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Terrorist Databases and the No Fly List: Procedural Due Process and Hurdles to Litigation

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Summary

In order to protect national security, the government maintains various terrorist watchlists, including the “No Fly” list, which contains the names of individuals to be denied boarding on commercial airline flights. Travelers on the No Fly list are not permitted to board an American airline or any flight on a foreign air carrier that lands or departs from U.S. territory or flies over U.S. airspace. Some persons have claimed that their alleged placement on the list was the result of an erroneous determination by the government that they posed a national security threat. In some cases, it has been reported that persons have been prevented from boarding an aircraft because they were mistakenly believed to be on the No Fly list, sometimes on account of having a name similar to another person who was actually on the list. As a result, various legal challenges to placement on the list have been brought in court.

The Due Process Clause provides that no person shall be “deprived of life, liberty, or property, without due process of law.” Accordingly, when a person has been deprived of a constitutionally protected liberty interest, the government must follow certain procedures. Several courts have found that placement on the No Fly list may impair constitutionally protected interests, including the right to travel internationally, and the government’s redress procedures must therefore satisfy due process. Typically, due process requires that the government provide a person with notice of the deprivation and an opportunity to be heard before a neutral party. However, the requirements of due process are not fixed, and can vary according to relevant factors. When determining the proper procedural protections in a given situation, courts employ the balancing test articulated by the Supreme Court in *Mathews v. Eldridge*, which weighs the private interests affected against the government’s interest. Courts applying this balancing test might consider several factors, including the severity of the deprivation involved in placement on the No Fly list. In addition, courts may examine the risk of an erroneous deprivation under the current procedural framework and the potential value of imposing additional procedures on the process. Finally, courts may inquire into the government’s interest in preserving the status quo, including the danger of permitting plaintiffs to access sensitive national security information.

Resolution of the issue is currently pending as at least two federal courts have ruled that the government’s redress procedures for travelers challenging placement on the No Fly list violate due process. The government is currently revising this process, although the precise details of what the new program will entail are unclear. Litigation is further complicated by several legal hurdles, such as the state secrets privilege, that can bar plaintiffs from accessing certain information during litigation.

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Introduction

The safety of air travel, particularly after the terrorist attacks of September 11, 2001, is an important priority for the U.S. government. The Aviation and Transportation Security Act of 2001 created the Transportation Security Administration (TSA) and charged it with ensuring the security of all modes of transportation, including civil aviation.¹ The TSA is responsible for prescreening all potential commercial airline travelers before they board an aircraft.² Pursuant to this responsibility, TSA uses the “No Fly” list to identify individuals who pose a threat to aviation safety. Persons attempting to board an aircraft who are matched to an identity on the No Fly list are not allowed to board. Recent news reports claim that 47,000 people are currently on the No Fly list, including 800 Americans.³

However, some persons have claimed that their alleged placement on the list was the result of an erroneous determination by the government that they posed a national security threat. In some cases, it has been reported that persons have been prevented from boarding an aircraft because they were mistakenly believed to be on the No Fly list, sometimes on account of having a name similar to another person who was actually on the list.⁴ The Department of Homeland Security (DHS) operates a redress process for travelers who wish to contest their right to board an aircraft, but this procedure has been challenged in federal court as violating the Fifth Amendment right to due process.⁵ After an adverse ruling in a recent federal district court,⁶ the executive branch is revising the process.⁷ This report will provide an overview of the operation of the government’s watchlists, examine some of the legal issues implicated by challenges to the No Fly list, and describe recent case law on the matter.

¹ See 49 U.S.C. § 114 (a), (d). The Homeland Security Act of 2002 transferred TSA to the Department of Homeland Security. See 6 U.S.C. § 203.

² See DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, *ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION* 3 (2009).

³ See Adam Goldman, *More Than 1 Million People Are Listed in U.S. Terrorism Database*, WASHINGTON POST (Aug. 5, 2014) available at http://www.washingtonpost.com/world/national-security/more-than-1-million-people-are-listed-in-us-terrorism-database/2014/08/05/a66de30c-1ccc-11e4-ab7b-696c295ddfd1_story.html.

⁴ See, e.g., Mike McIntire, *Ensnared by Error on Growing U.S. Watch List*, NEW YORK TIMES (April 6, 2010) available at <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>; U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 13* (2009).

⁵ See U.S. CONST. amend. V. Another challenge alleges that Federal Bureau of Investigation (FBI) agents used placement on the list to coerce Muslims to spy on their communities. See *First Amended Complaint, Tanvir v. Holder*, No. 1:13-cv-06951-RA (S.D.N.Y. April 22, 2014) available at http://www.ccrjustice.org/files/Tanvir%20v%20Comey%2013-cv-6951%20First%20Amended%20Complaint%202014_04_22%20-%20AS%20FILED.pdf. The plaintiffs alleged violations of their right to due process under the Fifth Amendment, and violations of the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. The alleged utilization of the No Fly list as a coercive tool is, however, beyond the scope of this report. Instead, this report focuses on the operation of the No Fly list and legal challenges to placement on the list under the Due Process Clause of the U.S. Constitution.

⁶ See *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 (D. Or. June 24, 2014).

⁷ See *Joint Status Report, Latif v. Holder*, 3:10-CV-00750-BR (D. Or. August 4, 2014).

Background of Government Watchlists

Terrorist Databases

The National Counterterrorism Center (NCTC) serves as the central information bank for the U.S. government on “known and suspected terrorists and international terrorist groups.”⁸ It is the government’s principal organization for “analyzing and integrating” intelligence concerning terrorism and counterterrorism.⁹ The NCTC maintains the Terrorist Identities Datamart Environment (TIDE), the central repository of the U.S. government containing derogatory information about suspected international terrorists.¹⁰ Based on evaluations of intelligence information, agencies in the intelligence community (IC)¹¹ nominate individuals known or suspected to be international terrorists and forward the names to the NCTC.¹² Using a non-exclusive list of possible factors, the NCTC determines if each name merits inclusion on the list.¹³ As of December 2013, according to the NCTC, about 1.1 million persons were included in TIDE, and about 25,000 were U.S. persons (citizens and lawful permanent residents).¹⁴ TIDE contains all of the government’s information regarding persons “known or appropriately suspected to be or to have been involved in activities constituting, in preparation for, in aid of, or related to terrorism (with the exception of purely domestic terrorism information).”¹⁵ Due to the national security importance of this information, the contents of the database are classified.¹⁶

The NCTC “exports” an unclassified subset of the data, including biometric and biographic identifiers, to the Terrorist Screening Center (TSC), which, in turn, operates the Terrorist Screening Database (TSDB).¹⁷ In contrast to TIDE (operated by NCTC), the TSDB (operated by TSC) does not include “derogatory intelligence information.”¹⁸ Instead, it consists of “sensitive but unclassified terrorist identity information consisting of biographic identifying information

⁸ DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, IMPLEMENTATION AND COORDINATION OF TSA’S SECURE FLIGHT PROGRAM 4 (2012) [hereinafter 2012 IG REPORT].

⁹ 50 U.S.C. § 3056.

¹⁰ See 2012 IG REPORT, *supra* note 8, at 4.

¹¹ The Intelligence Community includes the Office of the Director of National Intelligence, the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, other Department of Defense offices, intelligence units of the Armed Forces, the FBI, the DEA, and DHS, the Bureau of Intelligence and Research of the Department of State, and the Office of Intelligence and Analysis at the Department of the Treasury. 50 U.S.C. § 30003.

¹² See 2012 IG REPORT, *supra* note 8, at 4.

¹³ Some examples of conduct that merits entry into TIDE include persons who: engage in, plan, or prepare international terrorist activity; collect information on targets for terrorist activity; solicit funds for or membership in a terrorist organization; provide material support for terrorism. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-12-476, TERRORIST WATCHLIST, ROUTINELY ASSESSING IMPACTS OF AGENCY ACTIONS SINCE THE DECEMBER 25, 2009, ATTEMPTED ATTACK COULD HELP INFORM FUTURE AGENTS 17-18 (2012) [hereinafter 2012 GAO REPORT]; see Secure Flight Program; Final Rule, 73 Fed. Reg. 64018-64066 (Oct. 28, 2008).

¹⁴ National Counterterrorism Center, Terrorist Identities Datamart Environment Fact Sheet *available at* http://www.nctc.gov/docs/tidefactsheet_Aug12014.pdf [hereinafter NCTC Fact Sheet].

¹⁵ *Id.*

¹⁶ 2012 IG REPORT, *supra* note 8, at 4.

¹⁷ See NCTC FACT SHEET, *supra* note 14; DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 5-9 (2009).

