

Southern Methodist University

SMU Scholar

---

Faculty Journal Articles and Book Chapters

Faculty Scholarship

---

2017

## Terrorist Watchlists

Jeffrey D. Kahn

*Southern Methodist University, Dedman School of Law*

Author ORCID Identifier:

 <https://orcid.org/0000-0002-1688-9428>

---

### Recommended Citation

Jeffrey Kahn, Terrorist Watchlists in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW*, (Gray & Henderson, eds., Cambridge University Press, 2017)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

### 3 Terrorist Watchlists

Jeffrey Kahn<sup>†</sup>

This chapter assesses the legal history and policy development of the U.S. government's system of terrorist watchlists and the institutions established to create and use them. Watchlisting is in fact an old practice given new meaning by technological change and the societal impact of the September 11, 2001, terrorist attacks. Statutes and judicial precedents from an earlier era on which the first post-9/11 watchlists were built were not made to regulate the expanded uses of the new watchlists and presented few if any constraints on their development. Civil litigation has both revealed the inner workings of terrorist watchlists and spurred some reforms to them. While these reforms have succeeded in adding some due process protections to watchlisting remedies, the underlying premise of the new watchlists, and the hierarchies of citizenship that they produce, have not been subject to much challenge in either the courts or the Congress.

#### Introduction

"Major Strasser's been shot," police captain Renault tells his men as they rush into the final scene of the film *Casablanca*. "Round up the usual suspects."<sup>1</sup> Renault witnessed the shooting himself, so his order is ironic and subversive. But it also sounds oddly routine; the arriving *képis* take it in stride. *Of course* they have a go-to list of suspects. Good police work means keeping track of people, especially those whose objectively verifiable criminal record or subjectively assessed character elicits suspicion about their future conduct.

We might call these the first watchlists: quite literally, lists of people worth watching. How else does the cop walking his usual beat "know" his assigned neighborhood save for the list of bad apples he has drawn up in his mind? Thus, "watchlisting" is an idea that has long influenced police practices in the United States and elsewhere, though some now balk as technology grows their size and searchability.<sup>2</sup> In the United States, however, law and tradition have always established a limit, a divide that watchlists could

<sup>†</sup> Professor of Law and Gerald J. Ford Research Fellow, SMU Dedman School of Law.

<sup>1</sup> *CASABLANCA* (Warner Bros. 1942).

<sup>2</sup> See, e.g., Chicago Police Department Special Order S10-06, July 20, 2015, Targeted Repeat-Offender Apprehension and Prosecution (T.R.A.P.) Program (ordering District Commanders to select up to five individuals each for inclusion on this watchlist, "identified because of their criminal history, propensity for violence, and the [*sic*] involvement in narcotics distribution. The primary goal of T.R.A.P. is focused on enhanced prosecution to detain, convict, and incarcerate these offenders before they commit further crimes of violence").

not cross. The propensity evidence used to watchlist a suspect is generally inadmissible to try the accused in a court of law.<sup>3</sup> Police may wish to “round up the usual suspects,” but their conviction depends on admissible evidence of guilt for a particular past act that is publicly presented to a neutral judge and, perhaps, a jury.<sup>4</sup>

Historically, three features marked this boundary – the who, what, and where of this dividing line. Each element established an important check on the state’s police power. *Who* decides the individual’s fate changes at this divide: executive decision making is now subjected to judicial oversight. The evidence justifying state action – the *what* of watchlists – must satisfy substantial rules of evidence that extend beyond claims of propensity or reasonable suspicion.<sup>5</sup> And *where* that evaluative process occurs is moved from behind closed doors in police stations to courtrooms open to all.

These three features combine both substantive and structural protections for individual liberty. As Justice Frankfurter described the line in rejecting a government list of Communist organizations fashioned by the Attorney General for the Loyalty Review Board of the United States Civil Service Commission:

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. . . . The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.<sup>6</sup>

The list that resulted from the Attorney General’s secret assessment process crossed that line with ruinous consequences for those he listed. “No better instrument has been devised for arriving at truth,” Frankfurter argued, “than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.”<sup>7</sup>

All in all, this dividing line sought to prevent ordinary watchlists from becoming blacklists, which single out individuals “for adverse legal consequences that go beyond the discomfort associated with being the target of a lawfully conducted investigation.”<sup>8</sup>

<sup>3</sup> See, e.g., Fed. R. Evid. 404 (2016). It must be acknowledged that “in today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Missouri v. Frye*, 566 U.S. 133, 144 (2012). Nevertheless, the dividing line remains for those who demand their right to cross it.

<sup>4</sup> *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (“The State may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge”) (internal citations omitted).

<sup>5</sup> This would surprise Captain Renault. In the French legal system, the dossier informing the *juge d’instruction* includes propensity and character evidence concerning the accused, based on the theory “*On juge l’homme, pas les faits*” (“One judges the man, not the acts”). Unlike the Anglo-American adversarial tradition, the judiciary are involved in the compilation of the dossier and bear responsibility at various stages for confirming its adherence to procedural rules about its composition.

<sup>6</sup> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171–172 (1951) (Frankfurter, J., concurring) (footnote omitted).

<sup>7</sup> *Id.*

<sup>8</sup> This distinction, using this nomenclature, was first used in the context of terrorist watchlists by Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 Wisc. L. Rev. 1203, 1206 (2010).

Filtering the executive's lists through the screen of a neutral magistrate reduces the speed and effectiveness of executive action, but this has generally been the preferred check to protect individual liberty. When blacklists have emerged, often in response to national crises, they eventually have been subject to judicial review.<sup>9</sup>

There is something artificial about this divide. By what measure is legal consequence or loss "adverse" or "serious" enough to cross the line? When does an investigation shade into a violation of rights?<sup>10</sup> The state's officers, if they so desire, can make investigation a public spectacle or a secret affair; regardless, the suspect is left to the tender mercies of police and prosecutor, without any judicial intervention. The divide is also based on certain assumptions. Why assume, first of all, that the end goal – the safety of the community – is to be achieved within the rigid confines of the criminal justice system? Why presume the police – local, public, accessible – to be the proper government agents tasked with this goal?

The terrorist attacks in the United States on September 11, 2001, severely challenged these assumptions and this divide. The new watchlists it produced do not pursue the goal of public safety through the criminal justice system. The national security concerns that catalyzed watchlisting tended to complicate public access to the watchlists themselves. Those complaining that watchlists caused them adverse legal consequences or serious losses – the very nature of any injuries is often disputed – found ordinary avenues to judicial review blocked. At the same time, a technological revolution in communications and data mining fueled the proliferation of these new watchlists as oxygen fuels fire.

It is too early to tell how the changes worked on society by technological revolutions in transportation, communications, and computing have affected this historic divide. Some courts are slowly conforming watchlists to the limits set by our law and past traditions. But other courts have turned away legal challenges and watchlists have generally been upheld in the court of public opinion. The No-Fly List, for example, prevents listed individuals from boarding commercial aircraft. Such watchlists are now an established feature in the country's national security architecture, as natural to a generation of Americans born after 9/11 as submitting to a search at an airport (required by statute only since 1974).<sup>11</sup> Indeed, the very idea of a dividing line has been challenged by national security policy makers and officials on the front line of operations who question whether the world has become too fast, too connected, and too dangerous for checks and balances designed in and for an earlier era.

This chapter evaluates the emergence of these new watchlists, no longer limited to watching. The No-Fly List was the prototype and progenitor for this new model. Its development led to the creation of the much broader based Terrorist Screening Database

<sup>9</sup> McGrath determined the fate of the Attorney General's list of Communist organizations, *supra* note 6. The rise and fall of passport controls in the 1940s and 1950s, foreshadowing today's No-Fly List, are examined in detail as part of the analysis of today's watchlisting system in Jeffrey Kahn, *MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* (2013).

<sup>10</sup> Surveillance can also take forms that implicate the Fourth Amendment, in which case the divide between watchlists and arrests becomes harder to define. A neutral magistrate may be involved, but in nonpublic, ex parte ways. Evidentiary requirements may be lower. The complexities of this environment are the reason for this book. But even in this hazier borderland, the same divide must eventually be crossed if the suspect is to become an accused. *Whether* it is crossed is now a more salient question than ever before, and the reason for this chapter.

<sup>11</sup> Air Transportation Security Act, Pub. L. No. 93-366, §§ 315(a) & 1111, 88 Stat. 415 (1974).

(TSDB) – the central watchlist from which specialized watchlists are created. It also led to the creation of new offices and agencies to build, stock, and curate the TSDB and other watchlists, most notably the Terrorist Screening Center. The history of this process shows how expectations built by the traditional use of watchlists presented obstacles and opportunities for the parties, lawyers, and policy makers whose first experiences with terrorist watchlists led to the system in place today.

## I History

Long before the terrorist attacks of September 11, 2001, there were plenty of watchlists in the United States. For the most part, these were in the possession of local or perhaps regional law enforcement offices, and they were neither computerized nor connected to other departments of government. Few national “databases” (to use an anachronism) existed in this analog era of file cabinets and note cards. The “Official and Confidential” files that FBI Director J. Edgar Hoover kept for more than five decades might come to mind, though at a conservatively estimated seventeen thousand pages in 165 files, it was hardly the largest or most useful collection of its day.<sup>12</sup> At their peak in 1953, the files of Ruth Shipley’s passport office in the State Department kept watch on 12 million passport applicants and were housed in 1,250 filing cabinets.<sup>13</sup>

National watchlists came into their own in a computer era that enabled (relatively) speedy processing and distributing of large volumes of information. Post-Watergate, Senator Church’s select committee, Vice President Rockefeller’s presidential commission, and others uncovered a raft of secret surveillance and intelligence programs that went beyond collecting information. For example, the “Special Services Staff,” which operated within the IRS from 1969 to 1973,

believed its mission included saving the country from subversives, extremists, and anti-establishment organizations and individuals [and] reviewed for audit or collection potential organizations and individuals selected by other agencies, such as the Internal Security Division of the Justice Department and the FBI, on bases having no relation to the likelihood that such organizations or individuals had violated the tax laws.<sup>14</sup>

Using classified documents and top secret clearances, the group reviewed biweekly computer printouts ranging between ten thousand and sixteen thousand names of “officers, members and affiliates of activist, extremist and revolutionary organizations” so designated by the FBI or Justice Department.<sup>15</sup>

More open, and certainly less controversial, were watchlists of a more routine variety. Since 1995, for example, the FBI had maintained a “Violent Gang/Terrorist Organization File” (VGTOF). Federal, state, and local law enforcement could access it in the National Crime Information Center (NCIC) database, which in 2004 contained

<sup>12</sup> *A Byte out of History: J. Edgar Hoover’s “Official & Confidential” Files*, July 11, 2005, <https://www.fbi.gov/news/stories/2005/july/j.-edgar-hoovers-official-confidential-files>.

<sup>13</sup> Kahn, *supra* note 9, at 154.

<sup>14</sup> Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report of the U.S. Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities 881 (Apr. 23, 1976).

<sup>15</sup> *Id.* at 880 and 884.

more than 43 million records.<sup>16</sup> (In August 2009, the VGTOF separated into a Gang File and a Known or Suspected Terrorist (KST) File.) The State Department also created a list in 1995 – the Consular Lookout and Support System (CLASS) – that helped vet visa and passport applications. On September 11, 2001, CLASS contained roughly 10 million records on individuals with criminal backgrounds, past visa denials, or other grounds for heightened suspicion.<sup>17</sup> Other agencies tasked with immigration, customs inspection, and intelligence gathering possessed their own lists designed for their specialized purposes. As late as April 2003, the General Accounting Office (GAO) reported that “nine federal agencies, which prior to the establishment of DHS spanned five different cabinet-level departments, currently maintain twelve terrorist and criminal watch lists.”<sup>18</sup>

Common features emerge from this history. First, most watchlists had a foreign orientation – consular officers, customs agents, and other officials created lists that reflected their agency mission, which tended to be oriented to foreign threats and concerns at the border. Thus, few paid attention to the effect on the watchlisted themselves, who on the whole lacked legally cognizable interests or political representation. In any event, these were old-fashioned watchlists. Follow-up action – whether an arrest, deportation, visa denial, or asset seizure – was invariably public, traceable to the agency, and subject to judicial review.

