes questionable information. The alarms triggered by these subjects are so numerous that they have outstripped the government's resources devoted to conducting screening and law enforcement activities. The current redress process is secret and deliberately opaque that leads to a feeling among some groups that the government's practices are unfair or discriminatory toward minority communities, particularly those with high concentrations of Arab and Muslim Americans. The animus inspired by these feelings likely creates a barrier to effective cooperation with these same groups.

Civil rights groups and legal scholars have made numerous recommendations to improve the government's watchlist enterprise. These groups have called upon the government to raise the evidentiary standard for including persons on the TSDB and to improve the procedures for auditing the information included in the database. They have called for independent oversight of the government's watchlist determinations. They have also called for improvements to the government's watchlist redress procedure to increase

transparency and fairness. Some have called for a reorganization of the watchlist bureaucracy to improve efficiency and reduce redundancy.

The analysis of the watchlist enterprise and the criticism from civil libertarians has revealed a series of recommendations. First, the evidentiary standard needed to list a person on the watchlist should not be changed. Second, the government should extend the procedures recently adopted for No Fly subjects to all citizens and lawfully admitted permanent residents who request redress of their watchlist status. Third, judicial oversight should be added to the redress process to facilitate an independent review of the government's watchlisting determinations. Finally, the government should study the feasibility of adopting fixed review periods to ensure that all information contained in the TSDB is regularly reviewed.

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I. INTRODUCTION

The United States began developing terrorist screening watchlists in the 1980s to meet the growing threat of international terrorism against the United States. These watchlists evolved over time to meet the needs of many different agencies, but that very broad reliance created a single point of failure that allowed two of the 9/11 hijackers to slip into the United States undetected. The investigations that followed led to reforms of the watchlist enterprise that substantially increased the sophistication of the lists, but also their size, and in the process, ensnared thousands of U.S. citizens and lawful permanent residents in a web of suspicion. As a result, these persons are subject to close scrutiny and extensive security screening, but have extremely limited avenues to seek redress of their status as a suspected terrorist.

A. PROBLEM STATEMENT

The examinations of the homeland security enterprise following the 9/11 attacks revealed deficiencies in the government's terrorist watchlist enterprise that failed to identify some of the attackers who were known terrorists. As a result, the government sought to enhance the watchlisting enterprise through a series of reforms. One new unclassified watchlist, the Terrorism Screening Database (TSDB), began operation in 2004.[1] The TSDB is an essential tool for homeland security practitioners to identify, track, and gather intelligence on known or suspected terrorists both inside and outside the United States. The TSDB contains the names of all known or suspected terrorists, and links this information to a variety of other databases that support law enforcement and security screening activities.[2] The government applies a reasonable suspicion standard to watchlisted persons, defined by former Terrorist Screening Center (TSC) Director Christopher Piehota as, "articulable facts which, taken together with rational inferences,

[1] Office of the Inspector General, "Chapter 5: The Consolidated Watch List," in *Review of the Terrorist Screening Center*, Audit Report 05-27 (Washington, DC: Office of the Inspector General, 2005), https://oig.justice.gov/reports/FBI/a0527/chapter5.htm.

[2] Terrorist Screening Center, *Terrorist Screening Center—FAQs* (Washington, DC: Federal Bureau of Investigation, 2017), https://www.fbi.gov/file-repository/terrorist-screening-center-frequently-asked-questions.pdf/view.

reasonably warrant the determination that an individual 'is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities.'"[3] The standard of reasonable suspicion and its sister, probable cause, are familiar to law enforcement officers, who apply them daily in the field.

The government's watchlisting determinations, unlike those of the law enforcement officer on the street, however, are not overseen by a judge. In fact, the TSC manages the application of this standard without independent oversight. The same individuals who are accountable for preventing terror attacks must decide if the information meets the bar for inclusion, which creates a disincentive for a vigorous application of the standard. It is not necessary to conjure up an evil bureaucrat, gleefully adding name after name of innocent Americans to the watchlist; instead, this thesis assumes that those who apply the standard are well-meaning and diligent professionals with a herculean task of accurately predicting who is or is not a terrorist, within the bounds of policy and the law. Given the responsibility to adjudicate information that may be borderline, it is not difficult to imagine these agents erring on the side of caution; they are in the unenviable position of attempting to predict whether an individual will commit some future act of terror. Sometimes, the agents have been wrong; several instances have arisen where the Federal Bureau of Investigation (FBI) failed to watchlist individuals who were suspected of terrorist activity and subsequently investigated. The result of this failure is measured in American lives lost.

Since its inception—in part because of the complexity and difficulty of the mission, and in part due to design flaws or unintended consequences—the TSDB has been plagued

[3] *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe: Hearing before the Subcommittee on Transportation Security of the House Committee on Homeland Security, House of Representatives*, 113th Cong., 2nd sess., September 18, 2014, https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg93366/html/CHRG-113hhrg93366.htm.

by problems of transparency, accuracy, efficiency, and accountability.[4] The watchlist is choked with over a million names, and secrecy cloaks its procedures. The government does not inform those it adds to the TSDB; many come to suspect they are on the list only after experiencing repeated instances of extra security screening at airports or during border inspection. According to the American Civil Liberties Union (ACLU), "Placement on such watchlists can entail life-altering consequences without any meaningful mechanism for determining, let alone contesting, one's watchlisting status."[5] Those who suspect they are on the list must often resort to expensive and time-consuming litigation. Rather, the TSC evaluates information supplied by redress applicants to the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP), the government's sole form of administrative redress, to determine if persons listed on the database continue to meet the criteria to remain on the list. This evaluation, too, is done in secret and without any independent oversight. Applicants do not have any opportunity to review the allegations or any incriminating information. It appears impossible for innocent people, without knowing the charges or evidence against them, to offer meaningful information in their own defense. In the end, many applicants to DHS TRIP receive only a generic form letter stating the review is complete; the government neither confirms nor denies the applicant's presence on the watchlist.[6] This secrecy is curious, considering that in many instances, government agents investigating the information that resulted in the subject's watchlist status in the first

[4] Department of Justice, *Review of the Terrorist Screening Center; Eileen Larence, Terrorist Watch List Screening: Opportunities Exist to Enhance Management Oversight, Reduce Vulnerabilities in Agency Screening Processes, and Expand Use of the List*, GAO-08-110 (Washington, DC: Government Accountability Office, 2007); Office of the Inspector General, "Chapter 5"; Department of Justice, *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations*, Audit Report 14-16 (Washington, DC: Government Printing Office, 2014), https://www.hsdl.org/?abstract&did=751149; Eric Hedlund, "Good Intentions, Bad Results, and Ineffective Redress: The Story of the No Fly and Selectee Lists and a Suggestion for Change," *Journal of Air Law and Commerce* 79, no. 3 (2014): 606, https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1353&context=jalc.

[5] American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences* (New York: American Civil Liberties Union, 2014), 10, https://www.aclu.org/sites/default/files/assets/watchlist_briefing_paper_v3.pdf.

[6] DHS will inform No Fly listed applicants of their status on that list under guidelines established after litigation in *Latif v. Lynch*; Jared P. Cole, *Terrorist Databases and the No Fly List: Procedural Due Process and Hurdles to Litigation*, CRS Report No. R43730 (Washington, DC: Congressional Research Service, 2015), https://fas.org/sgp/crs/homesec/R43730.pdf.

place have already interviewed subjects.[7] The evidentiary standard used by the government is so low that inclusion on the watchlist fails as a reliable indicator that a person is an actual threat, and its unrefined use by agencies to determine the targets of extra screening drains limited resources from other law enforcement and security activities. Together, these issues limit the effectiveness of the TSDB as a national security tool.

Civil rights groups and legal scholars have called for changes to the watchlist guidelines to address these shortcomings. Some have recommended that the standard for inclusion be raised and redefined to increase the evidentiary standard for inclusion on the list.[8] Others have called for a revised system of redress that incorporates some level of review from an independent panel.[9] So far, agents and administrators who manage the watch list have ignored these calls, as well as the legislators who can institute a statutory requirement. The number of persons affected by the watchlist represents a tiny constituency, which may explain inaction on the part of legislators. Another explanation may be the fear some decision makers have of letting a possible attacker slip by. These same persons ignore the toll the ever-expanding list has on the finite screening and investigative resources of the homeland security enterprise. Only the judiciary has actually mandated change to the redress system in recent rulings on two No Fly cases, but these same rulings have reinforced the sufficiency of the TSC's watchlist standard.

B. RESEARCH QUESTION

How should the TSDB be improved to improve transparency, efficiency, and accuracy, and to decrease secrecy and perceived bias?

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[7] It is common practice for criminal investigators to interview subjects regarding terrorism allegations. Although not a hard and fast rule, it is extremely unlikely that a person accused of involvement in terrorist activity will be watchlisted without being interviewed by an investigator absent some overriding need for secrecy connected to an ongoing investigation requiring a higher degree of security.

[8] American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences*, 9.

[9] Chelsea Creta, "The No-Fly List: The New Redress Procedures, Criminal Treatment, and the Blanket of National Security," *Washington and Lee Journal of Civil Rights and Social Justice* 23, no. 1 (September 2016): 269–273, http://scholarlycommons.law.wlu.edu/crsj/vol23/iss1/7; Hedlund, "Good Intentions, Bad Results, and Ineffective Redress," 615–623.

C. LITERATURE REVIEW

The literature regarding the TSDB generally fits into three specific categories: government documents, external criticism from civil rights and legal watchdogs, and legal documents resulting from litigation instigated by those attempting to be removed from the watchlist. These documents, viewed as a whole, illustrate the two predominant views of government watchlists. The first view, expressed primarily by government officials and legislators, argues for the necessity and fairness of government's watchlist activities that are by design conducted in secret to protect the national security of the United States. The other side, made up of civil rights activists and legal scholars, finds those same activities to be too flawed to be effective and an infringement on the rights of U.S. persons. The focus of these two arguments is the person, protected on one side from the amorphous terrorist threat and trapped by an inescapable web of government suspicion, bureaucracy, and unnecessary secrecy on the other. This secrecy, necessary or not, impedes discourse and prevents easy examination.

The government illustrates the argument for the improved watchlists using the demonstrated flaws in the previous watchlist system. This justification appears in the literature in government documents. Some government documents, like the *Final Report of the National Commission on Terrorist Attacks upon the United States*, illuminate the historical development of the pre-9/11 watchlists and lay bare the flaws that prevented them from working as designed.[10] Primary among these flaws is the culture of secrecy that prevented information from being shared among the various agencies comprising the counterterror enterprise. This culture created silos that prevented critical information regarding terrorist threats received by intelligence agencies to move to other agencies with the responsibility to watchlist and screen for terrorist threats. The value of these documents is greater because they fully describe the government's errors and inept watchlist process that is the hallmark of pre-9/11 practices.

[10] National Commission on Terrorist Attacks upon the United States, *Final Report of the National Commission on Terrorist Attacks upon the United States* (Palmer, AK: Forms in Word, 2004), loc. 3248 of 17890, Kindle.

Fact sheets distributed by the organizations that administer the watchlist describe the general process and standards employed to enter names into the database. These documents generally detail how the standards and processes protect the civil rights and liberties of U.S. persons. However, the actual operation of the watchlist occurs in secret, and the guidebooks and procedures used by government agents to conduct their activities are classified or administratively controlled.[11] Journalists Jeremy Scahill and Ryan Devereaux, reporting on the TSC's watchlist guidance, noted that the government manual contained guidance allowing loopholes that render the standard meaningless.[12] Their article did not include a government response to their criticism, but their allegations were substantiated in legal findings that an individual was added to the TSDB based on a classified exemption to the reasonable suspicion standard.[13]

Reports from internal government watchdogs appear to validate some of these concerns. The Department of Justice (DOJ) Office of the Inspector General (OIG) issued a report in May 2009 that found FBI agents failed to follow the agency's watchlist procedures, which resulted in records not being updated promptly.[14] The Inspector General found that in many cases, agents did not remove subjects from the database following the conclusion of an investigation, even when required by policy to do so. The OIG cited a specific instance in which an individual remained on the watchlist for five years after the conclusion of an investigation warranted immediate removal.[15] A later report by the OIG from March 2014 found that while the FBI had improved its procedures, evidence still showed that individuals were not being properly added or removed from the TSDB.[16]

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[11] Jeremy Scahill and Ryan Devereaux, "The Secret Government Rulebook for Labeling You a Terrorist," *The Intercept*, July 23, 2014, https://theintercept.com/2014/07/23/blacklisted/.

[12] Scahill and Devereaux.

[13] *Ibrahim v. Dep't of Homeland Sec*., 62 F. Supp. 3d 909, 923 (N.D. Cal. 2014).

[14] Department of Justice, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Audit Report 09-25 (Washington, DC: Government Printing Office, 2009): xii, https://oig.justice.gov/reports/FBI/a0925/final.pdf.

[15] Department of Justice, vi.

[16] Department of Justice, *Audit of the Federal Bureau of Investigation's Management of the Terrorist Watchlist Nominations*, Audit Report 14-16 (Washington, DC: Government Printing Office, 2014), 52–58, https://www.hsdl.org/?abstract&did=751149.

Many documents produced by civil rights groups and legal scholars criticize the government watchlists for privacy, legal, or other civil rights infringements. For example, an ACLU report issued in 2014 described a "bloated watchlist system that contains the identities of significant numbers of people who are neither known nor appropriately suspected terrorists."[17] This report condemns the government's standards as insufficient, which allows information into the database that is "stale, poorly reviewed, or of questionable reliability."[18] The report details specific examples of how the standards and practices have resulted in innocent Americans' inclusion on the government's watchlists but who are not engaged in terrorist activities.[19] It is impossible actually to demonstrate this one-sided claim of innocence because it no possible to know what information the government holds. In addition, ideas like guilt or innocence are perhaps not as valuable in the context of a government prediction of the likelihood a person is a terrorist threat. A person is innocent in the sense that an offense has not yet been committed, but it does not mean that someone is not likely to offend in the future. In one instance, the government released an unclassified summary of the allegations against a subject who is litigating his placement on the No Fly List. That summary detailed substantial specific allegations against him.[20]

The courts have been the battlefield in the struggle between the government and its critics. A number of individuals who claim to have been unjustly nominated to and kept on the watchlist have filed suit in federal court to have themselves removed from the list. Legal documents and court filings detail the government's argument for keeping secret the information regarding suspected terrorists.[21] In June 2010, the ACLU filed suit in federal

[17] American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences*, 1.

[18] American Civil Liberties Union, 2.

[19] American Civil Liberties Union, 2–8.

[20] "Kariye v. Sessions-Government's Redacted Answering Briefing," American Civil Liberties Union, March 23, 2018, https://www.aclu.org/legal-document/kariye-v-sessions-governments-redacted-answering-brief 10-11.

[21] *Ibrahim*, 912.

court on behalf of 10 Americans believed to be on the No Fly list.[22] The briefs filed in this case clearly articulate the position of the government that the redress process offers sufficient due process while protecting the government's national security interests.[23] The government's brief asserted that merely acknowledging the applicant's status on the TSDB (in this particular case the No Fly list) would "cause significant harm to national security and law enforcement operations."[24] It argued further that providing this information would allow subjects and terrorist groups to avoid surveillance and place FBI agents in danger. In addition, applicants are not entitled to information because it is generally classified and may contain intelligence from human sources, foreign governments, or other intelligence sources.[25] Other legal cases demonstrate that seemingly innocent persons have been entrapped by the government's watchlist by mistake.[26]

A few legal scholars have examined the watchlist in law review articles. These documents expand the arguments of civil rights activists by examining the government's watchlist practice from a legal perspective. For example, Eric Hedlund uses a three-pronged approach in his criticism of DHS TRIP in the *Journal of Air Law and Commerce*.[27] He questions the efficacy of DHS TRIP by noting that the applications are not adjudicated by an independent authority, but are instead reviewed only by the nominating agency. He criticizes the process as opaque, with those seeking redress generally never receiving any information regarding their status unless they are on the smaller, subset No Fly list. Finally, he notes that these issues create a cloud of illegitimacy for the process as a whole. Such articles are helpful because they illuminate the impact of case law on the government's

[22] "Kariye, Et Al. V. Sessions, Et Al.—ACLU Challenge to Government No Fly List," American Civil Liberties Union, updated March 13, 2018, https://www.aclu.org/cases/latif-et-al-v-lynch-et-al-aclu-challenge-government-no-fly-list.

[23] "Latif, et al. v. Holder, et al.—Defendants' Supplemental Brief," American Civil Liberties Union, filed October 25, 2013, https://www.aclu.org/legal-document/latif-et-al-v-holder-et-al-defendants-supplemental-brief.

[24] Latif, 8.

[25] Latif, 8.

[26] *Ibrahim*, 915.

[27] Hedlund, "Good Intentions, Bad Results, and Ineffective Redress," 612–614.

practices, which have been generally found to be lawful in the majority of the cases examined.

The literature defines an argument with two distinct sides. On one side, the government demonstrates that value and necessity of the watchlists for security, while on the other, civil rights activists and scholars establish the harm to the liberty of watchlisting persons who have not been charged or convicted in a court. The divide between these two camps is characterized by a wall of secrecy that obfuscates what is true and what is false in each's argument. The court battles that have ensued between these two camps provide some clarity. In the courts, the government has argued the necessity of secrecy. These arguments allude to how adversaries may seek to use the redress process to subvert national security by forcing the government to show its cards. Information provided by the government demonstrates not only that it has removed persons from the watchlist through its redress process, but also that in some cases, it holds substantial derogatory information on persons who have feigned innocence in court. At the same time, other cases have provided glimpses that seemingly vindicate the fears of civil rights advocates that the watchlist is populated with inaccurate information that does not meet the publicly available standard, and that the secret guidelines contain exemptions that render the government's carefully erected procedures to prevent the inclusion of persons not appropriately suspected of terrorist activity meaningless. Interwoven with this evidence are stories of the effect on those who are ensnared in the government's net. The government is mostly silent in response to the arguments of the civil libertarians, who in turn, seemingly ignore not only the necessity of a watchlist, but the obvious consequences the government is desperately trying to avoid.

D. RESEARCH DESIGN

This thesis is a policy analysis that used Bardach's Eightfold Path approach to examine the costs and consequences of current policy, and confront the tradeoffs between security and civil rights.[28] It examines the TSDB administrative processes to determine the

[28] Eugene Bardach and Eric Patashnik, *A Practical Guide for Policy Analysis*, 5th ed. (Los Angeles: Sage, 2016), 1–72.

extent to which the structure and function serve or compromise national security. It also considers the difficulties the system of redress poses for those classified as a "known or suspected terrorist" (KST) by their inclusion on the watchlist. It relies on two types of materials open-source government policy documents, and open-source documents from a variety of sources, including civil rights organizations, scholarly journals, and legal journals. This thesis reviews current processes for nomination, watch list maintenance, and redress to identify and examine flaws, and to determine whether such flaws are systemic or anomalous. It examines how agencies use the watchlists to evaluate the burden on existing security and investigative resources. It explores anecdotal evidence of the real-world consequences of existing policies on both national security and civil rights. The analysis of the government's policies reveals burdens the procedures place on finite homeland security resources and the liberty interests of those who are watchlisted. To the extent possible using only publicly available information, this thesis renders a series of recommendations to provide a framework that bridges the divide between the security interests of the government and the liberty interests of civil libertarians.

The policy analysis involves several steps and phases. The system of watchlists that existed prior to the attacks on 9/11 is examined first to document the failures of the system that prevented government agents from indicting two of the hijackers. The reforms of the watchlist system following the attacks are reviewed next. This examination includes the lifecycle created by the current TSDB policies and describes how persons are added to the watchlist, how the list is maintained, and the redress opportunities for persons who feel they should be removed from the list. This examination also includes the criticism of the government's watchlist procedures and evidence of the best-documented experiences of people who have been watchlisted drawn from accounts published by media sources and court documents. These sources illustrate the unintended consequences of the current policy, in particular, the consequences for a person labeled as a KST, as well as the inadequacy of the redress process, and the tendency of the government to protect evidence of its shortcomings under the veil of national security. The effects of current policies on the government are reviewed next. Together, these examinations illuminate the perceptual "wall" that exists between the counter-terrorism professionals who seek to protect the

public from a concealed enemy, and civil rights advocates who object to the way those efforts can trample civil rights.

Finally, the existing recommendations for reform are examined. Most of the suggestions originate from civil rights advocates and legal scholars and are concerned mostly with the inadequacy of the reasonable suspicion standard and the redress process. Others have noted the absence of oversight on the administration of the watchlist and redress procedures. An attempt is made to integrate these recommendations with the author's analysis and develop recommendations for the TSDB from a national security perspective. The analysis of these recommendations results in a comprehensive set of proposals to improve the accuracy of the TSDB, strengthen the national security objectives of the government, and ameliorate the ability of persons to seek a full and fair opportunity to have their names removed from the database.

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II. BACKGROUND

This chapter describes how a sophisticated set of government watchlists existed prior to the attacks on 9/11. These watchlists evolved to meet the needs of individual agencies and were generally not connected electronically. A single point of focus to manage the flow of counterterrorism information inside the federal government did not exist, which inhibited the flow of information between departments that thus created silos among the various institutions responsible for investigating terrorism and conducting homeland security screening at the border and other critical sectors. This problem was exacerbated by misunderstandings within the intelligence community and law enforcement agencies about how to share and use foreign intelligence information for the purpose of criminal investigations within the United States. These combined vulnerabilities were unwittingly exploited by the 9/11 attackers to perpetrate the single deadliest terror attack in world history.

A. EVOLUTION OF TERROR WATCHLISTS BEFORE 9/11

Prior to 1987, the government did not maintain a watchlist of known or suspected terrorists. The first terrorist watchlist employed by the United States began as an unassuming shoebox full of three-by-five notecards assembled in 1987 by an enterprising employee of the State Department. That employee, John Arriza, started his watchlist project to prevent terrorists from receiving visas to enter the United States.[29] The development of this counterterrorism tool coincided with an intensified period of terrorist attacks against U.S. persons and interests, which from the late 1960s to the late 1980s saw 635 attacks against U.S. interests.[30] The attempted bombing of the World Trade Center in 1993 spurred further development of the government's watchlists to enhance the process by which suspected terrorists were added to the database.

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[29] Jeffrey Kahn, *Mrs. Shipley's Ghost: the Right to Travel and Terrorist Watchlists* (Ann Arbor, MI: University of Michigan Press, 2013), 10, https://ebookcentral.proquest.com/lib/ebook-nps/detail.action?docID=3415147.

[30] David Muhlhausen and Jena Baker McNeill, "Terror Trends: 40 Years' Data on International and Domestic Terrorism," Heritage Foundation, May 20, 2011, https://www.heritage.org/terrorism/report/terror-trends-40-years-data-international-and-domestic-terrorism.