¹⁸ *Mohamed v. Holder*, 995 F. Supp. 2d 520, 526 n.8 (E.D. Va. 2014) (E.D. Va. Jan. 22, 2014) (quotations omitted).

such as name or date of birth or biometric information such as photographs, iris scans, and fingerprints.”¹⁹ Established pursuant to *Homeland Security Presidential Directive 6*, the TSC is managed by the Federal Bureau of Investigation (FBI) and receives support from various federal agencies. The information in the TSDB is obtained from two primary sources.²⁰ First, as mentioned above, TIDE provides information on the identity of suspected *international* terrorists.²¹ Second, the FBI’s Automated Case Support System (ACSS) provides additional information on suspected *domestic* terrorists directly to the TSC.²²

Whether receiving information from TIDE or ACSS, the TSC will review each file to ensure that it satisfies the government’s watchlist standards before adding the name to the TSDB.²³ The information received by TSC must satisfy two requirements to merit inclusion on the TSDB.²⁴ First, the “biographic information associated with a nomination must contain sufficient identifying data so that a person being screened can be matched or disassociated from a watchlisted terrorist.”²⁵ Second, the “facts and circumstances” must “meet the reasonable suspicion standard of review.”²⁶ This means “articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be or

¹⁹ *Id.*

²⁰ See *Homeland Security Presidential Directive—6, Integration and Use of Screening Information to Protect Against Terrorism* (Sept. 16, 2003). See also *Homeland Security Presidential Directive—11, Comprehensive Terrorist-Related Screening Procedures* (Aug. 27, 2004); *Homeland Security Presidential Directive—24: Biometrics for Identification and Screening to Enhance National Security* (Jun. 5, 2008).

²¹ “[I]nternational terrorism” means activities that—

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 2331(1).

²² “[D]omestic terrorism means activities that—

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

50 U.S.C. § 2331(5).

²³ 2012 IG REPORT, *supra* note 8, at 6.

²⁴ Statement of Timothy J. Healy, Director, Terrorist Screening Center, Federal Bureau of Investigation, before the Committee on Homeland Security and Governmental Affairs, U.S. Senate, *The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-screening* (Mar. 10, 2010) [hereinafter Healy Statement] *available at* <http://www.fbi.gov/news/testimony/the-lessons-and-implications-of-the-christmas-day-attack-watchlisting-and-pre-screening>.

²⁵ *Id.* at 2.

²⁶ *Id.*

has been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities.”²⁷ This standard was not mandated by statute, but was “adopted by internal Executive Branch policy and practice.”²⁸ In addition, a recent district court case indicates that there is a “secret exception to the reasonable suspicion standard,” but the “nature of the exception and the reasons ... for nomination are claimed to be state secrets.”²⁹

As mentioned above, in contrast to the classified contents of TIDE, the TSDB contains sensitive, but not classified, information about the identity of suspected terrorists. The unclassified nature of the list permits a broad range of federal, state, and local organizations to access the data.³⁰ Accordingly, the TSC provides various frontline screening agencies with subsets of the TSDB for use in combating terrorism. These watchlists are tailored in accordance with the agency’s mission(s) and statutory authorities.³¹ For the purposes of monitoring flights, TSA receives two such lists: the No Fly list and the Selectee list. People on the first are prohibited from boarding an American airline or any flight that comes in contact with U.S. territory or airspace. Those on the second are subject to enhanced screening procedures when they attempt to do so.³² The No Fly and Selectee lists have their own substantive requirements for inclusion, which executive officials have stated are more stringent than the reasonable suspicion standard for placement on the TSDB.³³ TSC requires “sufficient biographical information and sufficient derogatory information” for inclusion on the No Fly and Selectee List.³⁴ When a person is placed on the list, they will not receive notice; instead, they will simply be denied boarding or subjected to enhanced screening procedures if they attempt to board a plane.³⁵

However, in a departure from the traditional requirements for inclusion on the No Fly list, after the failed terrorist attack of the so called “underwear bomber,” who attempted to destroy a commercial plane traveling from Amsterdam to Detroit on Christmas Day 2009, the NCTC and TSC were ordered to add a number of individuals from the TIDE database to the No Fly list.³⁶ This included a number of “individuals without any information indicating a personal involvement in terrorism.”³⁷ Accordingly, a number of individuals were placed on the No Fly list who may not have met the normal standards for inclusion. Subsequently, TSC, in coordination with the FBI and other intelligence agencies, conducted a review of all the individuals who had

²⁷ Ibrahim v. Department of Homeland Security, No. C 06-00545 WHA, slip op. at 12 (N.D. Cal. Jan. 14, 2014).

²⁸ *Id.* at 12.

²⁹ *Id.* at 19.

³⁰ 2012 IG REPORT, *supra* note 8, at 5. While not classified, this information is considered For Official Use Only. Declaration of G. Clayton Grigg, Mohamed v. Holder, Case No. 1:11-CV-50 (E.D. Va Dec. 9, 2014).

³¹ The TSC compiles a number of such lists for frontline agencies. These include the Department of State’s Consular Lookout and Support System (CLASS) for screening of passports and visas, the U.S. Customs and Border Protection TECS system, the No Fly and Selectee list, the FBI’s National Crime and Information Center’s Known or Suspected Terrorist File, and the Interagency Border Inspection System.

³² Placement on the Selectee list, which can result in enhanced screening procedures at an airport, may also present an impediment to travel; however, the legal issues raised by the Selectee list are beyond the scope of this report, which focuses instead on placement on the No Fly list.

³³ Healy Statement, *supra* note 24, at 4. Both lists, as well as the watchlist status of a particular individual, are considered Sensitive Security Information. *See* 49 C.F.R. § 1520.5(b)(9)(ii).

³⁴ *Id.* at 5.

³⁵ *See* Ibrahim v. Dep’t of Homeland Sec., No. C 06-00545 WHA, slip op. at 13 (N.D. Cal. Jan. 14, 2014).

³⁶ *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION’S MANAGEMENT OF TERRORIST WATCHLIST NOMINATIONS (March 2014).

³⁷ *Id.* at 19.

been upgraded. This review was completed more than two years after the original upgrading.³⁸ A recent Department of Justice (DOJ) Office of Inspector General audit expressed “concerns about the TSC’s ability to ensure that all watchlist records that were modified as a result of the attempted attack were reviewed and returned to the appropriate individualized status.”³⁹

The precise guidelines and particular factors the government relies on to place individuals on terrorist watchlists are not made public. The criteria for placement on the No Fly list, as well as whether a person is on the No Fly list, are considered “Sensitive Security Information” (SSI) and have not been publicly released by the federal government.⁴⁰

Secure Flight

In the past, TSA required aircraft operators to screen passengers by matching data against the No Fly and Selectee lists.⁴¹ Following the release of the *9/11 Commission Report*, the Intelligence Reform and Terrorism Prevention Act of 2004 altered this arrangement by requiring TSA to conduct the matching itself.⁴² The act also requires aircraft operators to provide passenger information to TSA for prescreening purposes.⁴³ TSA issued the Secure Flight Final Rule on October 28, 2008, implementing the act’s requirements.⁴⁴ Under the program, TSA requires aircraft operators to collect Secure Flight Passenger Data (SFPD) from passengers and provide it to TSA. SFPD includes passengers’ full name, date of birth, gender, and can also include certain non-personal information, such as itinerary and a travel record number.⁴⁵ The information is collected when a potential passenger makes a flight reservation. This information must be provided to TSA about 72 hours prior to the flight. For reservations that occur after this deadline, aircraft operators must provide the SFPD as soon as possible.

TSA then matches the data with the No Fly, Selectee, and Centers for Disease and Control (CDC) Do Not Board list.⁴⁶ The potential matches are compared to the TSA Cleared List, which contains the identities of individuals who have been cleared through the DHS redress process.⁴⁷ TSA then performs manual reviews of potential matches to ensure individuals are included on the No Fly

³⁸ *Id.* at 23.

³⁹ *Id.* at 28.

⁴⁰ News sources report that “Watchlisting Guidance” reportedly used by the government, dated March 2013, has been published by *The Intercept*, an online magazine that has published documents it says have been obtained from Edward Snowden. Spencer Ackerman, *How the US’s Terrorism Watchlists Work – And How You Could End Up on One*, THEGUARDIAN.COM (July 24, 2014); Charlie Savage, *Over Government Objections, Rules on No-Fly List are Made Public*, NYTIMES.COM (July 23, 2014).

⁴¹ Prior to 9/11, aviation security was handled by the Federal Aviation Administration (FAA). The FAA ordered air carriers not to board certain individuals who were deemed a threat to aviation safety. On 9/11, this “no fly” list contained 12 names. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 83 (2004).

⁴² P.L. 108-458, 118 Stat. 3638, Dec. 17, 2004, Sec. 4012.

⁴³ *Id.*

⁴⁴ See Secure Flight Program; Final Rule, 73 Fed. Reg. 64018-64066 (Oct. 28, 2008); GOVERNMENT ACCOUNTABILITY OFFICE, GAO-14-531, SECURE FLIGHT: TSA SHOULD TAKE STEPS TO DETERMINE PROGRAM EFFECTIVENESS 8 (2014) [hereinafter 2014 GAO Report].