Second, information sharing was the exception, not the rule. Interagency rivalries and the desire to protect sources and methods of intelligence created “silos” of information rather than networks for distributing it. The 9/11 Commission called this a Cold War era preoccupation with counterintelligence that was “no longer appropriate.” It therefore advised that the “culture of agencies feeling they own the information they gathered at taxpayer expense must be replaced by a culture in which the agencies instead feel they have a duty to the information – to repay the taxpayers’ investment by making that information available.”<sup>19</sup>

Third, the emergence of computer databases notwithstanding, watchlists tended to produce unwieldy paper documents. One State Department list of particular significance for future watchlists, called “TIPOFF,” began its life in 1987 as a shoebox full of index cards.<sup>20</sup> This paper world exacerbated the information-sharing problems agencies experienced with each other. It slowed data transfer to the speed of a fax machine or modem.

The No-Fly List, the first modern terrorist watchlist, followed these patterns. Violent aircraft hijackings and bombings in the 1970s and 1980s led to the creation of a new Federal Aviation Administration (FAA) authority to issue “security directives.” The

<sup>16</sup> William J. Krouse, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, CRS REPORT FOR CONGRESS (RL32366) 31 (2004).

<sup>17</sup> Thomas R. Eldridge, et al. *9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 78 (2004).

<sup>18</sup> U.S. GENERAL ACCOUNTING OFFICE, *INFORMATION TECHNOLOGY: TERRORIST WATCH LISTS SHOULD BE CONSOLIDATED TO PROMOTE BETTER INTEGRATION AND SHARING* (GAO-03-322) 12 (April 2003).

<sup>19</sup> THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 417 (2004).

<sup>20</sup> Krouse, *supra* note 16, at 26.

“do-not-carry” variety were obligatory orders directing commercial airlines not to carry a particular passenger whom the FAA determined to present a “specific and credible threat” to civil aviation (other security directives focused on security infrastructure and other security requirements not targeting specific individuals). Security directives took the form of thermal faxes to airline security officers.

Above the technology that slowed distribution stood a bureaucracy that often slowed it further. Every agency whose intelligence contributed to a security directive had to sign off on its release, prompting natural conflicts over balancing the risk of air piracy with the exposure of sources and methods of intelligence gathering. These impediments reduced the volume and frequency of security directives. On September 11, 2001, a total of three directives prohibited sixteen people from boarding commercial aircraft. None of them was among the attackers.<sup>21</sup>

The 9/11 commissioners were enraged by these statistics. By 2001, the State Department’s TIPOFF database (now a part of CLASS) had grown to list more than sixty thousand suspected terrorists who that agency thought should be denied visas. True to their “stovepiped” practices, members of the intelligence community contributed to this database at a miserly rate.<sup>22</sup> And although sharing occurred between some agencies, the FAA was not among them; indeed, one senior FAA official admitted to the 9/11 Commission that he learned of the very existence of TIPOFF the day before his testimony in 2004.<sup>23</sup> The FAA’s intelligence office relied on the willingness of other members of the intelligence community to supply it with information and to allow that information to be shared with the airlines. This was classic “stovepiping,” or “silo,” management of intelligence and the 9/11 commissioners took turns berating the officials who appeared before them for institutionalized hoarding of information.

Notwithstanding their infrequent use, security directives were an important milestone in the history of the new watchlists. Security directives departed from the conventions of the old watchlists in important ways. This system was not linked to the criminal justice system or border protection. Its purposes were not investigatory but were not intended to be punitive either; the purpose was, singularly, aviation security. For the first time, watchlisting results were sent to private actors (airlines) directing them to take concrete action against an individual. They were not only the model but also the legal instrument through which the No-Fly List was created. Michael Jackson, second in command at the Department of Transportation on 9/11 and Deputy Secretary of Homeland Security from 2005 to 2007, recalled:

It’s hard to underestimate the personal sense of responsibility that the senior government leaders felt in trying to do everything that was reasonable and yet doable to prevent another attack. And the watchlist was a core tool in that effort. So it would have been

<sup>21</sup> Memorandum from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy (Oct. 16, 2002).

<sup>22</sup> ELDRIDGE, *supra* note 17, at 80 (“In 2001, the CIA provided 1,527 source documents to TIPOFF; the State Department, 2, 013; the INS, 173. The FBI, during this same year, provided 63 documents to TIPOFF – fewer than were obtained from the public media, and about the same number as were provided by the Australian Intelligence Agency (52)”).

<sup>23</sup> Testimony of Rear Admiral Cathal “Irish” Flynn USN (ret), Associate FAA Administrator for Civil Aviation Security, Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 29.

irresponsible not to develop and actively manage a watchlist of the sort that we ended up with. And there was no disagreement about that, really, amongst the team.<sup>24</sup>

## II Creation: Building Institutions

The Aviation and Transportation Security Act, signed by President George W. Bush in November 2001, transferred the FAA's responsibility for aviation security to the new Transportation Security Administration (TSA). That statute instructed the new agency, "in consultation with other appropriate Federal agencies and air carriers," to require airlines

to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security and, if such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual.<sup>25</sup>

This new statute did not grant the TSA the power to create a watchlist. The legal authority for the No-Fly List already existed in the old FAA "do-not-carry" security directives, which were transferred to the new TSA.<sup>26</sup> The new language, read carefully, did not grant any authority to *compose* watchlists at all, merely to "use information from government agencies" – and no particular agency is named. Richard Falkenrath, a special assistant to President Bush who was instrumental in designing this first watchlisting system, recalled:

It was just accidental that the authority originated in [the TSA's] authorizing statute, I assume, and then some pre-9/11 security directive. It was really grabbed a hold of by the White House, which was driving everything back then – FBI, CIA to a certain extent. And it just became, with every single case that came into the White House post-9/11, and there were lots, we got into the habit of just asking, Is he no-flied? Is he no-flied? Is he no-flied? And the bureaucracy at first would respond, "We don't know," and they couldn't keep track of all these lists.<sup>27</sup>

Although the TSA seemed to possess the list, it was the FBI and other agencies that supplied, and often seemed to control, the content. As one key official at the time put it, this was a continuation of operations begun the day after 9/11:

At the request of the FBI, the FAA issued SD-108-01-06/EA 129-01-05, which included a list of individuals developed by the FBI as part of the *Pentbom* [*sic*] investigation [PENTTBOM was the codename for the FBI's investigation of the 9/11 attacks]. ... The FBI "controlled," both administratively and operationally, the contents of the list and added or removed names in accordance with the *Pentbom* [*sic*] investigation. The FAA received the list from the FBI and disseminated it to air carriers, without any format or content changes. FAA, in essence, acted as a conduit for the dissemination of their "watchlist."<sup>28</sup>

<sup>24</sup> Kahn, *supra* note 9, at 138 (Author's Interview, Mar. 14, 2011, Arlington, Virginia).

<sup>25</sup> Pub. L. No. 107-71, § 101(a), 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114(h)(3)(A)–(B)).

<sup>26</sup> According to Jackson, who was one of the Bush administration's negotiators for the ATSA bill that established the TSA, "when TSA promulgated the Selectee and the No-Fly List, it was done through security directives." Kahn, *supra* note 9, at 296 n.105.

<sup>27</sup> Kahn, *supra* note 9, at 139 (Author's interview, June 8, 2010, New York City).

<sup>28</sup> Internal TSA Memorandum on "TSA Watchlists" dated Oct. 16, 2002, from Claudio Manno, *supra* note 21.



This dynamic – the FBI supplying content compiled and distributed by the TSA – rapidly grew the No-Fly List. Growing pains to a name-based watchlist were expected. Similar or even misspelled names caused frustration for passengers denied boarding. News stories abounded of the elderly, toddlers, and even the rich and famous all being subject to the vicissitudes of a No-Fly List that could not distinguish the partial record for “T. Kennedy,” possible IRA terrorist, from Ted Kennedy, U.S. Senator.<sup>29</sup>

Another growing pain, however, was bureaucratic: a turf war between the new TSA and the old FBI. Emails between the TSA and FBIHQ, and between FBIHQ and FBI agents throughout the country, reveal growing tensions between these agencies but also the first signs of a twin challenge to the new watchlists: standardization and containment. Emails poured into the TSA from FBI agents throughout the country eager to use the new watchlisting tool to pursue and control suspects. “We’ve got a guy we want to no-fly,” wrote one special agent. “Do you have a copy of the last one we gave you?”<sup>30</sup> The cutting-and-pasting from one request to another was hard to control. Beyond a plaintive TSA request that “you state in the EC [electronic communication] that the FBI believes that the listed individual is a threat to Civil Aviation Security,” there was little the TSA could do to verify that the watchlist was used for its intended purpose or based on a consistent quantity and quality of information.<sup>31</sup> The TSA, in turn, could be bureaucratic and unresponsive to FBI agents who demanded updated versions of the list, and who were often left to respond to a public increasingly confused by the new watchlisting regime.

Solutions to these problems of standardization (quality control) and containment (mission control) were sought in the creation of two new institutions. President Bush announced this new direction and the first of these new organizations, the Terrorist Threat Integration Center (TTIC), in his January 2003 State of the Union address to Congress:

Since September the 11th, our intelligence and law enforcement agencies have worked more closely than ever to track and disrupt the terrorists. The FBI is improving its ability to analyze intelligence and is transforming itself to meet new threats. Tonight I am instructing the leaders of the FBI, the CIA, the Homeland Security, and the Department of Defense to develop a Terrorist Threat Integration Center, to merge and analyze all threat information in a single location. Our Government must have the very best information possible, and we will use it to make sure the right people are in the right places to protect all our citizens.

The president noted both the new orientation of the FBI beyond law enforcement and the need for coordination in the intelligence community to meet national security threats. The TTIC opened in May 2003 at CIA Headquarters in Langley, Virginia, with multiagency staff and funding. (The TTIC would eventually become the National Counterterrorism Center [NCTC], and relocate to a complex called Liberty Crossing in the Washington D.C., suburb of McLean, Virginia.)<sup>32</sup> Its mission is to gather all

<sup>29</sup> Sara Kehaulani Goo, *Sen. Kennedy Flagged by No-Fly List*, WASH. POST, Aug. 20, 2004, at A01; Lizette Alvarez, *Meet Mikey*, 8; *U.S. Has Him on Watch List*, N.Y. TIMES, Jan. 13, 2010.

<sup>30</sup> Redacted Email dated Feb. 4, 2003 (Bates Stamp B2–130), released in *Gordon v. FBI*, 390 F.Supp.2d 897 (N.D. Cal. 2004).

<sup>31</sup> Redacted Email dated Oct. 11, 2002 (Bates Stamp B2–137), *supra* note 30.