The government approach to watchlisting evolved over time. Before the 9/11 attacks, it used a loose system of watchlists to monitor known or suspected terrorists.[31] An audit by the Government Accountability Office released in 2003 found that nine federal agencies maintained 12 separate terrorist and criminal watch lists.[32] The report stated, "Generally, the federal government's approach to developing and using terrorist and criminal watch lists in performing its border security mission is diffuse and nonstandard, largely because these lists were developed and had evolved in response to individual agencies' unique mission needs and the agencies' respective legal, cultural, and technological environments."[33] The report found that each of the agencies had different policies restricting or prohibiting the sharing of watchlist information. Few of the systems were connected electronically, so the information was not readily available to local, state, tribal, and federal law enforcement officers. Of the 12 watchlists, three were considered primary systems containing original information focused on terrorist subjects: TIPOFF, the Violent Gang and Terrorist Organizations File (VGTOF), and the Treasury Enforcement Communications System (TECS).[34]

1. TIPOFF

That shoebox of notecards started by Arriza gradually evolved into a sophisticated computerized database of thousands of terrorist identities known as TIPOFF. This watchlist, maintained by the Department of State Bureau of Intelligence and Research, became the primary terrorist watchlist that eventually grew to contain approximately 60,000 names by 2001.[35] The TIPOFF database was classified, and access to the information was limited to those with the proper security clearance and need to know. The

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[31] The term "known or suspected terrorist" (KST) is commonly used within government agencies to refer to persons on the government's watchlists.

[32] Randolph C. Hite, *Information Technology: Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322 (Washington, DC: Government Accountability Office, 2003), 2.

[33] Hite, 1–2.

[34] Department of Justice, *Review of the Terrorist Screening Center*, ch. 2.

[35] Department of State, *Review of the Department's Terrorist Watch List Nomination (Visas Viper) Process*, OIG-SIA-08-02 (Washington, DC: Government Printing Office, 2008), https://oig.state.gov/system/files/oig-sia-08-02.pdf; National Commission, *Final Report*, loc. 3248.

list existed solely in paper form until shortly after the bombing of the World Trade Center in 1993. In response to that event, the government automated the list, and developed procedures for the Immigration and Naturalization Service (INS), FBI, and the State Department to respond when a terrorist attempted to enter the country.[36] As a result of these improvements, 97 watchlisted terrorists were denied entry into the United States by 1998.[37]

2. TECS

The TECS was a database maintained by the former U.S. Customs Service that consisted of 700 tables and contained over one billion records.[38] It also housed the Interagency Border Inspection System (IBIS) that allowed the formerly separate customs and immigration agencies to share watch list information, and the INS's National Automated Immigration Lookout System (NAILS), which contained information regarding immigrants in the process of removal, as well as terrorist lookout data.[39] The TECS database served as the primary database for screening persons and cargo at U.S. ports of entry; IBIS contained information regarding persons, conveyances, and businesses suspected of criminal activity. NAILS was a database maintained by the former Immigration and Naturalization Service with information regarding immigrants considered inadmissible to the United States or wanted by law enforcement. TIPOFF was used to update both NAILS and IBIS by manually uploading information from a diskette.[40]

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[36] National Commission, loc. 3179.

[37] National Commission, loc. 3172.

[38] DHS no longer refers to the database as the Treasury Enforcement Communication System, and TECS is no longer an acronym. Department of Justice, *Review of the Terrorist Screening Center*, ch. 2.

[39] William J. Krouse, *Terrorist Identification Screening and Tracking under Homeland Security Presidential Directive 6*, CRS Order Code RL32366 (Washington, DC: congressional Research Service, 2004), https://fas.org/irp/crs/RL32366.pdf.

[40] Hite, *Information Technology*, 26.

3. VGTOF

VGTOF was a component of the National Crime Information Center (NCIC) used to classify associates of criminal and terrorist organizations.[41] The VGTOF database contained information on both terrorist groups and individual members. The data contained in the VGTOF identified the group, including identifying characteristics, communication methods, and types of crimes. Once the group profile was complete, individual group members would be enrolled using identifying information—such as name, gender, age, physical appearance, and visible marks—and threat information, like whether the person was thought to be armed, or if the individual had made threats against law enforcement. Conceptually, the VGTOF was a method of sharing information between law enforcement at all levels, and the information was available to local law enforcement officers through the NCIC.

B. FAILURE

The failures of the U.S. counterterror, law enforcement, and terrorism enterprise to detect, deter, or defeat the 9/11 terror plot are legion. The chief communication failure occurred because of information silos between the intelligence and law enforcement enterprises meant to prevent information obtained through intelligence activities from being used in a criminal investigation. The "wall" delayed two of the terrorists from being entered on the TIPOFF watchlist. This critical failure was compounded by a series of flawed assumptions in the design and implementation of the government's watchlists and databases that prevented them from being effective as a tool for screening, gathering intelligence, and information sharing, and which created a vulnerability unwittingly exploited by the terrorists.

[41] Peter Episcopo and Darrin Moor, "The Violent Gang and Terrorist Organizations File," *FBI Law Enforcement Bulletin* 65, no. 10 (October 1996): 21–23, https://leb.fbi.gov/file-repository/archives/October-1996.pdf.

1. The Intelligence Wall

The FBI maintained separate divisions for criminal enforcement and counter-intelligence prior to the 9/11 attacks.[42] Prior to 1978, no warrant from a court was required for the Attorney General to place foreign governments or their agents under surveillance.[43] The 1978 Foreign Intelligence Surveillance Act (FISA) required approval of the courts for surveillance to obtain intelligence information. The courts did not authorize surveillance activity for criminal investigations; the FBI maintained loose procedures to determine when intelligence collected under a FISA warrant could be shared for the purpose of a criminal investigation.[44] Due to later concerns about FISA material becoming inadmissible in court, Attorney General Janet Reno published guidance in 1995 to manage sharing of FISA information between the FBI and Justice Department attorneys.[45] According to the 9/11 Commission:

> These procedures were almost immediately misunderstood and misapplied. As a result, there was far less information sharing and coordination between the FBI and the Criminal Division in practice than was allowed under the department's procedures. Over time the procedures came to be referred to as "the wall."[46]

This wall extended beyond the FBI to members of the intelligence community. Deputy Attorney General Larry Thompson noted frustration immediately prior to 9/11 that the intelligence community was not communicating with federal law enforcement organizations and vice versa.[47] This lack of communication led to the creation of silos that prevented the communication about the identities of known terror suspects. The *Final Report of the National Commission on the Terrorist Attacks upon the United States*, known

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[42] National Commission, *Final Report*, loc. 3131.

[43] National Commission, loc. 3115.

[44] National Commission, loc. 3123.

[45] Janet Reno, "Procedures for Contacts between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" (official memorandum, Washington, DC: Department of Justice, 1995), https://fas.org/irp/agency/doj/fisa/1995procs.html.

[46] National Commission, *Final Report*, loc. 3131.

[47] Larry D. Thompson, "Intelligence Collection and Information Sharing within the United States," Brookings, December 8, 2003, https://www.brookings.edu/testimonies/intelligence-collection-and-information-sharing-within-the-united-states/.

colloquially as the *9/11 Commission Report*, found that prior to the 9/11 attacks, two of the 9/11 hijackers, Nawaf al Hazmi and Khalid al Mihdhar, were identified and known by the Central Intelligence Agency (CIA) to be involved with terrorism. Former FBI Special Agent Mark Rossini has alleged that his CIA supervisor forbade him from informing the FBI about the two terrorists during his assignment to the CIA Counterterrorism Center in January 2000.[48] Rossini did not parse words: "There would have not been a 9/11 if Doug's CIR [Central Intelligence Report] on al Mihdhar was sent. Period. End of story."[49]

2. Failures Resulting from the Decision Not to Watchlist

Rossini's assertion is difficult to prove. Both terrorists were in possession of visas to enter the United States, but the CIA failed to enter either man into the TIPOFF watchlist.[50] It is very likely that the FBI would have added both al Hazmi and al Mihdhar to the TIPOFF watchlist if they had received the report. Adding the terrorists to TIPOFF probably would have caused a cascade reaction that might have resulted in their inclusion in TECs and VGTOF. As it was, both terrorists were able to travel into the country through Los Angeles International Airport under their own names without arousing the suspicion of an immigration officer on January 15, 2000. It is likely that al Mihdhar or al Hazmi would have been denied entry into the United States if their identity information was in TIPOFF. The act of denying entry to these terrorists may not have, by itself, prevented the attack. The 9/11 Commission noted that other operatives had been unable to gain visas to enter the United States, and the terrorist group simply adapted. However, it would have alerted the FBI that two known terrorist operatives were attempting to enter the United States, and it was likely that before denying the men entry, they would have been interviewed by an FBI agent. Al Mihdhar returned to Yemen on June 10, 2000. He returned to the United States through John F. Kennedy Airport (JFK) in New York City on July 2, 2001. These travels represent two other lost opportunities for al Mihdhar to be intercepted by officials at the border.

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[48] Jeff Stein, "FBI Agent: The CIA Could Have Stopped 9/11," *Newsweek*, June 19, 2015, https://www.newsweek.com/saudi-arabia-911-cia-344693.

[49] Stein.

[50] National Commission, *Final Report*, loc. 5634–5657.

Once inside the United States, both terrorists were able to move freely about the country. They obtained drivers licenses, bought and registered a car, and enrolled in flight school to prepare for the attack.[51] The terrorists lived under their own names in a series of rented rooms and apartments in Los Angeles, California; San Diego, California; Mesa, Arizona; Falls Church, Virginia; and Paterson, New Jersey. Al Hazmi obtained a house phone with a number listed under his name in the phonebook. All the hijackers established bank accounts in their own names. In short, they would have been easy to find, with well-established patterns of easily accessible data pinpointing their movements.

The hijackers even interacted with law enforcement authorities. A police officer stopped al Hazmi for speeding and not wearing a seatbelt on April 1, 2001.[52] Trooper C. L. Parkins of the Oklahoma Highway Patrol described an unremarkable interaction that did nothing to arouse his suspicions. Parkins conducted database checks of al Hazmi including the NCIC database. Al Hazmi's driver's license and registration on his blue Toyota checked out. That same blue Toyota would be found at the Dulles Airport after the attack. Things might have been different if al Hazmi had been added to the TIPOFF database. His information would have been added subsequently to the VGTOF database. The officer conducting the traffic stop would have been alerted that al Hazmi was a suspected terrorist. It was also likely that al Hazmi's status on the watchlist would have led to additional scrutiny. It would also have provided the FBI with al Hazmi's location and information gleaned by the trooper. This encounter between a law enforcement officer and al Hazmi could have provided the FBI yet another opportunity to stop the plot.

In August 2001, CIA officers reviewing information regarding al Mihdhar and al Hazmi became concerned that al Mihdhar was in the country.[53] The officers mistakenly believed that al Hazmi had departed with al Mihdhar in June 2000 and had not returned.[54]

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[51] National Commission, loc. 6584–6732.

[52] Nolan Clay and Randy Ellis, "Terrorist Ticketed Last Year on I-40," *Oklahoman*, January 20, 2002, https://newsok.com/article/2779124/terrorist-ticketed-last-year-on-i-40.

[53] National Commission, *Final Report*, loc. 675.

[54] National Commission, loc. 7950.

Both al Hazmi and al Mihdhar were listed on the TIPOFF watchlist on August 24, 2001.[55] On August 28, 2001, a CIA agent sent a request to the FBI to locate and interview al Mihdhar.[56] What followed was a debate among CIA and FBI officials about whether the FBI could conduct a criminal investigation due to perceived prohibition on the use of intelligence information:

> One of the Cole case agents read the lead with interest, and contacted [the CIA officer] to obtain more information. [The CIA officer] argued, however, that because the agent was designated a "criminal" FBI agent, not an intelligence FBI agent, the wall kept him from participating in any search for Mihdhar. In fact, she felt he had to destroy his copy of the lead because it contained NSA information from reports that included caveats ordering that the information not be shared without OIPR's permission. The agent asked [the CIA officer] to get an opinion from the FBI's National Security Law Unit (NSLU) on whether he could open a criminal case on Mihdhar.[57]

The bureaucrats finally assigned the "routine" investigation to an agent. It was the agent's first counterterrorism investigation. The agent made a preliminary effort to locate al Mihdhar in the local New York databases and found nothing. He eventually forwarded the information to the FBI Field Office in Los Angeles since al Mihdhar had originally arrived there. The 9/11 terrorists remained hidden in plain sight.

3. Failure to Use the Watchlist as a Screening Tool

As the date of the attack approached, al Hazmi traveled on cross-country flights similar to the one he would hijack. His travel aroused no suspicion. The Federal Aviation Administration (FAA) or any airline personnel had no way to know that he was a terrorist. The FAA did not use the TIPOFF watchlist to vet travelers, and in fact, had only limited access to TIPOFF. [58] The FAA did not add watchlisted subjects to a No Fly list, and the single list maintained by the agency contained only 12 people.[59] One of these people was the architect of 9/11, Khalid Sheikh Mohammed, but none of the other hijackers appeared

[55] National Commission, loc. 7958.

[56] National Commission, loc. 7950–7971.

[57] National Commission, loc. 7971.

[58] National Commission, loc. 826.

[59] National Commission, loc. 3260.

on the list. Al Hazmi and al Mihdhar were allowed to book flights for American Airlines Flight 77 with no complications.[60]

The agency did maintain a layered approach to security in the years preceding 9/11 that was concerned primarily with the introduction of explosives onto aircraft.[61] The FAA developed an automated system known as Computer Assisted Passenger Prescreening System (CAPPS). This system was designed to identify passengers who posed a higher than average risk to the aircraft. Unfortunately, the CAPPS process included two flawed assumptions. First, the government viewed explosives contained in checked luggage as the primary terrorist threat to aviation. The second assumption was that a hostile actor would not be suicidal and board an aircraft that contained an explosive device. If CAPPS identified passengers for extra scrutiny, these passengers' checked luggage would receive enhanced explosives screening and would not be loaded on the aircraft until after they boarded.[62] The passengers would receive no additional screening of their person or carry-on luggage. CAPPS identified more than half of the 9/11 hijackers as high risk, and this identification only resulted in a more thorough examination of their checked luggage.[63] All proceeded through routine screening and onto their flights armed with small knives.[64] At that time, knives with blades shorter than four inches were permitted onboard the aircraft.[65]

C. 9/11 COMMISSION RECOMMENDATIONS FOR REFORM

The 9/11 Commission recommended a number of steps to address these flaws. First, the Commission described the systemic failure among the executive agencies of the government. According to the report, "Much of the public commentary about the 9/11 attacks has focused on 'lost opportunities.' Though characterized as problems of 'watchlisting,' 'information sharing,' or 'connecting the dots,' each of these labels is too

[60] National Commission, loc. 709.

[61] National Commission, loc. 3229.

[62] National Commission, loc. 3260.

[63] National Commission, loc. 10913.

[64] National Commission, loc. 3276.

[65] Lloyd Vries, "Boxcutters Weren't Allowed Pre-9/11," CBS News, November 12, 2002, https://www.cbsnews.com/news/boxcutters-werent-allowed-pre-9-11/.

narrow. They describe the symptoms, not the disease."[66] The Commission recommended the establishment of a National Counterterrorism Center (NCTC) with a "unified command" to integrate the flow of domestic and international terrorist information into one location. The Commission recommended that information sharing among agencies be increased, and that the old adage of "need to know" be replaced with a new "need to share."[67] It recognized that the government had already begun reforming the systems that had failed.

Another recommendation would also be important in dictating future reform. The Commission understood that many changes had already been implemented by the Bush Administration to enhance the counterterrorism enterprise, including enhancements to the watchlists that had already began to expand substantially with new information.[68] The Commission recognized that the terrorists had taken advantage of their freedom of movement to commit their attack. The Commission recommended a strategy of using the watchlists to target terrorist travel and to constrain their mobility, noting that, "targeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility."[69]

To facilitate this containment of terrorist travel, as well as to improve security in aviation and other critical sectors, the Commission also recommended the integration of border screening procedures to other critical homeland security sectors.[70] They recommended expansion of the No Fly list and other forms of enhanced aviation security screening using the government's watchlists. Perhaps recognizing the potential for such a system to infringe on civil rights, the Commission stated, "We advocate a system for screening, not categorical profiling. A screening system looks for particular, identifiable

[66] National Commission, *Final Report*, loc. 962.

[67] National Commission, loc. 1003.

[68] National Commission, loc. 10733.

[69] National Commission, loc. 10729.

[70] National Commission, loc. 10789.

suspects or indicators of risk. It does not involve guesswork about who might be dangerous."[71] These recommendations would come into play in the development of new and better systems and processes in the homeland security and counterterrorism enterprise.

[71] National Commission, loc. 10794.

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III. POST 9/11 INFORMATION SHARING AND WATCHLIST SYSTEMS

The following chapter examines the systematic reforms undertaken to address these documented flaws. These reforms have placed tremendous emphasis on the watchlist process and created efficiencies that have led to tremendous growth in the data held by the government. This examination proceeds in five parts. Part one describes the formation of the NCTC to merge the flow of terror information and establish a single classified repository of information. The second part describes the creation of the TSC as a multi-agency center to manage the unclassified terror watchlist known as the TSDB. The TSDB guideline for aggregating and identifying identity information is described in detail in the third section. The fourth section describes how the TSDB is utilized by Customs and Border Protection (CBP), Transportation Security Administration (TSA), and law enforcement officers. The final section explains the processes available for individuals who believe that they are incorrectly watchlisted to seek redress. Criticism from civil rights groups, legal scholars, and others is woven into the examination of these systems. Additionally, these sections include specific examples of how inclusion on the TSDB affects individuals.

A. NATIONAL COUNTERTERRORISM CENTER AND TIDE

President George W. Bush's administration had begun to reform the terror watchlist system before the publication of the 9/11 Commission's report. Before the creation of the Terrorist Threat Integration Center (TTIC), intelligence community agencies provided information directly to the White House, which was required to synthesize the threat data from multiple streams.[72] In 2003, the administration announced the creation of the TTIC to merge the flow of terrorism information and analysis to a single point. President Bush issued Homeland Security Presidential Directive 6 (HSPD-6) on September 16, 2003, which required executive branch agencies to "develop, integrate, and maintain" data

[72] National Counterterrorism Center, *NCTC at a Glance* (Washington, DC: Office of the Director of National Intelligence, 2017), https://www.dni.gov/files/NCTC/documents/features_documents/NCTC-At-a-Glance_2017.pdf.

regarding known or suspected terrorists.[73] This order required all agencies to provide the TTIC with all terrorist information to facilitate information sharing.[74] The TTIC assumed the management of the TIPOFF database at that time.[75] These two reforms were a critical measure that established a clear flow of terrorist information to a single organization responsible for aggregating terrorist information.

Following the publication of the Commission's report, President Bush issued Executive Order 13354 on August 27, 2004, which transferred all functions of the TTIC to the newly created NCTC, inside the newly codified Office of the Director of National Intelligence (ODNI). The mission of the NCTC is to "lead and integrate the national counterterrorism effort by fusing foreign and domestic counterterrorism information, providing terrorism analysis, sharing information with partners across the counterterrorism enterprise, and driving whole-of-government action to secure our national counterterrorism objectives."[76] As shown in Figure 1, four directorates make up the NCTC; the mission of the Directorate of Terrorist Identities is to, "discover, enhance, and share identity intelligence that advances the most complete and accurate identity picture to our partners and support terrorism analysts and successful screening activities that ultimately prevent terrorism plans and operations against U.S. interests."[77]

[73] "Integration and Use of Screening Information, Homeland Security Presidential Directive-6," George W. Bush Code of Federal Regulations, title 3 (2003 comp.), 1234–1235.

[74] Bush.

[75] William J. Krouse and Bart Elias, *Terrorist Watchlist Checks and Air Passenger Prescreening*, CRS Report No. RL33645 (Washington, DC: Congressional Research Service, 2009), 2, http://www.au.af.mil/au/AWC/AWCgate/crs/rl33645.pdf.

[76] National Counterterrorism Center, *Today's NCTC*, Report No. 030370 (Washington, DC: Office of the Director of National Intelligence, 2017), 4, https://www.dni.gov/files/NCTC/documents/features_documents/NCTC-Primer_FINAL.pdf.

[77] National Counterterrorism Center, 11.

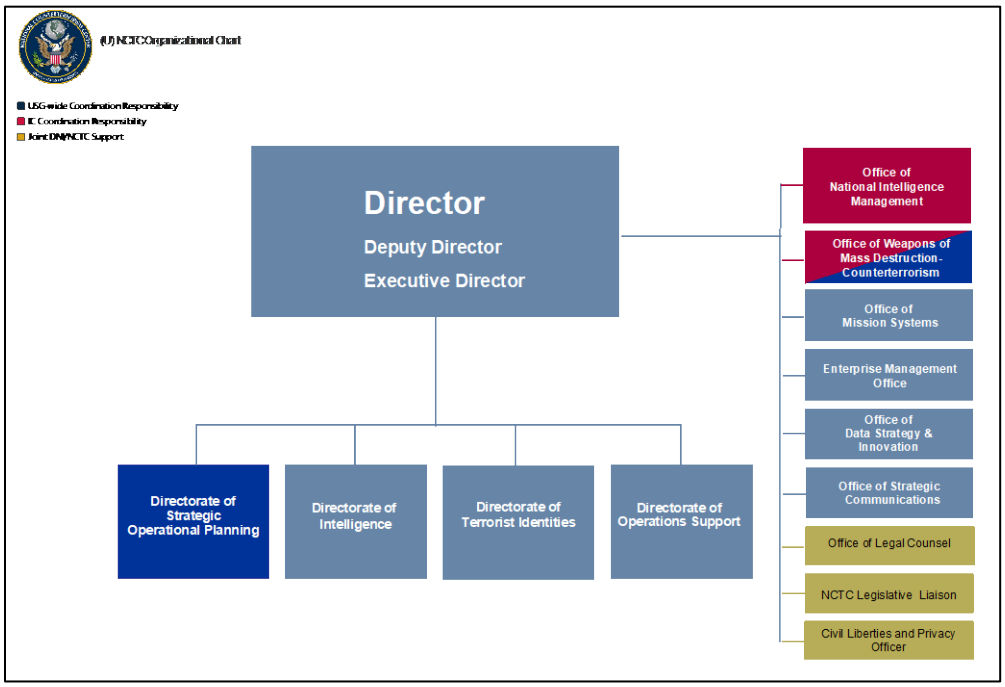

Figure 1. NCTC Organization Chart[78]

The primary duty of the Directorate of Terrorist Identities is to maintain a detailed database of terrorist identities, the Terrorist Identities Datamart Environment (TIDE). TIDE replaced the TIPOFF database, and the first iteration of TIDE was populated primarily from the data in TIPOFF. TIDE is the central collection point for all information on terrorist identities, according to the NCTC, "To the extent permitted by law, the TIDE database includes information the U.S. Government possesses related to the identities of individuals known or appropriately suspected to be or to have been involved in activities constituting, in preparation for, in aid of, or related to terrorism (with the exception of purely domestic terrorism information)."[79] The TIDE database is web accessible and available to all members of the intelligence community and many law enforcement organizations. The information within the database can then be accessed and correlated.