⁴⁵ 2012 IG Report, *supra* note 8, at 10.

⁴⁶ *Id.* The CDC Do Not Board List contains individuals considered a significant health risk to fellow travelers.

⁴⁷ See 2014 GAO Report at 9; *infra* “Redress Process.”

and Selectee lists, which may include the consultation of other databases.⁴⁸ Following this process, TSA will prohibit certain passengers from receiving a boarding pass. If such passengers arrive at the airport, air carriers may send updated passenger information to TSA for rematching or may call Secure Flight to resolve an issue. This process may involve contact between Secure Flight and the Terrorist Screening Center to confirm or eliminate a match.⁴⁹ At the conclusion of this procedure, a passenger will either be cleared to fly, designated as a selectee for enhanced screening, or barred from boarding the aircraft.

Since 2009, Secure Flight has evolved to assign passengers a risk category: high risk, low risk, or unknown.⁵⁰ The Secure Flight Final Rule provides that TSA has discretion to check against the entire TSDB and other watchlists when warranted for security reasons,⁵¹ and has developed new lists for passengers considered high risk and subject to enhanced screening.⁵² First, working with Customs and Border Protection—which has access to additional information about international travelers—Secure Flight has developed two lists to identify certain individuals for enhanced screening. TSA analysts examine relevant intelligence information to identify factors that may denote a passenger who poses an elevated risk. TSA then develops rules based on these factors, and these rules are provided to CBP, which uses the Automated Targeting System-Passenger to identify individuals who correspond to the rules. Those passengers are then subject to enhanced screening.⁵³

Second, beginning in April 2011, TSA began matching against an Expanded Selectee List, which includes records in the TSDB with a full name and date of birth that are not on the No Fly or Selectee List but do meet the Terrorist Screening Center’s reasonable suspicion standard to qualify as a known or suspected terrorist.⁵⁴ Individuals identified in this list are also subject to enhanced screening.

Redress Process

A number of travelers who dispute any connection to terrorism have alleged that they have been denied boarding on commercial aircraft.⁵⁵ A denial of entry can occur, for example, when a person’s name and/or date of birth correspond or are similar to the identity of someone in the government’s watchlist database. The Implementing Recommendations of the 9/11 Commission Act of 2007 directed DHS to create an Office of Appeals and Redress for people who believe they have been mistakenly denied boarding or subjected to heightened screening for security reasons.⁵⁶ Pursuant to these requirements, DHS established the Traveler Redress Inquiry Program (TRIP) to

⁴⁸ See 2014 GAO Report at 9.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See 2012 GAO Report, *supra* note 13, at 17-18; see also Secure Flight Program; Final Rule, 73 Fed. Reg. 64018-64066 (Oct. 28, 2008).

⁵² 2014 GAO Report at 12.

⁵³ *Id.* at 12-13.

⁵⁴ *Id.* at 13-14.

⁵⁵ See, e.g., *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 (D. Or. June 24, 2014) (challenge brought by thirteen plaintiffs denied boarding on flight).

⁵⁶ P.L. 110-53; codified at 49 U.S.C. § 44926(a). The Intelligence Reform and Terrorism Prevention Act of 2004 required TSA to establish procedures for persons identified as security threats to appeal such determinations. P.L. 108-458; codified at 49 U.S.C. § 44926(a)(j)(2)(G) & 44909(c)(6)(B).

resolve such issues.⁵⁷ In general, the program is designed to offer an efficient remedy for travelers who encounter difficulty with the government's screening process and to centralize a multiagency process of reviewing and responding to any traveler complaints.⁵⁸

Following recent litigation concerning the constitutionality of the redress procedures available to plaintiffs who challenge their inclusion on a government watchlist, the government is currently revising the DHS TRIP redress procedures, although it has not revealed what the modified system will entail.⁵⁹ Prior to this ongoing revision, passengers who were denied boarding or subjected to additional screening procedures could seek redress by filing a complaint online or by mailing a complaint form.⁶⁰ All travelers who did so were assigned a redress number. If DHS decided that a person seeking redress was a match or near match to an identity contained in the TSDB, the agency referred the potential match to the redress unit of the TSC. TSC then determined if the person was an actual match with the identity of someone in the TSDB. If the person was determined to be a match, TSC next determined whether the person should continue to be in the TSDB; and, finally, whether the person should continue to be on the No Fly or Selectee list.⁶¹ Those travelers determined not to match a person in the TSDB were added to the DHS TRIP Cleared List and received a corresponding traveler redress number.⁶² Subsequently, a traveler could enter his or her redress number when purchasing an airline ticket. If travelers were on the DHS TRIP Cleared List, they could be cleared by Secure Flight,⁶³ and presumably would receive authorization to board an aircraft.

When the review process was completed, DHS TRIP sent a letter to travelers notifying them that review was complete. The letter, however, did not confirm or deny whether an individual was on the No Fly list or in the TSDB.⁶⁴ Notifications usually provided that travelers may seek judicial review in a U.S. court of appeals under 49 U.S.C. § 46110.⁶⁵ That review consisted of an *ex parte*

⁵⁷ See Department of Homeland Security, One-Stop Travelers' Redress Process, <https://www.dhs.gov/one-stop-travelers-redress-process>; see generally DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELLER REDRESS INQUIRY PROGRAM 7-9 (2009).

⁵⁸ 2012 IG REPORT, *supra* note 8, at 18. DHS TRIP is a department-wide redress process that covers any of the "department's component agencies," including TSA programs as well as Customs and Border Protection. See NCTC FACT SHEET, *supra* note 14.

⁵⁹ See Memorandum in Support of Defendants' Motion for Partial Summary Judgment or, in the Alternative, for Dismissal in Part, Mohamed v. Holder, Case No. 1:11-CV-00050 (E.D. Va. Dec. 9, 2014); Memorandum in Support of Defendant's Motion to Stay, Mohamed v. Holder, Case No. 1:11-CV-00050 (E.D. Va. Nov. 14, 2014) ("The Government ... is currently reviewing and revising the administrative redress procedures for denials of boarding. These procedures are being developed in connection with an effort to apply revised redress to the plaintiffs in *Latif v. Holder*.").

⁶⁰ Instructions for filing a complaint can be found at <https://www.dhs.gov/one-stop-travelers-redress-process>.

⁶¹ Ibrahim v. Department of Homeland Security, No. C 06-00545 WHA, slip op. at 14 (N.D. Cal. Jan. 14, 2014).

⁶² 2012 IG REPORT, *supra* note 8, at 18.

⁶³ *Id.*

⁶⁴ See *Latif v. Holder*, 969 F. Supp. 2d 1293, 1297 (D. Or. 2013); Mohamed v. Holder, 995 F. Supp. 2d 520, 527 (E.D. Va. 2014). The government has asserted that its practice of neither confirming nor denying a person's watchlist status is conducted pursuant to its "Glomar" policy, see *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), a judicially recognized exception to FOIA requests seeking national security information. See Defendant's Memorandum of Law in Support of Motion for Partial Summary Judgment at 15, *Latif v. Holder*, No. 3:10-cv-00750-BR (D.Or. Feb. 13, 2013).

⁶⁵ See *Latif v. Holder*, 969 F. Supp. 2d 1293, 1297 (D. Or. 2013); Mohamed v. Holder, 995 F. Supp. 2d 520, 527 (E.D. Va. 2014). A letter will sometimes notify the traveler that he or she may seek further administrative review with DHS. *Id.* In that case, the final determination letter will notify the traveler that he or she may seek review in a United States court of appeals. These letters also do not confirm or deny whether the traveler is or was on a watchlist. See Third Joint Statement of Stipulated Facts, *Latif v. Holder*, No. 3:10-cv-00750-BR (D.Or. 2013).

and *in camera* examination by the court of the administrative record provided by the government containing the evidence it relied upon.⁶⁶ If the court disagreed with the government's determination, the court could remand the case to the agency for further consideration.⁶⁷ Even after judicial review by a U.S. court of appeals, travelers were never informed of their status on any watchlist or whether they would be permitted to board an aircraft traveling to, from, or within the United States in the future.⁶⁸ Instead, a person on a No Fly list who attempted to board a plane would simply be denied boarding. The DHS TRIP redress process did not provide travelers with reasons for inclusion on the list, or a hearing where they might challenge their inclusion on the list. At no point did travelers have the opportunity "to contest or to offer corrections to the record on which any such determination may be based."⁶⁹ In fact, the "government's policy [was] never to confirm or to deny an individual's placement on the No Fly list."⁷⁰

While the administrative and judicial review process described above was established—pursuant to statute—by the government to consider travelers' complaints, some travelers have brought legal challenges outside of this process in federal courts, challenging both their alleged placement on the No Fly list and the adequacy of the government's redress procedures.⁷¹

Select Legal Issues Implicated by the No Fly List

The Fifth Amendment of the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law."⁷² This protection extends to U.S. citizens and noncitizens who have sufficient ties to the United States.⁷³ Courts have developed two major legal doctrines to protect rights and liberty interests under the Due Process Clause—procedural and substantive due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due

⁶⁶ Defendants' Supplemental Brief at 9-10, *Latif v. Holder*, No. 3:10-cv-00750-BR (D.Or. Oct. 25, 2013).

