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The No-Fly List: The New Redress Procedures, Criminal Treatment, and the Blanket of "National Security"

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* Candidate for J.D., May, 2017. I would like to thank Professor Margaret Hu for acting as my faculty advisor on this Note and for her help and guidance. I would also like to thank Judge Anthony J. Trenga for giving me the opportunity to intern for him and research the state secrets doctrine, which inspired the topic of this note.

I. Introduction

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which make the defense of the Nation worthwhile.
>
> -Chief Justice Warren in *United States v. Robel*[1]

On September 11, 2001, the school day was interrupted when mothers and fathers suddenly arrived at Long Island schools to pick up their children. Parents pulled their unknowing children out of these schools—schools within a quick driving distance to Manhattan, New York—for reasons only communicated on the car-ride home. I was one of these unknowing fourth graders who found out what happened upon arriving home.

News programs covered the tragedy: two planes hit the North and South Towers of the World Trade Center, one plane crashed into the Pentagon, and the other failed in its attempt at Washington, D.C., instead crashing into a Pennsylvania field.[2] Newscasters reported that "[nineteen] militants associated with the Islamic extremist group al-Qaeda hijacked four airliners and carried out suicide attacks against . . . the United States."[3] "Over

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1. United States v. Robel, 389 U.S. 258, 264 (1967).

2. *See generally World Trade Center Disaster,* CNN LIVE (Sept. 11, 2001), https://www.youtube.com/watch?v=vfYQAPhjwzA; *Flashback 9/11: As It Happened*, FOX NEWS LIVE (Sept. 11, 2001), http://video.foxnews.com/v/1151859712001/flashback-911-as-it-happened/?#sp= show-clips; *World Trade Center: New York City*, MSNBC LIVE (Sept. 11, 2001), https://www.youtube.com/watch?v=OtZKEjr-Sfg; *America Under Attack*, CNN Live (Sept. 11, 2001), https://www.youtube.com/watch?v=uU53JlksKQo; *Attack on America*, FOX 5 NEWS LIVE (Sept. 11, 2001), https://www.youtube.com/watch? v=SbJ2oA3KSxY (reporting on the events as they occurred).

3. *See 9/11 Attacks*, HISTORY CHANNEL, http://www.history.com/topics/9-

3,000 people were killed during the attacks . . . including more than 400 police officers and firefighters."[4]

Most of us can recall where we were or what we were doing when severe tragedy struck. The September 11 terrorist attacks (9/11) introduce this Note because they caused a whirlwind of legislation and executive action that formulated one of the most controversial lists in modern times: The No-Fly List.[5]

Before the 9/11 attacks, the United States federal government maintained a list of sixteen people deemed "no transport" because they presented a specific known or suspected threat to aviation.[6] As a result of 9/11, the Homeland Security Act of 2002 created the Department of Homeland Security and the Aviation and Transportation Security Act of 2001 made the federal government responsible for airport security.[7] After tragedy hit, the "Selectee" and "No-Fly" lists were created in mid-December 2001 and grew in size.[8] The Selectee List calls for additional security and enhanced screening without flight prohibition.[9] The No-Fly List prevents boarding of persons known or suspected as threats to aviation.[10]

11-attacks (last visited Oct. 1, 2016) (introducing the timeline of events of September 11, 2001) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. *See id.* (stating that "September 11, 2001 was the deadliest day in history for New York City firefighters: 343 were killed.").

5. *See Terrorist Screening Center: Frequently Asked Questions*, FED. BUREAU OF INTELLIGENCE (Apr. 11, 2016), https://www.fbi.gov/file-repository/terrorist-screening-center-frequently-asked-questions.pdf/view (stating that "[t]he Terrorist Screening Center was established in 2003, pursuant to Presidential Directive by the Attorney General and is administered by the [FBI]" and that "[t]he No-Fly List is a subset of the Terrorist Screening Database") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. *See Transp. Sec. Intelligence Serv., Attachment A- Part 1: TSA Watch Lists*, U.S. DEP'T OF TRANSP. 2 (2002), https://www.aclunc.org/sites/default/files/asset_upload_file371_3549.pdf (presenting a classified and unclassified portrayal of information regarding the TSA Fly Lists) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. *See id.* at 2–3 (expressing that the Federal Aviation Administration assumed responsibility for the FBI *Pentborn* List in November 2001 and then that the Terrorist Screening Center created and maintained the No-Fly List).

8. *Id.* at 3.

9. *See id.* at 3, 16 (describing the criteria for placement on the Selectee List in classified redaction, but describing that the Selectee List calls for additional security).

10. *See id.* at 4 (describing the criteria for placement on the No-Fly List).

Answers to questions concerning the No-Fly List hide behind a veil: The United States has disclosed limited amounts of information regarding No-Fly List placement criteria and redress intelligence.[11] The classified nature of the intelligence utilized to fulfill the limited amount of unclassified criteria for placement on a terrorist watchlist therefore makes it extremely difficult for individuals to challenge their inclusion.[12] Professor Margaret Hu explained that "the nomination and determination process has been criticized for its . . . . lack of any minimum qualitative guideline or quantitative baseline for investigatory or evidentiary standards."[13] These criticisms remain pressing issues today as the List continues to grow in size.