[78] Source: National Counterterrorism Center, *NCTC Organizational Chart* (Washington, DC: Office of the Director of National Intelligence, 2017), 1, https://www.dni.gov/files/NCTC/documents/RelatedContent_documents/NCTC_Org_Chart_April2017_UNCLASS.pdf.

[79] National Counterterrorism Center, *Terrorist Identities Datamart Environment (TIDE)* (Washington, DC: Office of the Director of National Intelligence, 2017), 1, https://www.dni.gov/files/NCTC/documents/features_documents/TIDEfactsheet10FEB2017.pdf.

Some of the information in the database is classified, and users need both a security clearance and a "need to know" to access that information.[80]

The NCTC has stated that it includes individuals in TIDE who:

- Commit international terrorist activity
- Prepare or plan international terrorist activity
- Gather information on potential targets for international terrorist activity
- Solicit funds or valuables for international terrorist activity or a terrorist organization
- Solicit membership in an international terrorist organization
- Provide material support, e.g., safe house, transportation, or training
- Are members of or represent a foreign terrorist organization[81]

The streamlined and centralized process for recording this identity information has resulted in incredible growth, from 400,000 persons in 2008, to 1.1 million people in 2013, to approximately 1.6 million people in April 2017.[82] This number includes approximately 16,000 to 25,000 "U.S. persons," defined as citizens and lawful permanent residents of the United States.[83] The NCTC periodically deletes information from TIDE if it ceases to meet the (classified) standards to be included in the database; the NCTC has deleted 228,000 records in the last six years.[84] NCTC has stated, "All activities at NCTC are guided by our

[80] National Counterterrorism Center, 1.

[81] National Counterterrorism Center, 1.

[82] National Counterterrorism Center; National Counterterrorism Center, *Terrorist Identities Datamart Environment (TIDE)* (Washington, DC: Office of the Director of National Intelligence, 2008), 2, http://online.wsj.com/public/resources/documents/watchlist082108c.pdf; National Counterterrorism Center, *Terrorist Identities Datamart Environment (TIDE)* (Washington, DC: Office of the Director of National Intelligence, 2014), 2, https://www.hsdl.org/?view&did=20742; National Counterterrorism Center, *Terrorist Identities Datamart Environment (TIDE)*, 2017, 2.

[83] National Counterterrorism Center, 2014, 2; National Counterterrorism Center, *Terrorist Identities Datamart Environment (TIDE)*, 2017, 2.

[84] National Counterterrorism Center, 2017, 2.

strong commitment to protect privacy and civil liberties. As such, a person cannot be watchlisted based solely upon First Amendment protected activity."[85] Concerns from civil rights groups regarding the inclusion of subjects due to such activities are discussed in depth later in this section.

B. TERRORIST SCREENING CENTER

President Bush's directive, HSPD-6, required agencies to use watchlist information to conduct security screening activities at "all appropriate opportunities" and share the information with local, state, federal, territorial, and tribal governments.[86] The directive also mandated that foreign governments and private entities with "screening processes that have a substantial bearing on homeland security" be provided access to that information as well.[87] However, the potential consumers of this information would not necessarily have the security clearance to access the identity information within the TIDE database. To facilitate information sharing, the government needed to establish an unclassified database that could be exported into a variety of systems without regard for a clearance.

As a result of this directive, on September 16, 2003, the Secretaries of DHS and the Department of State, the Attorney General, and the CIA Director signed a Memorandum of Understanding that created the TSC.[88] This memorandum directed that the Attorney General appoint a TSC Director who would report to the Attorney General with the FBI Director acting as an intermediary.[89] The memorandum also stipulated that the Deputy Director of the TSC be a senior member of DHS. This balance of leadership appears to ensure that the TSC is tied to both of these important parts of the homeland security enterprise, but give the FBI primary oversight of the activities of the agency. The memorandum outlined the purpose of the TSC as to, "consolidate the Government's

[85] National Counterterrorism Center, 2017, 1.

[86] Bush, "Integration and Use of Screening Information."

[87] Bush.

[88] Colin Powell et al., "Memorandum of Understanding on the Integration and Use of Screening Information to Protect against Terrorism" (official memorandum, Washington, DC: Department of State et al., 2003), https://www.hsdl.org/?view&did=443969.

[89] Powell et al.

approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information, in screening processes."[90] Unlike the NCTC, the TSC does not have a statutory mission. It exists solely as a result of the memorandum of understanding; it is administered by the FBI and staffed by contractors and employees from many different agencies within the government. Walter Haydock, former targeting officer for the NCTC and staff member of the House Committee on Homeland Security, describes the TSC as a "bureaucratically homeless" agency without statutory authorization that has become a "Frankenstein's Monster" of multiple agencies.[91]

C. TERRORIST SCREENING DATABASE

The memorandum also established the TSDB. The TSDB is the "sensitive, but unclassified subset of the classified information held by the TTIC (now NCTC)."[92] The TSDB is essentially a list of persons whom the government reasonably suspects are involved in terrorist activity. This list is fed in real time into a variety of other databases used by government agencies to conduct security screening and law enforcement activities. The TSDB serves as a communication tool, not only identifying suspects to the agency conducting the activity, but also connecting these agencies with intelligence officers and investigative agents who can solicit information about encounters to further their individual missions. The details of this operation are more fully discussed in the next chapter.

1. Nomination to the TSDB

Persons are added to the TSDB through a process known as nomination. Nominations relating to international terrorism are submitted directly to the NCTC.[93] If the information meets the NCTC standards, it is entered into TIDE, and then it is sent to the TSC. The FBI is responsible for submitting information regarding the identities of

[90] Powell et al.

[91] Walter Haydock, "Consolidating the Terrorist Watchlisting Bureaucracy," Lawfare, June 14, 2017, https://www.lawfareblog.com/consolidating-terrorist-watchlisting-bureaucracy.

[92] Powell et al., "Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism."

[93] National Counterterrorism Center, *Terrorist Identities Datamart Environment (TIDE)*, 2017.

suspected domestic terrorists directly to the TSC. The TSC then evaluates the nomination to ensure it is accurate and meets the standard of reasonable suspicion.[94] Former TSC Director Thomas Healy described the standard:

> Reasonable suspicion requires "articulable" facts which, taken together with rational inferences, reasonably warrant a determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities, and is based on the totality of the circumstances.[95]

Jeffrey Kahn of the Southern Methodist University Dedman School of Law notes that the TSC's reasonable suspicion standard is closely linked with the standard established in the Supreme Court case *Terry v. Ohio*.[96] He writes that prior to 2008, the TSC required that information have only a nebulous "nexus to terrorism."[97] In 2008, the TSC established a workgroup to establish a written standard inspired by *Terry*. In that 1968 decision, the Court determined that police officers could stop and frisk a subject, an interaction known as a "Terry Stop," when the officer could "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[98] Devallis Rutledge explains that the court noted that a simple pat down was seen by the court as, "less of an intrusion on the suspect's privacy than a full-scale search of everything he was wearing and carrying."[99] He explained that reasonable suspicion differs from the standard of proof noted in the 4th Amendment Constitution, probable cause, which is needed to seek a warrant. He notes that this burden of proof is also required to make an arrest. The Constitution is silent on a definition of probable cause, which is

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[94] H.R., *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*.

[95] *Five Years after the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing before the Senate Committee on Homeland Security and Governmental Affairs*, Senate, 111th Cong., 1st sess., December 9, 2009, https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56149/html/CHRG-111shrg56149.htm.

[96] Jeffrey Kahn, "The Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and Terry v. Ohio," *William and Mary Bill of Rights Journal*, no. 2 (2017): 385, http://scholarship.law.wm.edu/wmborj/vol26/iss2/7.

[97] Kahn, 393–394.

[98] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 21 (1968).

[99] Devallis Rutledge, "Probable Cause the Reasonable Suspicion: These Familiar Terms are Often Confused and Misused," Police, June 7, 2011, http://www.policemag.com/channel/patrol/articles/2011/06/probable-cause-and-reasonable-suspicion.aspx.

determined in the courts. In *Beck v. Ohio*, the Supreme Court defined probable cause thusly:

> Whether an arrest is constitutionally valid depends in turn upon whether, at the moment the arrest is made, the officers have probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense.[100]

Kahn notes, "the same arguments made in support of lowering the standard for police to detain people they could not arrest were used to justify its application to the world of watchlists."[101]

Despite the government's attempt to establish a standard rooted in existing jurisprudence, the TSDB standard has been heavily criticized. Kahn cautions that despite its modeling on *Terry*, the standard is missing an important component, that of judicial review. As Kahn notes, in criminal law, the reasonable suspicion standard is scrutinized in the courtroom, and if the judge determines that the standard was not reached in the interaction, any evidence resulting from the interaction is inadmissible in a criminal proceeding: "In the crime-fighting world of *Terry*, the expected appearance of the accused before a magistrate was the norm used to minimize the impact of detention based on this lower standard. In the world of terrorist watchlists, however, appearance before a magistrate has always been an undesired end, to be avoided at all costs."[102]

Civil rights advocates have been critical of the standard. The ACLU issued a report in 2014 blasting it:

> On its face, this standard is baffling and circular: it essentially defines a suspected terrorist as a suspected terrorist. The standard is certainly not sufficient to ensure that a person is truly a threat. It lacks any requirement that an individual knowingly engage in wrongful conduct, and it permits weak speculative inferences. Indeed, the phrases "related to" and "in aid of" are broad enough to include First Amendment-protected speech and association, or conduct that is entirely unwitting. Mere proximity to a

[100] *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 91 (1964).

[101] Kahn, "The Unreasonable Rise of Reasonable Suspicion," 385.

[102] Kahn, 385.

> suspected terrorist should not make one a suspected terrorist, but that is what the standard allows. And it is not at all clear what separates a reasonable-suspicion-based-on-a-reasonable-suspicion from a simple hunch.[103]

Journalists Jeremy Scahill and Ryan Devereaux echoed the ACLU's criticism when they reported on the TSC's watchlist guidance. They noted a number of loopholes in the reasonable suspicion standard.[104] The presence of classified exemptions to the TSC's standard has been noted during litigation, and is discussed later in this chapter. The journalists argued that these loopholes render the reasonable suspicion standard meaningless, a point proven, they said, by the fact that only 4,915 of the 468,749 nominations in 2013 were rejected.[105] The low rate of rejection may partially explain the exponential growth of the database.

This criticism ignores the fact that the mission of the TSC is to make decisions to direct government scrutiny on a subject *before* they commit an act of terrorism. As Kahn states, "The goal of terrorist watchlists is not prosecution or even law enforcement; watchlists are used to investigate, disrupt, and prevent terrorist activity in ways that do not inevitably (in fact quite rarely) lead to an open hearing in court."[106] Instituting a more precise standard with a higher level of suspicion is problematic. Were the standard for inclusion in the watchlist to be raised, for example to probable cause, it would limit the value of the list as a predictive tool. Daniel Steinbock, writing before the adoption of the reasonable suspicion standard in 2008, explains:

> However, revisions in the substantive criteria, the standard of proof, or the kinds of evidence considered-even if practicable-would reduce, if not eliminate, the value of watch lists, at least for certain kinds of uses. To the extent that watch lists are employed to initiate further investigation, surveillance, or other kinds of enhanced scrutiny, a high threshold of proof is self-defeating. Even ordinary criminal investigators do not require reasonable suspicion to begin an investigation; reasonable suspicion may arise along the way or it may never develop at all. Insisting upon reasonable

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[103] American Civil Liberties Union, *Government Watchlisting: Unfair Process and Devastating Consequences*, 4.

[104] Scahill and Devereaux, "The Secret Government Rulebook for Labeling You a Terrorist."

[105] Scahill and Devereaux.

[106] Kahn, "The Unreasonable Rise of Reasonable Suspicion," 387.

> suspicion (or probable cause itself) before a person could be watch listed would eliminate potentially fruitful investigative opportunities. Investigation (be it of visa applicants, air passengers, transportation workers, etc.), must start somewhere, and especially when seeking to head off possible terrorists, that threshold should not be set too high. A higher standard not only reduces the chance of false positives but increases the risk of false negatives. Tinkering with the substantive standards for watch list inclusion, then, would change the nature of watch lists and make them less effective as a convenient trigger for further investigation, in exchange for some indeterminate reduction in false positives.[107]

According to former TSC Director Christopher Piehota, "NCTC, TSC, and the nominating agencies participate in ongoing quality control efforts to ensure that the information contained in the TSDB is continuously reviewed and is complete, correct, and up-to-date."[108] According to the TSC, "This includes regular reviews and post-encounter quality assurance conducted by the nominating agencies, the NCTC, and the TSC to ensure the information continues to satisfy the applicable criteria for inclusion in the TSDB."[109] Nominating agencies are required to notify the NCTC and TSC if changes to a record affect the legitimacy or dependability of said record. The government does not publicize whether it follows a specified schedule for reviewing information, nor what specific types of activity may cause an entry to be reviewed. As former TSC Director Kopel stated, "Due to the national security nature of TSC's work, however, it is impossible to explain in precise detail how the watchlist is managed."[110] TSC Assistant General Counsel Sharon Geddes has stated that 1,500 additions, deletions, or changes are made to TSDB records each day.[111]

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[107] Daniel J. Steinbock, "Designating the Dangerous: From Blacklists to Watch Lists," *Seattle University Law Review* 30 (October 2006): 104–105, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1883&context=sulr.

[108] H.R., *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*.

[109] Terrorist Screening Center, *Terrorist Screening Center—FAQs*.

[110] *Ensuring America's Security: Cleaning up the Nation's Watchlists: Hearing before the Subcommittee on Transportation Security and Infrastructure Protection of the House Homeland Security Committee*, House of Representatives, 110th Cong., 2nd sess., September 9, 2008, 16, https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg47173/pdf/CHRG-110hhrg47173.pdf.

[111] Sharon Geddes, "Presentation to BRIDGES" (presentation, Building Respect in Diverse Groups to Enhance Sensitivity, Dearborn, MI, October 4, 2017).

The TSC has guidelines to protect the civil rights of U.S. persons, "Nominations to the TSDB are not accepted if they are based solely on race, ethnicity, national origin, religious affiliation, or First Amendment-protected activities, such as free speech, the exercise of religion, freedom of the press, freedom of peaceful assembly, or petitioning the government for redress of grievances."[112] However, it is clear that the FBI does monitor social media sites, and that investigations are initiated when the agents note concerns.[113] FBI Director Christopher Wray has explained the importance of social media in counterterrorism, stating:

> Many foreign terrorist organizations use various digital communication platforms to reach individuals they believe may be susceptible and sympathetic to extremist messages, however, no group has been as successful at drawing people into its perverse ideology as ISIS. ISIS has proven dangerously competent at employing such tools for its nefarious strategy. ISIS uses high-quality, traditional media platforms, as well as widespread social media campaigns to propagate its extremist ideology. Social media also helps groups such as ISIS to spot and assess potential recruits. With the widespread distribution of social media, terrorists can spot, assess, recruit, and radicalize vulnerable persons of all ages in the United States either to travel or to conduct a homeland attack. Through the Internet, terrorists overseas now have direct access into our local communities to target and recruit our citizens and spread the message of radicalization faster than we imagined just a few years ago.[114]

A report by the Fordham Law Center on National Security has estimated that one third of prosecutions involving ISIS between March 1, 2014 and June 30, 2016 were initially detected via social media.[115] Hugh Handeyside, senior staff attorney for the

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[112] Terrorist Screening Center, *Terrorist Screening Center—FAQs*.

[113] Kevin Grasha and James Pilcher, "Records: July 4 Terror Plot Suspect Lived in St. Bernard, Wrote of Jihad and 'Blue-Eyed Devils,'" *Cincinnati Enquirer*, July 2, 2018, https://www.cincinnati.com/story/news/2018/07/02/cleveland-july-4-attack-fbi-makes-arrest-alleged-terror-plan-cleveland/750345002/; Laura Jarrett, "Ex-marine behind Thwarted Attack at San Francisco's Pier 39 Sentenced to 15 Years," CNN, August 6, 2018, https://www.cnn.com/2018/08/06/politics/everitt-aaron-jameson-sentenced/index.html.

[114] *World-Wide Threats: Keeping America Secure in the New Age of Terror: Hearing before the House Committee on Homeland Security*, House of Representatives, 115th Cong., 1st sess., November 30, 2017, 27, https://fas.org/irp/congress/2017_hr/threats2.pdf.

[115] Karen J. Greenberg ed., *Case by Case: ISIS Prosecutions in the United States* (New York: Center on National Security at Fordham Law, 2016), 19, http://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf.

ACLU, has raised serious concerns about government monitoring of social media on first amendment grounds. He notes:

> Social media platforms are today's public square, but they're unlike any other that has ever existed. Never has more of our speech been concentrated in fewer places, where it is often accessible worldwide. In the aggregate, the social media web is an up-to-date archive of our online speech, a map of our contacts and associations, and a nuanced guide to our habits and preferences—all in one.[116]

Handeyside further notes that a single social media post may result in nomination to the TSDB. His criticism seems to ignore the fact that the statements made on social media may constitute a threat of violence not protected free speech. Demetrius Nathaniel Pitts was recently arrested in Cleveland for plotting to attack the city's Fourth of July celebration.[117] The affidavit of the investigating agent in that case shows that Pitts came to the attention of the FBI after posting a series of concerning statements on Facebook.[118] On January 25, 2017, Pitts used a Facebook account to post the following statement:

> We as Muslim (sic) need to start. Training like this everyday (sic). We need to known (sic) how to shoot guns. Throw hand grenades hand to hand combat (sic). Look at the bed blue eyed devils (sic). They teach their little dogs on how to shoot and Hunt (sic). We should always be prepared to fight in the name of Allah Akbar. All cowards stay home. Walsalaam. Adbur Raheem sahl Rafeeq. Allahu Akbar Allahu Akbar Allahu Akbar.[119]

In this case, Pitts' Facebook posts formed the seed of suspicion that led to a more comprehensive investigation that ultimately resulted in terrorism charges. It seems entirely reasonable that Pitts' statement would lead to extra scrutiny by the government. The record does not indicate if Pitts was added to the TSDB, but it seems logical that the FBI would

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[116] Hugh Handeyside, "We're Demanding the Government Come Clean on Surveillance of Social Media," American Civil Liberties Union, May 24, 2018, https://www.aclu.org/blog/privacy-technology/internet-privacy/were-demanding-government-come-clean-surveillance-social.

[117] "Ohio Man Arrested for Attempting to Assist a Foreign Terrorist Organization with Homeland Attack Plot," Department of Justice, July 2, 2018, https://www.justice.gov/opa/pr/ohio-man-arrested-attempting-assist-foreign-terrorist-organization-homeland-attack-plot.

[118] *United States of America V. Demetrius Pitts, aka Abdur Raheem Rahfeeq, aka Salahadeen Osama Waleed*, 1:18 MJ 2120 (United States District Court for the Northern District of Ohio 2018), https://www.justice.gov/opa/press-release/file/1077151/download.

[119] Pitts.

have done so. In this case, a single post appears to meet the government's standard. To Handeyside's point, it is also possible that lesser statements, while provocative, may not constitute a threat nor be considered protected free speech. Given the secrecy that cloaks the TSDB, and the lack of judicial oversight that has historically been the method of determining what speech should be protected, it is impossible to know.

The case of Laura Poitras illustrates some of this criticism of the TSDB standards. The Academy Award™-winning documentary filmmaker and prominent critic of the administrations of Presidents Bush and Obama claimed to have been stopped at the U.S. border for enhanced security screening dozens of times between 2006 and the end of 2012.[120] She claimed the treatment she was subjected to at the border included being met at the aircraft door by government agents, being held for three or more hours for questioning, and having her electronic devices seized and held for 41 days.[121]

Poitras filed a Freedom of Information request for documents that might explain this treatment. The documents she received revealed that she was suspected of having foreknowledge of an insurgent ambush on U.S. forces in Iraq in 2004 that killed one U.S. soldier.[122] Such alleged conduct would constitute a federal crime, and it was reported to the Army Criminal Investigative Command.[123] In a letter to the FBI released to Poitras, an official for the Army Criminal Investigative Command wrote in May 2006:

> A review by our legal staff of the information developed thus far revealed *credible information does not presently exist* to believe Ms. Poitras committed a criminal offense; however, this could quickly change if Ms. Poitras were to be interviewed and admitted she had knowledge of the

[120] Jamie Williams, "Court Orders Government to Provide More Information about Withheld Information in Laura Poitras' FOIA Lawsuit," Electronic Frontier Foundation, May 23, 2017, https://www.eff.org/deeplinks/2017/05/court-orders-government-provide-more-information-about-withheld-information-laura.

[121] A discussion of this type of search appears in the next chapter. Glenn Greenwald, "U.S. Filmmaker Repeatedly Detained at Border," Salon, April 8, 2012, http://www.salon.com/2012/04/08/u_s_filmmaker_repeatedly_detained_at_border/.

[122] Deb Riechmann, "Filmmaker Learns Why She Endured Airport Stops for Years," Associated Press, April 17, 2017, http://www.businessinsider.com/ap-filmmaker-learns-why-she-endured-airport-stops-for-years-2017-4.

[123] John Bruning, *The Devil's Sandbox: With the 2nd* Battalion, 162nd Infantry at War in Iraq (Minneapolis, MN: Zenith Press, 2006), 303.

> ambush and refused to notify U.S. forces in order to further her documentary and media interest[124] (italics added)

Poitras has stated that the FBI never questioned her, nor charged her regarding the allegation.[125] Of concern was that Poitras, a government critic and journalist, would be watchlisted based on a single, uncorroborated accusation, and despite the view of the Army Criminal Investigative Command that the information was not credible. She alleges that the extra security measures at the border started in 2006 shortly after the FBI received the communication from the Army.[126] Plausibly, her name was added to the TIDE database and the TSDB at that time. It is impossible to know whether the government has other information on Poitras, beyond the single and unsubstantiated claim, which on its face appears not to meet the government's reasonable suspicion standard established in 2008. Her name likely remained on the TSDB until 2012, when journalist Glenn Greenwald wrote an expose detailing her treatment at the border.[127] Although a spokesperson for DHS has stated that she is no longer of "significant interest," Poitras does not know whether she is still under investigation by the FBI, whether she was or is still on the watchlist, or if she will face extra security again in the future.[128]

2. Intelligence Collection

The information in the TSDB is exported to a variety of other information systems used by other government agencies to conduct security-screening activities. The moment when an individual on the TSDB interacts with an agency is known as an encounter.[129] This encounter may take the form of an individual passing through immigration and customs screening at an airport, when a police officer conducts a traffic stop, or other interactions with law enforcement or security authorities. The TSC has issued guidance for

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[124] Kevin Gosztola, "Filmmaker Laura Poitras Still Does Not Know if U.S. Military Is Done Investigating Her," ShadowProof, April 18, 2017, https://shadowproof.com/2017/04/18/filmmaker-laura-poitras-still-not-know-u-s-military-done-investigating/.