⁶⁷ *Id.* at 7-8.

⁶⁸ *Latif v. Holder*, 969 F. Supp. 2d 1293, 1297 (D. Or. 2013).

⁶⁹ *Id.* at 1298.

⁷⁰ *Id.* at 1305. Exceptions to this policy have been made in rare circumstances. See Federal Bureau of Investigation, Press Release, *International Government Officials not on No Fly List*, Oct. 6, 2006 (announcing that two foreign elected officials were not on the No Fly list).

⁷¹ See *e.g.*, *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012) (claim brought by foreign national barred from flying seeking an injunction requiring the government to remove her name from its terrorist watchlists); *Latif v. Holder*, 969 F. Supp. 2d 1293, 1296 (D. Or. 2013) (claim brought by citizens and lawful permanent residents who were not allowed to board an aircraft alleging a violation of their right to procedural due process because the government failed to deliver post-deprivation notice or a meaningful opportunity to contest inclusion on the No Fly list).

⁷² U.S. Const. amend. V. The No Fly list and airport screening procedures might raise equal protection issues as well, but these issues are beyond the scope of this report.

⁷³ See *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). Aliens outside the country generally lack constitutional protection. *Id.* at 269 ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.") *But see* *Ibrahim v. Department of Homeland Security*, 669 F.3d 983, 997 (9th Cir. 2012) (holding that an alien not currently in the country, but had been lawfully present in the United States for four years before departing the country and being prevented from returning, had established a "significant voluntary connection" to the United States sufficient to assert claims under the First and Fifth Amendments).

Process Clause of the Fifth or Fourteenth Amendment.”⁷⁴ As explained below, the particular procedures required may vary according to the situation.⁷⁵ Substantive due process encapsulates the Supreme Court’s notion that the Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”⁷⁶ Courts have found that placement on the No Fly list can potentially implicate procedural or substantive due process rights.⁷⁷ However, because claims alleging substantive due process violations are somewhat underdeveloped as of yet, this report primarily examines procedural due process claims, which have received more extensive analysis by federal courts.

Procedural Due Process

Some travelers who challenge their placement on the No Fly list and the government’s redress process have alleged that their right to international travel has been deprived without due process of law. Courts assessing procedural due process claims first ask “whether the plaintiff has been deprived of a [constitutionally] protected interest.”⁷⁸ If so, courts next “consider whether the procedures used by the government in effecting the deprivation ‘comport with due process.’”⁷⁹

Constitutionally Protected Interests

Placement on the No Fly list can impede one’s ability to travel internationally. While a “right to travel” is not expressly mentioned in the Constitution, the Supreme Court has recognized a right to travel as “a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”⁸⁰ The right to *interstate* travel is less susceptible to government restraint than the right to *international* travel, as the Court has described the former as “virtually unqualified.”⁸¹ However, the right to international travel is nonetheless a “liberty protected by the Due Process Clause.”⁸² Accordingly, the right to international travel is subject to “reasonable governmental regulations”,⁸³ and not every restriction on a person’s right to travel will raise a significant due process concern.⁸⁴ In assessing whether a governmental policy infringes upon

⁷⁴ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

⁷⁵ The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

⁷⁷ See *infra*, notes 86-99 and accompanying text.

⁷⁸ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). See *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (“But, to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment’s protection of liberty and property.”) (citations omitted).

⁷⁹ *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014) (quoting *Am. Mfrs.*, 526 U.S. at 59). But see *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 (D. Or. June 24, 2014) (appearing to include the recognition of a liberty interest within *Mathews*’ first step, rather than as a preliminary finding).

⁸⁰ *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

⁸¹ *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) (citations omitted) (*italics added*).

⁸² *Id.* See *Aptheker v. Secretary of State*, 378 U.S. 500, 505–508 (1964).

⁸³ *Haig v. Agee*, 453 U.S. 280, 306-07 (1981) (citation omitted).

⁸⁴ See *Mackey v. Montrym*, 443 U.S. 1 (1979) (states may exercise regulatory powers to deter drunk driving); *Miller v. Reed*, 176 F.3d 1202, 1205–1206 (9th Cir. 1999); *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991).

such a right, courts will often examine the scope of the policy and the degree to which it impairs the ability of a person to feasibly travel.⁸⁵

Not every impediment to travel is considered a deprivation of a constitutionally protected interest. In *Gilmore v. Gonzales* for example, the U.S. Court of Appeals for the Ninth Circuit rejected a constitutional challenge to the TSA's requirement that an airline passenger present identification before boarding a flight from Oakland to Baltimore-Washington International Airport.⁸⁶ The court noted that the plaintiff was barred from only one form of interstate travel, and ruled that the government's policy did not violate the plaintiff's right to interstate travel "because the Constitution does not guarantee the right to travel by any particular form of transportation."⁸⁷ The court explained that the "burden" of presenting identification was not unreasonable and "other forms of travel remain[ed] possible."⁸⁸

Several federal courts, however, have distinguished certain challenges to placement on the No Fly list from this case and determined that placement on the No Fly list can deprive someone of a constitutionally protected liberty interest in international travel.⁸⁹ For example, one district court noted that *Gilmore* concerned a plaintiff's right to fly within the United States, while placement on the No Fly list bars international flight.⁹⁰ While there may be "alternatives to flying for domestic travel within the continental United States," the court reasoned, flying is often the only feasible method of international travel.⁹¹ Further, *Gilmore* concerned a requirement to show identification in order to board an airline, while placement on the No Fly list bars flying indefinitely.⁹² For these courts, placement on the No Fly list is a deprivation of a constitutionally protected interest, and the government's procedures must therefore comport with due process.

Another liberty interest that can be implicated by placement on the No Fly list—thus triggering procedural due process protection—is harm to one's reputation combined with a denial of a legal right or status.⁹³ Under this "stigma-plus" doctrine,⁹⁴ a plaintiff can establish a due process claim

⁸⁵ See, e.g., *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006).

⁸⁶ *Id.*

⁸⁷ *Id.* at 1136.

⁸⁸ *Id.* at 1137.

⁸⁹ See, e.g., *Mohamed v. Holder*, 995 F. Supp. 2d 520, 522 (E.D. Va. 2014); *Ibrahim v. Dep't of Homeland Sec.*, C 06-00545 WHA, 2012 WL 6652362 (N.D. Cal. Dec. 20, 2012).

⁹⁰ *Latif v. Holder*, 969 F. Supp. 2d 1293, 1303 (D. Or. 2013).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *Paul v. Davis*, 424 U.S. 693, 709 (1976). Closely related to a liberty interest in international travel, but legally distinct, is a citizen's right to reenter the United States. Some federal courts have found that the right of an American citizen to return to the United States from abroad is a substantive due process right. See *Fikre v. F.B.I.*, 3:13-CV-00899-BR, 2014 WL 2335343 (D. Or. May 29, 2014); *Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 (D. Or. Mar. 26, 2014); see also *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 67 (2001) (discussing privileges of U.S. citizenship, including "the absolute right to enter [the] borders" of the United States). Placement on the No Fly list, under this theory, can infringe upon this right. For example, one district court has ruled that a U.S. citizen, allegedly placed on the No Fly list while abroad, raised a colorable substantive due process claim related to his right to reenter the United States. *Mohamed v. Holder*, 995 F. Supp. 2d 520, 536-37 (E.D. Va. 2014). In that case, the government argued that the right of reentry applies only to citizens who present themselves at the border, and does not apply to impediments preventing one's ability to actually reach the United States. *Id.* The government asserted that the plaintiff had never actually been denied entry into the United States, and would be permitted to enter if he found an alternative mode of transportation (other than flying) that enabled the plaintiff to present himself at a port of entry. The district court rejected these arguments, concluding that the right of reentry "entails more than simply the right to step (continued...)

by showing (1) “the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested” and (2) “the denial of ‘some more tangible interest’ ... or the alteration of a right or status recognized by state law.”⁹⁵ For example, one federal district court found that the plaintiffs, who allegedly had names similar to names on the No Fly list and were regularly subjected to enhanced screening procedures in view of their fellow travelers, satisfied the first prong because public association with terrorism was sufficiently stigmatizing.⁹⁶ However, the court found that the plaintiffs failed to satisfy the second prong, because they did not show a “tangible harm.”⁹⁷ The court noted that the “Plaintiffs do not have a right to travel without any impediments whatsoever,” and “have not alleged any tangible harm to their personal or professional lives that is attributable to their association with the No-Fly List, and which would rise to the level of a Constitutional deprivation of a liberty right.”⁹⁸

In contrast, another federal district court found that plaintiffs who had actually been prevented from flying met both factors.⁹⁹ The first was met because placement on a No Fly list “carries with it the stigma of being a suspected terrorist that is publicly disclosed to airline employees and other travelers.”¹⁰⁰ The second was met because the plaintiffs suffered a “change in legal status”—they are legally barred from traveling by air to or from the United States, which they would do had they not been placed on the No Fly list.¹⁰¹ Nonetheless, another district court, in weighing a challenge to placement on the No Fly list, found the stigma plus doctrine was not satisfied because the plaintiff failed to sufficiently allege facts that would “give rise to an inference that the stigmatizing statements reached the other passengers so as to cause harm to Plaintiff’s reputation.”¹⁰²

What Process Is Due?