<sup>32</sup> E.O. 13,354, § 5(f), 69 Fed. Reg. 53589 (Aug. 27, 2004). The status of the NCTC was codified a few months later in the Intelligence Reform and Terrorism Prevention Act (IRTPA), Pub. L. No. 108–458, § 1021, 118 Stat. 3638 (2004) (codified at 50 U.S.C. § 3056).

intelligence known to the U.S. government on international terrorism and counterterrorism in one central repository.<sup>33</sup>

In particular, the TTIC/NCTC was tasked to produce reports and analysis but, most importantly, to curate a single, massive database: the Terrorist Identities Datamart Environment (TIDE).<sup>34</sup> The State Department's TIPOFF database – the one that grew from a shoebox to sixty thousand records – was transferred to the TTIC, becoming the seed that started TIDE. To the extent permitted by law, all federal agencies were directed to send to the TTIC “on an ongoing basis all relevant Terrorist Information in their possession, custody, or control, with the exception of Purely Domestic Terrorism Information, which will instead be provided directly to the FBI.”<sup>35</sup> According to an August 2014 NCTC “factsheet” on TIDE (the most recent available): “As of December 2013, TIDE contained about 1.1 million persons, most containing multiple minor spelling variations of their names. US persons (including both citizens and legal permanent residents) account for about 25,000 of that total.”<sup>36</sup> TIDE was, in the words of one former NCTC director, “the mother of all databases . . . if there's a piece of derogatory information on a known or suspected terrorist, it goes in that database.”<sup>37</sup>

Roughly contemporaneous with the TTIC's creation, another new organization, the Terrorist Screening Center (TSC), was being developed. The TSC received much less fanfare than the TTIC, and certainly no mention in presidential addresses, but it was the core of the developing watchlist system. The consolidation of the federal government's information was important, but would take time – TIDE did not become operational until May 2005. TIDE also did not resolve continuing problems in the efficient *use* of information, the fundamental feature of the new watchlisting. One problem was inter-agency coordination, as illustrated by conflicts between the FBI and TSA over the No-Fly List. Another was quality control – a massive database full of inaccurate, partial, or old information could do more harm than good. The TSC was the institutional solution to these problems.

The TSC was authorized by Homeland Security Presidential Directive Six (HSPD-6) on September 16, 2003, as “an organization to consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes.” The Directive ordered all executive departments and agencies to provide the TTIC with “Terrorist Information.”<sup>38</sup> The TTIC, in turn,

<sup>33</sup> Intelligence on purely domestic terrorism remained the province of the FBI, a remnant of prohibitions on domestic activity by the CIA that date back to its creation. See 50 U.S.C. § 3036(d)(1) (authorizing intelligence collection “through human sources and by other appropriate means, except that the Director of the Central Intelligence Agency shall have no police, subpoena, or law enforcement powers or internal security functions”).

<sup>34</sup> IRTPA, *supra* note 32, § 1021(d)(6) (codified at 50 U.S.C. § 3056(d)(6)).

<sup>35</sup> Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism, Sept. 16, 2003 (hereinafter “MOU”).

<sup>36</sup> [https://www.nctc.gov/docs/tidefactsheet\\_aug12014.pdf](https://www.nctc.gov/docs/tidefactsheet_aug12014.pdf). An earlier factsheet provides evidence of the accelerating speed of watchlist expansion: “As of January 2009, TIDE contained more than 564,000 names, but only about 500,000 separate ‘identities’ because of the use of aliases and name variants. U.S. persons (including both citizens and legal permanent residents) make up less than five percent of the listings.”

<sup>37</sup> Ronald Kessler, *THE TERRORIST WATCH: INSIDE THE DESPERATE RACE TO STOP THE NEXT ATTACK* 166 (2007) (quoting Vice Admiral John Scott Redd).

<sup>38</sup> This capitalized term is not defined in HSPD-6, a short one-page document. Its accompanying eight-page Memorandum of Understanding, however, defines Terrorist Information as information “about individuals known or appropriately suspected to be or have been involved in activities constituting, in preparation for, in aid of, or related to terrorism.”

was directed to provide to the TSC “access to all appropriate information or intelligence in the TTIC’s custody, possession, or control that the organization requires to perform its functions.” Federal agencies would then use only the filtered products of the TSC to conduct screening. The Congressional Research Service illustrated this relationship in the acronym-rich diagram in Figure 3.1.<sup>39</sup>

The TSC became operational on December 1, 2003. Unlike the NCTC, the TSC has never publicly acknowledged its physical location; its complex in Vienna, Virginia, is known to exist only because the high-pitched buzz of air-conditioning units cooling its array of computers drew a noise complaint before the town council.<sup>40</sup> Administered and funded through the FBI, it was designed, like the TTIC, with a multiagency staff that served all members of what was becoming known as the “Watchlisting Community.”<sup>41</sup> This is attested by the signature lines for the Secretary of State, Attorney General, Secretary of Homeland Security, and Director of Central Intelligence that conclude the Memorandum of Understanding accompanying HSPD-6. TSC staff expanded to include personnel borrowed from the Defense Department, Treasury Department, and private contractors.

If the Terrorist Screening Center was the institution designated to consolidate, standardize, and regulate the use of watchlists, the Terrorist Screening Database (TSDB) was the vehicle by which the TSC sought to achieve this mission. In the words of Timothy Healy, the project leader who set up the TSC and would later serve as its director, TSDB was “the bucket that had them all in there.”<sup>42</sup> By “them,” Healy meant a database from which usable watchlists – such as the No-Fly List – could be derived. A PowerPoint presentation Healy gave to congressional staff (and provided to the author in unclassified form) illustrates this relationship (see Figure 3.2).

Why, one might ask, would “consolidation” mean creating *two* massive databases, TIDE housed at the TTIC/NCTC and the TSDB housed at the TSC? Like an old-fashioned card catalog system, the TSDB kept track of the library of terrorist information housed in the TIDE and in FBI intelligence about domestic terrorism (which by law could not be collected by the CIA). Just as one might ask a librarian for help finding a particular book in the closed stacks of a library, the TSC guided access to the federal government’s terrorist information. And by curating the TSDB, the Terrorist Screening Center used the authority given by HSPD-6 to set standards for all agencies submitting biographical and substantive information – known as “derogatory” information in watchlisting nomenclature – into this system.

Interposing the TSC-controlled TSDB between frontline users such as airport screeners or police officers and the NCTC-controlled TIDE served another function. The

<sup>39</sup> Krouse, *supra* note 16, at 16.

<sup>40</sup> Tom Jackman, *Vienna Tormented by FBI Building’s Non-Stop Buzz*, WASH. POST (June 21, 2012). The TSC describes itself simply as “housed in a nondescript building in northern Virginia.” See Press Release, <https://www.fbi.gov/news/stories/2007/august/tsc083107>.

<sup>41</sup> The TSC director reports through the executive assistant director of the FBI’s national security branch to the director of the FBI. Unlike the NCTC, given a statutory foundation by the Intelligence Reform and Terrorism Prevention Act of 2004, the only legal basis for the TSC is HSPD-6. By Fiscal Year 2007, the TSC had secured an \$83 million budget and 408 staffed positions. U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (Audit Report 07–41) 1 (September 2007).

<sup>42</sup> Kahn, *supra* note 9, at 147 (Author’s interview, FBIHQ, Washington D.C., Dec. 4, 2009).

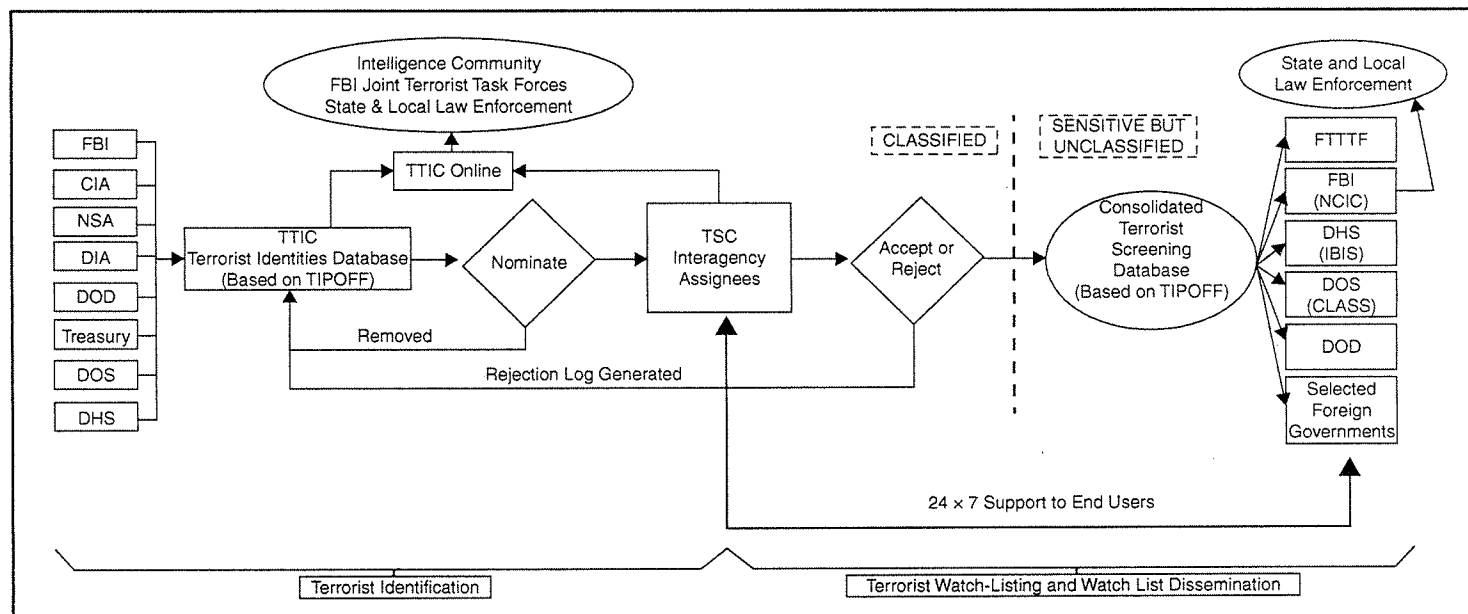


Figure 3.1. Congressional Research Service illustration of the inter-agency watchlisting process.

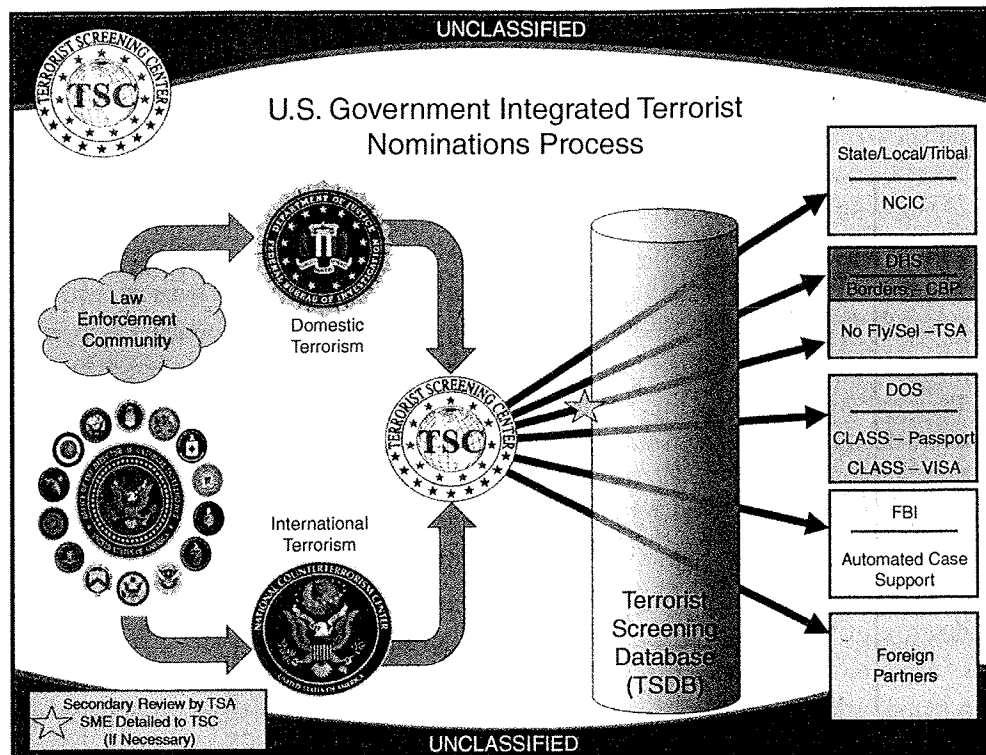


Figure 3.2. TSC PowerPoint Slide Depicting Inter-Agency Watchlisting Process.