[125] Gosztola.

[126] Gosztola.

[127] Greenwald, "U.S. Filmmaker Repeatedly Detained at Border."

[128] Gosztola, "Filmmaker Laura Poitras Does Not Know."

[129] Scahill and Devereaux, "The Secret Government Rulebook for Labeling You a Terrorist."

agencies on managing encounters, and these agencies are encouraged to report practically all information acquired during the encounter to the TSC; thus, the TSDB has become an intelligence-gathering tool. In most lawful encounters, a subject is not required to provide more than basic biographic data to a screening agency, absent a warrant or probable cause to search that person, belongings or conveyance. In other situations, the government can ignore the traditional boundaries of probable cause and search a person's belongings without obtaining a search warrant.[130] This additional scrutiny, repeated over time, has been the root of many complaints from persons who feel they are being unfairly targeted.

The use of the TSDB as an intelligence-collection tool is not an unintended byproduct of the process. A report from the Office for the Inspector General of the DOJ details a June 2005 inspection of the TSC. The first TSC director, Donna Buscella, was interviewed about the operations of the TSC and its management of the TSDB for the report. The inspectors reported comments Buscella made explaining the intelligence value of the TSDB:

> We asked the TSC Director about the content of the TSC's consolidated watch list. She informed us that, to err on the side of caution, individuals with any degree of a terrorism nexus were included on the consolidated watch list, as long as minimum criteria (sic) was met (i.e., the person's name was partially known plus one other piece of identifying information, such as the date of birth). ***The Director further explained that one of the benefits of watch listing individuals who pose a lower threat was that their movement could be monitored through the screening process and thereby provide useful intelligence information to counterterrorism investigators.*** [emphasis added] In addition, she stated that lower-threat level individuals can have associations with higher threat level terrorists, and watch listing lower-threat individuals may lead to uncovering the location of other watch list individuals.[131]

This statement describes why the government may choose to watchlist individuals who are not themselves reasonably suspected of involvement in terrorism, and then subject these same persons to more invasive screening at the border. Buscella's statements were

[130] Stephen Viña, *Protecting Our Perimeter: "Border Searches" Under the Fourth Amendment*, CRS Report No. RL31826 (Washington, DC: Congressional Research Service, 2006), 2–6, http://trac.syr.edu/immigration/library/P1075.pdf.

[131] Department of Justice, *Review of the Terrorist Screening Center*, viii.

somewhat at odds with testimony she gave to the National Commission on Terrorist Attacks upon the United States on January 26, 2004 regarding the how the TSC safeguards civil liberties:

> We recognize that with all of these capabilities also comes the responsibility to ensure that we continue to protect our civil liberties. The TSC has absolutely no independent authority to conduct intelligence collection or other operations. In fact, the TSC does not collect information at all—it only receives information collected by other entities with preexisting authority to do so, each with their own policies and procedures to protect privacy rights and civil liberties. The handling and use of information, including U.S. person information, is governed by the same statutory, regulatory, and constitutional requirements as if the information was not to be included in a TSC-managed database.[132]

While the TSC does not collect the information, the placement of an individual ensures that information is collected in situations during which a law enforcement organization may not otherwise have an interest or reason to look more closely. The KST label is a signal to security and law enforcement agencies to probe further or utilize more extreme methods to extract information from a subject. The TSC then becomes the conduit for sharing the information among the various components of the homeland security enterprise. The collection of this information is lawful, and clearly benefits the government. The cost is stigmatization of otherwise law-abiding persons, and the results of this stigmatization may have negative consequences for the homeland security enterprise discussed later.

D. THE WATCHLIST IN OPERATION

Five major agencies use the data in the TSDB: the Department of State, TSA, FBI, CBP, and Department of Defense.[133] As illustrated in Figure 2, State uses the TSDB to conduct passport and visa screening; Defense uses the system to conduct base access screening. These functions are not discussed, as the visa and passport process primarily

[132] "Statement of Donna A. Bucella to the National Commission on Terrorist Attacks upon the United States," National Commission on Terrorist Attack upon the United States, January 26, 2004, http://govinfo.library.unt.edu/911/hearings/hearing7/witness_bucella.htm.

[133] Terrorist Screening Center, *Terrorist Screening Center—FAQs*.

impact foreign nationals, and base access screening has not been a matter of significant attention. The use of the TSDB for screening by TSA and CBP, and its use by the FBI for law enforcement screening, impacts a large number of U.S. persons and is analyzed in this section.

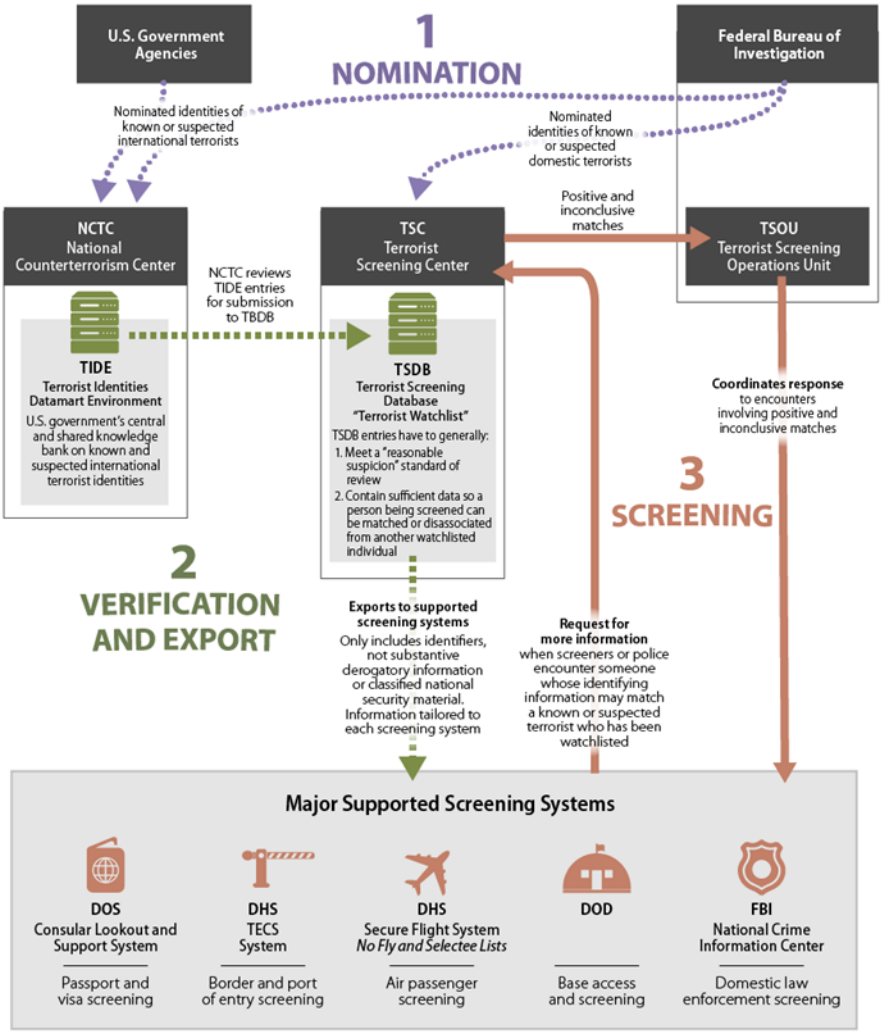

Figure 2. U.S. Counterterrorism Watchlisting Regimen[134]

[134] Source: Jerome P. Bjelopera, Bart Elias, and Alison Siskin, *The Terrorist Screening Database and Preventing Terrorist Travel*, CRS Report N. R44678 (Washington, DC: Congressional Research Service, 2016), 3, https://fas.org/sgp/crs/terror/R44678.pdf.

1. Customs and Border Protection

The CBP's mission is, "To safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel."[135] CBP officers interview persons arriving into the United States to verify their identity and ensure that they are allowed entry into the country. CBP imports data from the TSDB into a number of different systems to conduct its border security mission, including the TECS (not an acronym) database, which includes most records from the TSDB.[136] A joint report from DHS and the DOJ detailed figures on the number of encounters CBP had with subjects listed on the TSDB. The report stated that 2,554 KSTs attempted to enter the United States in fiscal 2017.[137] This large number of KSTs being turned away from entering the United States stands in stark contrast to the numbers seen before 9/11. As previously stated, use of the watchlists prior to 9/11 resulted in only 97 KSTs being refused entry from 1993 to 1998.[138] The difference may be one of efficiency, but it may also be the result of the tremendous expansion of the number of subjects on the watchlist, which is possibly itself related to the low standard for accessing who is a KST.

CBP has a unique authority, known as the border search exemption, which allows warrantless searches of persons, their possessions, and their conveyance at the border or functional equivalents like an arrival airport following an international flight.[139] In other words, travelers passing through an immigration and customs inspection can have every item in their possession searched, cataloged, and photographed even if they are U.S. citizens not engaging in any kind of illegal conduct. These inspections make CBP encounters very valuable for the collection of intelligence on watchlisted subjects and their traveling companions. Given the guidance provided by the TSC, it is logical to expect that any person with a record in the TSDB will be subject to this kind of search. This search includes the contents of all electronic devices carried by the travelers. CPB agents can

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[135] "About CBP," Department of Homeland Security, November 21, 2016, https://www.cbp.gov/about.

[136] Bjelopera, Elias, and Siskin, *The Terrorist Screening Database and Preventing Terrorist Travel*, 8.

[137] Department of Homeland Security and Department of Justice, *Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry into the United States Initial Section 11 Report* (Washington, DC: Government Printing Office, 2018), https://www.justice.gov/opa/press-release/file/1026436/download.

[138] National Commission, *Final Report*, loc. 3179.

[139] Viña, *Protecting Our Perimeter*, 6–7.

detain travelers for questioning, in some cases, for up to 48 hours, if they have reasonable suspicion of inadmissibility or criminal conduct.[140] Although U.S. citizens have the right to an attorney present during questioning, foreign persons, including those with immigrant visas, can be questioned without an attorney present.[141]

Laura Poitras, introduced in Chapter III, no longer travels internationally with electronic devices, and she has substantially altered her work methods, including limiting her use of phones, out of a stated fear that U.S. agents will attempt to seize her work or subject her to further electronic surveillance.[142] As Sophia Cope, Staff Attorney for the Electronic Frontier Foundation, stated, "Warrantless and suspicion-less searches of digital devices at the border (or the functional equivalent of the border, such as international airports and other ports of entry) are particularly invasive given the vast amount of personal information they can store on the devices themselves or connect to in the 'cloud'—beyond what any piece of traditional luggage can hold."[143]

2. Law Enforcement Encounters

The TSDB is exported into the NCIC database available to almost every law enforcement agency in the country. The Bureau of Justice Statistics estimates that 41% of police contact occurs during routine traffic enforcement.[144] Typically, law enforcement officers query the NCIC database when they conduct a traffic stop. Former TSC Director Timothy Healy has stated that approximately one third of TSDB encounters stem from

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[140] Viña, 13–14.

[141] "Know Your Rights," American Civil Liberties Union, accessed September 8, 2017, https://www.aclu.org/files/kyr/kyr_english_5.pdf.

[142] Alexandra Ellerbeck, Stephanie Sugars and Avi Asher-Schapiro, "Nothing to Declare: Why U.S. Border Agency's Vast Stop and Search Powers Undermine Press Freedom," Committee to Protect Journalists, October 22, 2018, https://cpj.org/reports/2018/10/nothing-to-declare-us-border-search-phone-press-freedom-cbp.php.

[143] Sophia Cope, "Law Enforcement Uses Border Search Exception as Fourth Amendment Loophole," Electronic Frontier Foundation, December 8, 2017, https://www.eff.org/deeplinks/2016/12/law-enforcement-uses-border-search-exception-fourth-amendment-loophole.

[144] Elizabeth Davis, Anthony Whyde, and Lynn Langton, *Contacts between Police and the Public, 2015*, Report No. NCJ 251145 (Washington, DC: Department of Justice, 2018), 1, https://www.bjs.gov/content/pub/pdf/cpp15.pdf.

traffic stops. He explained that 15 to 25 of these encounters occur each day.[145] Three handling codes are given when an officer, or dispatch, queries NCIC:

- Handling Code 1—Individuals for whom there is an active arrest warrant in the NCIC Wanted Persons File.
- Handling Code 2—Individuals for whom DHS will issue an immigration detainer if the subject is encountered by law enforcement.
- Handling Code 3—Individuals who are listed on the TSDB but do not meet the criteria for the first two codes.[146]

The database displays a message alerting the officer to a series of actions. Obviously, subjects with the first two handling codes are likely to be arrested when encountered. If an officer encounters an individual with Handling Code 3, the following message is displayed, as seen in Figure 3.

DO NOT DETAIN OR ARREST THIS INDIVIDUAL UNLESS THERE IS EVIDENCE OF A VIOLATION OF FEDERAL, STATE OR LOCAL STATUTES.
UNAUTHORIZED DISCLOSURE IS PROHIBITED.
INFORMATION THAT THIS INDIVIDUAL MAY BE ON A TERRORIST WATCHLIST IS THE PROPERTY OF THE TSC AND IS A FEDERAL RECORD PROVIDED TO YOUR AGENCY ONLY FOR INTELLIGENCE AND LEAD PURPOSES. THIS RECORD, AND ANY INFORMATION CONTAINED WITHIN IT, MAY NOT BE DISCLOSED OR USED IN ANY PROCEEDING WITHOUT THE ADVANCE AUTHORIZATION OF THE TSC.
WARNING - APPROACH WITH CAUTION
LAW ENFORCEMENT SENSITIVE INFORMATION"
"***LAW ENFORCEMENT SENSITIVE INFORMATION***
DO NOT ADVISE THIS INDIVIDUAL THAT THEY MAY BE ON A TERRORIST WATCHLIST. CONTACT THE TERRORIST SCREENING CENTER (TSC) AT [redacted] DURING THIS ENCOUNTER. IF THIS WOULD EXTEND THE SCOPE OR DURATION OF THE ENCOUNTER, CONTACT THE TSC IMMEDIATELY THEREAFTER. IF YOU ARE A BORDER PATROL OFFICER IMMEDIATELY CALL THE NTC.

ATTEMPT TO OBTAIN SUFFICIENT IDENTIFYING INFORMATION DURING THE ENCOUNTER, WITHOUT OTHERWISE EXTENDING THE SCOPE OR DURATION OF THE ENCOUNTER, TO ASSIST THE TSC IN DETERMINING WHETHER OR NOT THE NAME OR IDENTIFIER(S) YOU QUERIED BELONGS TO AN INDIVIDUAL IDENTIFIED AS HAVING POSSIBLE TIES WITH TERRORISM.

Figure 3. NCIC Handling Code 3[147]

[145] Doug Wyllie, "A Powerful Weapon for Police in the Post-9/11 World," PoliceOne, September 10, 2010, https://www.policeone.com/terrorism/articles/2654171-A-powerful-weapon-for-police-in-the-post-9-11-world/.

[146] David M. Hardy, "No Fly List/Selectee List et al." (official memorandum, Washington, DC: Department of Justice, 2011), https//www2.epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11.pdf.

[147] Source: Hardy.

Healy noted that useful intelligence information has been gleaned from these types of encounters:

> We had a subject stopped in L.A. and there were two other people in the car. One was a subject of an FBI CT investigation in New Orleans, another one was a CT investigation I believe in Phoenix. Neither the Phoenix nor the New Orleans case agent nor the L.A. case agent knew that their subjects were associated somehow. Nor did any of them know that their subjects were together, and none of them knew that the subjects were in the same car together kind of hanging out.[148]

Healy also notes that phone numbers obtained by police officers have been entered into the TIDE database and were eventually used by the CIA to further a counterterrorism case.[149] His comments further illustrate how the watchlist is used to gather intelligence information and share it among the various agencies of the intelligence and homeland security enterprise.

3. TSA

Several subsets of the TSDB are used in aviation screening activities. Following the 9/11 attacks, it was apparent that the aviation security screening system was ineffective. Congress created a new agency focused on aviation security, the TSA, through the Aviation and Transportation Security Act in November 2001.[150] The TSA assumed responsibility for all screening operations at U.S. airports and attempted to deploy improvements to the CAPPS security system. These efforts were almost immediately drawn into controversy, as well-known persons, such as Senator Edward Kennedy, found themselves drawn into additional security checks simply because they shared a name with another individual deemed a security threat.[151] The TSA admitted that these and other issues were created

[148] Wyllie, "A Powerful Weapon for Police in the Post-9/11 World."

[149] Wyllie.

[150] Cathleen A. Berrick and David A. Powner, *Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges*, GAO-04-385 (Washington, DC: Government Accountability Office, 2004), 6, http://www.gao.gov/new.items/d04385.pdf.

[151] "Myth Buster: TSA's Watch List is More than One Million People Strong," Transportation Security Administration, July 14, 2008, https://www.tsa.gov/blog/2008/07/14/myth-buster-tsas-watch-list-more-one-million-people-strong.

simply because the system could not distinguish between individuals with the same name.[152]

The TSA rolled out an improved system, known as Secure Flight, in 2009.[153] Secure Flight uses the TSDB to identify individuals who require extra screening or who may not board an airline flight. According to a General Accounting Office study, "The Secure Flight program, as implemented pursuant to the 2008 Secure Flight Final Rule, requires U.S.- and foreign-based commercial aircraft operators traveling to, from, within, or overflying the United States, as well as U.S. commercial aircraft operators with international point-to-point flights, to collect information from passengers and transmit that information electronically to TSA."[154] Secure Flight breaks travelers into distinct low and high-risk categories based on a risk assessment.[155] Passengers in the low risk category are eligible for expedited screening; passengers in the regular risk category are subject to routine screening; and passengers in the high-risk category are considered Selectees.[156] Selectees are persons for whom information exists identifying them as a threat in excess of the reasonable suspicion standard used for the watch list, but the exact requirements are not publicly disclosed.[157] Approximately 3 percent of persons, or 24,000, listed on the TSDB are included on the Selectee list.[158] Any person listed in the TSDB with a full name and date of birth is placed on the Expanded Selectee (E-Selectee) list.[159] Passengers in both

[152] Transportation Security Administration.

[153] Jennifer A. Grover, *Secure Flight: TSA Should Take Additional Steps to Determine Program Effectiveness*, GAO-14-531 (Washington, DC: Government Accountability Office, 2014), 8, https://www.gao.gov/assets/670/665676.pdf.

[154] Grover.

[155] "Security Screening," Transportation Security Administration, accessed September 2, 2018, https://www.tsa.gov/travel/security-screening#quickset-security_screening_quicktabs_0URL.

[156] Transportation Security Administration.

[157] Bjelopera, Elias and Siskin, *The Terrorist Screening Database and Preventing Terrorist Travel*, 8.

[158] H.R., *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*.

[159] H.R.

groups are given enhanced screening prior to boarding an aircraft. Additionally, the TSA may assign federal air marshals to flights with ticketed passengers identified as KSTs.[160]

The TSA maintains a No Fly list of individuals prohibited from boarding a commercial aircraft that traverses U.S. airspace.[161] According to the TSC, the No Fly list will include an individual who "presents a threat of committing an act of terrorism with respect to an aircraft, the homeland, U.S. facilities, or interests abroad."[162] The specific criteria for inclusion on the No Fly list are considered Sensitive Security Information and are not publicly available.[163] A purported 44,000 names were on the No Fly list in 2006; among them, 14 of the 19 9/11 hijackers, despite the fact that they had been dead for five years.[164] After enduring criticism, Homeland Security Secretary Michael Chertoff announced in 2008 that the list had been culled to 2,500 names; but after the failed bombing of a Delta Airlines flight to Detroit by Umar Farouk Abdulmutallab on December 25, 2009, the list once again began to grow exponentially.[165] TSC Director Christopher Piehota offered testimony before a House subcommittee in 2014 in which he stated that 64,000 persons were then on the No Fly list.[166] The No Fly list expanded to 99,000 persons by 2017, nearly 1,000 of them U.S. citizens.[167]

From an intelligence perspective, Secure Flight allows TSA and other homeland security entities to track the airline travel of every individual who is on the TSDB. From a security perspective, it seems reasonable to ensure that individuals suspected of terrorist

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[160] Jennifer Grover, *Federal Air Marshal Service: Actions Needed to Better Incorporate Risk in Deployment Strategy*, GAO-16-582 (Washington, DC: Government Accountability Office, 2016), 6, http://www.gao.gov/assets/680/677590.pdf.

[161] Bjelopera, Elias and Siskin, *The Terrorist Screening Database and Preventing Terrorist Travel*, 7.

[162] Terrorist Screening Center, *Terrorist Screening Center—FAQs*.

[163] Linda L. Lane, "The Discoverability of Sensitive Security Information in Aviation Litigation," *Journal of Air Law and Commerce* 71, no. 3 (Summer 2006): 427, https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1109&context=jalc.

[164] Steve Kroft, "Unlikely Terrorists on No Fly List," 60 Minutes, October 5, 2006, http://www.cbsnews.com/news/unlikely-terrorists-on-no-fly-list/.

[165] Jeanne Meserve, "Terrorist Watch Lists Shorter than Previously Reported," CNN, October 22, 2008, http://www.cnn.com/2008/TRAVEL/10/22/no.fly.lists/index.html.

[166] H.R., *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*.

[167] Geddess, "Presentation to BRIDGES."

activity receive adequate security screening when they travel. It follows that those deemed an extreme risk of committing an attack aboard an aircraft should not be allowed to fly. However, it has been alleged that investigators may be attempting to use the No Fly list to coerce some into becoming informants.[168] Ibrahim Mashal, a former U.S. Marine and dog trainer from Chicago, attempted to board a flight to Spokane, Washington, but claims he was told by the airline agent that he was on the No Fly list. He soon found himself surrounded by dozens of law enforcement officers, who questioned him before eventually releasing him to go home.[169] Within minutes, two FBI agents contacted him who then asked to meet him at his home to talk. He claims they questioned him for an hour about his parents' national origin, his religion, and his personal habits of using social media, banking, and communication with persons outside the country. He claims these same agents offered to get him off the list months later if he would become an informant against local mosques. Mashal has stated that his business suffered, and he missed significant personal events, as he could not easily travel.