As explained above, if a court finds that the government has deprived someone of a constitutionally protected liberty interest—one’s right to international travel, for example—then

(...continued)

over the border after having arrived there.” Government actions to prevent a citizen from reaching the border, the court explained, can “infringe” upon the right to reentry. *Id.*

The outcome of a substantive due process challenge often turns on the level of scrutiny a court uses to examine the government’s action. *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 546-47 (2006). However, substantive due process challenges to placement on the No Fly list are less developed in federal courts than claims under procedural due process, as no court appears to have fully adjudicated the issue. One court recognized a substantive due process right to return to the United States, but ultimately dismissed the claim because the plaintiff had alternative means to return. *See* *Fikre v. F.B.I.*, 3:13-CV-00899-BR, 2014 WL 2335343 (D. Or. May 29, 2014). Another recognized the same right and denied the government’s motion to dismiss. *See* *Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 (D. Or. Mar. 26, 2014). Because it is unclear what the proper level of scrutiny is in a substantive due process challenge to placement on the No Fly list, resolution of the matter is uncertain at this time.

⁹⁴ *See* *Mead v. Independence Ass’n*, 684 F.3d 226, 233 (1st Cir. 2012); *Miller v. California*, 355 F.3d 1172, 1178 (9th Cir. 2004).

⁹⁵ *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (quoting *Paul*, 424 U.S. at 701).

⁹⁶ *Green v. Transportation Security Admin.*, 351 F.Supp.2d 1119, 1129 (W.D. Wa. 2005),

⁹⁷ *Id.* at 1130.

⁹⁸ *Id.*

⁹⁹ *Latif v. Holder*, No. 3:10-cv-00750-BR, 2014 WL 2871346 (D.Or. Jun. 24, 2014).

¹⁰⁰ *Id.* at *12.

¹⁰¹ *Id.*

¹⁰² *See* *Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 at *14 (D. Or. Mar. 26, 2014).

the government must provide that person with due process. This usually requires the government to provide the person with notice of the deprivation¹⁰³ and an opportunity to be heard¹⁰⁴ before a neutral party.¹⁰⁵ The Supreme Court has explained, however, that due process is not a “technical conception with a fixed content unrelated to time, place, and circumstances.”¹⁰⁶ Instead, the concept is “flexible and calls for such procedural protections as the particular situation demands.”¹⁰⁷ Consequently, the precise type of notice, the manner and time of a hearing, and the identity of the decision maker can vary according to the situation. When determining the proper procedural protections in a given situation, courts will weigh the private interests affected against the government’s interest. In *Matthews v. Eldridge*, the Supreme Court articulated the balancing test for deciding what procedural protections are required when the government deprives someone of life, liberty, or property.¹⁰⁸ A court must examine three broad factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁰⁹

Therefore, as explained more fully below, when a court confronts a challenge to a governmental deprivation of a constitutionally protected liberty interest, a court will balance each of these factors in order to determine what procedural protections due process requires.

Plaintiff’s Interest

As explained above, the right to international travel is a constitutionally protected liberty interest that some courts have found to be infringed by placement on the No Fly list.¹¹⁰ In assessing a procedural due process challenge to the governmental procedures when a person’s liberty is infringed, courts will first weigh the private interest affected by the government’s action. In assessing the significance of the deprivation, the Supreme Court has examined a number of different factors, including the severity, length, and the finality of a deprivation.¹¹¹ For example, the Court has found the termination of welfare benefits—which are based on financial need—to be more severe than the termination of disability benefits, which are not.¹¹² In the latter case, the

¹⁰³ *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

¹⁰⁴ *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970).

¹⁰⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

¹⁰⁶ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

¹⁰⁷ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹⁰⁸ *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

¹⁰⁹ *Id.* at 335.

¹¹⁰ Challenges to No Fly list placements that only burden the right to *interstate* travel—rather than international—might be less likely to raise a due process issue because of the availability of alternative modes of transportation for interstate travel. *See Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 at *12 (D. Or. Mar. 26, 2014); *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006).

¹¹¹ *See Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (“But while our opinions have recognized the severity of depriving someone of the means of his livelihood ... they have also emphasized that in determining what process is due, account must be taken of ‘the length’ and ‘finality of the deprivation.’”) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982)).

¹¹² Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits) with *Matthews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits).

Court has ruled, less procedural protections are required.¹¹³ Similarly, the Court has noted the difference between absolute termination and a temporary suspension from one's employment.¹¹⁴ Again, the latter requires less procedural protections.¹¹⁵

The weight given the private interest by courts weighing challenges to placement on the No Fly list might turn on the level of generality the court uses to interpret the deprivation. One might argue, for example, that for most people, air travel is often the only feasible method for international travel available.¹¹⁶ Arguably, placement on the No Fly list can effectively bar someone from traveling internationally.¹¹⁷ Analyzing the deprivation in this manner might point towards finding the deprivation of a significant liberty interest. In contrast, one might characterize placement on a No Fly list as limited to a restriction on a person's "preferred method of travel," rather than the ability to travel at all.¹¹⁸ In litigation concerning the No Fly list, the DOJ has argued that "[t]he Constitution does not guarantee ... a right to the most convenient means of travel, nor does it create a liberty interest in travel by airplane in particular."¹¹⁹ Following this line of argument, because a person on the No Fly list is not barred from travel entirely, the deprivation is of a less significant liberty interest.

Risk of Erroneous Deprivation and Value of Additional Procedures

A court would next examine the risk of an erroneous deprivation of liberty under the current procedural framework and the potential value of imposing additional procedures on the process.¹²⁰ Put another way, a court would investigate how likely it is that someone would be incorrectly placed on the No Fly list, and how helpful requiring different procedures would be in preventing such errors.

In analyzing the risk of error, a court might examine both the standard used by the government to make its initial decision to place someone on the No Fly list, as well as the procedures currently afforded travelers via DHS TRIP, including its judicial review provision.¹²¹ One factor courts examine in weighing the risk of error is the amount of discretion afforded the decision maker. For example, the Supreme Court has distinguished between a deprivation based on a medical assessment and one predicated on a variety of disparate information including "witness credibility and veracity."¹²² For the Court, the latter situation involves a greater risk of error than the former.¹²³ Another factor might be the standard of proof required for the government to deprive

¹¹³ *Matthews*, 424 U.S. at 340.

¹¹⁴ Compare *Gilbert v. Homar* 520 U.S. 924 (1997) (temporary suspension) with *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination).

¹¹⁵ *Loudermill*, 470 U.S. at 932.

¹¹⁶ See, e.g., *Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 at *11 (D. Or. Mar. 26, 2014); *Latif v. Holder*, 969 F. Supp. 2d 1293, 1303 (D. Or. 2013).

¹¹⁷ See *Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 at *11 (D. Or. Mar. 26, 2014).

¹¹⁸ Reply Memorandum in Support of Defendants' Motion for Partial Summary Judgment at 12, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Ore. Mar. 26, 2013).

¹¹⁹ *Id.* at 11.

¹²⁰ *Matthews*, 424 U.S. at 335.

¹²¹ See *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 at *13-16 (D. Or. June 24, 2014).

¹²² Compare *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) with *Matthews v. Eldridge*, 424 U.S. 319, 343-44 (1976).