TSDB is an unclassified but sensitive watchlist. Its records link to, but do not necessarily reveal, information that is classified either because of its substantive content or because it could reveal sources or methods of intelligence collection. In other words, this “card catalog” provides enough information about the book on the restricted shelves of this closed library to be useful, but no more. Access beyond the card catalog is therefore yet another function of the Terrorist Screening Center, which serves as the liaison between frontline operators and sources of intelligence.

By setting those standards, and constantly evaluating and auditing submissions, the TSC also fulfilled a third, more creative purpose: organizing subsets of the information stored in the TSDB into useful watchlists for recipient agencies (i.e., “downstream” watchlists operated by “customer” agencies). Its multiagency staff includes “subject matter experts” who advise on the particular needs of TSC “customers.” Thus, the TSA sends officials to work within the TSC as aides in preparing the No-Fly List. In this way, the watchlists that the TSC constructs are customized to the needs of the downstream agencies that use them.

### III Development: Building Watchlists

The NCTC and the TSC changed the way terrorist information is stored and used in the United States. The “stove piping” and “silos” that characterized the pre-9/11 Cold War era were, if not altogether banished, greatly diminished. Now anyone – from the cop walking a neighborhood beat, to the FBI special agent working a case, to the intelligence analyst at a remote foreign outpost – could query a central repository and, through the TSC’s 24/7 call center, be connected with the originating source of intelligence about the subject of interest.

But this new system also created new challenges. The greatest of these, on which the success of the entire enterprise depended, was the standard used to decide whether available information warranted including a person in the TSDB (known as “nominating” in the watchlisting nomenclature). This decision determines the size of the TSDB itself and what data are available to compose downstream watchlists. Make the standard too high and the repository would very likely be “too small” in the sense of being incomplete. But make the standard too low and the collections would grow unmanageably large, hiding terrorist needles in watchlisting haystacks. The challenge is made more difficult still by the political pressures riding on either choice. Create a list that generates too many false positives and the public would soon demand public scrutiny in courts or other forums that would create limits the watchlisters were eager to avoid. But create a list that fails to stop successive attacks and its makers would face the wrath of a public angry for the opposite reasons.

The standard of review for successful nomination to the TSDB is the “reasonable suspicion” standard. Although there has been minor variation in its wording, this standard has applied since at least 2009 as a result of a working group convened the previous year in which the TSC legal counsel played an instrumental role.<sup>43</sup> Its most recent public articulation occurred in testimony given in September 2014 by TSC Director Christopher Piehota.<sup>44</sup> But a more detailed and revealing definition is found in the March 2013 Watchlisting Guidance. A leaked copy of this unclassified but “for official use only/sensitive security information” document was published in 2014 by *The Intercept*, a blog operated by the investigative journalist Glenn Greenwald.<sup>45</sup> Its 166-page detailed description of the process, standards, and criteria for watchlisting has largely been accepted as authentic, though it is not officially acknowledged as such by the watchlisting community. In it, the term “reasonable suspicion” is defined as:

the standard that must be met in order to include an individual in the TSDB, absent an exception provided for in the Watchlisting Guidance. To meet the REASONABLE SUSPICION standard, the NOMINATOR, based on the totality of the circumstances, must rely upon articulable intelligence or information which, taken together with rational inferences from those facts, reasonably warrants a determination that an individual is known or suspected to be or has been knowingly engaged in conduct constituting, in preparation for, in aid of, or related to TERRORISM and/or TERRORIST ACTIVITIES. There must be an objective factual basis for the NOMINATOR to believe that the individual is a KNOWN OR SUSPECTED TERRORIST. Mere guesses or hunches are not enough to constitute a REASONABLE SUSPICION that an individual is a KNOWN OR SUSPECTED TERRORIST. Reporting of suspicious activity alone that does not meet the REASONABLE SUSPICION standard set forth herein is not a sufficient basis to watchlist an individual. The facts, however, given fair consideration, should sensibly lead to the conclusion that an individual is, or has, engaged in TERRORISM and/or TERRORIST ACTIVITIES.<sup>46</sup>

<sup>43</sup> Kahn, *supra* note 9, at 158, 303 nn.11–12.

<sup>44</sup> *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*: Hearing before the Subcomm. on Transp. Sec. of the Comm. on Homeland Sec., 113th Cong., 14 (2014).

<sup>45</sup> Jeremy Scahill & Ryan Devereaux, *Blacklisted: The Secret Government Rulebook for Labeling You a Terrorist*, *THE INTERCEPT*, July 23, 2014, <https://theintercept.com/2014/07/23/blacklisted/>.

<sup>46</sup> Terms in small caps appear in this fashion throughout the guidance manual, indicating that they are terms defined in appendix I of the manual (this one is at “U”). See March 2013 Watchlisting Guidance (hereinafter “Guidance”), page 5 n.1.

The Memorandum of Understanding accompanying HSPD-6 defined “Terrorist Information”; this Watchlisting Guidance builds on that foundation to define “terrorist activities” and “terrorism.”<sup>47</sup> As would be expected, these terms are defined to include violent and destructive acts. But they also include “activities that facilitate or support” a range of actions that are not inherently dangerous, their meaning dependent on the actors involved. For example, an innocent commercial exchange, viewed more suspiciously, could be provision of “a safe house, transportation, communications, funds,” etc.<sup>48</sup> The terms “known terrorist” and “suspected terrorist” are also defined:

**KNOWN TERRORIST:** is an individual whom the U.S. Government knows is engaged, has been engaged, or who intends to engage in TERRORISM and/or TERRORIST ACTIVITY, including an individual (a) who has been charged, arrested, indicted, or convicted for a crime related to TERRORISM by U.S. Government or foreign government authorities; or (b) identified as a terrorist or member of a designated foreign terrorist organization pursuant to statute, Executive Order or international legal obligation pursuant to a United Nations Security Council Resolution.<sup>49</sup>

**SUSPECTED TERRORIST:** is an individual who is REASONABLY SUSPECTED to be, or has been engaged in conduct constituting, in preparation for, in aid of, or related to TERRORISM and/or TERRORIST ACTIVITIES based on an articulable and REASONABLE SUSPICION.<sup>50</sup>

It is noteworthy that a “known terrorist” is *not* defined as someone formally designated as such; the definition notes these designations as only “including” the universe of possibly known terrorists (indeed, the crime for which the person might be arrested, charged, or convicted need only be “related” to terrorism in unspecified ways). The definition of a “suspected terrorist” is hard to untangle from the standard of reasonable suspicion embedded in the term. As one federal judge put it: “In other words, an American citizen can find himself labeled a suspected terrorist because of a ‘reasonable suspicion’ based on a ‘reasonable suspicion.’”<sup>51</sup>

The March 2013 Watchlisting Guidance provides for numerous exceptions to this standard. For example, the Assistant to the President for Homeland Security and Counterterrorism (or her designee), without any individualized derogatory information, “may direct the TSC and NCTC to place categories of individuals from TIDE or TSDB on the No-Fly List, Selectee List, or into the TSDB for up to 72 hours.”<sup>52</sup> An expedited nomination process allows watchlisting over the phone “[i]f exigent circumstances exist (imminent travel and/or threat),” with documentation to follow within three days.<sup>53</sup> As

<sup>47</sup> See MOU, *supra* note 38. See Guidance, §§ 1.14–1.15.

<sup>48</sup> Guidance, § 1.15.

<sup>49</sup> Guidance, Appendix I at “L.” This definition seems to have recently broadened. An affidavit sworn by then-deputy TSC director Piehota filed in federal court on June 3, 2011, refers to the July 2010 Watchlisting Guidance to define a known terrorist “as an individual who has been convicted of, currently charged with, or under indictment for a crime related to terrorism in a U.S. or foreign court of competent jurisdiction.” Declaration of Christopher M. Piehota at 6 n.4, *Mohammad v. Holder*, Case No. 1:11-CV-50 (E.D. Va.) (No. 22–1).

<sup>50</sup> Guidance, Appendix I at “W.”

<sup>51</sup> *Mohamed v. Holder*, 995 F. Supp. 2d 520, 531–32 (E.D. Va. 2014).

<sup>52</sup> Guidance, § 1.59.2. “To the extent practicable,” this order “will be in writing.” *Id.* After seventy-two hours, and in thirty-day increments, concurrence must be sought from the Deputies or Principals Committee. *Id.* at § 1.59.3.

<sup>53</sup> Guidance, § 1.58.

Table 3.1. TSDB activity, October 1, 2008–September 30, 2013

Fiscal year	Nominations	Rejected
2009	227,932	508
2010	250,847	1628
2011	274,470	2776
2012	336,712	4356
2013	468,749	4915

would be expected, non-U.S. persons (especially those outside the United States) are subject to more exceptions than U.S. persons. But even a U.S. person “for whom there is insufficient derogatory information to support entry in TSDB” must be included in TIDE if he or she has “a nexus to terrorism.”<sup>54</sup>

Most nominations to the TSDB are successful. This was verified in discovery permitted in recent litigation. In response to an interrogatory, the Justice Department produced the chart in Table 3.1 for TSDB activity between October 1, 2008, and September 30, 2013.<sup>55</sup> Although nominations more than doubled in five years, the percentage of nominations rejected rose from slightly more than 0.2 percent in 2009 to only slightly more than 1 percent in 2013.

Once a name is nominated to the TSDB, it is considered for inclusion in “downstream” watchlists designed for the particular needs of different federal agencies. Thus, the 2013 Watchlisting Guidance provides that an individual may be added to the No-Fly List if the person “represents a threat” of committing various definitions of terrorism found in the U.S. Code to aircraft, the “homeland,” or U.S. facilities abroad. A person may also be added to the No-Fly List whose threat of “engaging in or conducting a violent act of terrorism” is judged real although the target is not locatable, so long as the person is “operationally capable” of such action.<sup>56</sup>

How judged? Oddly, the 2013 Watchlisting Guidance makes no reference to any evaluative standard in describing these No-Fly List criteria. Prior to the leak of this manual, high-level individuals familiar with the process struggled in interviews with the author to answer within the confines of an information environment in which the criteria themselves could not be identified. They finally agreed, however, that an analyst “must *at least* have a reasonable suspicion that the criteria were met, but the process of decision making is hard to reduce to the traditional legal standards familiar to lawyers.”<sup>57</sup>

<sup>54</sup> Guidance, § 3.15.2. How a nexus is found when there is insufficient derogatory information to watchlist in the ordinary fashion is unexplained.

<sup>55</sup> Defendants’ Objections and Responses to Plaintiff’s First Set of Interrogatories, *Mohamed v. Holder*, 1:11-cv-00050-AJT-TRJ (E.D. Va. 2014) (No. 91–3).

<sup>56</sup> Guidance, § 4.5. After years of asserting that publication of these criteria would threaten national security, they are now publicly acknowledged by the government. See *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1055 (D. Or. 2015).