Mashal was eventually represented by the ACLU in the federal litigation *Latif v. Holder*, which resulted in changes to the DHS TRIP redress procedure for No Fly subjects (discussed in the next section). Mashal's attorneys received a letter from the DOJ shortly after a judge ordered Mashal to be provided an unclassified summary of the reasons for his presence on the No Fly list. The letter indicated that he was no longer on the No Fly list; he does not know if he will be added again to the No Fly list again in the future.[170] Mashal's experience is not unique. In 2014, four Muslim men filed suit against government officials they say attempted to coerce them into becoming informants or providing information regarding their co-religionists, using the No Fly list.[171] Another man, Libyan-American

[168] Nusrat Choudhury, "The No-Fly List: Where the FBI Goes Fishing for Informants," American Civil Liberties Union, September 27, 2013, https://www.aclu.org/blog/national-security/discriminatory-profiling/no-fly-list-where-fbi-goes-fishing-informants.

[169] Ibraheim Mashal, "I'm a Former Marine Who Was on the No Fly List for 4 Years," American Civil Liberties Union, July 1, 2016, https://www.aclu.org/blog/speak-freely/im-former-marine-who-was-no-fly-list-4-years-and-i-still-dont-know-why.

[170] Amy Powell, "Latif v. Holder, 3:10-cv-00750-BR (D. Oregon)" (official memorandum, Washington, DC: Department of Justice, 2014), https://www.aclu.org/sites/default/files/assets/no_fly_letter.pdf.

[171] *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018).

medical student Yaseen Kadura, was added to the No Fly list in 2012 after being detained at the U.S.-Canadian Border. Kadura claims that during his eight-hour detainment, his phone was seized, and it was not returned for two months.[172] He claims he was approached by an Immigration and Customs Enforcement agent months later to discuss the contents of his phone. According to Kadura, the agent told him that the only way to be removed from the list was to work as an informant.[173] Like the others, Kadura eventually filed suit, and like Mashal, he received a letter from the government informing him that he was no longer on the No Fly list. His experience has left him bitter and fearful. "I was only 22 when I was first placed on the No Fly list," Kadura said. "Even though no charge or accusation has ever once been made against me, if I ever decide that I want to voice an opinion or be politically active in the future, there's always going to be this hanging over me."[174] Other examples of allegations have been raised that law enforcement officials have used the No Fly list to pressure people to cooperate in investigations.

E. REDRESS

Many begin to suspect that they are on a watchlist after experiencing repeated, enhanced screening, such as that described by Laura Poitras. Others are told—improperly—of their presence on the list by unauthorized agents or officers during the course of an encounter, as in the case of Ibrahim Mashal. For these persons, only a few avenues are available for addressing their status, TRIP, the Freedom of Information Act, or the federal courts.

1. DHS TRIP

If U.S. citizens believe that they are listed on the TSDB or any other terrorism watch list, the sole form of administrative redress is the DHS TRIP. People can submit a complaint and information to DHS TRIP, which the agency will review to determine if current information listing the persons exists, and if so, if it is accurate. According to

[172] Murtaza Hassain, "How a Young American Escaped the No-Fly List," The Intercept, January 21, 2016, https://theintercept.com/2016/01/21/how-a-young-american-escaped-the-no-fly-list/.

[173] Hassain.

[174] Hassain.

Clayton Grigg, Deputy Director of the TSC, applications to the DHS TRIP are vetted against the TSDB, and matches are referred to the TSC Redress Office.[175] This office reviews all available information in the database, as well as that submitted by the applicant for redress. If it is determined that these persons are on the TSDB, the nominating agency and the NCTC is contacted for updated information. The TSC Redress office will determine if the persons should be removed, modified (for example, moved from No Fly to Selectee status), or remain in the TSDB. Its decision is then communicated to the DHS TRIP office for communication to the applicants.

DHS has received a large number of requests for redress. A Freedom of Information Act response obtained by the Electronic Frontier Foundation revealed that the DHS TRIP received 66,455 applications for redress from February 2007 through August 2009.[176] Officials have stated that only 0.7 to two percent of those persons were actually listed on the TSDB.[177] According to DHS, the majority of these applications identified individuals with names similar to others on the list.[178] When it is determined that the persons seeking redress are a name match to a subject on the watchlist, the applicants are provided with redress control numbers that can be included on future reservations to prevent misidentification. A declaration filed by Grigg in a court case has revealed 2,660 applications for redress from subjects who were listed on the TSDB for the period October 1, 2009 through September 30, 2013.[179] The TSC removed 391 of the applicants following their reviews.[180] Regardless of the outcome of the DHS TRIP or TSC reviews, applicants for redress are not provided with any meaningful information. Applicants who were not

[175] "Latif, et al. v. Holder, et al.—Declaration of G. Clayton Grigg," American Civil Liberties Union, 14, filed May 28, 2015, https://www.aclu.org/legal-document/latif-et-al-v-holder-et-al-declaration-g-clayton-grigg.

[176] Vania T. Lockett, "DHS/OS/PRIV 09-836" (official memorandum, Washington, DC: Department of Justice, 2010), https://www.eff.org/files/filenode/trip_complaints/20100121_trip_complaints.pdf.

[177] S., *Five Years after the Intelligence Reform and Terrorism Prevention Act*; American Civil Liberties Union, "Latif, et al. v. Holder, et al."

[178] Lockett, "DHS/OS/PRIV 09-836."

[179] American Civil Liberties Union, "Latif, et al. v. Holder, et al."

[180] American Civil Liberties Union.

listed on the watchlist, those who were removed, and those who remain, receive this boilerplate response:

> DHS has researched and completed our review of your case. DHS TRIP can neither confirm nor deny any information about you which may be within federal watchlists or reveal any law enforcement sensitive information. However, we have made any corrections to records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding incidents of misidentification.[181]

Thus, except in cases involving the No Fly list discussed as follows, individuals are not provided any information regarding their status on a watch list, under the veil of government secrecy. The DHS TRIP procedure appears to be a mechanism for removing persons with a name that matches a government suspect, rather than a legitimate form of redress. The applicants cannot refute any incorrect information held by the government, because they cannot know if the information even exists. People who do not appear on the list receives the same response as those who are listed as KSTs. Applicants can only guess why, or even if, they are on the list; a guess that will be informed only by their perception of the continued scrutiny that alerted them to it in the first place. The form letter states that applicants may file a federal suit to review the action in the Court of Appeals.

More recent litigation has forced the government to undertake some changes to the No Fly list redress procedures. In June 2010, the ACLU filed suit in federal court on behalf of 13 Americans believed to be on the No Fly list.[182] This belief was based on the fact that all had been denied boarding at U.S. airports, but at the time of filing, the government had refused to even acknowledge their presence on the list despite the use of the applicable redress procedure. Of the 13 plaintiffs, four were military veterans, and several were living outside of the country and unable to return due to their status on the No Fly list.[183] After an initial dismissal in District Court on procedural grounds, the Ninth Circuit reversed and

[181] Rocky Horan, "Should You Get a Redress Number?" *Travel Codex*, July 13, 2017, https://www.travelcodex.com/get-redress-number/.

[182] American Civil Liberties Union, "Kariye, Et Al. V. Sessions, Et Al.–ACLU Challenge to Government No Fly List."

[183] American Civil Liberties Union.

remanded the case back to District Court.[184] The court ruled that the reasonable suspicion standard was sufficient for inclusion on the No Fly list and that the government was not required to share all available information in the interest of national security.[185] As Judge Anna Brown noted in her opinion:

> Due process does not require Defendants to apply the clear and convincing evidence standard to the No Fly List determinations that Defendants made as to these Plaintiffs nor to provide original evidence to support such determinations. The reasonable-suspicion standard does not violate procedural due process when applied to a particular Plaintiff as long as Defendants provide such Plaintiff with (1) a statement of reasons that is sufficient to permit such Plaintiff to respond meaningfully and (2) any material exculpatory or inculpatory information in Defendants' possession that is necessary for such a meaningful response.[186]

In 2014, only after they prevailed in court, the government informed seven of the plaintiffs that they were no longer on the No Fly list.[187] The remaining six plaintiffs were afforded unclassified summaries of some of the information for keeping them on the list. The fact that the government chose to remove more than half the plaintiffs rather than afford them an unclassified summary of the information that led to their presence on the watchlist is curious and problematic. It is unlikely that they would have been removed from the list had they truly constituted a threat. It is more likely that they never met the classified standard instituted by the government. Whether their status was simply an attempt to strong-arm their cooperation, as Mashal and others have alleged, or some other purpose, is impossible to know given the secrecy that cloaks the watchlisting system.[188]

2. Litigation

Applicants for redress who are not satisfied with the outcome of the DHS TRIP procedure can file a lawsuit in federal court, a costly proposition. Simply filing a complaint

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[184] *Latif v. Holder*, 28 F. Supp. 3d 1134, 1140 (D. Or. 2014).

[185] *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 U.S. Dist. LEXIS 40177 (D. Or. Mar. 28, 2016).

[186] *Latif*, 6.

[187] American Civil Liberties Union, "Kariye, Et Al. V. Sessions, Et Al.–ACLU Challenge to Government No Fly List."

[188] Mashal, "I'm a Former Marine Who Was on the No Fly List for 4 Years."

in federal court requires a $400 fee (this fee may be waived by the court).[189] Although people may represent themselves pro se, they will face a team of government attorneys. The costs for litigation in a successful suit, which can take many years, can run into the millions of dollars. Thus, in many cases, individuals have been represented by civil rights organizations or by firms on a pro bono basis. An additional barrier exists. Generally, when the government seeks to deprive a citizen of a life, liberty, or property interest, that citizen is entitled to due process. This guarantee is enshrined in the 14th Amendment of the Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[190]

When examining the amount of due process required in each case, the courts use a balancing test first established in *Mathews v. Eldridge*. In that case, the courts determined that due process is "flexible and calls for such procedural protections as the particular situation demands." The majority decision outlined the factors lower courts need to consider to balance the competing government and individual interests when deciding due process cases:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[191]

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[189] U.S. District Court for Western Washington, *A Pro Se Guide to Filing Your Lawsuit in Federal Court* (Seattle, WA: U.S. District Court for Western Washington, 2015), 9, http://www.wawd.uscourts.gov/sites/wawd/files/ProSeManual4_8_2013wforms.pdf.

[190] "Procedural Due Process Civil," Justia, accessed November 12, 2018, https://law.justia.com/constitution/us/amendment-14/05-procedural-due-process-civil.html.

[191] Brett Beaubien, "A Matter of Balance: Mathews v. Eldridge Provides the Procedural Fairness Rhode Island's Judiciary Desperately Needs," *Roger Williams University Law Review* 21, no. 2 (Spring 2016): 357, https://docs.rwu.edu/cgi/viewcontent.cgi?article=1592&context=rwu_LR.

Legal scholar Brett Beaubien explained, "The test is inherently designed to scrutinize governmental procedure, as courts are tasked with determining whether the competing interests of the individual and the government are in harmony with the protections required by the Constitution."[192] The courts have allowed litigation on No Fly cases, finding that plaintiffs have a constitutionally protected interest in traveling internationally by air as noted in the *Latif* case.[193] However, the courts have generally ruled that placement on the watchlist itself does not constitute a violation of due process.

The successful case of Dr. Rahinah Ibrahim demonstrates the futility of attempting to prevail in federal court. Dr. Ibrahim is an architect from Malaysia who was completing a Ph.D. program with Stanford University in 2004. FBI Agent Kevin Kelley and another agent from the FBI Joint Terrorism Task force interviewed Ibrahim in December 2004. The agents reportedly questioned her about her family, studies, and involvement with Jemaah Islamiya, a southwest Asian terror group.[194] Ibrahim stated she did not know much about that group, but was involved in Jemaah Islah Malaysia, which she described as an association for Malaysians who had studied abroad in the West.[195] This organization has been described as a group committed to reforming Malaysian society according to the ideals established by the Muslim Brotherhood.[196] The literature does not at all indicate that the group is involved with terrorism, but it is possible that the group's name was conflated with Jemaah Islamiya. Ibrahim has never been provided an explanation for why Special Agent Kelley questioned her that day. Some civil rights groups have speculated that the true reason that Ibrahim originally came under scrutiny was due to concerns about her

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[192] Beaubien.

[193] *Latif v. Holder*, 969 F. Supp. 2d 1293, 1295 (D. Or. 2013).

[194] "The FBI Checked the Wrong Box and a Woman Ended up on the Terrorism Watch List for Years," ProPublica, December 15, 2015, https://www.propublica.org/article/fbi-checked-wrong-box-rahinah-ibrahim-terrorism-watch-list.

[195] ProPublica.

[196] Maszlee Malik et al., "Pertubuhan Jamaah Islah Malaysia (JIM): An Analysis on its Philosophy of Education (1990–2000)," *Journal of Al-Tamaddun* 11, no. 1 (2016): 1–15, https://www.researchgate.net/publication/309255058_Pertubuhan_Jammad_Islah_Malaysia_JIM_An_Analysis_on_Its_Philosophy_of_Education_1990-2000.

husband or his other wives' activities.[197] Also unknown to Ibrahim was the fact that Agent Kelley had placed her on the No Fly list.

On January 2, 2005, she attempted to fly from San Francisco to Hawaii to present research findings at a conference.[198] Upon checking in for her flight, she was met by airport police, who handcuffed and escorted her to a holding cell. Ibrahim later received a settlement of $225,000 from the city for unlawful arrest.[199] She was released after two hours, and an aviation security inspector for TSA informed her, improperly, that she had been removed from the No Fly list. The reasons she was listed on the No Fly list or subsequently removed were never explained to her. She was told she could proceed on her trip the following day. Ibrahim did fly to Hawaii, and then she returned to Malaysia. When she attempted to return to the United States in March 2005, she found that her student visa had been revoked.[200]

Ibrahim completed the redress procedure, then known as the Passenger Identity Verification Form, in March 2005. A year later, she received a generic response:

> The Transportation Security Administration (TSA) has received your Passenger Identity Verification Form (PIVF) and identity documentation. In response to your request, we have conducted a review of any applicable records in consultation with other federal agencies, as appropriate. Where it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may have experienced as a result of the watchlist screening process . . . . This letter constitutes TSA's final agency decision, which is reviewable by the United States Court of Appeals under 49 U.S.C. § 46110.[201]

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[197] ProPublica, "The FBI Checked the Wrong Box."

[198] Sam Scott, "Flight Risk?" *Stanford Magazine*, November 2013, https://stanfordmag.org/contents/flight-risk.

[199] Howard Mintz, "U.S. Terrorism Program Challenged: Former Stanford Doctoral Student Fights 'No Fly' Lists in Trial," *Mercury News*, December 1, 2013, https://www.mercurynews.com/2013/12/01/u-s-terrorism-program-challenged-former-stanford-doctoral-student-fights-no-fly-lists-in-trial/.

[200] Mike McIntire, "Ensnared by Error on Growing U.S. Watch List," *New York Times*, April 6, 2010, https://www.nytimes.com/2010/04/07/us/07watch.html.

[201] *Ibrahim*, 923.

She filed a lawsuit in federal court on January 27, 2006 to challenge both her watchlist status and visa revocation.[202] Ibrahim was not allowed to return to the United States for any of the legal proceedings; the U.S. Embassy in Kuala Lumpur denied her visa applications because she had once again been placed in the TSDB.[203] District Court Judge William Alsup twice dismissed her case. First, the government argued that lawsuits regarding TSA rulings must be filed in the U.S. Court of Appeals. Judge Alsup agreed. On appeal, however, the Ninth Circuit ruled that the TSC, and not the TSA, decided who was on the watchlists, and remanded the case back to Judge Alsup. Next, the government argued that Ibrahim was not entitled to constitutional protections as a foreign national. Again, Alsup agreed. Yet, the Ninth Circuit again ruled in Ibrahim's favor on appeal and found that she had "a substantial voluntary connection" to the United States, and that she clearly intended to return following her brief stay in Malaysia.[204]

Special Agent Kelley testified that he had enrolled Ibrahim in the TSDB in November 2004, using the VGTOF Gang Member Entry Form. The form prompted, "It is recommended the subject NOT be entered into the following selected terrorist screening databases."[205] Agent Kelley erroneously checked the boxes for CLASS, the TSA Selectee List, TUSCAN, and TACTICS, believing that Ibrahim *would* be included on these watchlists.[206] In actuality, Ibrahim was included in the two lists Kelley did not select, TSA No Fly and IBIS. Agent Kelley did not discover his error until he was deposed for Ibrahim's lawsuit in September 2013.[207]

Judge Alsup would later refer to Ibrahim's experience on the watchlist as Kafkaesque.[208] Alsup's findings of fact in the case revealed that Ibrahim's watchlist status had been changed numerous times. In December 2005, Ibrahim was removed from the

[202] *Ibrahim*, 922.

[203] *Ibrahim*, 927.

[204] *Ibrahim*, 912.

[205] *Ibrahim*, 916.

[206] *Ibrahim*, 917.

[207] *Ibrahim*, 918–919.

[208] *Ibrahim*, 931.

Selectee list, but she was added to the Australian TACTICS and Canadian TUSCAN databases.[209] On February 2006, an unidentified government agent submitted a form requesting that Ibrahim be removed from all watchlists.[210] She was removed from the TSDB in September 2006.[211] She was added to the TSDB again on March 2, 2007 and again removed on May 20, 2007.[212] On October 2009, Ibrahim was again nominated to the TSDB under an exemption to the reasonable suspicion standard that was considered a state secret and not disclosed at trial. She remained on the watchlist until the trial.[213]

Ibrahim's daughter, Raihan Binti Mustafa Kamal, a U.S. citizen, was scheduled to appear as a witness in her mother's suit. On December 1, 2013, she was denied boarding on a flight to the United States because the government had sent information to the airline indicating that she might be inadmissible.[214] When questioned about this denial by Judge Alsup, the government's attorneys stated that Kamal had not flown because she was late for her flight.[215] Ibrahim's counsel insisted that Kamal had arrived on time before the flight, and that she had been denied boarding by the airline.[216] The next day the government attorneys assured the judge that the error had been corrected, and that Kamal was free to fly to the United States, but she elected to remain in Malaysia.[217] The case continued without her testimony.

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[209] *Ibrahim*, 935.

[210] *Ibrahim*, 935.

[211] *Ibrahim*, 935–936.

[212] *Ibrahim*, 937.

[213] *Ibrahim*, 923.

[214] *Ibrahim*, 946–947.

[215] William Dotinga, "Government Secrecy Vexes Judge in Long-Awaited No-Fly List Trial," Courthouse News Service, December 5, 2013, https://www.courthousenews.com/government-secrecy-vexes-judgein-long-awaited-no-fly-list-trial/.

[216] Mike Masnick, "Case Over No-Fly List Takes Bizarre Turn as Gov't Puts Witness on List, Then Denies Having Done So," Techdirt, December 4, 2013, https://www.techdirt.com/articles/20131204/10434025453/dhs-puts-witness-trial-over-legality-no-fly-list-no-fly-list-making-her-late-her-testimony.shtml.

[217] *Ibrahim*, 948.

Ultimately, Judge Alsup ruled in favor of Ibrahim, and ordered that the government expunge all databases of the erroneous information from 2004.[218] Ibrahim thus became the first, and to date only, to be ordered removed from a terror watchlist through litigation. In his order, District Judge William Alsup wrote:

> At long last, the government has conceded that plaintiff poses no threat to air safety or national security and should never have been placed on the no-fly list. She got there by human error within the FBI. This too is conceded. This was no minor human error but an error with palpable impact, leading to the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler. That it was human error may seem hard to accept—the FBI agent filled out the nomination form in a way exactly opposite from the instructions on the form, a bureaucratic analogy to a surgeon amputating the wrong digit—human error, yes, but of considerable consequence. Nonetheless, this order accepts the agent's testimony.[219]

Ibrahim is the only person to have been removed from the watchlist through a court order.[220] To date, the government has been ordered to pay more than $400,000 in attorney's fees to Ibrahim's attorneys.[221] Her attorneys continue to ligate the matter and claim they are owed $3.9 million for over a decade of work on the case.[222] These resources are unachievable for most people. Despite her success, the State Department denied her a visa to return to the United States just three months after her court victory.[223] The reason noted on her form, terrorism.[224] It is unlikely that a person simply listed on the TSDB can find success in court. Most litigation, like the *Latif* case, involves the No Fly List, and none of those cases has ever received a bench trial.

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[218] *Ibrahim*, 936.

[219] *Ibrahim*, 927.

[220] ProPublica, "The FBI Checked the Wrong Box."

[221] William Dotinga, "En Banc Ninth Circuit to Revisit No-Fly Case Fee Flap," Court House News, December 29, 2017, https://www.courthousenews.com/en-banc-ninth-circuit-to-revisit-no-fly-case-fee-flap/.

[222] Dotinga.

[223] ProPublica, "The FBI Checked the Wrong Box."

[224] ProPublica.

3. Redress through the Freedom of Information Act

The freedom to access government information is a hallmark of democratic society. One of the chief attributes of open government is that it allows citizens to examine the actions of government to ensure accountability. However, it is also the case that some secrecy is essential to providing national security. In the United States, the Freedom of Information Act (FOIA) ensures that citizens have access to information from executive agencies of the government while offering effective protection of government secrets. However, the executive branch has historically sought exemptions to allowing public access to records with a marked propensity to avoid and obstruct the release of information, often under the guise of national security. Despite this obstacle, some, like Poitras, have attempted to confirm or remediate their suspected status on the watchlist through FOIA. It was enacted in 1966 to allow public access to government records from federal agencies of the executive branch.[225] FOIA is overseen by the DOJ Office of Information Policy (OIP), which issues guidance to agencies on FOIA compliance.[226] To balance the national security interests of the government, disclosure consists of nine exemptions.[227] These exemptions cover classified information, internal personnel rules and practices, information barred from release by other laws, trade secrets, privileged communications, other individual's personal privacy, criminal investigations, supervision of financial services, and geological information on wells.[228]

In most circumstances, the requestor receives one of three statutory responses from the agency: (1) identification and release of the records, (2) determination of no applicable

[225] Department of Justice, *Department of Justice Guide to the Freedom of Information Act* (Washington, DC: Government Printing Office, 2013), introduction, 6, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/intro-july-19-2013.pdf#p5.

[226] "About the Office," Department of Justice, February 15, 2017, https://www.justice.gov/oip/about-office.

[227] Department of Justice, *Department of Justice Guide to the Freedom of Information Act*.