¹²³ *Matthews*, 424 U.S. at 343-45.

someone of liberty. For example, the Court has held that before a state may permanently sever a parent's relation with a child, a state must meet a higher evidentiary threshold than "fair preponderance of the evidence."¹²⁴

Yet another factor is the ability to see and challenge the evidence relied on to justify a deprivation.¹²⁵ In the context of a security clearance revocation that resulted in the impairment of a plaintiff's job opportunities, the Supreme Court stressed that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."¹²⁶ Likewise, in the disability benefits context, the Court has noted the important "safeguard against mistake" of permitting access to the government's information and the reasons for the government's action, as well as the ability of a claimant to submit his own arguments and challenge the accuracy of the government's conclusion.¹²⁷ Finally, in the context of considering the government's detention of a U.S. citizen in an armed conflict, the Supreme Court has ruled that a process where "the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity ... to demonstrate otherwise falls constitutionally short."¹²⁸ When a "citizen-detainee ... challenge[s] his classification as an enemy combatant [he] must receive fair notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."¹²⁹

Some plaintiffs who have challenged their alleged placement on the No Fly list have argued both that the current standard used to place someone on a No Fly list entails a high risk of error, and that the current procedure afforded those seeking to challenge their placement on the No Fly list creates a high risk of an erroneous deprivation.¹³⁰ There is arguably a considerable amount of

¹²⁴ *Santosky v. Kramer*, 455 U.S. 745, 761-64 (1982).

¹²⁵ In *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001), the D.C. Circuit examined the Secretary of State's designation of an entity to be a Foreign Terrorist Organization under the Anti-Terrorism and Effective Death Penalty Act. The relevant judicial review provision did not permit the entity to "access, comment on, or contest the critical material." *Id.* at 197. The court ruled that this review was not sufficient to satisfy due process. The court required the Secretary to provide the entity with the unclassified material to be used to make the designation and "the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations." *Id.* at 208-209. See *People's Mojahedin Organization of Iran v. U.S. Dep't of State*, 613 F.3d 220, 227-28 (D.C. Cir. 2010) (similar holding). In *Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2011), the Ninth Circuit examined the procedures used when the Office of Foreign Assets Control designated an entity to be a "specially designated global terrorist." *Id.* at 970. The court noted the high risk of error when the government relies upon classified information without disclosure and held that the government must, at least when it does not implicate national security, provide the entity with mitigation measures such as unclassified summaries of information or permitting counsel with an appropriate security clearance to access the material. *Id.* at 982-83. In *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004), however, the D.C. Circuit upheld a process wherein plaintiffs did not receive the materials explaining the factual basis for the government's deprivation. *Id.* at 1184. In that case, the Federal Aviation Administration revoked the airman certificates of two nonresident alien pilots because they presented a security risk. *Id.* at 1177. After noting that the pilots' interest in a possessing certificates to fly foreign aircraft "pales in significance to the government's security interests in preventing pilots from using civil aircraft as instruments of terror," the court ruled that notice to the plaintiffs and the opportunity to present their own evidence to rebut the record—without a chance to view the underlying facts—satisfied due process. *Id.* at 1183-84.

¹²⁶ *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

¹²⁷ *Matthews*, 424 U.S. at 345-46.

¹²⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

¹²⁹ *Id.* at 533.

¹³⁰ See *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 (D. Or. June 24, 2014).

discretion involved in making the determination that someone is a danger to aviation safety. In addition, if the government has faulty information, a traveler does not have the opportunity to evaluate the evidence against her or to present her own evidence to correct the record. Some courts have noted government studies that document numerous errors with the operation of the watch lists,¹³¹ and media accounts have highlighted mistaken placements on the No Fly list.¹³²

The executive branch has argued, however, that such studies predate the current methods used under the Secure Flight program, which has reduced the number of travelers wrongly denied boarding.¹³³ In addition, DHS TRIP does provide a redress process, which can be appealed to a United States court of appeals.¹³⁴ One might argue that this opportunity for judicial review of the agency's determination is sufficient to prevent erroneous deprivations.

Government's Interest

Finally, a court would examine the government's interest in the matter and the cost of imposing additional procedures. The government has a strong interest in preventing terrorism, which includes ensuring the safety of air travel.¹³⁵ The operation of the No Fly list arguably is an important tool to do so.¹³⁶ The government also has an interest in protecting sensitive national security information. The executive branch has argued that "protecting TSDB information enables agencies to share that information across the government, without fear that it will be disclosed whenever anyone sues after he or she cannot travel as he or she might choose."¹³⁷ Requiring DHS to reveal classified information through this process, even to the complainant, could "damage ... national security, including by jeopardizing intelligence sources and methods."¹³⁸

Accordingly, the danger to the public of disclosing certain material might, in some observers' view, outweigh the benefit to the plaintiff. Indeed, the executive branch has argued that "opportunities for confrontation and rebuttal are not absolute requirements of due process, particularly where the information upon which the government acts is highly sensitive."¹³⁹ More generally, courts have sometimes been reluctant to require the executive branch to release information that implicates national security concerns.¹⁴⁰ In cases bringing procedural due

¹³¹ See, e.g., Ibrahim v. Department of Homeland Security, 669 F.3d 983, 990 (9th Cir. 2012); Latif v. Holder, 969 F. Supp. 2d 1293, 1306 (D. Or. 2013). See also U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 13 (2009).

¹³² See, e.g., Mike McIntire, *Ensnared by Error on Growing U.S. Watch List*, NEW YORK TIMES (April 6, 2010) available at <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>.

¹³³ Latif v. Holder, 969 F. Supp. 2d 1293, 1306 (D. Or. 2013); see 2012 GAO Report, *supra* note 13.

¹³⁴ See 49 U.S.C. § 46110.

¹³⁵ See e.g., Latif v. Holder, 3:10-CV-00750-BR, 2014 WL 2871346 at *16 (D. Or. June 24, 2014).

¹³⁶ The chair of the Senate Intelligence Committee, Dianne Feinstein, has remarked that the No Fly list is "one of our best lines of defense" in preventing terrorism. Scott Shane, *Senators Demand Tighter Rules on No-Fly List and Addition to Terror Group List*, NEW YORK TIMES (May 11, 2010) available at http://www.nytimes.com/2010/05/12/world/americas/12investigate.html?_r=0.

¹³⁷ Defendants' Supplemental Brief at 12, Latif v. Holder, No. 3:10-cv-00750-BR (D.Or. Oct. 25, 2013).

¹³⁸ *Id.*

¹³⁹ Defendants' Supplemental Brief at 13, Latif v. Holder, No. 3:10-cv-00750-BR (D.Or. Oct. 25, 2013) (citing *Jiffrey v. FAA*, 370 F.3d 1174, 1183-84 (D.C. Cir. 2004)).

¹⁴⁰ See, e.g., *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

process claims that concern sensitive materials outside of No Fly list challenges, courts have often declined to require the government to release classified information directly to the plaintiff.¹⁴¹

Nonetheless, as explained below, one federal district court—in ruling on a challenge to placement on the No Fly list—has signaled that permitting a plaintiff’s counsel with proper security clearances to access the government’s evidence might alleviate some national security concerns.¹⁴² However, in contexts outside of challenges to the No Fly list, some courts have declined to interpret this possibility as foreclosing the government’s interest in protecting national security. As the Seventh Circuit explained recently, counsel might, “in their zeal to defend their client ... inadvertently say things that would provide clues to classified material.”¹⁴³ In contrast, other courts, including the Ninth Circuit, have approved this procedure, at least in appropriate circumstances.¹⁴⁴ Finally, one alternative used in other national security contexts is a requirement that the government provide unclassified summaries of particular information to a plaintiff, rather than the classified material itself.¹⁴⁵

In addition, specific forms of procedural protections might compromise national security more than others. A requirement that the government provide prior notice to anyone placed on a No Fly list and a pre-deprivation hearing where both sides presented evidence might “aid terrorists in their plans to bomb and kill Americans” by providing advance notice to all suspected terrorists.¹⁴⁶ More generally, the Supreme Court has recognized that a pre-deprivation hearing is not necessary in certain situations, for example, those implicating substantial national security concerns¹⁴⁷ or public safety.¹⁴⁸

¹⁴¹ See, e.g., *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 319 (D.C. Cir. 2014); *Al Haramain Islamic Foundation, Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 980-81 (9th Cir. 2011); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003); *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001); see generally *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

¹⁴² See *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 at *23-24 (D. Or. June 24, 2014).

¹⁴³ *United States v. Daoud*, 755 F.3d 479, 484 (7th Cir. 2014) *supplemented*, 14-1284, 2014 WL 3734136 (7th Cir. July 14, 2014). See *United States v. El-Mezain*, 664 F.3d 467, 468 (5th Cir. 2011).

¹⁴⁴ See *Al Haramain Islamic Foundation, Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 983 (9th Cir. 2011); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010) (“If declassification or summarization of classified information is insufficient or impossible, then KindHearts’ counsel will obtain an adequate security clearance to view the necessary documents, and will then view these documents in camera, under protective order, and without disclosing the contents to KindHearts.”).

¹⁴⁵ See *Al Haramain Islamic Foundation, Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 982-83 (9th Cir. 2011). In the criminal context, this procedure is authorized under the Classified Information Procedure Act. See 18 U.S.C.A. § 4 (“The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.”).