<sup>57</sup> Kahn, *supra* note 9, at 168–69. The government has since confirmed this conclusion. See Declaration of G. Clayton Grigg, Deputy Director for Operations, Terrorist Screening Center, May 28, 2015, *Tarhuni v. Lynch*, No. 3:13-cv-1 (D. Or. Sept. 1, 2015) (No. 105-A). (“Nominations that recommend an individual also be included on either the No Fly or Selectee List are evaluated by the TSC to determine if the derogatory information provided by the nominating agency establishes a reasonable suspicion that the individual



Where did the reasonable suspicion standard originate? An interagency working group developed this standard beginning in 2008.<sup>58</sup> It was modeled on the standard for a police “stop-and-frisk” that the Supreme Court devised in 1968 in *Terry v. Ohio*.<sup>59</sup> The Court held that Police Detective McFadden, though lacking probable cause to arrest John Terry and Richard Chilton, could nevertheless briefly stop, question, and frisk them (the latter for the officer’s safety) if McFadden could “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>60</sup> Although some in the working group raised concerns about the differences between the law enforcement and intelligence contexts, the group adopted a strikingly similar standard. This was not uncommon. The NSA adopted the same standard for its secret metadata collection program.<sup>61</sup>

But the *Terry* test was designed for the world of the old watchlists, one in which a sharp boundary line divided watching from acting on what was observed. When that limit was reached, the law required a public process in which executive action was assessed by a neutral judge. Indeed, immediately after setting forth the *Terry* reasonable suspicion standard, Chief Justice Warren’s very next sentence described the classic boundary against which – and only against which – such an exception to probable cause made sense:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.<sup>62</sup>

Adopted for the new watchlists, the “reasonable suspicion” standard is stripped of this context. The “who, what, and where” of the boundary – which give that boundary meaning – are no longer present. The decisions made by executive officials at the TSC and NCTC (unlike the evaluation of Detective McFadden’s judgment by a court) were not intended to be subject to judicial oversight. Nor was there intended to be a second, public forum at which a final determination about the individual’s rights would be made under heightened rules of evidence. McFadden stopped Terry because if his suspicions were right, McFadden would arrest Terry, a prosecutor would charge him with a crime, and a judge would oversee his trial. Watchlisting does not proceed past the stop. Loosed of these constraints, imposed as much by the liberty-protecting function of the separation of powers as by the Fourth Amendment, the reasonable suspicion standard that populates

meets additional heightened derogatory criteria that goes above and beyond the criteria required for inclusion in the broader TSDB”).

<sup>58</sup> A more detailed treatment of its development is found in Kahn, *supra* note 9, at 158, 169–171, & 303 nn.11–12.

<sup>59</sup> 392 U.S. 1 (1968).

<sup>60</sup> *Id.* at 21. Detective McFadden’s actions might well have fallen short of the requirements of this test. Cross-examined at one of the criminal trials, he testified: “Some people that don’t look right to me, I will watch them. Now, in this case when I looked over they didn’t look right to me at the time.” John Q. Barrett, *Appendix B State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN’S L. REV. 1387, 1456 (1998). Other factual details, as well as the racial undertones and societal context of the case, have come under scrutiny. Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L. J. 423 (2004).

<sup>61</sup> Robert S. Litt, *The Fourth Amendment in the Information Age*, 126 YALE L.J. F. 8, 9 (April 27, 2016).

<sup>62</sup> 392 U.S. at 21.

the TSDB and the No-Fly List gives the false appearance of constraint, as shadows give the illusion of bars on a window.

#### IV Growth and Use

In the earliest days of watchlisting, closest in time to 9/11, there were few incentives to be underinclusive. In response to a 2005 DOJ Inspector General's audit, the TSC attributed incomplete, inaccurate, or inconsistent information in the TSDB to "the immediate need during the earliest days of the TSC to develop a comprehensive database of potentially high-risk suspects."<sup>63</sup> The first TSC director, Donna Bucella, explained that "to err on the side of caution, individuals with any degree of a terrorism nexus were included" in the TSDB if at all possible.<sup>64</sup> According to Justice Department auditors, Bucella 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 this could provide useful intelligence information to investigators. In addition, she stated that watch listing lower-threat individuals that have associations with higher-threat level terrorists may lead to uncovering the location of higher watch listed individuals.<sup>65</sup>

Such policies tended to have long tails. Consider, for example, the interconnected nature of the TSDB and the No-Fly List generated from it. From the sixteen names on the FAA "do-not-carry" security directives on September 11, 2001, there were upward of sixty-four thousand "identities" in September 2014 (Table 3.2).<sup>66</sup>

A 2009 DOJ audit found substantially untimely delays in both nominating and removing individuals considered to be "investigative subjects" from the TSDB.<sup>67</sup> Perhaps most disconcerting, the audit found more than sixty thousand nominations for "non-investigative subjects" that had not followed the standard nomination process; internal controls over such nominations were found to be "weak or nonexistent."<sup>68</sup>

<sup>63</sup> FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, *supra* note 41, at 2.

<sup>64</sup> U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE TERRORIST SCREENING CENTER (Audit Report 05-27) 30 (2005).

<sup>65</sup> *Id.*

<sup>66</sup> These statistics require careful interpretation. Sometimes, officials reveal the number of "records" or "identities" in a database or watchlist. This is not synonymous with the number of unique individuals, which is often much lower because of duplicate records, aliases, and other multipliers in these systems. Thus, the figure of sixty-four thousand identities noted in the text is drawn from testimony provided by TSC Director Pichota. See *Hearing before the Subcomm. on Transp. Sec. of the Comm. on Homeland Sec.*, *supra* note 44 ("The Terrorist Screening Center currently stands at about 800,000 identities. For those identities, for the No-Fly List, we are looking at about 8 percent of the overall population of the TSDB are watchlisted at the No-Fly level; about 3 percent of the overall population of the TSDB is watchlisted at the Selectee level.") The labels in this table are those used in the sources cited for each statistic.

<sup>67</sup> AUDIT DIVISION, OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES 23 & 36 (2009) (finding "78 percent of the FBI terrorist watchlist nominations we reviewed were completed in an untimely manner" and that "the FBI was untimely in its removal of the subjects in 72 percent of the cases we reviewed and when the FBI removed these subjects, it took, on average, 60 days to process the removal requests").

<sup>68</sup> *Id.* at 46 ("In total, more than 62,000 watchlist nominations have been made by non-standard FBI nomination processes. We also found almost 24,000 FBI watchlist records that were not sourced to a current terrorism case classification. Many of the records we tested were based on cases that had been closed years ago and should have been removed at that time. These records caused individuals to be screened unnecessarily by frontline screening personnel.").

Table 3.2. Watchlist Expansion Between September 2001 and February 2007

Date	Terrorist screening database (TSDB)	No-Fly List
Sept. 11, 2001		16 people
Nov. 2001		400 people <sup>a</sup>
Dec. 2001		594 people <sup>b</sup>
Dec. 22, 2001	AA Flight 63 Richard Reid (“shoe bomber”)	
Apr. 2004	≈ 150,000 records <sup>c</sup>	
July 2004	≈ 225,000 records (≈ 170,000 “unique terrorist identities”) <sup>d</sup>	
Feb. 2006	≈ 400,000 records <sup>e</sup>	
July 2006		71,872 records <sup>f</sup>
Start of TSC Review		
Feb. 2007		34,230 records <sup>g</sup>
End of TSC Review		
Apr. 2007	724,442 records <sup>h</sup>	
Sept. 2008	≈ 400,000 “unique individuals” <sup>i</sup>	
Dec. 2008	1,183,447 “known or suspected international and domestic terrorist identity records” <sup>i</sup>	
Sept. 2009		3,403 people <sup>k</sup>
Dec. 25, 2009	NW Flight 253 Umar Farouk Abdulmutallab (“underwear bomber”)	
Jan. 2011		10,000 people <sup>l</sup>
Sept. 2011		16,000 individuals <sup>m</sup>
Feb. 2012	≈ 520,000 people <sup>n</sup>	21,000 people <sup>o</sup>
Sept. 2014	800,000 identities <sup>p</sup>	64,000 identities <sup>q</sup>

<sup>a</sup> Internal TSA Memorandum from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy, Oct. 16, 2002 (ACLU FOIA Release, A1-010).

<sup>b</sup> PowerPoint, TSIS, Dec. 2002 (ACLU FOIA Release, A1-03), *supra* note 30.

<sup>c</sup> Follow-Up Audit of the Terrorist Screening Center, *supra* note 41, at 7.

<sup>d</sup> *Id.*

<sup>e</sup> *Id.*

<sup>f</sup> *Id.* at 31–32.

<sup>g</sup> *Id.* at 31–32.

<sup>h</sup> *Id.* at 7.

<sup>i</sup> U.S. Department of Justice Office of the Inspector General, The Federal Bureau of Investigation’s Terrorist Watchlist Nomination Practices (Audit Report 09–25) 1, n.40 (May 2009).

<sup>j</sup> *Id.* at 1.

<sup>k</sup> Author’s interview, FBI HQ, Washington D.C., Dec. 4, 2009.

<sup>l</sup> Jamie Tarabay, *The No-Fly List: FBI Says It’s Smaller than You Think*, NATIONAL PUBLIC RADIO (Jan. 26, 2011).

<sup>m</sup> Hearing before the House Subcommittee on Transportation Security of the Committee on Homeland Security, *supra* note 44 (statement by Congressman Cedric L. Richmond).

<sup>n</sup> Bob Orr, Inside a Secret U.S. Terrorist Screening Center, CBS News, Oct. 1, 2012.

<sup>o</sup> Carol Cratty, 21,000 people now on U.S. No-Fly List, official says, CNN, Feb. 2, 2012 (quoting unnamed official).

<sup>p</sup> Testimony of TSC Director Piehota, *supra* note 44.

<sup>q</sup> *Id.*

The result, as litigation would eventually reveal, was a TSDB and set of downstream watchlists that were sticky: the legacy of once having been watchlisted, even if later removed from one part of the system, tended to linger. In the words of one judge, “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.”<sup>69</sup>

Whatever its faults, the TSDB had grown into an extraordinarily powerful and useful tool. There was now a watchlist available to every police officer in the United States, expanding the list of bad apples and “usual suspects” far beyond any previous capacity. According to a former TSC director:

So if you are speeding, you get pulled over, they’ll query that name. And if they are encountering a known or suspected terrorist, it will pop up and say call the Terror[ist] Screening Center. So now the officer on the street knows he may be dealing with a known or suspected terrorist.<sup>70</sup>

And even if there is no arrest, or even any indication that the label placed on the individual is the correct one, the police encounter will augment the watchlist record with that person’s observed activities, destination, and associates, all entered in the TSDB.<sup>71</sup>

The No-Fly List also came into its own as one of the key counterterrorism tools of the TSA. This was due to two substantial changes in this watchlist from the old security directives from which it emerged. First, the application of the “reasonable suspicion” standard to build the No-Fly List was a departure from the much narrower standard that security directives used “to pass on specific, credible threats and mandatory countermeasures” subject to civil penalties for noncompliance.<sup>72</sup> The “do-not-carry” variety of these security directives were limited to denying boarding to those individuals determined to present “a direct and credible threat to aviation.”<sup>73</sup> But when creating the TSA in 2001, Congress expressed interest in the identification of individuals who may be “a threat to civil aviation or national security.”<sup>74</sup> The disjunctive “or” was now viewed as authority to use the No-Fly List to prevent air travel by someone who was *not* a threat to civil aviation, but who met the expansive definitions and low standard described above.

Second, control of the watchlist by commercial airlines was significantly reduced. Frustrations in implementing an expanding No-Fly List, and the hazards perceived in a watchlist revealed to persons outside the government, led to the conclusion that watchlist screening – like security checkpoints – should be “an inherently governmental function.”<sup>75</sup> This was implemented in 2008 by the “Secure Flight” program, through which

<sup>69</sup> *Ibrahim v. DHS*, 62 F. Supp. 3d 909, 928 (N.D. Cal. 2014).

<sup>70</sup> Bob Orr, *Inside a Secret U.S. Terrorist Screening Center*, CBS NEWS, Oct. 1, 2012.

<sup>71</sup> *Id.*

<sup>72</sup> Department of Transportation Selected Aviation Security Initiatives, Appendix H to REPORT OF THE PRESIDENT’S COMMISSION ON AVIATION SECURITY AND TERRORISM 178 (1990).

<sup>73</sup> Memorandum for the Record, 9/11 Commission interview with Claudio Manno, Oct. 1, 2003, at 8.

<sup>74</sup> *See supra* note 25.