[228] "What are FOIA Exemptions," Department of Justice, accessed November 11, 2018, https://www.foia.gov/faq.html.

records, and (3) determination of records exempt from disclosure.[229] The requestor can file an administrative appeal if an agency indicates that the documents are exempt from disclosure.[230] Ultimately, the requestor retains the right to challenge the denial in federal court, where the court will review the documents in camera to determine whether the denial was correct.[231] In most cases, the judiciary is thus allowed to act as a balance between the interests of the government in protecting national security and the public's right to know under FOIA. In one recent example, the U.S. District Court for the District of Columbia ruled that documents pertaining to immigration policy had been improperly withheld from a FOIA request made by the watchdog group Judicial Watch.[232]

However, another agency, known as a "Glomar Response," threatens this judicial review. Journalist Harriet Ann Phillippi filed a request in 1976 requesting records from the CIA regarding the Hughes Glomar Explorer, a privately registered ship reported at the time to be involved in the recovery of a sunken Soviet submarine.[233] The CIA response that it could "neither confirm nor deny" the existence of the requested records, as even acknowledging their existence could compromise national security, despite the fact that the program was widely reported by that time in the media.[234] The courts have consistently affirmed agencies' ability to offer a "Glomar Response."[235] However, legal scholar Nathan Wessler writes, "The Glomar response creates particularly difficult problems for litigants in FOIA suits because, by both depriving them of information essential to litigation and

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[229] Nathan F. Wessler, "'[We] Can neither Confirm nor Deny the Existence or Nonexistence of Records Responsive to Your Request': Reforming the Glomar Response under FOIA," *New York University Law Review* 85, no. 4 (October 2010): 1381, https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-85-4-Wessler.pdf.

[230] Wessler, 1385.

[231] Wessler, 1385.

[232] "Judicial Watch Victory: Court Rules Obama Department of Homeland Security Violated FOIA With Stealth Amnesty Secrecy," Marketwire, March 7, 2013, https://finance.yahoo.com/news/judicial-watch-victory-court-rules-185820292.html.

[233] Nate Jones, "Confirm nor Deny: The History of the Glomar Response and the Glomar Explorer," *Unredacted: National Security Archive* (blog), January 7, 2010, https://nsarchive.wordpress.com/2010/01/07/foia-tip-7-glomar-response.

[234] Jones, "Confirm nor Deny."

[235] Wessler, "[We] Can neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request," 1382.

hobbling judicial review, it severely limits litigants' ability to contest agencies' withholding of records."[236] The DHS TRIP response letter is an example of a Glomar Response that essentially provides no information whatsoever to a person seeking redress.

The Congress amended FOIA in 1986 to exclude three more categories of information from disclosure under FOIA: criminal law investigations where the target is unaware of the investigation, unacknowledged, confidential informants, and classified foreign intelligence, counterintelligence, or international terrorism records.[237] Attorney General Edwin Meese issued guidelines for how agencies should respond to requests for information that meet these exemptions. Those guidelines state that when records exist that are excludable under the 1986 exemptions, "a requester can properly be advised…that 'there exist no records responsive to your FOIA request.'"[238] This response is different from the Glomar's, neither confirm nor deny; essentially, the government exercises strategic deception and simply denies the existence of records. The DOJ gives an example of why this type of response is necessary:

> (I)f a criminal enterprise suspected it was infiltrated by an informant, it could try to uncover the suspected informant by using the FOIA. The enterprise could require the suspected informant to provide a privacy waiver and then could make a FOIA request to a law enforcement agency such as the FBI seeking any records on that individual. The submission of the privacy waiver would preclude the criminal law enforcement agency from using a privacy-based Glomar response. Without the exclusion, the law enforcement agency which was working with that informant in the criminal enterprise would be in an untenable position. Invoking (the exemption) which protects confidential informants, would tip off the criminal enterprise that indeed it had been infiltrated. To address just such a scenario, the second exclusion removes criminal law enforcement informant records from the requirements of the FOIA, when they are requested by a third party, thereby providing protection for the confidential informant.[239]

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[236] Wessler, 1382.

[237] "FOIA Update: FOIA Reform Legislations Enacted," Department of Justice, January 1, 1986, https://www.justice.gov/oip/blog/foia-update-foia-reform-legislation-enacted.

[238] "OIP Guidance," Department of Justice, August 15, 2014, https://www.justice.gov/oip/blog/foia-guidance-6.

[239] Department of Justice.

The DOJ used the exclusion only 123 times out of 70,081 requests in Fiscal Year 2013.[240] It is very likely that relevant TSDB records can be handled under this exception.

The use of FOIA by Poitras is instructive. Poitras filed requests to several agencies requesting records relating to her.[241] She received no response except from the FBI, which responded a year later that it had six records that could not be released due to grand jury secrecy rules.[242] Poitras, assisted by the Electronic Frontier Foundation, filed suit against the DOJ, DHS, and the ODNI seeking the release of these documents. On March 31, 2017, U.S. District Court Judge Ketanji Brown Jackson ordered the government to submit a "Vaughn Index" detailing the governments exempted holdings.[243] The OGIS describes the purpose of this index:

> A Vaughn Index is a document that agencies prepare in FOIA litigation to justify each withholding of information under a FOIA exemption. The term arose from a case captioned Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), in which the court required such an index to determine the validity of the agency's withholdings in the case. Sometimes such an index can be useful in a non-litigation setting, though the Vaughn ruling does not require that agencies prepare an itemized index of withheld documents, in the context of the administrative process. A requester whose FOIA request is pending in the administrative stage of processing, is not entitled to a Vaughn index.
>
> A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995).[244]

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[240] Department of Justice, *United States Department of Justice Chief Freedom of Information Act Report for 2014* (Washington, DC: Government Printing Office, 2014): 27, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/cfo-report-fy2014.pdf.

[241] Williams, "Court Orders Government to Provide More Information about Withheld Information in Laura Poitras' FOIA Lawsuit."

[242] Williams.

[243] *Poitras v. Dep't of Homeland Sec*., 303 F. Supp. 3d 136, 148 (D.D.C. 2018).

[244] "Office of Government Information Services (OGIS) FOIA Frequently Asked Questions," National Archives and Records Administration, June 1, 2017, https://www.archives.gov/ogis/resources/ogis-toolbox/foia-frequently-asked-questions.

The government subsequently released over 1,000 pages of heavily redacted documents detailing the government's investigation.[245] The records document the FBI's investigative activities that commenced subsequent to the allegation that Poitras had foreknowledge of the Iraq ambush that killed a U.S. soldier. The government classified the investigation as "secret," convened a grand jury in 2007, subpoenaed records from several companies, and sent FBI agents to film Poitras's question and answer sessions during the screenings of her films. It is important to note that the documents do not explain why the enhanced screening experiences that Poitras reports stopped abruptly in 2012. Poitras suspected that the government ceased the activities subsequent to media attention that followed an article published by journalist Glenn Greenwald. According to Jamie Williams and Karen Gullo:

> We now know that even though investigators determined in 2006 that there was no evidence Poitras had committed a crime, the FBI maintained a fishing expedition for another six years, finally closing the matter and giving up its efforts to find something it could use against Poitras after journalist Glenn Greenwald published an article about Poitras' experiences and a group of documentary filmmakers submitted a petition to the Department of Homeland Security protesting her treatment. It's concerning to think that these detentions may have continued indefinitely had they not been called out. The government's use of border crossings as an opportunity to target a journalist for intelligence investigations is disturbing and wrong.[246]

While it is noteworthy that Poitras was ultimately successful in her action, it must also be noted that she had advantages that most seeking redress would not have. Poitras was likely removed from the watchlist because of the media attention. Poitras has notoriety as a frequent critic of U.S. counterterrorism policies; this position naturally attracts more media attention. It is very unlikely that an ordinary citizen could marshal the same media interest. Her position was also likely a factor in the Electronic Frontier Foundation taking an interest in her litigation. It is also unlikely that an ordinary citizen could attract the same

[245] *Poitras*, 146–148.

[246] Jamie Williams and Karen Gullo, "Government Documents Show FBI Cleared Filmmaker Laura Poitras after Six-Year Fishing Expedition," Electronic Frontier Foundation, December 6, 2017, https://www.eff.org/deeplinks/2017/11/government-documents-show-fbi-cleared-filmmaker-laura-poitras-after-six-year.

kind of assistance without expending tremendous personal resources. These factors make FOIA litigation an unlikely form of redress for most people.

IV. CONSEQUENCES

The new watchlist process is very efficient, and the size of the TSDB has grown rapidly as it consumes information on more and more people. This chapter explores the unintended consequences of the enhanced watchlist processes. This examination proceeds in three parts. Part one describes how the watchlist process creates an incentive to watchlist subjects who do not necessarily meet the government standard. The second part describes how the gargantuan size of the TSDB is preventing it from operating efficiently. The last section describes how listing persons on the watchlist in an unfair manner, with limited opportunities for redress, is creating a barrier to cooperation inside minority communities.

A. THE PROCESS PLACES UNFAIR BURDENS ON AGENTS TO ENFORCE AN AMBIGUOUS STANDARD WITHOUT OVERSIGHT

Government agents engaged in counterterrorism face a daunting challenge. They face adversaries who are motivated, resourceful, and quick to exploit any weakness in the security enterprise. These agents, rightly constrained by U.S. laws, must operate within their extensively developed bureaucracies, following rules and procedures designed to prevent an almost endless array of past or possible overreach or underperformance. Meanwhile, their adversaries are unbounded, unrestrained, and capable of committing heinous acts of barbarity. These adversaries' ideological motivations are as diverse as their genders, races, religions, ethnicities, and national origins. They can be anyone, from anywhere, and they have often lived normal, unremarkable lives before becoming radicalized. Former FBI Director James Comey described the difficult work of counterterrorism stating, "We are looking for needles in a nationwide haystack, but we are also called up to figure out which pieces of hay might someday become needles."[247] In this context, the TSDB is an important tool. The watchlist can act as a decision tool that highlights individuals in that vast haystack who require additional scrutiny or screening.

[247] James B. Comey, "Update on Orlando Terrorism Investigation," Federal Bureau of Investigation, June 13, 2016, https://www.fbi.gov/news/speeches/update-on-orlando-terrorism-investigation.

Watchlists are binary; a person is either watchlisted or not. The consequences of not adding a suspect to the TSDB can be severe, even fatal: The FBI placed Omar Mateen, who murdered 49 people at the Pulse nightclub in Orlando, Florida on June 12, 2016, on the TSDB for a year based on statements to coworkers that he was involved with terrorist groups.[248] He was eventually removed from the watchlist when agents could not substantiate charges against him, despite his admission to making some of the remarks. Mateen had not yet committed a crime the agents could charge him with, and the agents could not discover a sufficient number of articulable facts to establish a reasonable suspicion that he was involved in terrorism. The policies of the FBI and the TSC dictated that he be removed, and the agents followed the policies. It could be surmised that they—or other observers in the Bureau and in law enforcement—regretted having to do so. For one thing, most importantly, innocents died. By far, FBI agents and other law enforcement personnel are motivated principally by the desire to serve, to protect, and to save citizens. Following that logic, and given a choice, it makes better sense to err on the side of caution in decisions, such as whether to watchlist someone (the pragmatic or operational costs of doing so notwithstanding are discussed in a later section). The downside or the tradeoffs seem to pale by comparison: inconvenience, or affront, or bureaucratic irritation to a single potentially innocent, but also potentially dangerous, individual. The *9/11 Commission Report* illustrates this conundrum:

> We must find ways of reconciling security with liberty since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.[249]

Such a calculus arguably though has a professional component as well. The FBI agents in the Mateen case were subject to intense, public, highly politicized scrutiny and

[248] Eric Lichtblau and Matt Apuzzo, "Orlando Gunman Was on Terror Watchlist, FBI Director Says," *New York Times*, June 13, 2016, https://www.nytimes.com/2016/06/14/us/omar-mateen-fbi.html.

[249] National Commission, *Final Report*, loc. 10967.

outrage; they had failed to prevent a massacre.[250] Contrast this situation with the consequences to agents of watchlisting a person who is not a terrorist: nothing. It is rare for the identity of an agent in the watchlist process to become public information. The disclosure of the identity of the FBI agent who mistakenly listed Rahinah Ibrahim on the No Fly list came only after years of litigation, and it received only a fraction of the media attention of the Mateen case. It is unknown whether the agent was disciplined for the error, but it seems unlikely. It is not difficult to understand how an individual agent, well-meaning and dedicated to the mission, might apply a cost-benefit analysis subconsciously when following the watchlist guidelines. The downside falls completely on one side. Some evidence can show that this bias toward watchlisting extends into the review process. The TSC rejected a mere .9 percent of the nominations it received between 2009 and 2013.[251]

Anya Bernstein posits that additional factors may place additional emphasis on growing the size of the watchlist. She notes that the size of an agency's watchlist may be considered an unconscious performance metric, and the agency appears "active and efficacious" by adding more and more names to its list.[252] Additionally, she notes that a large terrorist watchlist indicates a larger terrorist threat to outside observers to justify ever larger resources be devoted to the agency's mission. As she notes, "That cycle can encourage rent-seeking in the form of spurious prediction: a large watch list makes national security threats seem prevalent, which makes the agency's activities particularly necessary, which encourages attention and resources to flow to the agency and the watch list."[253] Bernstein notes that this process may not result in a conscious decision on the part of an agent to make an incorrect watchlist determination; rather, it may simply result in the development of poor assessment mechanisms within the agency itself.

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[250] Karoun Demirjian, "After Orlando Shooting, Senators Target Terror Watch Lists," *Washington Post*, June 14, 2016, https://www.washingtonpost.com/news/powerpost/wp/2016/06/14/terror-watch-lists-at-center-of-congressional-debate-post-orlando-shooting/?noredirect=on&utm_term=.6524f20f5463.

[251] *Gulet Mohamed, Plaintiff v. Erich H. Holder, in his Official Capacity as Attorney General of the United States, et al.*, Case No. 1:11-CV-00050 (United States District Court, Eastern District of Virginia Alexandria Division 2014), https://www.documentcloud.org/documents/1232171-91-3.html.

[252] Anya Bernstein, "The Hidden Costs of Terrorist Watch Lists," *Buffalo Law Review* 61, no. 3 (May 2013): 472, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11485&context=journal_articles.

[253] Bernstein, 473.

It is not difficult to imagine that the individual factors that may drive any bias toward watchlisting may have resulted in the explosive growth of the TSDB. The growth of the No Fly list component of the TSDB may be an example of how external factors can drive these factors. After the post 9/11 reforms took place, the size of the No Fly list began to increase. In 2004, Senator Edward Kennedy revealed that he had been delayed traveling several times because his name matched that of another on the No Fly list.[254] His revelation and others led to an effort on the government's part to reduce the size and scope of the list. A purported 44,000 names were on the No Fly list in 2006.[255] Homeland Security Secretary Michael Chertoff culled the list in 2008 to 2,500 names.[256] Nevertheless, after the failed bombing of a Delta Airlines flight to Detroit by Umar Farouk Abdulmutallab on December 25, 2009, the list once again expanded. TSC Director Christopher Piehota stated that 64,000 persons were then on the "No Fly" list in 2014.[257] By 2017, that number had grown to over 99,000.[258]

B. TOO BLOATED TO BE EFFECTIVE

Bernstein notes that one way to view the watchlist process is that it is better to populate a watchlist with information that might be spurious rather than miss one opportunity to watchlist an actual terrorist. As she states:

> Any reduction in missed predictions, or false negatives, justifies any number of spurious predictions, or false positives. The point of a terrorist suspect database, after all, is to prevent terrorist attacks, not to prevent inaccurate listing. Inaccuracy, the argument goes, is a fine price to pay for the benefit of avoiding an attack, because the cost of allowing some very damaging events like terrorist attacks to occur will always be higher than the cost of inaccurate predictions.[259]

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[254] Sara K. Goo, "Sen. Kennedy Flagged by No-Fly List," *Washington Post*, August 20, 2004, http://www.washingtonpost.com/wp-dyn/articles/A17073-2004Aug19.html.

[255] Kroft, "Unlikely Terrorists on No Fly List."

[256] Meserve, "Terrorist Watch Lists Shorter than Previously Reports."

[257] H.R., *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*.

[258] Geddes, "Presentation to BRIDGES."

[259] Bernstein, "The Hidden Costs of Terrorist Watch Lists," 473.

Bernstein uses the analogy of a medical test that often incorrectly indicates a positive result for a particular medical condition, but that never gives a negative result when the condition is present. In this example, the high incident of false positives due to the sensitivity of the test is justified by the low rate of false negatives. She notes that unlike a medical test, watchlists determinations are based on predictions of human behavior that may not lend themselves to the same calculation. She notes that it is assumed that a high cost is associated with a false negative, but a low (or no) cost for false positives.[260] The attacks perpetrated by Mateen perfectly illustrate the high cost of a false negative; it is incorrect to assume, however, that no costs result from watchlisting innocent (and unsuspecting) Americans.

1. Size is the Enemy of Data Integrity

As the watchlist grows in size, it also becomes more difficult to administer. The resources devoted to maintaining the watchlist are finite. TSC personnel are purported to be continuously scouring the database to ensure that the information contained continues to meet the requirements.[261] Unless the TSC continuously hires more and more analysts to conduct these audits, as the number of records rapidly grows, each individual entry receives less scrutiny. A May 2009 Department of Justice Inspector General report found that 72% of watchlist records were not updated promptly.[262] The Inspector General also found that in 8% of the reviewed cases, agents did not remove subjects from the database following the conclusion of an investigation, even when required by policy to do so. The Inspector General cited a specific instance in which an individual remained on the watchlist for five years after the conclusion of an investigation warranted immediate removal.[263] A later report by the Inspector General from March 2014 found that while the FBI had improved

[260] Bernstein, 478.

[261] Terrorist Screening Center, *Terrorist Screening Center—FAQs*.

[262] Department of Justice, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, 36.

[263] Department of Justice, vi.

its procedures, evidence still shows failures to add to or remove individuals properly from the TSDB.[264]

2. An Alarm that Never Stops Ringing Will Be Ignored

The size of the current watchlist also limits its effectiveness as a tool for screening and investigations. Only a finite number of agents can respond to a watchlist alert. In other words, agents must decide when to ignore an alert when more alerts are coming in than agents who can clear them. The consequences of this reality can be seen in the missed opportunities to stop Boston Marathon bomber Tamerlan Tsarnaev. Tsarnaev was the subject of a tip received by the FBI from Russian state intelligence agencies years before his attack.[265] This tip stated that Tsarnaev associated with radical Islamists.[266] The FBI interviewed Tsarnaev and concluded that he was not a threat. The CIA later received a second warning from the Russians and nominated Tsarnaev for inclusion in TIDE.[267] A second notation was subsequently entered into TECS, and this note specifically directed that Tsarnaev be detained if he attempted to leave or enter the United States.[268] Unfortunately, this notation misspelled his last name.[269]

On January 12, 2012, Tsarnaev was booked on an Aeroflot flight to Moscow from JFK to attend jihadist training. According to a congressional report on the bombing, "On the date of Tamerlan Tsarnaev's travel, there were 22 CBP officers assigned to conduct outbound targeting and examinations for the five international terminals at JFK

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[264] Department of Justice, *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations*, iii–vi.

[265] Michael German, "On Tsarnaev and the Inspectors General Review: A Response to Philip Heymann," Lawfare, May 9, 2014, https://www.lawfareblog.com/tsarnaev-and-inspectors-general-review-response-philip-heymann.

[266] Tom Winter, "Russia Warned U.S. about Tsarnaev, but Spelling Issue Let Him Escape," NBC News, March 25, 2014, http://www.nbcnews.com/storyline/boston-bombing-anniversary/russia-warned-u-s-about-tsarnaev-spelling-issue-let-him-n60836.

[267] Winter.

[268] Winter.

[269] Winter.

International Airport."[270] Agents decided not to interview him because many watchlisted subjects were traveling that day, and the officers focused on other, higher-profile, watchlist subjects per established CBP procedures.[271] They did not note the guidance in TECS to detain him. The report further notes, "Given the volume of passengers travelling into and out of the United States on any given day, ensuring all individuals of concern are examined is, and always will be, a challenge."[272] Tsarnaev subsequently reentered the United States without notice because his CBP record was not visible to the officer performing the inspection, because his name was misspelled.

The House report offered a recommendation that CBP find a way to interview all outbound travelers with a TECS alert.[273] However, the report noted that the "current fiscal environment and tightening budgets across Federal agencies" makes this goal difficult.[274] Michael German, former FBI Special Agent turned civil rights activist, said about the Inspector General's after-action report on the Boston Marathon attack, "The Inspectors General described a rushed and incomplete investigation, further hampered by an overburdened watchlisting system that pings so often agents don't even respond."[275] The watchlist has become an analogous to Aesop's fabled boy, who makes alerts so often to so many wolves, that cries of a true threat are unheard.

Some evidence shows that agents do not have confidence in the watchlist system. An OIG report noted:

> Two agents in one field office expressed to us their frustration with the fact that the watchlist had prevented one of their subjects from reentering the country, which they believed halted their investigation. Other agents expressed concern that when the consolidated terrorist watchlist is shared, other government agencies may open their own cases based solely on the FBI's watchlist record for an individual. Also, an FBI supervisor reported

[270] Committee on Homeland Security, *The Road to Boston: Counterterrorism Challenges and Lessons from the Marathon Bombings* (Washington, DC: U.S. House of Representatives, 2014), https://homeland.house.gov/files/documents/Boston-Bombings-Report.pdf.

[271] Committee on Homeland Security, 30.

[272] Committee on Homeland Security, 30.

[273] Committee on Homeland Security, 31.

[274] Committee on Homeland Security, 31.

[275] German, "On Tsarnaev and the Inspectors General Review."

> that some case agents were reluctant to nominate subjects to the watchlist. We believe that some case agents do not understand the full value in watchlisting their subjects and appeared to consider watchlisting to be an administrative burden.[276]

As noted previously, the FBI has taken steps to improve its procedures. It is not known if these reforms increased the confidence in agents investigating terrorism, nor is it known if these same agents continue to see watchlisting as an administrative burden. What is known is that the list has continued to grow at a terrific rate as the resources dedicated to investigate terrorism and screen threats have shrunk or remained stagnant.

C. A BARRIER TO COOPERATION

Terrorism, as defined under federal law, is violence in furtherance of a political or social objective.[277] This definition places government agents in the unenviable position of scrutinizing a wide range of constitutionally protected activities like the practice of religion and free speech, among others, in search of extremists who would do violence in the name of their cause. In the American legal tradition, a person is considered innocent until proven guilty in a court of law. A law enforcement officer is limited in acting to search and arrest subjects according to a precise set of laws that dictate the level of suspicion necessary to take a specific action. For example, as discussed in the previous chapters, a police officer who wants to stop and briefly detain a subject for questioning needs to demonstrate reasonable suspicion. The officer would then need to articulate a set of observations that led to making that determination. The final determination occurs in a courtroom where a judge or jury makes a judgement. However, the agents charged with evaluating suspected terrorists are making an assessment that becomes more of an educated guess using information that falls far short of that needed to establish guilt or innocence. This assessment takes place away from a courtroom and is reviewed by fellow actors in the enterprise in a secret setting completely away from public scrutiny. TSC Deputy Director Russell Travers explained the difficulty of making this assessment:

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[276] Department of Justice, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, 18.