¹⁴⁶ *Ibrahim v. Dep’t of Homeland Sec.*, slip op. at 29, No. 3:06-cv-00545-WHA (N.D. Ca. Jan. 14, 2014).

¹⁴⁷ *Haig v. Agee*, 453 U.S. 280, 309 (1981); see also *Palestine Information Office v. Shultz*, 853 F.2d 932, 942-43 (D.C. Cir. 1988); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

¹⁴⁸ *Mackey v. Montrym*, 443 U.S. 1, 19 (1979).

Possible Outcomes of the Balancing Test

Judicial resolution of a due process challenge requires a balancing of all three factors to determine what process is due. Several federal district courts have directly addressed challenges to placement on the No Fly list which allege that the government's procedures violate due process.¹⁴⁹ In a case in the Northern District of California, a federal court ruled on a claim brought by Rahinah Ibrahim, a Malaysian national who was present in the United States under a student visa in 2005, when she was prevented from boarding a plane to Malaysia and temporarily detained for several hours. During the trial, the government admitted that it had mistakenly placed her on the No Fly list. The court ruled that when the government mistakenly places someone on a No Fly list, due process "requires the government to cleanse and/or correct its lists and records of the mistaken information and to certify under oath that such correction(s) have been made."¹⁵⁰ In addition to ordering this remedy, the judge also directed the government to reveal to the plaintiff whether she was currently on the No Fly list.¹⁵¹ At least in this situation, the court ruled, where a plaintiff is mistakenly placed on the No Fly list, the current redress procedures under DHS TRIP did not satisfy due process.¹⁵² However, the scope of the ruling is rather narrow. The court explained that its ruling was limited to a situation where the government admits that it has mistakenly placed a traveler on the list. The court left open situations where the government had not conceded error.¹⁵³

In contrast, a federal district court in Oregon ruled that the government's procedures violated due process in a case where the government did not appear to concede error. In *Latif v. Holder*, the plaintiffs had been barred from flying and submitted complaints via the DHS TRIP process; pursuant to the procedures described above, the government's reply did not confirm or deny whether they were on a No Fly list or provide any reason why plaintiffs could not board an aircraft.¹⁵⁴ The court found that the plaintiffs had "constitutionally-protected liberty interests in traveling internationally by air, which are significantly affected by being placed on the No-Fly list."¹⁵⁵ The court conducted a *Mathews* balancing test and concluded that the DHS TRIP process failed to provide due process.¹⁵⁶ The court noted the various harms that can result from being denied boarding on international flights and concluded that the deprivation was "significant."¹⁵⁷

¹⁴⁹ 49 U.S.C. § 46110 provides that a person challenging a TSA order may petition a United States court of appeals for review. Some courts have determined that challenges to the No Fly list may nonetheless be brought in federal district court. See *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250 (9th Cir. 2008); *Mohamed v. Holder*, No. 1:11-cv-00050-AJT-TRJ (4th Cir. May 28, 2013). Others have concluded that challenges are proper in the United States courts of appeals. See *Scherfen v. United States Dep't of Homeland Sec.*, 2010 U.S. Dist. LEXIS 8336 (M.D. Penn 2010) (distinguishing *Ibrahim* as "focused solely on the question of whether placement on the No Fly List fell within § 46110," while the case at hand followed the receipt of a TRIP determination letter); *Tooley v. Bush*, CIV.A. 06-306, 2006 WL 3783142 (D.D.C. Dec. 21, 2006) *rev'd in part sub nom.* *Tooley v. Napolitano*, 556 F.3d 836 on reh'g, 586 F.3d 1006 (D.C. Cir. 2009) *and aff'd sub nom.* *Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009).

¹⁵⁰ *Ibrahim v. Dep't of Homeland Sec.*, Case3:06-cv-005450WHA, slip op. at 2 (N.D. Ca. Jan 14, 2014) (summary of order).

¹⁵¹ *Id.*

¹⁵² *Ibrahim v. Dep't of Homeland Sec.*, Case3:06-cv-00545-WHA, slip op. at 31 (N.D. Ca. Jan. 14, 2014).

¹⁵³ *Id.* at 30.

¹⁵⁴ *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346 (D. Or. June 24, 2014).

¹⁵⁵ *Id.* at *11.

¹⁵⁶ *Id.* at *9-24. The district court described the first *Mathews* step as including (1) a recognition of a liberty interest and (2) a weighing of that interest "against the other factors." *Id.* at *11.

¹⁵⁷ *Id.* at *12. In addition, the court concluded that the injury to the plaintiffs' reputations from being placed on the list—though somewhat limited in scope because disclosure was limited to those individuals near the traveler in the (continued...)

Turning to the second *Matthews* factor, the court noted a “fundamental flaw” of the procedures in both the DHS TRIP and judicial review process: a low evidentiary standard—reasonable suspicion—sufficient to be placed on the No Fly list, combined with a one sided review process.¹⁵⁸ Taken together, the court found, these aspects made it likely that factual errors in the government’s record could go uncorrected. Therefore, the court concluded, the government’s procedures “contain[ed] a high risk of erroneous deprivation” of the plaintiffs’ liberty interests.¹⁵⁹ Further, the court found, providing notice of inclusion on the list, a list of reasons for placement on the list, and/or the opportunity to present exculpatory evidence “would have significant probative value in ensuring that individuals are not erroneously deprived of their constitutionally-protected liberty interests.”¹⁶⁰ On the other hand, the court recognized the significant government interest in national security, the third *Matthews* factor.¹⁶¹ Nonetheless, the court noted that certain procedural protections were possible that did not endanger national security, such as providing summaries of classified information or permitting defense counsel with appropriate clearances to access sensitive material.¹⁶²

Consequently, the court held that “the absence of any meaningful procedures” to contest plaintiffs’ placement on the No Fly list violated due process.¹⁶³ The court ordered the government to “fashion new procedures” that satisfied due process, including notifying the plaintiffs whether or not they were on the No Fly list and “the reasons for placement on that List.”¹⁶⁴ That notice must be sufficient to provide the plaintiffs with a meaningful opportunity to respond, and that response must be taken into account at both the judicial and administrative review stages.¹⁶⁵ However, the court left the precise type of procedures up to the government and allowed for the possibility that such disclosure might “create an undue risk to national security.”¹⁶⁶ That determination, however, had to be made on a case-by-case basis.¹⁶⁷

On October 10, 2014, the government filed a report with the court notifying it that seven of the plaintiffs were not on the No Fly list.¹⁶⁸ The government also conducted revised redress procedures for those plaintiffs still on the No Fly list.¹⁶⁹ The government informed plaintiffs of their status on or off the No Fly list, the substantive criteria used to determine that status, and unclassified summaries of how the plaintiffs met that criteria. The plaintiffs were also permitted to file responses and the government reviewed these submissions and then made a final

(...continued)

airport—implicated the plaintiffs’ “interests in their reputations.” *Id.* at *12-13.

¹⁵⁸ *Id.* at *15.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *16.

¹⁶¹ *Id.*

¹⁶² *Id.* at *23-24.

¹⁶³ *Id.* at *24.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* In a filing with the court on September 4, 2014, the DOJ indicated that it did “not intend to seek an appeal” of this order “at this time.” Supplemental Joint Status Report at 3, *Latif v. Holder*, No. CV 10-00750-BR (D. Or. Sept. 4, 2014).

¹⁶⁸ Joint Filing Regarding Disposition of Claims for Individuals Not on the No Fly List, *Latif v. Holder*, Case No. 3:10-cv-00750-BR (D. Or. Mar. 13, 2015).

¹⁶⁹ Joint Status Report, *Latif v. Holder*, Case No. 3:10-cv-00750-BR (D. Or. Feb. 6, 2015).

determination for each plaintiff.¹⁷⁰ However, the adequacy of these new procedures is also being challenged by the plaintiffs who remain on the No Fly list.¹⁷¹ In addition, the government has indicated that it is revising the redress process for other travelers who contest being denied boarding or subject to enhanced screening procedures; although it is unclear whether the new redress process will be similar to the new procedures crafted for the plaintiffs in *Latif v. Holder*.