<sup>75</sup> DHS OFFICE OF THE INSPECTOR GENERAL, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 4 (2009). The Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, § 4012(a)(1), 118 Stat. 3638 (2004) (codified at 49 U.S.C. § 44903(j)(2)(C)), transferred the ministerial function of comparing passenger information to watchlists from the airlines to the TSA.

passenger information is sent to the TSA when an airline ticket is purchased for comparison against the relevant watchlists.<sup>76</sup>

Given the power of these watchlists to track and, potentially, affect a wide variety of restrictions on rights, what explains the generally muted public attitude toward them? One answer might reside in the small number of U.S. persons (defined as citizens and permanent residents) who are watch listed. Testifying before Congress in late 2013, TSC Director Piehota estimated that U.S. persons on the No-Fly List were about “0.8 percent of the overall TSDB population,” or sixty-four hundred identities.<sup>77</sup> Since so few U.S. citizens find themselves on such watchlists – and so many individuals subject to them lack representation in democratic forums – many are happy to have the costs of security externalized in this fashion.

## V Litigation

A key FAA and TSA intelligence official could not recall anyone subject to a pre-9/11 security directive who had contested a denial to board, or even attempted to board a plane, once such an order had been issued. Perhaps because of the long interagency process for sharing intelligence with commercial airlines, such “watchlisted” individuals had stopped flying by that point.<sup>78</sup>

The size and expanded coverage of the No-Fly List, on the other hand, led to litigation both about that watchlist and eventually about the larger TSDB from which it originates. Such lawsuits presented unusual difficulties. Since government officials declined to confirm watchlisting decisions, some plaintiffs had difficulty satisfying standing requirements or found their complaints mooted by agency action on the eve of judicial scrutiny.<sup>79</sup> In their lawsuits, some plaintiffs alleged not only that they were wrongly placed on watchlists, but that they were subsequently approached by FBI agents who offered to restore their ability to travel in exchange for becoming government informants.<sup>80</sup> In other cases, plaintiffs alleged harassment or even torture by the FBI or foreign government agents acting jointly with the FBI, using the No-Fly List as a tool of coercion and control.<sup>81</sup>

If the multiagency design of the watchlisting process was not intended to make litigation more difficult – and there is no available evidence that it was – that was nevertheless a consequence. Authority to curate the TSDB and compose downstream lists lay with the TSC. Operational use of those lists (such as the No-Fly List) resided with “customer” agencies (such as the TSA). Naming a defendant was therefore the first difficulty.

<sup>76</sup> Secure Flight Program, 73 FED. REG. 64,018 (Oct. 28, 2008) (codified at 49 C.F.R. §§ 1540 & 1560).

<sup>77</sup> Testimony of TSC Director Piehota, *supra* note 44.

<sup>78</sup> Author’s interview with Claudio Manno, FAA HQ, Washington D.C., Mar. 14, 2011.

<sup>79</sup> *Scherfen v. U.S. Dep’t Homeland Sec’y*, No. 3:CV–08–1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010); *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052 (D. Or. 2015); Joint Stipulation Regarding the Effect of Plaintiff’s Removal from the No-Fly List, *Fikre v. FBI*, 3:13-cv-00899 (D. Ore. May 27, 2016) (No. 102).

<sup>80</sup> See, e.g., Third Amended Complaint, *Latif v. Lynch*, 3:10–750 (D. Or. Jan. 11, 2013); Fifth Amended Complaint, *Fikre v. FBI*, 3:13-cv-00899 (D. Or. Nov. 29, 2015). These and other materials from similar cases may be accessed at the author’s Web site, [www.watchlistlaw.com](http://www.watchlistlaw.com).

<sup>81</sup> See, e.g., Fourth Amended Complaint, *Mohamed v. Holder*, 1:11-cv-50 (E.D. Va. Mar. 7, 2014).

A lawsuit directed at the TSC alleging that placement on the No-Fly List had injured the plaintiff had to overcome the obstacle that the TSC had not itself prevented the plaintiff from flying. That was the operational decision of the TSA. But a lawsuit directed at the TSA – which put the list into operation by issuing a security directive – faced a problem in obtaining a suitable remedy. A court could not order the TSA to remove a name from the relevant watchlists since that authority rested with the TSC. And courts initially insisted that would-be litigants exhaust their administrative remedies before the TSA (no such process exists at the TSC) prior to seeking judicial remedies against either agency. The administrative appeal process, run by the Department of Homeland Security, is called DHS TRIP (Traveler Redress Inquiry Program). As its name implies, where watchlist related complaints are concerned, it is limited to complaints concerning the No-Fly List and Selectee List, but not the TSDB. In its early form, DHS TRIP generated a “final agency decision” that was often opaque and uninformative, an example of which is provided in an appendix to this chapter, Figure 3.4.

Suing both together presented a separate difficulty. Among the powers and authorities transferred to the TSA upon its creation was a statutory provision dating to the creation of the FAA in 1958 that provided for review of certain agency action only in the U.S. courts of appeals.<sup>82</sup> The government argued, successfully at first, that this provision deprived federal trial courts of jurisdiction to hear such complaints.<sup>83</sup> This also had the effect of preventing pretrial discovery and the submission of evidence by the plaintiff outside of any administrative record.<sup>84</sup> When such lawsuits occurred, such records would typically be filed under seal. In one early case, a description of the submitted record was docketed, revealing that the record included a number of electronic exchanges between the TSA and the TSC, which had created the list.<sup>85</sup>

Eventually, these impediments started to fall. In August 2008, the Ninth Circuit Court of Appeals was persuaded that the relevant issue in watchlisting cases concerned the *composition* of watchlists, not their implementation at airports. As then Chief Judge Alex Kozinski wrote for the 2–1 majority:

Our interpretation of section 46110 is consistent not merely with the statutory language but with common sense as well. Just how would an appellate court review the agency’s decision to put a particular name on the list? There was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know, there is no administrative record of any sort for us to review. So if any court is going to review the government’s decision to put Ibrahim’s name on the No-Fly List, it makes sense that it be a court with the ability to take evidence.<sup>86</sup>

<sup>82</sup> 49 U.S.C. § 46110.

<sup>83</sup> *Tooley v. Bush*, No. 06–306, 2006 WL 3783142 at \*26 (D.D.C. Dec. 21, 2006); *Green v. TSA*, 351 F. Supp. 2d 1119, 1126 (W.D. Wa. 2005).

<sup>84</sup> Although that statute provided that when such a petition for review was filed, the agency must then “file with the court a record of any proceeding in which the order was issued,” on at least one occasion, the government argued that it was not required to submit an administrative record at all. *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 n.7 (9th Cir. 2006).

<sup>85</sup> *Kadirov v. TSA*, No. 10–1185 (D.C. Cir. filed July 12, 2010).

<sup>86</sup> *Ibrahim v. DHS*, 538 F.3d 1250, 1256 (9th Cir. 2008).

Since composition was a TSC function, and the TSC was not subject to the jurisdiction-shifting provision of Section 46110, the district courts were open to hear carefully crafted complaints.<sup>87</sup> In 2015, the D.C. Circuit and Sixth Circuit adopted similar positions.<sup>88</sup>

This opened the door for litigation before trial courts that could order discovery and consider evidence outside the record. Attempts to obtain information in the form of interrogatories or document requests, however, were often met with claims of executive privilege based on “sensitive security information” in the record or with assertions of the law enforcement privilege or state secrets privilege.<sup>89</sup>

Only one case has reached the trial stage in federal court. In November 2004, Dr. Rahinah Ibrahim, an accomplished Malaysian architect and academic, was nominated to the No-Fly List by FBI Special Agent Kevin Michael Kelley. Kelley had mistakenly nominated Ibrahim to the No-Fly List by checking the wrong box on a watchlist nomination form, a mistake he acknowledged (and, indeed, seems only to have realized himself) at his deposition: the form was designed to assume nomination to all watchlists save those affirmatively excluded by marking a box.<sup>90</sup> As a result, Ibrahim was arrested and detained when she arrived in a wheelchair at the check-in counter at San Francisco International Airport with her daughter to depart for an academic conference. Further, her student visa was later revoked (as a result of nomination to CLASS) and she has not been permitted to return to the United States despite twenty years as a lawful resident. Although her name was removed from some watchlists, and the government determined in November 2006 that she did not meet the reasonable suspicion standard, her name was repeatedly removed from and then re-added to the TSDB and other watchlists over the next several years.<sup>91</sup>

<sup>87</sup> *Id.* at 1255. In so doing, the court also rejected the government’s frequently made (and previously successful) argument that TSC composition functions were so “inextricably intertwined” with TSA security orders as to require TSA as an indispensable party, forcing litigation into the courts of appeals. *See, e.g., Latif v. Holder*, No. 10–CV–750, 2011 WL 1667471 (D. Or. 2011), rev’d and remanded, 686 F.3d 1122 (9th Cir. 2012).

<sup>88</sup> *Ege v. DHS*, 784 F.3d 791 (D.C. Cir. 2015); *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015). Following revision to the DHS TRIP that resulted from ongoing litigation in *Latif v. Lynch*, the government took the position that “those conclusions are, in any event, not applicable to the TSA orders generated by the revised redress process. TSA now explicitly makes the final determination and does in fact have the information and the authority to effectuate the relief Plaintiff seeks.” *See* Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s 5th Amended Complaint at 5, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. Jan. 21, 2016) (No. 90) (internal citation and quotation marks omitted). The government argued that in any such § 46110 review by a court of appeals, “consistent with past practice, classified and privileged portions of the records may be submitted *ex parte* and *in camera* for judicial review in the court of appeals.” *Id.*

<sup>89</sup> *See, e.g., Ibrahim v. DHS*, 62 F. Supp. 3d 909, 913–914 (N.D. Cal. 2014); Defendants’ Opposition to Plaintiff’s Motion to Compel at 1, *Tarhuni v. Holder*, 3:13-cv-1 (D. Or. Sept. 16, 2014) (No. 72).

<sup>90</sup> *Ibrahim*, 62 F. Supp. 3d at 916. The author served as a testifying expert for the plaintiff in this case.

<sup>91</sup> *Id.* at 922–23. Two email exchanges obtained in the course of discovery in this case suggest how the mere fact of being placed on a watchlist, more than the substantive grounds for watchlisting, can drive decision making in other parts of the government. The first email was sent between two officials in the State Department’s visa office the day after Dr. Ibrahim’s arrest in San Francisco:

As I mentioned to you, I have a stack of pending revocations that are based on VGTO [the FBI’s Violent Gang and Terrorist Organization] entries. These revocations contain virtually no derogatory information. After a *long* and frustrating game of phone tag with INR [the Department of State’s Bureau of Intelligence and Research], TSC, and Steve Naugle of the FBI’s VGTO office, finally we’re going to revoke them.

Per my conversation with Steve, there is no practical way to determine what the basis of the investigation is for these applicants. The only way to do it would be to contact the case agent for each case individually to determine what the basis of the investigation is. Since we don’t have the time to do

It was Ibrahim's case that opened the door to the trial courts by removing the jurisdictional impediment of Section 46110. After eight years of litigation, her one-week bench trial – ironically, her U.S. citizen daughter was erroneously prevented by the TSDB from attending and offering testimony<sup>92</sup> – led Judge William Alsup to conclude:

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.<sup>93</sup>

Despite these strong words, the court limited its remedy – scrubbing “every single government watchlist and database” – to instances that would be hard to uncover, as this long lawsuit itself demonstrated: “a conceded, proven, undeniable, and serious error by the government – not merely a risk of error.”<sup>94</sup>

Therefore, perhaps the case that has had the most significant influence on the No-Fly List is *Latif v. Lynch*. In that case, thirteen U.S. citizen plaintiffs (including several veterans) alleged that the No-Fly List prevented their domestic and international travel. Some of the plaintiffs alleged that FBI agents promised to arrange air travel if they agreed to become government informants.

The long history of this case reads like a staged retreat. In addition to the jurisdictional arguments noted above, the government initially argued that plaintiffs had suffered no injury to their right to travel, a right that the government argued did not include “the most convenient means of travel,” by airplane: “counsel’s research shows that passenger ships frequently cross the Atlantic.”<sup>95</sup> After the Ninth Circuit reversed the trial court’s

that (and, in my experience, case agents don’t call you back promptly, if at all), we will accept that the opening of an investigation itself is a *prima facie* indicator of potential ineligibility under 3(B) [Immigration and Nationality Act, § 212(a)(3)(B)].