[277] "Subpart P," Federal Bureau of Investigation, Code of Federal Regulations, 28 CFR Ch. I (2010), § 0.85, https://www.gpo.gov/fdsys/pkg/CFR-2010-title28-vol1/pdf/CFR-2010-title28-vol1-sec0-85.pdf.

> What exactly is a terrorist? He swears loyalty to bin Laden. He attacks U.S. interests. He went to a camp in the Federally Administered Tribal Areas (FATA). Those are easy. What if he is an associate of a terrorist or an affiliate? What if he just gave money to an extremist cause? Those are a little grayer. What if he gave money to a non-governmental organization (NGO)? That NGO supports legitimate and extremist causes. What if he owns a bookstore that sells mainly extremist literature? What if he is in a chat room or on a web forum espousing ''extremist rhetoric''? What if he is under the influence of extremists and he goes off to practice not jihad, but dawa, proselytizing? They get very gray in a hurry. The point is, we go from very easy cases to very hard. They are, in fact, gray areas, and that gets to the issue of standards that Senator Collins talked about and that is one of the issues that the community is working its way through.[278]

Any list of suspected terrorists would include large groups of co-religionists and fellow travelers of similar political and social causes who have not demonstrated a propensity toward violence. Terrorists do not operate in isolation, but have teachers, trainers, funders, and planners, many of whom are often indistinguishable from innocent family, friends, and co-religionists. Given the volume of news articles that have documented the watchlisting travails of certain segments of the population, it is possible to understand how moderate and peaceful members of these groups may begin to feel as though their group is being unfairly targeted. Indeed, many civil rights groups have specifically criticized the watchlist for targeting minority groups unfairly. Given the secrecy that cloaks the watchlist and the lack of redress, it is likely that this perception of discrimination may serve as a barrier between government agents who investigate terrorism and the moderate citizens whose cooperation seems essential. This observation is not an indictment of the individual agents who give their best efforts every day in a fair manner; rather, it seems that this effect may be the result of a flawed set of government standards creating a negative sum of all actions.

Recent reporting has demonstrated that high geographic concentrations of watchlisted subjects tend to be located in areas that also have large populations of Arab Americans and Muslims. According to reporting by Scahill and Devereaux, Dearborn,

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[278] *Intelligence Reform: The Lessons and Implications of the Christmas Day Attack-Part One: Hearing before the Committee on Homeland Security and Governmental Affairs*, Senate, 111th Cong., 2nd sess., January 20, 2010, 87, https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56838/pdf/CHRG-111shrg56838.pdf.

Michigan is home to the second largest population of subjects listed on the TSDB.[279] It differs from the other cities with large populations of subjects on the TSDB in two important ways. Four of these cities, whose total populations range from one million to over eight million, are also in the top 10 for total population in the United States. Dearborn has a population of under 100,000, and it is smaller than at least 300 other U.S. cities. Also, 30% of Dearborn's residents identify as Arab Americans, which ranks it as the city with the largest percentage of residents who identify as Arab.[280] This designation has led to a perception among Dearborn residents that Arab Americans and Muslims have been unfairly targeted for watchlisting. Christopher Mathias, Rowaida Abdelaziz, Hassan Khalifeh, and Afaf Humayun, reported on the effect of the watchlist on Dearborn's residents:

> There's a running joke here that has residents talking to an omnipresent Uncle Sam. Off-color or politically contentious remarks—whether uttered at work, school, the hair salon, the grocery store, the masjid or the shawarma place—are sometimes followed by a person looking up at the ceiling and saying something like: "I didn't mean it! They're not looking up at God," explained Dawud Walid, executive director at the Michigan chapter of the Council on American-Islamic Relations. "They're looking up because they think maybe there's a bug somewhere"—a recording device, that is, placed by the U.S. government to listen in on a community with one of the highest concentrations of Arab and Muslim Americans in the country. "You have to joke about it to relieve some of the anxiety," said Walid.[281]

Walid is the Executive Director of the Michigan Chapter of the Council on American-Islamic Relations, who explains further, "It's just overt and bodacious racial profiling by the federal government's law enforcement entities on this community, which again has not produced a single terrorist that's done anything to harm the homeland."[282]

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[279] Jeremy Scahill and Ryan Devereaux, "Watch Commander: Barack Obama's Secret Terrorist-Tracking System, by the Numbers," The Intercept, August 5, 2014, https://theintercept.com/2014/08/05/watch-commander/.

[280] Department of Commerce, *The Arab Population: 2000*, C2KBR-23 (Washington, DC: Government Printing Office, 2003), 7, https://www.census.gov/prod/2003pubs/c2kbr-23.pdf.

[281] Christopher Mathias et al., "The City that Bears the Brunt of the National Terror Watchlist," *Huffington Post*, October 3, 2017, https://www.huffingtonpost.com/entry/dearborn-michigan-terror-watchlist_us_59d27114e4b06791bb122cfe.

[282] Mathias et al.

He is not alone in his distrust of federal law enforcement resulting from the government's watchlist activities. Local community leaders, the U.S. Attorney's Office for Eastern Michigan, and the FBI started a group known as Building Respect in Diverse Groups to Enhance Sensitivity, or "BRIDGES," to address the backlash against the Arab and Muslim community following the 9/11 attacks. BRIDGES leaders met with Attorney General Loretta Lynch in 2016 to complain of profiling at the airports and border, due presumably to their widespread presence on the watchlists.[283] Many complained of the inadequate redress opportunities afforded by DHS TRIP, and the continued scrutiny faced by community members without the resources to challenge their status in court. Imam Mustapha Elturk, a co-chair of the Imams' Council of the Michigan Muslims Community Council, stated at the meeting, "These kind of attitudes and behaviors may be counterproductive. Things like that may very well radicalize these individuals—whom we don't want to be radicalized—simply because of the behavior of the U.S. government."[284] For her part, Lynch acknowledged the problem and placed the responsibility on Congress for failing to reform the existing statutes governing TRIP, "The No Fly list… contribute(s) to the sense of alienation as well as a sense of frustration on the part of this community. America is only strong if we are all part of it, and to the extent there are issues that separate any of us...our larger society suffers as well."[285]

That sense of frustration is illustrated in the experience of Nasser Beydoun. Beydoun is a Dearborn businessman and President of the Arab American Civil Rights League. He has described his experiences as a person allegedly listed on the terror watchlist, "My situation is I am on this watchlist. I can't check in (for a flight) online. I have to show up at the airport and every time I do I am sent to secondary screening, randomly selected of course and then after secondary screening I am also screened at the

[283] Niraj Warikoo, "U.S. Attorney General Loretta Lynch Meets with Arab Americans, Muslims," *Detroit Free Press*, August 3, 2016, http://www.freep.com/story/news/local/michigan/wayne/2016/08/03/attorney-general-loretta-lynch-arab-americans-muslims-dearborn/88033226/.

[284] Warikoo.

[285] Warikoo.

gate before I board the plane."[286] He alleges that he is stopped for several hours every time he enters or leaves the country by CBP officers who make copies of all his documents. His treatment at the border appears to be neither unique nor exceptional. It is not possible to know what information the government holds on Beydoun. The government does not so much as officially acknowledge his placement on the watchlist. He can file for redress, but unless he is on the No Fly list, it is unlikely he will be removed. Beydoun filed a lawsuit challenging his placement on the watchlist. He alleged that subsequent to the lawsuit, he was removed from the watchlist.[287] He stated, "When we filed the lawsuit, [the U.S. government] told us, 'Hey. We took Mr. Beydoun off the list. Can you drop the lawsuit?' We said no, because it's not just about me."[288] Unfortunately for Beydoun, the Court of Appeals ruled unanimously that the treatment he was subjected to as a result of his presence on the list was lawful and did not violate the Constitution.[289] Based on this ruling, it can be concluded that redress in the courts is also unlikely to result in removal. A LexisNexis database search reveals dozens of cases where individuals have challenged their watchlist status in federal courts.[290] Only one person, Rahinah Ibrahim, has successfully compelled a court to order her removal from the TSDB after years of litigation, and only after demonstrating to the judge that her presence resulted from an error. The conclusion to be reached is that the government holds all the cards.

The importance of fairness in government procedures has been noted in academic literature. Dr. Fathali Moghaddam is a professor of psychology at Georgetown University. In *The Psychology of Democracy*, Moghaddam explores the psychological factors that help societies to achieve actualized democracy, which he defines as, "full, informed, equal

[286] Natasha Dodo, "Civil Rights Group Challenges DHS 'Can Ask, Won't Tell' Policy," *Arab American News*, January 24, 2014, http://www.arabamericannews.com/2014/01/24/Civil-rights-group-challenges-DHS-%E2%80%9Ccan%E2%80%99t-ask-won%E2%80%99t-tell%E2%80%9D-policy/.

[287] *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017).

[288] Mathias et al., "The City that Bears the Brunt of the National Terror Watchlist."

[289] "Arab Men Lose Challenge over Extra Airport Screening," Associated Press, September 12, 2017, https://www.apnews.com/fdb393d1d9024012a798276b247e23f9.

[290] A LexisNexis Academic search was conducted on November 15, 2018 for all federal cases regarding the Traveler Redress Inquiry Program that returned 48 results from January 1, 2010 to present.

participation in wide aspects of political, economic, and cultural decision making independent of financial investment and resources."[291] He emphasizes:

> As Putnam pointed out, trust is integral to the social capital that enables dense social interconnections to develop and a healthy democracy to function. Institutions and various mechanisms can be developed to enable some levels and forms of cooperation to take place without trust, but low trust in authorities with no sense of effective recourse is a major factor in disengagement and cynicism among large numbers of citizens in democracies, such as the United States.[292]

Moghaddam has asserted that the perception of the fairness of government procedures is an important element in building strong democracies. He states, "Identification with and loyalty to the government, and society generally, is enhanced when people feel that the procedures for making decisions are fair and inclusive."[293] His assertions illustrate the importance in the perception of fairness and transparency in the government's TRIP procedures.

A 2009 DHS OIG audit of the TRIP redress process found it not to be transparent, and that it provides applicants with little information regarding their status. The report noted that despite the fact that only a small number of applicants are actually listed in the TSDB, the generic response is "singularly focused on the protection of law enforcement and watchlist information."[294] The report found further that:

> TRIP has created expectations about transparency that it does not fulfill. DHS websites have cultivated expectations that redress-seekers will learn the source of their travel difficulties. As of November 2008, the public could access the TRIP web page by clicking the phrase "Are you on a watch list?" on TSA's website. Similarly, a past DHS website link to the TRIP web page read, "Find out if I am on a travel watch list." In doing so, DHS has created

[291] Fathali M. Moghaddam, *The Psychology of Democracy* (Washington, DC: American Psychological Association, 1016), 4.

[292] Moghaddam, 190.

[293] Moghaddam, 184.

[294] Department of Homeland Security, *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program*, OIG-09-103 (Washington, DC: Government Printing Office, 2009), 94, https://www.oig.dhs.gov/assets/Mgmt/OIG-09-103r_Sep09.pdf.

> false expectation that TRIP will reveal whether redress seekers are on a watch list.[295]

The website subsequently revised the language on the website, but the fact remains that most applicants will never receive a meaningful reply to their inquiry. The OIG report continued:

> Forthright communications with redress-seekers are vital to TRIP's success and necessary for the public's trust. Without more transparent communication with redress-seekers, public confidence and participation in the program could decline. Redress responses should assure redress seekers that the government has acted fairly and reasonably in addressing their request. To the extent possible, these responses should provide information about the basis for their travel difficulty, the nature of the government's review, and the steps taken to rectify the underlying issue, without compromising matters of national security.[296]

The OIG was critical of the government's assertions that national security would be harmed if individuals were informed that they were or were not on the watchlist. They noted that travelers could already infer their status from treatment at the border and through repeated aviation screening. The report details the DHS response, "DHS managers disagreed that persons on the Selectee list can determine their watch list status, and noted that they have an obligation to coordinate the development of some redress letter responses with the TSC." Beydoun's experiences would appear to show the fallacy of the government's response.

The government documents regarding the watchlist process and institutions contain a variety of assurances regarding the protection of civil rights. Indeed, the government does not track data that can potentially validate or invalidate claims that the watchlist process is discriminatory. TSC Deputy Director G. Clayton Grigg provided the following statement in a declaration, "The TSC does not, in the usual course of business, identify the religion of individuals in the TSDB or on the No Fly List. The TSDB, and its subset No Fly List, does not include a field for indicating an individual's religion." Since the TSC does not track this data, it cannot provide evidence that affirmatively shows the individuals of a

[295] Department of Homeland Security, 94.

[296] Department of Homeland Security, 94.

particular religious group are not disproportionately impacted by the watchlist process or included in the TSDB disproportionately.

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V. EXISTING RECOMMENDATIONS FOR REFORM

The previous chapters have described the expansion of the government's watchlist activities that followed its previous failures to prevent the 9/11 attacks. This expansion has improved the performance of the system and resulted in incredible increases to the number of U.S. persons who are watchlisted and the scrutiny they receive due to this status. It has also, though, placed the government's standards and practices in the sights of a number of different groups, who charge negative effects on national security and civil rights. This chapter reviews the recommendations these groups have made to improve the government's structure, function, and practices related to watchlisting.

A. IMPROVE THE STANDARD FOR INCLUSION IN THE TSDB

Many civil rights groups have criticized the government's reasonable suspicion standard, but have not suggested a specific standard the TSC could adopt. Instead, they only suggest that the standard needs to be improved or generally raised. The ACLU has stated, "Federal agencies need clear, uniform, narrowly written standards that detail the specific evidentiary requirements for placing a person on a list."[297] This standard is not in itself concrete one. Alice Wang and Zachary Blau have stated, "Before a name is added to the list, multiple agencies should review the nomination to ensure that it's based on adequate, up-to-date evidence."[298] Again, this recommendation falls short of a demonstrable standard to be applied to the TSDB.

B. REFORM THE TSDB PROCESS FOR INCLUDING SUBJECTS ON THE WATCHLIST

Much of the criticism of the TSDB has centered on the process that governs how persons are included on the watchlist, or more specifically, the lack of an independent review of the government's exercise of the reasonable suspicion standard. Others have

[297] American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences*, 9.

[298] Alice A. Wang and Zachary Blau, "Who Will Watch the Watch List?" *New York Times*, August 16, 2016, https://www.nytimes.com/2016/08/16/opinion/who-will-watch-the-watch-list.html.

complained of the inadequate redress available to those who believe that they are on the watchlist, while still others have criticized the structure of the redress process, particularly that the DHS TRIP process is located within DHS and not within the TSC itself.

1. Judicial Review

Some have suggested that the addition of judicial review could improve redress. As previously discussed, when the government seeks to deprive a citizen of a life, liberty, or property interest, that citizen is entitled to due process. This due process can take many forms, including pre-deprivation and post-deprivation hearings. The essential difference in these cases is whether the individual has the opportunity to contest the deprivation of a liberty interest before or after the government makes its decision. Most legal scholarship regarding the TSDB has focused on the No Fly list because of the demonstrated deprivation of a liberty interest that the courts have accepted.

The courts have held that in many cases that due process requires a pre-deprivation hearing. Chelsea Creta, editor-in-chief of the *Journal of Civil Rights and Social Justice* at the Washington and Lee University School of Law, has proposed that the ideal solution is to conduct a pre-deprivation hearing before placing a subject on the No Fly list.[299] Creta imagines a process where the subjects be notified of their nomination to the No Fly list with a specified period to respond to the proposal. If the subjects elected to apply for redress of the proposal, a hearing would take place before a neutral party. The government would present the information to justify the placement of the subjects on the list, and the subjects would have the opportunity to defend themselves. The neutral party would then issue a decision. Legal scholar Dan Lowe notes that a precedent exists in immigration law for a pre-deprivation hearing at which DHS provides individuals notice that they are subject to removal and an opportunity to contest that finding in court.[300] Creta judges that her ideal solution is not a constitutionally required due process:

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[299] Creta, "The No-Fly List," 273.

[300] Dan Lowe, "The Flap with No Fly-Does the No Fly List Violate Privacy and Due Process Constitutional Protections," *University of Detroit Mercy Law Review* 92 (2015): 179, http://www.udetmercylrev.com/wp-content/uploads/2015/07/Lowe.pdf.

> Although ideal, a pre-deprivation hearing is unrealistic. Pre-deprivation notice of No-Fly List placement severely affects the government's compelling interest in protecting national security. For example, say an actual terrorist discovers the TSC's intention to place her on the No-Fly List before placement occurs. The terrorist then has a few options. These options include, but are not limited to: accelerating her plans against the United States, potentially cutting ties with or tipping off her affiliated terrorist organization, or potentially fleeing the country to wreak havoc against the United States abroad. Disclosure of potential placement may also encourage terrorists to take further steps to avoid detection, destroy evidence, coerce witnesses, alter plans from what is known by law enforcement or intelligence agencies, and recruit new members…The balance unduly tips far from the nation's interest in national security and places the United States and the public in great danger.[301]

Creta finds that a post-deprivation hearing is the next logical choice. A post-deprivation hearing would occur after an individual was placed on the TSDB. Creta notes that any hearing would be pointless given the government's reliance on using the states' secrets privilege to keep documents out of the hands of plaintiffs.[302] This practice is well illustrated in the previously cited case of Ibrahim. The government fought the release of information and eventually proved that Ibrahim's No Fly status was the result of a simple paperwork error.

The idea that the government can hide information from public scrutiny under the guise of national security is not new. Nor is the idea that the government may classify information that it finds embarrassing. In 1973, several members of Congress sued the federal government under FOIA for access to classified documents regarding underground nuclear testing.[303] The case, *EPA v. Mink*, was argued before the Supreme Court that found that the Court of Appeals had erred when it ordered the documents to be reviewed in camera. In his dissent to that ruling, Justice William O. Douglas wrote:

> The majority makes the [classification] stamp sacrosanct, thereby immunizing stamped documents from judicial scrutiny, whether or not factual information contained in the document is in fact colorably (sic) related to interests of the national defense or foreign policy. Yet, anyone

[301] Creta, "The No-Fly List," 273.

[302] Creta, 274.

[303] *EPA v. Mink*, 410 U.S. 73, 93 S. Ct. 827 (1973).

> who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.[304]

Without having the ability to know the information the government is using to watchlist an individual, no one may make any kind of meaningful defense. In general, courts have upheld the government's ability to exclude classified material from discovery or review, and to limit due process in cases involving national security. In certain cases, the courts have found that a due process right still exists. Legal scholar Louisa Slocum examined the case of the Department of States Office of Foreign Assets Control designation of the People's Mojahedin Organization of Iran as a Foreign Terrorist Organization. She notes:

> [C]ourts generally defer to the Executive Branch's reasoning on national security and foreign policy issues, the court has generally upheld the Secretary of State's [rationalization on security related issues] if it was based on a sufficient administrative record. Such judicial deference is not unlimited [though]. For example, the D.C. Circuit recently held that the Department of State violated the People's Mojahedin Organization of Iran's (PMOI's) procedural due process rights when it did not provide the group with sufficient notice of the reasons behind its designation as a [foreign terrorist organization].[305]

Lowe noted that in the case Slocum analyzed, the court found that PMOI had the right to produce evidence to rebut the government's information.[306] Creta has suggested using a hearing in criminal prosecutions, the Classified Information Procedures Act's (CIPA) § 6(a) Hearing, as a framework to overcome this challenge. The DOJ states:

> The purpose of the hearing pursuant to section 6(a) of CIPA is for the court "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial...." 18 U.S.C. App. III § 6(a). The statute expressly provides that, after a pretrial section 6(a) hearing on the admissibility of evidence, the court shall enter

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[304] *Mink*, 108.

[305] Louisa C. Slocum, "OFAC, the Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion," *Administrative Law Review* 65 (March 2013): 402, http://www.administrativelawreview.org/wp-content/uploads/2014/04/OPAC-The-Department-of-State-and-the-Terrorist-Designation-Process-A-Comparative-Analysis-of-Agency-Discretion.pdf.

[306] Lowe, "The Flap with No Fly-Does the No Fly List Violate Privacy and Due Process Constitutional Protections," 402.

> its rulings *prior* to the commencement of trial. If the Attorney General or his/her designee certifies to the court in a petition that a public proceeding may result in the disclosure of classified information, then the hearing will be held *in camera*. CIPA does not change the "generally applicable evidentiary rules of admissibility," *United States v. Wilson*, *supra* 750 F.2d at 9, but rather alters the *timing* of rulings as to admissibility to require them to be made before the trial. *Accord*, *United States v. Smith*, *supra*, 780 F.2d at 1106.
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> At the section 6(a) hearing, the court is to hear the defense proffer and the arguments of counsel, and then rule whether the classified information identified by the defense is relevant under the standards of Fed.R.Evid. 401. *United States v. Smith*, *supra*, 780 F.2d at 1106. The court's inquiry does not end there, for under Fed.R.Evid. 402, not all relevant evidence is admissible at trial. The Court therefore must also determine whether the evidence is cumulative, prejudicial, confusing, or misleading," *United States v. Wilson*, *supra*, 750 F.2d at 9, so that it should be excluded under Fed.R.Evid. 403.
>
> At the conclusion of the section 6 (a) hearing, the court must state in writing the reasons for its determination as to each item of classified information. 18 U.S.C. App..III section 6(a).[307]

Such a framework could provide a meaningful opportunity for a judge to evaluate in camera the sensitive or classified information contained in the TSDB that caused an individual to be placed on a watch list, which would protect the liberty interests of the plaintiff and the security interests of the government.

2. Reform of the Structure

Walter Haydock has proposed merging TSC with the CBP NTC. NTC is a round-the-clock watch center that analyzes data on all persons who attempt to travel into or out of the United States. NTC utilizes a variety of data points to screen subjects through a

[307] "2054. Synopsis of Classified Information Procedures Act (CIPA)," Offices of the United States Attorneys, accessed August 11, 2017, https://www.justice.gov/usam/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa.

coterie of law enforcement databases. This screening begins when a subject applies to travel to the United States and continues through all phases of travel.[308] Haydock states:

> Identifying a concise, publicly available mission statement for the NTC is challenging, but it does serve as the "CBP focal point for all possible [TSDB] encounters" and analyzes every inbound "traveler's risk before departure to identify possible matches" in the TSDB. A more appropriate name for the NTC would be the National Screening Center due to its clear focus on vetting travelers and materials entering the country. CBP's choice of the word "targeting" is likely representative of its desire to expand its mission set and authorities.[309]

Haydock's core argument is that merging the TSC and NTC will increase efficiency and eliminate redundancy in the missions of both organizations. He notes that the proposed merger would move the TSC into DHS, and thereby eliminate the need for DHS to forward requests outside the agency to TSC, and thus eliminate the "bureaucratic wall" between the organizations to improve the speed of redress.