Hurdles to Litigation

As explained above, some travelers have challenged their alleged placement on the No Fly list and the government's redress process in federal court outside of the DHS TRIP review mechanism. However, governmental privileges barring disclosure of sensitive information present hurdles for plaintiffs.¹⁷² In No Fly list cases brought in federal courts, a number of common law and statutory privileges have been invoked by the government to bar a plaintiff's access to certain information via discovery, including the state secrets, law enforcement, and deliberative process privileges.¹⁷³ When properly invoked and accepted by courts, these privileges can prevent plaintiffs from examining certain sensitive information potentially relevant to their case, potentially impeding their ability to challenge placement on the list. For example, the state secrets privilege is an evidentiary privilege that allows the government to withhold information during civil litigation if there is a reasonable danger that disclosure would endanger national security.¹⁷⁴ If the government invokes the privilege during litigation, the court will then make an independent determination of the validity of the claim, possibly via *in camera* review of the relevant materials.¹⁷⁵ If the court is satisfied that the privilege applies, that information will be unavailable to the plaintiff.¹⁷⁶

Recently, in a case challenging a plaintiff's placement on the No Fly list, the government invoked the state secrets privilege and moved to dismiss the case entirely.¹⁷⁷ The government claimed that the privilege applied both to the "sensitive policies and procedures used in the watchlisting process" and any substantive underlying information regarding the reasons for placement on the No Fly list.¹⁷⁸ According to the government, this precluded any consideration of the adequacy of the redress process,¹⁷⁹ as well as a full inquiry into "the possibility of substitute procedures."¹⁸⁰ Indeed, "any attempt to litigate how these nomination procedures were applied in this case ... risks disclosure of the privileged information."¹⁸¹ In addition, the government argued that due to

¹⁷⁰ Defendant's Status Report, *Latif v. Holder*, Case No. 3:10-cv-00750-BR (D. Or. Jan. 22, 2015).

¹⁷¹ Joint Status Report, *Latif v. Holder*, Case No. 3:10-cv-00750-BR (D. Or. Feb. 6, 2015).

¹⁷² These privileges would not be invoked within the DHS TRIP process itself because that review mechanism never reveals information to the traveler beyond the status of the review process.

¹⁷³ See, e.g., *Ibrahim v. Dep't of Homeland Sec.*, C 06-00545 WHA, 2014 WL 1493561 at *2 (N.D. Cal. Apr. 16, 2014).

¹⁷⁴ See *U.S. v. Reynolds*, 345 U.S. 1, 10 (1953); see also CRS Report R41741, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation*, by Todd Garvey and Edward C. Liu.

¹⁷⁵ See *Reynolds*, 345 U.S. at 8.

¹⁷⁶ See *id.* at 9.

¹⁷⁷ See Defendant's Memorandum in Support of Their Motion to Dismiss Plaintiff's Complaint as a Result of the Assertion of the State Secrets Privilege, *Mohamed v. Holder*, No. 1:11-cv-0050 (E.D. Va. May 28, 2014).

¹⁷⁸ *Id.* at 11.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 12.

¹⁸¹ *Id.*

the potential for sensitive matters to be probed via discovery, “future proceedings will inherently put the privileged information at risk of being disclosed.”¹⁸² Accordingly, the government moved to dismiss the case entirely.¹⁸³ This particular motion to dismiss was denied by the court, on the grounds that the plaintiff’s claim might be adjudicated without recourse to documents subject to the privilege.¹⁸⁴ However, litigation concerning the applicability of the state secrets privilege to various aspects of the government watchlist process is ongoing.¹⁸⁵

The law enforcement privilege has also been invoked by the government in challenges to placement on the No Fly list.¹⁸⁶ The purpose of the privilege is “to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.”¹⁸⁷ The investigation is not required to be ongoing, as disclosure of past tactics might impair future investigations.¹⁸⁸ However, the privilege is not absolute: “[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information.”¹⁸⁹ In order to conduct this balancing test, courts often examine an extensive list of factors.¹⁹⁰ Courts may examine the evidence *in camera* in order to determine if the privilege applies and balance the litigant’s need against the public interest in nondisclosure.¹⁹¹ If a court determines that the privilege applies, then that information will not be available to the defendant. In No Fly list cases,

¹⁸² *Id.* at 14.

¹⁸³ *Id.* The case is currently pending in the district court.

¹⁸⁴ See Order, Mohamed v. Holder, Civil Action No. 1:11-cv-50 (E.D. Va. Oct. 30, 2014).

¹⁸⁵ See Order, Mohamed v. Holder, Civil Action No. 1:11-cv-50 (E.D. Va. Feb. 2, 2015); Order, Mohamed v. Holder, Civil Action No. 1:11-cv-50 (E.D. Va. Oct. 30, 2014).

¹⁸⁶ See, e.g., Ibrahim v. Dep’t of Homeland Sec., C 06-00545 WHA, 2014 WL 1493561 (N.D. Cal. Apr. 16, 2014).

¹⁸⁷ *In re* Dep’t of Investigation of City of New York, 856 F.2d 481, 484 (2d Cir. 1988). See also *Aspin v. Dep’t of Defense*, 491 F.2d 24, 29-30 (D.C. Cir. 1973); *Frankel v. Securities and Exchange Commission*, 460 F.2d 813, 817 (2d Cir. 1972); *Ibrahim v. Dep’t of Homeland Sec.*, C 06-00545 WHA, 2014 WL 1493561 (N.D. Cal. Apr. 16, 2014).

¹⁸⁸ See *In re* The City of New York, 607 F.3d 923, 944 (2d Cir. 2010); see also *Nat’l Congress for P.R. Rights ex rel. Perez v. City of N.Y.*, 194 F.R.D. 88, 95 (S.D.N.Y. 2000); *Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999).

¹⁸⁹ *In re* Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988); see also *In re* The City of New York, 607 F.3d 923, 945 (2d Cir. 2010).

¹⁹⁰ One district court summarized the law as follows:

In deciding whether the privilege should apply, courts typically balance the following factors:

“(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff’s suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff’s case.”

S.E.C. v. Gowrish, C 09-05883 SI, 2010 WL 1929498 (N.D. Cal. May 12, 2010) (quoting *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973), overruled on other grounds, *Startzell v. City of Phila.*, No. 05–05287, 2006 WL 2945226 (E.D. Pa. Oct. 13, 2006)). See also *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984) (invoking the same factors).

¹⁹¹ See, e.g., *In re* The City of New York, 607 F.3d 923, 948 (2d Cir. 2010).

the executive branch has asserted this privilege over a “plaintiff’s status on any terrorist database and the policies and procedures used for determining how an individual’s name is placed in such a database.”¹⁹²

Similarly, the deliberative process privilege has been invoked by the executive branch in challenges to placement on the No Fly list.¹⁹³ The privilege allows the government to withhold material that “reflect[] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”¹⁹⁴ In order to qualify, documents must be “predecisional” and “deliberative.”¹⁹⁵ A document qualifies as the former if it “was prepared in order to assist an agency decisionmaker in arriving at his decision,” and the latter if its release would “expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”¹⁹⁶ As with the other privileges, however, its invocation by the government is not absolute. A plaintiff “may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding over-ride the government’s interest in non-disclosure.”¹⁹⁷ In the No Fly list context, this privilege might be invoked in an attempt to withhold documents used in certain decision-making processes, such as whether to place an individual on the No Fly list.

Finally, TSA has statutory discretion to designate certain material as “sensitive security information,” or “information obtained ... in the conduct of security activities ... the disclosure of which TSA has determined would ... [b]e detrimental to the security of transportation.”¹⁹⁸ Such information is “not available for public inspection,”¹⁹⁹ and the government has claimed exemptions from disclosure at trial on this basis.²⁰⁰ Nonetheless, as with the privileges discussed above, plaintiffs and their counsel can access information in certain circumstances.²⁰¹

Conclusion

Properly balancing the important national security interest of preventing terrorist attacks with the civil liberties of travelers prevented from boarding a plane is a complicated and delicate matter. Operation of the government’s No Fly list implicates a wide variety of statutory and constitutional issues. Apparently in response to legal challenges brought by individuals placed on the No Fly

¹⁹² See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, C 06-00545 WHA, 2009 WL 5069133 at *6 (N.D. Cal. Dec. 17, 2009) *vacated and remanded*, 669 F.3d 983 (9th Cir. 2012).

¹⁹³ See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, C 06-00545 WHA, 2013 WL 1703367 at *5-6 (N.D. Cal. Apr. 19, 2013).

¹⁹⁴ *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted).

¹⁹⁵ *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir. 2010).

¹⁹⁶ *Id.* (citations and quotations omitted).

¹⁹⁷ *Ibrahim v. Dep’t of Homeland Sec.*, C 06-00545 WHA, 2013 WL 1703367 at *2 (N.D. Cal. Apr. 19, 2013) (quoting *Cal. State Foster Parent Ass’n v. Wagner*, No. 07-05086 WHA, 2008 WL 2872775 at *4 (N.D. Cal. July 23, 2008)).

¹⁹⁸ 49 C.F.R. § 1520.5.

¹⁹⁹ 49 C.F.R. § 1520.15.

²⁰⁰ See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, C 06-00545 WHA, 2009 WL 5069133 at *6 (N.D. Cal. Dec. 17, 2009) *vacated and remanded*, 669 F.3d 983 (9th Cir. 2012).

²⁰¹ See, e.g., *id.*; see also Department of Homeland Security Appropriations Act of 2007, P.L. 109-295, 120 Stat. 1355 (Oct. 4, 2006).

list, the government is revising its redress procedures, although the precise contours of the new process are still unknown.

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