*Id.* at 921 (emphasis in original). The second email was sent a month later between an official at the State Department’s visa office and the chief of the consular section of the U.S. Embassy in Malaysia:

The short version is that [Dr. Ibrahim’s] visa was revoked because there is law enforcement interest in her as a potential terrorist. This is sufficient to prudentially revoke a visa but doesn’t constitute a finding of ineligibility. The idea is to revoke first and resolve the issues later in the context of a new visa application. ... My guess based on past experience is that she’s probably issuable. However, there’s no way to be sure without putting her through the interagency process. I’ll gin up the revocation.

*Id.* at 922. As a result, a consular officer wrote the word “terrorist” on the form letter Ibrahim received in December 2009, five years after her initial, erroneous watchlisting. *Id.* at 924–25. After the trial, in December 2013, the court noted and so held that “government counsel has conceded at trial that Dr. Ibrahim is not a threat to our national security. She does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism.” *Id.* at 915–16.

<sup>92</sup> *Id.* at 927.

<sup>93</sup> *Id.* at 927–928.

<sup>94</sup> *Id.* at 929.

<sup>95</sup> Defendants’ Motion for Summary Judgment at 24 & 30, *Latif v. Holder*, 3:10-cv-750 (Nov. 17, 2010) (No. 44). The suggestion was answered by one of the plaintiffs, who alleged that his attempt to travel across the Atlantic by cargo freighter was denied by the ship’s captain “based on the recommendation of U.S. Customs and Border Protection.” 3rd Amended Complaint at ¶ 86, *Latif*, 3:10-cv-750 (No. 83).



dismissal on Section 46110 grounds and remanded the case, Judge Anna Brown of the District Court of Oregon began a long (and still ongoing at the time of this writing) deconstruction of the No-Fly List and its multiagency support structure. The court rejected the argument that international air travel was “a mere convenience in light of the realities of our modern world.” “Such an argument,” she rightly pointed out, “ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation,” all of which were implicated in the plaintiffs’ allegations.<sup>96</sup> The court also found the DHS TRIP determination letters to be inadequate, providing neither adequate notice nor a meaningful chance to be heard.<sup>97</sup>

One year later, the court elaborated on this conclusion, finding that the low-threshold reasonable suspicion test, refusal to reveal the fact of or reasons for watchlisting on the No-Fly List, and one-sided nature of an administrative record offered for judicial review all conspired to create a redress process that “contains a high risk of erroneous deprivation” of constitutional rights.<sup>98</sup> Finding that the plaintiffs’ right to procedural due process was violated, but unwilling to dictate a suitable process, the court ordered the government to “fashion new procedures that provide Plaintiffs with the requisite due process . . . without jeopardizing national security.”<sup>99</sup> In the meantime, the court ordered the government to disclose to the plaintiffs their status on the No-Fly List; seven of the thirteen plaintiffs were then informed that they were not on that watchlist.<sup>100</sup>

In spring 2016, Judge Brown upheld in principle the new redress processes that she had compelled the government to devise (while permitting the underlying watchlist to remain operational). In particular, the court held that the No-Fly List could continue to use the reasonable suspicion standard so long as the government provided “(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.”<sup>101</sup> No live hearing, neutral magistrate, or ability to cross-examine witnesses was necessary in such a process, and even the statement of reasons could be redacted under certain circumstances to protect national security.

On April 21, 2017, the seven-year-old case seemed to come to a close, at least in the District Court.<sup>102</sup> Judge Brown summarized the new DHS TRIP procedures:

First, DHS TRIP (as noted, in consultation with TSC) would send to the traveler a notification letter that only indicates whether the traveler was on the No-Fly List. If the traveler is on the No-Fly List and requests additional information, the revised procedures

<sup>96</sup> *Latif v. Holder*, 969 F. Supp. 2d 1293, 1303 (D. Or. 2013). This finding established the tangible “plus” necessary for an additional right to be free from false, government-imposed injuries to reputation as suspected terrorists. *Id.* at 1304.

<sup>97</sup> *Id.* at 1307–08.

<sup>98</sup> *Latif v. Holder*, 28 F. Supp. 3d 1134, 1153 (D. Or. 2014).

<sup>99</sup> *Id.* at 1162. The government initially appealed this order to the Ninth Circuit but then moved for voluntary dismissal of its appeal.

<sup>100</sup> *Latif v. Holder*, 2015 WL 1883890 at \*1 (D. Or. Apr. 24, 2015).

<sup>101</sup> *Latif v. Lynch*, 2016 WL 1239925, at \*2 (D. Or. Mar. 28, 2016). One of the original plaintiffs, an air force veteran who described a seven-country odyssey by air and land in order to return to his birthplace in New Mexico, died three weeks before this ruling. Notice of the Death of a Party, *Latif v. Lynch*, 3:10-cv-750 (D. Or. Apr. 12, 2016) (No. 324) (noticing death of Steven William Washburn on March 7, 2016). Thus, five plaintiffs remained who contested their status on the No-Fly List.

<sup>102</sup> *Latif v. Sessions*, 2017 WL 1434648 (D. Or. Apr. 21, 2017).

call for DHS TRIP (in consultation with the TSC) to send the traveler a second notification letter that identifies the applicable substantive criteria and contains the unclassified summary of the reasons for the traveler's placement on the List. ... [I]f an individual timely responds to the second letter and requests additional review, DHS TRIP forwards the response and any enclosed information to the TSC for consideration. Upon completion of TSC's review of materials submitted to DHS TRIP, the TSC provides a written recommendation to the TSA Administrator as to whether the individual should be removed from or remain on the No-Fly List and the reasons for that recommendation. The information that the TSC provides to the TSA Administrator may be a summary of the information that the TSC relied on to make its determination regarding whether the individual should remain on the No-Fly List and does not necessarily include all underlying documentation. The TSC's recommendation to the TSA Administrator may contain classified and/or law-enforcement sensitive information. In addition, DHS TRIP also provides the traveler's complete DHS TRIP file to the TSA Administrator, including all information submitted by the traveler.<sup>103</sup>

Under the new procedures, the TSA Administrator then issues a final order adopting or rejecting the TSC recommendation concerning retention on the No-Fly List. That order will "state the basis for the decision to the extent possible without compromising national security or law-enforcement interests."<sup>104</sup>

Judge Brown rejected the plaintiffs' arguments that the new process fell short of constitutional requirements.<sup>105</sup> This was all the process the plaintiffs were due, at least with regard to the No-Fly List.<sup>106</sup>

There remained, however, plaintiffs' substantive due process claim.<sup>107</sup> Since the TSA now made the final decision regarding an individual's retention on the No-Fly List, the government argued (as it had begun to argue from the moment it began to revise these procedures) that the court of appeals now had exclusive jurisdiction over this final agency action under the old § 46110. The plaintiffs argued for district court jurisdiction, since the TSC seemed to retain the initial decision to compose the No-Fly List in the first place and was the source of the information that the TSA used to decide any DHS TRIP appeal.<sup>108</sup>

Judge Brown, considering this an issue of first impression, limited the reach of her decision, concluding "in the unique procedural posture of this case that jurisdiction over Plaintiffs' remaining substantive claims explicitly lies in the Ninth Circuit Court

<sup>103</sup> *Id.*, at \*2, n.2 & \*3.

<sup>104</sup> *Id.*, at \*3.

<sup>105</sup> *Id.*, at \*4.

<sup>106</sup> It is worth emphasizing that the Court focused *only* on the No-Fly List, not the TSDB or other TSC-compiled and controlled watchlists. The plaintiffs sought injunctive relief requiring "the removal of Plaintiffs from any watch list or database that prevents them from flying," which implicated only the No-Fly List. Third Amended Complaint, *Latif v. Lynch*, 3:10-cv-750 (D. Or. Jan. 11, 2013) (No. 83) at Prayer for Relief, ¶ 2(a).

<sup>107</sup> *Id.* at ¶ 145 ("Because Plaintiffs do not present a security threat to commercial aviation, Defendants' actions as described above in including Plaintiffs on a watch list that prevents them from boarding commercial flights to and from the United States, and over U.S. airspace, are arbitrary, lack even a rational relationship to any legitimate government interest, and have unreasonably deprived Plaintiffs of constitutionally protected rights, including their liberty interests in travel, freedom from false stigmatization, and nonattainder.").

<sup>108</sup> *Latif*, 2017 WL 1434648, at \*6. See also *supra* note 105.

of Appeals pursuant to § 46110.”<sup>109</sup> At the time of this writing, an appeal in this long-running, landmark case seems certain.

## Conclusion: The Future of Watchlists

“Electronic databases form the nervous system of contemporary criminal justice operations,” Justice Ginsburg observed in 2009. Quoting Justice Stevens’s dissent in another database case almost fifteen years earlier, she expressed concern for their reliability:

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.<sup>110</sup>

The dissenting justices’ concern for the effect on liberty of inaccurate databases continues to motivate courts, as Judge Alsup’s *Ibrahim* opinion and Judge Brown’s *Latif* opinions attest. But courts have not been as concerned about the effect on liberty of the increasing use of these databases themselves. The technological innovations that make large, computerized databases integral components of government operations work a qualitative change to traditional modes of state action (investigation, regulation, distribution of benefits/burdens, etc.).<sup>111</sup> “[P]olice and other criminal justice officials are ‘trackers’ rather than investigators,” and “[t]he virtually ubiquitous availability of personal information to law enforcement, coupled with the advent of the investigatory stop, has radically altered the landscape of policing.”<sup>112</sup>

Further, many of the new watchlists do not exist in a world in which a criminal trial is the concluding step available to evaluate the merit of state action. As a result, the assumptions that long established a boundary that limited use of the old watchlists via scrutiny by a neutral judge in an open forum are increasingly subject to challenge. Although the No-Fly List is presently the most well-known of the new watchlists, there is no reason its logic must be limited to air travel. And the TSDB is increasingly tapped for new uses, some of which were imagined long ago, as revealed by a PowerPoint slide created by the TSC to brief congressional staff (and provided to the author in unclassified form; see Figure 3.3):

<sup>109</sup> 2017 WL 1434648, at \*7. Noting that the question of TSC’s role in disclosing information both to the plaintiffs and to the TSA implicated procedural as well as substantive issues of due process, Judge Brown noted that “this consideration may effectively limit this Court’s rationale to the facts of this case. In the ordinary course, judicial review of a DHS TRIP determination will involve both procedural and substantive aspects because the reviewing court must determine both whether the Defendants provided sufficient information to the traveler and whether the TSA Administrator’s substantive decision is supported by the record. Because only Plaintiffs’ substantive claims remain pending in this case, however, this Court cannot determine whether the hybrid nature of an ordinary judicial review of a DHS TRIP determination would lead to a different result.” *Id.* at \*7, n.4.

<sup>110</sup> *Herring v. United States*, 555 U.S. 135, 155–56 (2009) (Ginsburg, J., dissenting) (quoting Justice Stevens’s dissent in *Arizona v. Evans*, 514 U.S. 1, 23 (1995)) (citations and quotation marks omitted).

<sup>111</sup> Margaret Hu, *Big Data Blacklisting*, 67 FLORIDA L. REV. 1735 (2015).

<sup>112</sup> Kathryn M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1322 & 1330 (2016).