It follows that notwithstanding Haydock's core arguments, the TRIP procedure can also move from under DHS to the TSC to achieve a similar benefit. It is unlikely that the government will seek this consolidation regardless of the described efficiency benefits. As previously noted, the government has fought to keep judicial oversight out of the district courts and in the Court of Appeals. As Kahn has noted, the government relied on previsions in the law under 49 U.S.C. § 46110, which mandates that administrative orders of the TSA must be brought in the Court of Appeals.[310] He describes the effect of this action:

> But in the new context of terrorist watchlists, in which the record was very much in dispute, this had the effect of preventing discovery, witness testimony, and other forms of testing the reasonableness of the agency's suspicion by limiting review to the agency's administrative record, which was often sealed for national security reasons.[311]

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[308] *Eleven Years Later: Preventing Terrorists from Coming to America: Hearing before the Subcommittee on Border and Maritime Security of the Committee on Homeland Security*, House of Representatives, 112th Cong., 2nd sess., September 11, 2012, 16–17, https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg80855/pdf/CHRG-112hhrg80855.pdf.

[309] Haydock, "Consolidating the Terrorist Watchlisting Bureaucracy."

[310] Kahn, "The Unreasonable Rise of Reasonable Suspicion," 397.

[311] Kahn, 397.

In *Latif*, the plaintiff's attorneys argued that the actual determination of who should remain on the watchlist occurred within the TSC. The Judge Brown agreed by finding that the watchlisting decision fell to the TSC and not the TSA, and that those orders were not subject to the provisions requiring a hearing in the Court of Appeals. The government then revised the No Fly redress procedure, and the procedure now emphasizes the TSA administrator will review the applicant's response and make the final determination whether a subject will remain on the watchlist. Thus, Judge Brown once again found that "that jurisdiction over the remaining Plaintiffs' substantive due process claims lies exclusively in the Ninth Circuit Court of Appeals pursuant to 49 U.S.C. § 46110." Moving the DHS TRIP under the TSC would jeopardize review in the Court of Appeals, and it is unlikely that the government would accept this procedure as a proposal.

C. THE TSC AUDIT PROCESS

The audits of the watchlist process have revealed that some subjects were not removed from the watchlist in the past. The government has responded to these audits and indicated that the processes were improved, and subsequent audits have shown improvement. The TSC has stated that it maintains regular reviews of the information in the TSDB, but it does not elaborate on how often these reviews take place and the standards used to reevaluate the information. The case of Ibrahim demonstrates that a subject can be mistakenly added to the TSDB and remain there indefinitely. Judge Alsup noted, "Once derogatory information is posted to the TSDB, it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away."[312] The ACLU has called for improvements to these procedures, "Routine, comprehensive audits must result in the removal of outdated or inaccurate information, and where no longer warranted, watchlist entries must be purged."[313] Given the size of the database and the limited resources of the TSC to conduct these reviews, it is reasonable to assume that information may still remain in the database for years without review.

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[312] *Ibrahim*, 928.

[313] American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences*, 9.

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VI. ANALYSIS AND RECOMMENDATIONS

This chapter proposes a number of recommendations based on an analysis of the publicly available data regarding the operation of the TSDB and the documented failures of the improved process to predict accurately who is or is not a terrorist. Specifically, this thesis offers four specific recommendations. First, the standard used by the TSC to watchlist persons is sufficient and should not be changed. Next, the extension of the redress process adopted for No Fly subjects should be extended to all U.S. persons on the watchlist. Third, judicial oversight should be enabled within the government's redress process to allow an independent authority to review the information and ascertain if it meets the justifiable standard. Finally, it is recommended that the TSC formalize review periods for information contained in the TSDB.

A. THE STANDARD SHOULD NOT BE RAISED

The government's reasonable suspicion standard is lawful and appropriate for the intended purpose. Further, the standard has been found to be legally sufficient in every case before the courts. The TSDB is a predictive tool. The actions that may lead the government to suspect that a person is a threat who may commit a terrorist act or offer some sort of material support to terrorism will often fall short of that which can substantiate probable cause that a crime has been committed. Often, waiting for that level of substantiation entails waiting for an attack. The case of Omar Mateen is illustrative. None of Mateen's known actions prior to his attack would constitute a crime for which probable cause would be demonstrable until the day of his attack. Mateen was not watchlisted by the FBI because his known statements and actions were not found to be sufficient even to meet the reasonable suspicion standard.

Adoption of a higher standard would essentially mean that subjects would have to commit an act to qualify for inclusion. In that case, the government could simply seek a warrant to search and arrest the subject, and prosecute the case in criminal court. The ability of agencies like the TSA and CBP to rely on a predictive watchlist system is critical to the success of the homeland security enterprise. The TSDB acts like a decision tool and

highlights those who require extra attention. This ability becomes increasingly critical in a time where government funding is short and resources are scarce. The TSDB allows the government to focus its limited resources to known threats. Had this tool been in place prior to 9/11, a different outcome possibly would have resulted that allowed the pre-existing security structure to intercept the terrorists before they struck. The potential consequence for raising the standard is compelling. Failure for the men and women working at the TSC might be measured in terrible injuries, lives lost, and destroyed infrastructure. The specter of the spectacular failures prior to 9/11 hangs over their enterprise.

At the same time, consequences result for applying this standard in a predictive application, such as the TSDB. The one-sided process is applying a terrible label of KST to an individual who may have not committed a single act in furtherance of terrorism. This label is stigmatizing and isolating. The results of this stigmatization are seen in the media, with minority community leaders claiming the system is unfair and discriminatory. The government's defense until now is simply, "trust us." The government claims it does not use race, religion, or constitutionally protected activity solely to determine if someone is to be added to the watchlist. Yet, the political and social grievances that spawn terrorist acts are such that these factors are certainly intertwined in the government agent's articulation of suspicion. It is important for the government to place safeguards into the system to promote trust in groups that up to now have shown a reluctance to take the government at its word. Although raising the standard is not appropriate to this task, other options can improve the application of the standard in the watchlist enterprise.

B. EXTEND THE DHS TRIP PROCEDURES FOR NO FLY TO U.S. PERSONS LISTED ON THE SELECTEE LIST

The new No Fly procedures that resulted from the *Latif* case now require the government to provide applicants for redress listed on the No Fly subset of the TSDB with an acknowledgement of their status and an unclassified summary of the reasons for their watchlist determination. The five defendants in the *Latif* case still on the No Fly list were provided with these summaries. One defendant in the case, Mohamed Sheikh Kariye, requested that his summary be unsealed and unredacted in the public record. The

government summary in that case was substantial. The government alleged that Kariye fought as a mujahedeen against Russian forces in Afghanistan, that he had interactions and financial support of other terrorists, including recorded conversations with two convicted terrorists where he advocated for violence.[314] The information given to Kariye is substantial. It provides enough specific information to allow him to offer a defense of his placement on the No Fly list. The record is silent on his defense, and he is still litigating his presence on the list. He can now reply to the government's allegations in a meaningful way. He can attempt to directly refute the allegations against him or explain the government's information in a way that somehow mitigates it. This process improves the redress procedure to allow a person to make a meaningful response to the government's charges. This response then gives the government an opportunity to extract additional information regarding its holdings on a suspect. For example, perhaps Kariye could conclusively demonstrate that he was not in Afghanistan during the period of the Russian occupation. It would seem that the government would want to have access to that information to increase the accuracy of its counterterrorism information.

The government should apply the redress procedures for No Fly subjects to all U.S. persons listed on the TSDB who apply for redress. Neither the TSC nor TSA publishes the criteria used for the No Fly and Selectee lists. A reasonable inference would be that the government would place the individuals it considers the highest threat of committing an act of terrorism on the No Fly list. It would follow that individuals listed on the Selectee and E-Selectee lists would be considered to be lower on the threat spectrum. In this sense, it would appear that it would be unlikely that acknowledging watchlist status of lower threat individuals would be creating a vulnerability. As previously noted, the DHS OIG report on DHS TRIP submitted that individuals placed on the No Fly and Selectee lists could infer their watchlist status from their inability to board an aircraft or repeated instances of enhanced screening. Government acknowledgement of this status would not appear to create a vulnerability.

[314] American Civil Liberties Union, "Kariye v. Sessions-Government's Redacted Answering Briefing," 10–11.

The government often interviews individuals who are accused or suspected of involvement with terrorism. As previously noted, FBI agents interviewed Mateen and Tsarnaev prior to their attacks. It is also true that the government uses a variety of other means to investigate terrorist accusations that may conceal the government's interest. In the noted case of Demetrius Pitts, the government used a variety of clandestine means to investigate him, including the use of undercover personnel to interact with him regarding his plot.[315] If the government were truly concerned that individuals' knowledge of their placement on a watchlist could compromise national security, a more logical approach would be to refrain from adding them to a database that practically ensures different treatment or special enhanced screening by security organizations. If the government is actively investigating an individual for a national security or terrorism offense, and the government has taken specific steps to ensure that the individual will not be alerted to this scrutiny, it seems appropriate that the government will not confirm a person's status on a watchlist for the time these measures are in place.

C. REFORM DHS TRIP TO INTRODUCE JUDICIAL OVERSIGHT

The DHS TRIP process needs judicial oversight to increase public trust in the reasonable suspicion standard. Kahn's arguments for judicial oversight of the reasonable suspicion standard are persuasive. This oversight can address the issue of motivation that currently requires one agency to both protect against terrorism and decide who constitutes a threat. This oversight would replace a nameless bureaucrat from the TSC with a judge who would apply the law to pass the final judgement on who should be listed on the watchlist. Kahn uses the example of a police officer on a beat to define the role of the court in assuring reasonable suspicion standard in *Terry* is not abused:

> Why did the Terry Court think police could stop people like this? Most of all, because if anything came of the police officer's action, a judge would be interposed between the stop and any criminal sanction. If no arrest resulted from the stop, no harm was done; the detention was a brief inconvenience necessary for "effective crime prevention and detection." But the Court believed that if the initial reasonable suspicion that permitted

[315] "Demetrius Nathaniel Pitts Affidavit," Scribd, 2018, https://www.scribd.com/document/383037546/Demetrius-Nathaniel-Pitts-affidavit#download&from_embed.

> the Terry stop should develop into probable cause to arrest, then what was crucial was the inevitable intercession of a magistrate to independently assess the state's actions—to police the police—and offer a remedy for any excesses.[316]

The adoption of judicial oversight into the DHS TRIP procedures would allow the court to act as an independent authority over a system that works in secret by necessity. In this way, judicial oversight would become the insurance policy of the legally sufficient standard being applied correctly. The civil rights groups and legal scholars who have long advocated for its adoption would welcome such oversight. It would also increase accountability in such a way that public trust in the activities of the TSC would increase. The judiciary is best suited to determine if the information used constitutes reasonable suspicion as defined by the court, as in a criminal trial. This review could increase the integrity of the data within the TSDB by preventing the use of uncorroborated or unsubstantiated information—as shown with Poitras—and protect citizens from being included on the No Fly list accidentally, as in the case of Ibrahim. The need for future costly litigation could also be reduced while still protecting legitimate national security information.

The government has long argued that revealing classified information regarding the reasons that individuals are on the TSDB can be harmful to national security. A note in Judge Alsup's opinion addressed the difficulty of adjudicating No Fly cases:

> In the instant case, the nomination in 2004 to the no-fly list was conceded at trial to have been a mistake. In this sense, this is an easier case to resolve. Harder no-fly cases surely exist. For example, the government uses "derogatory" information to place individuals on the no-fly list. When an individual is refused boarding, does he or she have a right to know the specific information that led to the listing? Certainly, in some (but not all) cases, providing the specifics would reveal sources and methods used in our counterterrorism defense program and disclosure would unreasonably jeopardize our national security. Possibly, instead, a general summary might provide a degree of due process, allowing the nominee an opportunity to refute the charge. Or, agents might interview the nominee in such a way as to address the points of concern without revealing the specifics. Possibly (or possibly not), even that much process would betray our defense systems to

[316] Kahn, "The Unreasonable Rise of Reasonable Suspicion," 388.

> our enemies. This order need not and does not reach this tougher, broader issue, for, again, the listing of Dr. Ibrahim was concededly based on human error. Revealing this error could not and has not betrayed any worthwhile methods or sources.[317]

The later modification to DHS TRIP instituted as a result of the *Latif* case provided some of the framework envisioned by Judge Alsup. However, the government's reliance on the provisions in 49 U.S.C. § 46110 to keep litigation in the Court of Appeals and out of the district courts still limits the opportunity for judicial oversight.

A specific process for judicial oversight as a routine part of the watchlisting process is needed. It is unrealistic that the watchlisting process includes judicial oversight *before* adding a person to the TSDB, given the sheer volume of information in question. In the same way that a police officer does not seek judicial approval for a Terry Stop, agents of the TSC should not be required to seek a judge's approval before adding individuals to the TSDB. The courts have held that a person's mere inclusion on the TSDB does not constitute a constitutionally protected deprivation of rights. It would seem instead that application of oversight within the redress process itself would be more practical.

Given the current state of the law and process, it would fall to Congress to mandate some form of judicial oversight. One model for the creation of this judicial venue is the FISA, established by Congress in 1978 to review requests for electronic surveillance and searches for foreign intelligence investigations.[318] The court, composed of 11 district court judges, hears the government's requests for FISA warrants ex parte to protect national security information.[319] A similarly configured court could review, ex parte, redress requests submitted under the current DHS TRIP procedures. The establishment of this court would be an expensive proposition. It would require judges, staff, and physical space. The conduct of redress hearings ex parte would prevent representation of the applicants, and such hearings on the part of the FISA court have caused it to be labeled a "kangaroo

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[317] *Ibrahim*, 930.

[318] "About the Foreign Intelligence Surveillance Court," Foreign Intelligence Surveillance Court, accessed August 11, 2017, http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court.

[319] Foreign Intelligence Surveillance Court.

court."[320] Judge Brown has commented on the application of this style of one-sided judicial review:

> The availability of judicial review does little to cure this risk of error. While judicial review provides an independent examination of the existing administrative record, that review is of the same one-sided and potentially insufficient administrative record that TSC relied on in its listing decision without any additional meaningful opportunity for the aggrieved traveler to submit evidence intelligently in order to correct anticipated errors in the record.' Moreover, judicial review only extends to whether the government reasonably determined the traveler meets the minimum substantive derogatory criteria; i.e., the reasonable suspicion standard. Thus, the fundamental flaw at the administrative-review stage (the combination of a one-sided record and a low evidentiary standard) carries over to the judicial-review stage.[321]

The concerns voiced by Judge Brown would be somewhat abated if the applicant was provided with an unclassified summary of the government's information as recommended previously. Theoretically, applicants for redress could make a meaningful reply for ex parte review based on the information in the summary. However, such a hearing would limit representation in the hearing.

A better alternative may be to allow this review to occur in the appropriate U.S. District Court in the same manner that FOIA cases are litigated. As has been previously stated, the courts have a framework for evaluating sensitive information to ensure that the liberty interests of the individual are balanced against the government's interest in national security. Whether using a Vaughn Index to determine what information should be provided to the plaintiff, or adopting CIPA like procedures, the District Court Judge is in an ideal situation to decide whether the information held by the government is sufficient to meet the reasonable suspicion standard. Applicants for redress have a difficult time seeking redress in the courts because, outside of No Fly cases, the court has not recognized placement on the watchlist as a constitutionally protected interest requiring due process,

[320] Jennifer Granick and Christopher Sprigman, "The Secret FISA Court Must Go," Daily Beast, July 24, 2013, http://www.thedailybeast.com/the-secret-fisa-court-must-go.

[321] *Latif v. Holder*, 28 F. Supp. 3d 1134, 1153 (D. Or. 2014).

and review of the TSC's determination is restricted to the Court of Appeals. Only one plaintiff, Ibrahim, was able to secure a bench trial.

It is unlikely that the government will voluntarily adopt judicial review. Changes in the law would be required to secure due process. Until now, Congress has not made any move to do so, and it seems extraordinarily unlikely that government will move to do so. The only substantial reform to the watchlist redress came after the reporting regarding high profile persons like Senator Kennedy being mistakenly delayed due to name matches with watchlisted subjects. The small number of U.S. persons affected by the TSDB does not represent a constituency that can make this change through their elected representatives.

D. FORMALIZE REVIEW PERIODS

The government has made assurances that information in the TSDB is subject to routine audits to ensure that it continues to meet the TSC standards for inclusion in the database. However, the government does not publish its process for conducting this review. Numerous instances are known of bad information remaining in the database for years. So too, as the size of the database grows, it becomes increasingly difficult to review the information. Over one million subjects are in the TSDB. If the government were to employ 200 auditors, each would have to review 5,000 records every year to ensure a yearly review of each record. This review would have to take place in addition to the 1,500 additions, modifications, and deletions purported to happen every day as a part of routine watchlist operations. It is unlikely that the TSC has the resources to devote anything approaching this number of persons to the task of reviewing the watchlist information full-time.

The United States is not the only country that operates a terror watchlist. The French government operates several separate terrorist watch lists. The original terror watch list is a subset of the Fichier des Personnes Recherchées (FPR), or File of Wanted Persons in English, known as Fiche S (File S).[322] File S is a consolidated list of individuals thought to be a threat to state security. These individuals can be political dissidents, terrorists, or

[322] "RPF: Wanted Persons File," National Commission of Computing and Freedoms, November 19, 2013, https://www.cnil.fr/fr/fpr-fichier-des-personnes-recherchees.

"hooligans."[323] Each entry into the File S database has a lifespan of two years. If the subject does not engage in additional behaviors or activities, the card, and the subject file, is removed.[324] The government also operates a separate watch list known as the Fichier des Signalements pour la Prévention et la Radicalisation à caractère Terroriste (FSPRT), or Terrorism Prevention and Terrorism Reporting Files.[325] The FSPRT differs from the Fiche S watchlist in that it focuses exclusively on Islamic radicals. Names on the Fiche S system may or may not appear on the FSPRT, and vice versa. Police and intelligence personnel screen the information on subjects to determine if they qualify for watchlisting and at what risk classification.[326] The FSPRT has three risk groups: The first group, considered the most dangerous, includes those facing or were previously convicted of terrorist or criminal charges.[327] The next group, considered less dangerous, are monitored by the Central Territorial Intelligence Service (SCRT). Finally, the government classifies those no longer to be a threat in a pending status, and they remain in the database for five years.

Instituting a fixed review period for TSDB entries could alleviate the problem of bad data remaining in the system. The two-year review cycle of the Fiche S watchlist appears to be a reasonable starting point. The TSC should undertake a study to determine the feasibility of adopting this review period using existing resources. Instituting a fixed review period would guarantee that data on each person would be reviewed to ensure that it continues to meet the standards for inclusion in the TSDB. Once the government closes an investigation on subjects without filing charges, it would seem appropriate to set a date for their TSDB record to be removed from the database. The five-year period of the FSPRT also seems like a reasonable starting point. The TSC should undertake a study to determine

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[323] Lise Verbeke, "Sheets S, RPF, and FSPRT, Dive into Anti-Terrorism Files," France Culture, March 26, 2018, https://www.franceculture.fr/droit-justice/fiches-s-fpret-fsprt-plongee-dans-les-fichiers-de-l-antiterrorisme.

[324] "Attack in Isère—The Alleged Perpetrator was Stuck "S": What is it?" BFM TV, June 26, 2016, https://www.bfmtv.com/societe/attentat-en-isere-l-auteur-presume-etait-fiche-s-en-quoi-ca-consiste-897653.html.

[325] Verbeke, "Sheets S, RPF, and FSPRT, Dive Into Anti-Terrorism Files."

[326] Stéphane Sellami, "Terrorism: The Secret Card of the Radicalized in Ile-de-France," *Le Parisien*, January 25, 2017, http://www.leparisien.fr/faits-divers/cartographie-secrete-des-radicalises-25-01-2017-6614952.php.

[327] Sellami.

the feasibility of adopting this review period. Particularly, the TSC should look at what records would be removed from the database, and whether this removal would create a significant homeland security vulnerability.

E. CONCLUSION

The final analysis of the watchlist enterprise reveals a conflict between security and liberty. On one side stands the government and its agents, dutifully working to prevent acts of violence inside and outside of the homeland within the constructs of law and policy. On the other are individuals who have been watchlisted, and who are subject to the humiliation and consequence of a terrorist label without a meaningful way to contest the government's prediction. Imagine a dial with security on one side and liberty on the other. If the needle is moved toward security, it *may* protect against some future attack and save lives and property. As that needle is moved, the number of innocent persons swept into the government's net increases to the point where everyone become a suspect, and then creates a system of alarms that never stop ringing. Conversely, moving the needle toward liberty eventually renders the watchlists toothless and eliminates its value as a predictive tool. However, an environment in which U.S. adversaries can move about freely and without fear of discovery until the moment of their attacks is completely feasible. The consequences of both are terrible, and this conflict illustrates the importance of achieving a balance that best protects all interests.

Evaluating the government terror watchlisting scheme is difficult due to the secrecy that cloaks the enterprise. This secrecy limits the information available to conduct a completely thorough analysis of the government's practice and the results. This secrecy limits to an extent the ability to judge accurately the criticism against the system brought by a range of organizations and persons. It has been demonstrated that the government holds substantial derogatory information on some of the persons suing to free themselves of their status on the list. This situation is not unexpected, but it makes ultimate judgements about the guilt or innocence of most individuals almost impossible to an outside observer. A more thorough analysis, including all the secret information held by the government, would undoubtedly provide a more valuable insight. The resulting study would itself be

necessarily classified and locked away from view of both the public and future homeland security scholars. It might provide the impetus for action within the government, particularly for those legislators who might pass laws to improve the availability of both resources and legal process available to redress seekers.

An additional area for future study is the effectiveness of the individual behaviors used by the government to predict terrorist behavior. This area is also virtually impossible to study in an unclassified context. The behaviors and algorithms used by the government are necessarily classified and locked away from public view. However, the government's model for predicting behavior is critical for ensuring the effectiveness of the TSDB as a tool. Ineffective prediction would result in improper watchlisting and allow some future terrorists to escape the watchlist while other innocent persons would be included. Improving the government's ability to predict behavior seems critical given the continuing attacks that plague the United States and the noted failures to watchlist persons who later committed attacks despite some form of government scrutiny. Improved prediction would also likely limit the number of persons on the watchlists who do not pose a threat towards terrorist activity, as well as limit the drain on government resources from continued monitoring while protecting the liberty interests of the same persons.

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