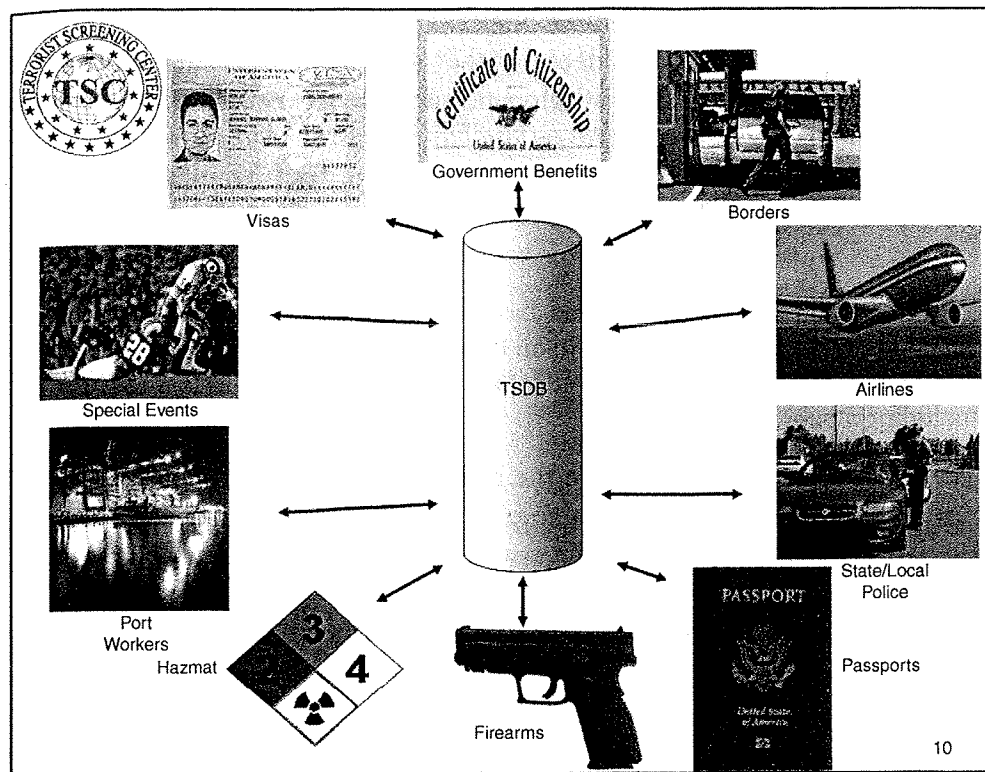


Figure 3.3. TSC PowerPoint Slide *circa* December 2009 on Current and Future Uses of the Terrorist Screening Database (TSDB).

Many future uses of watchlists were envisioned when the slide in Figure 3.3 was created in 2009, from controlling access to sporting events, to patrolling city streets, to vetting government benefits and gun licenses. The politics of gun control in the United States have (so far) limited expansion of watchlists into that last category, although legislation to create a “No-Gun List” has been proposed in the wake of mass shootings.<sup>113</sup> But the argument in favor of expansion has consistently been the same: if a person is “too dangerous to fly,” that person is too dangerous for any number of activities that, as the PowerPoint slide at Figure 3.3 shows, are limited only by the imagination.

Indeed, the expansive logic of the new watchlists has led state governments to tap federal watchlists in various ways. New Jersey makes the purchase of weapons contingent on a check of the TSDB, a list never intended to serve this purpose.<sup>114</sup> In West Virginia, a plan by local law enforcement to consult terrorist watchlists before allowing participation

<sup>113</sup> After the mass shooting in June 2016 at a night club in Orlando, Florida, two proposals to use watchlists to restrict firearm transfers were defeated in the Senate. See S.Amdt. 4720 to S.Amdt. 4685 (tabled by voice vote on June 20, 2016), <https://www.congress.gov/amendment/114th-congress/senate-amendment/4720>, and S.Amdt. 4749 to S.Amdt. 4720 (felled upon tabling of S.Amdt. 4720 on June 20, 2016), <https://www.congress.gov/amendment/114th-congress/senate-amendment/4749>. A third and more substantial proposal, by Senator Susan Collins (R-ME), received broad bipartisan support; see S.Amdt. 4814, 162 CONG. REC. S4419-S4420 (daily ed. June 21, 2016), but ultimately not enough. David M. Herszenhorn, *Senate Votes to Keep Gun Proposal Alive, but in Limbo*, N.Y. TIMES (June 23, 2016). My view of this proposal aligns with the concerns expressed in this chapter. See Jeffrey Kahn, *A ‘No Buy’ List for Guns Is a Bad Idea*, N.Y. TIMES (July 1, 2016), at A23.

<sup>114</sup> See N.J.S.A. 2C:58-3(c)(9) (“No handgun purchase permit or firearms purchaser identification card shall be issued ... to any person named on the consolidated Terrorist Watchlist maintained by Terrorist Screening Center administered by the Federal Bureau of Investigation”). This requirement was signed

in an annual “bridge jump” so outraged the libertarian crowd of rappellers and bungee jumpers who make up the bulk of attendees that they decamped to an alternative site in Idaho.<sup>115</sup> In Minnesota, Fox News investigators pursued the logic of the watchlist to its extreme conclusion, asking why someone on the No-Fly List should receive a trucking license from the Minnesota Department of Public Safety. That Minnesotan’s lawyer protested the obvious danger of barring an ever-expanding range of lawful activity, noting that his client

has never been charged with a crime and has sued the government to obtain a fair process to challenge his wrongful inclusion on the No-Fly List. Like many other unemployed Americans, he’s trying to obtain credentials for a job so he can build a life for his family, including a baby.<sup>116</sup>

But Fox News investigators picked up on the apparent discrepancy between the federal conclusion that this man was too dangerous to fly and the state view that he was not too dangerous to drive an eighteen-wheeler. Whose “reasonable suspicion” should prevail?

When the Supreme Court created the “reasonable suspicion standard” in its 1968 opinion *Terry v. Ohio*, it included some words of caution about its use:

Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.<sup>117</sup>

That might have established a check on the old watchlists, but it does not affect the new watchlists, for which no trial, criminal or otherwise, is contemplated. Indeed, ordinary police are not always even involved. The new watchlists are now so firmly established – but still lacking in legislative and judicial oversight – that younger generations may reach political maturity in a society in which the “new normal” is the idea that access to lawful, everyday activities may be subject to executive control that renders citizenship a characteristic akin to that of first-, second-, and third-class passengers on an airplane or ocean

into law by Governor Chris Christie on August 8, 2013; the bill, A3867 (Linda Stender, primary sponsor) was introduced one month after the shooting at Sandy Hook Elementary School in nearby Newton, Connecticut. See Matt Friedman, *Christie Signs 10 Gun Bills, but Leaves Controversial Measures on His Desk*, NJ.COM (Aug. 8, 2013); see also [http://www.njleg.state.nj.us/2012/Bills/PL13/114\\_.PDF](http://www.njleg.state.nj.us/2012/Bills/PL13/114_.PDF). In the wake of the South Carolina AME Church shooting, Senator Charles Schumer (D-NY) issued a press release announcing his support for a similar federal requirement. See Senator Charles Schumer, Newsroom Press Release (June 29, 2015), available at: <http://www.schumer.senate.gov/newsroom/press-releases/after-south-carolina-tragedy-schumer-launches-new-effort-to-pass-significant-background-check-common-sense-gun-safety-legislation-weak-laws-allow-people-who-shouldnt-obtain-guns-to-get-them-and-use-them-in-massacre-after-massacre-senator-will-invoke-1993-brady-bill-passage-as-model-to-emulate-take-action-americans-are-calling-for->

<sup>115</sup> Erin Beck, “Other Bridge Day” in Peril Idahoans Don’t Want BASE Jumpers There, SUNDAY GAZETTE-MAIL (Charleston, WV) (June 7, 2015).

<sup>116</sup> Tom Lyden, *Minnesota Terror Suspect Gets a Class A Trucking License*, FOX News 9, Aug. 27, 2015.

Amir Meshal is one of the plaintiffs in the *Latif* case.

<sup>117</sup> 392 U.S. at 15.

liner. Indeed, a June 2016 poll conducted for CNN found that 85 percent of registered voters favored using the TSDB or No-Fly List to restrict gun ownership.<sup>118</sup>

Watchlists developed as a closed system, meaning one in which watchlisting decisions were insulated from outside review. The *Latif* litigation in particular reveals the government interest in preserving that original formulation, notwithstanding a citizen's right to protections like those that established the boundaries for the use of the old watchlists in an earlier time. All the while, society's extraordinary interest in national security hangs over these cases.

This perhaps reveals the wisdom of the framers of the U.S. Constitution in their defense of the separation of powers, for the tendency toward overinclusion has been (understandably) hard to avoid. At their facility in Vienna, Virginia, TSC employees walk past charred artefacts of the World Trade Center that stand as sculptures at the entrance to the facility.<sup>119</sup> Despite sincere efforts to create a culture in the agencies that create and use watchlists that can be trusted to make decisions requiring no external check and balance – and this objective is one repeatedly offered as grounds to exclude watchlisting decisions from judicial review – the record of recent experience suggests that the founding fathers were right to value the separation of powers as a fundamental protection of liberty.

As the former TSC director Timothy Healy explained, “The problem I’ve got is if I allow that person to get on a plane and something happens, what do I say to those victims that go on the plane?”<sup>120</sup> Or as Captain Renault remarked in *Casablanca*, “Realizing the importance of the case, my men are rounding up twice the usual number of suspects.”<sup>121</sup>

<sup>118</sup> This percentage was roughly similar across age, gender, race, income, political party, and regional divisions. See CNN/ORC International Poll (June 16–19, 2016), available at [http://i2.cdn.turner.com/cnn/2016/images/06/20/cnn\\_orc\\_poll\\_june\\_20.pdf](http://i2.cdn.turner.com/cnn/2016/images/06/20/cnn_orc_poll_june_20.pdf). See also Samantha Neal, *Americans Aren't Always as Divided on Gun Control as it Seems*, Huffington Post (June 28, 2016), at [http://www.huffingtonpost.com/entry/americans-gun-control-poll-orlando\\_us\\_5772b6f1e4b0352fed3e0402](http://www.huffingtonpost.com/entry/americans-gun-control-poll-orlando_us_5772b6f1e4b0352fed3e0402).

<sup>119</sup> Bob Orr, *Inside a Secret U.S. Terrorist Screening Center*, CBS News, Oct. 1, 2012 (“Throughout the Terrorist Screening Center are placed artifacts from various terrorist attacks including Oklahoma City federal building, the USS Cole bombing, and the World Trade Centers. All sober reminders of how important their work is”).


<sup>120</sup> Helen Jung, *Case of Tigard Man, Grounded by No-Fly List, Offers Glimpse into Secretive Airport Security Screening*, THE OREGONIAN, Apr. 12, 2012, at A1.

<sup>121</sup> CASABLANCA, *supra* note 1.

## Appendix

U.S. Department of Homeland Security  
Office of Transportation Security Redress  
Arlington, VA 22202

February 8, 2006  
[REDACTED]  
[REDACTED]

 **Transportation  
Security  
Administration**

Dear [REDACTED]:

The Transportation Security Administration (TSA) has received your Passenger Identity Verification Form (PIVF) and identity documentation. In response to your request dated, [REDACTED], 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 watch list screening process.

TSA cannot ensure that your travel will always be delay free as this redress process does not affect other standard screening procedures in place at the security checkpoint. For example, an individual may be selected by TSA for enhanced screening in order to resolve a walk-through metal detector alarm, because of random selection, or based on certain non-identity based factors reflected in reservation information. Additionally this process may not eliminate the need to go to the ticket counter in order to obtain a boarding pass. For instance, an airline might still require a brief period of time to comply with identity verification requirements prior to issuing a boarding pass.

This letter constitutes TSA's final agency decision, which is reviewable by a United States Court of Appeals under 49 U.S.C. § 46110.

If you have any further questions, please call the TSA Contact Center Office of Transportation Security Redress (OTSR) toll-free at (866) 289-9673 or locally at (571) 227-2900, send an E-mail to TSA-ContactCenter@dhs.gov, or . i. to the following address:

Transportation Security Administration  
TSA-901  
601 South 12th Street  
Arlington, VA 22202-4220

Sincerely,

Office of Transportation Security Redress

Figure 3.4. Sample of an early TSA Final Agency Decision.