The sixteen-person List no longer exists. A 2007 Department of Justice (DOJ) report estimated that the No-Fly List "contained over 700,000 names and . . . was 'increasing by an average of more than 20,000 records each month.'"[14] A 2012 Government Accountability Office (GAO) report noted an increase in individuals denied boarding or selected for screening, but did not report any data on the specific amount when, at the time, the Federal Bureau of Investigation (FBI) reported approximately 550,000 names on the No-Fly List.[15] The exact number of names on the list remains unknown.[16]

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11. *See generally id.* (portraying some information as unclassified with large chunks of information as redacted, classified information).

12. *See* Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1786–88, 1799 (2015) (analyzing big data blacklisting programs in her article and suggesting that big data blacklisting harms interfere with and obstruct fundamental liberty interests in a way that now calls for "an evolution of the existing due process jurisprudence.").

13. *See id.* at 1787 (citing Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. 804, 816–17 (2007)).

14. *See id.* at 1791 (quoting *Justice Department Report Tells of Flaws in Terrorist Watch List*, CNN (Sept. 6, 2007), http://www.cnn.com/2007/US/09/06/terror.watchlist/ (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (alteration omitted)).

15. *See id.* (citing Andrea Stone, *No Fly List Maintained by FBI Includes Double the U.S. Citizens Since 2009*, HUFFINGTON POST (June 1, 2012, 3:39 PM), http://www.huffingtonpost.com/2012/06/01/No Fly-list_n_1563261.html (on file with the Washington and Lee Journal of Civil Rights and Social Justice)).

16. *See Know Your Rights: What to Do If You Think You're On A No-Fly List*, ACLU (2015), https://www.aclu.org/know-your-rights/what-do-if-you-think-youre-no-fly-list (stating that "the public does not know how many people are on

The second section of this Note will discuss the Department of Homeland Security's Traveler Redress Program and the redress procedures in place before courts began to deem those procedures unconstitutional.[17] It will also discuss the initial judicial treatment of No-Fly List cases and judges' tendency to dismiss on jurisdictional bases.[18]

The third section will analyze the evolution of judicial views toward No-Fly List cases.[19] This section concludes that courts around the country began interpreting the No-Fly List's jurisdictional statute differently to accept No-Fly List cases into district court dockets. Eventually, this allowed district courts to analyze the government's redress procedures available to United States citizens and to find them unconstitutional in violation of due process.[20] This section focuses on how courts wanted to begin interpreting No-Fly List legal questions because of a changing attitude toward national security developing over a number of years since 9/11, an attitude evolving to this day.[21]

The fourth section of this Note discusses the government's "state secrets" privilege, and how the privilege is used to prevent litigation of No-Fly List cases as a response to recent judicial rejection of lack of jurisdiction claims.[22] This section will analyze

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the No Fly List") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

17. *See infra* Part II. The Department of Homeland Security's Traveler Redress Program (DHS TRIP), the Old Procedures, and Judicial Dismissal (discussing the old redress procedures and the little information given those seeking redress about their case).

18. *See infra* Part II (explaining how judicial interpretation of statute prevented district courts from hearing No Fly List cases).

19. *See infra* Part III. The District Courts Gain Jurisdiction and the New Redress Procedures Are Created (transitioning from a discussion on the dismissal of No Fly List cases based on lack of jurisdiction and into a discussion on changing judicial statutory interpretation).

20. *See infra* Part III (analyzing how statutory interpretation by the courts allowed citizens to find legal avenues in the district courts, not solely through the United States Court of Appeals).

21. *See infra* Part III (realizing this attitude appeared first in Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250 (9th Cir. 2008), which held that the district court was not divested of subject matter jurisdiction over alien's claim for injunction directing removal of her name from the No-Fly List).

22. *See infra* Part IV. The "National Security" Blanket (discussing the state secrets privilege in further detail, which prevents disclosure of information in a legal case because the government states that court proceedings would disclose

the 2015 *Mohamed v. Holder*[23] decision and its implications on the future of No-Fly List cases.[24] Finally, this Note will conclude that even the revised redress procedures unconstitutionally deprive citizens of due process despite the recent change.[25] This Note concludes that with the evolution of judicial viewpoints towards No-Fly List cases and in the wake of the government's blanket "national security" and "state secrets" defenses since 9/11, the likelihood that courts will find the new redress procedures unconstitutional once again is high.[26] This Note then suggests potential solutions to fix this constitutional issue because, currently, American liberty interests are too important, the risk of erred placement on the No-Fly List is too high, and the government's intent to keep secret information crucial to citizen defenses forces people to involuntary remain on the No-Fly List without proper redress.[27] This erroneous deprivation of civil liberties is still met with inadequate notice and the inability to be heard to reverse placement.[28] Instead, the government's interests in "national security" have wrongly taken precedence.[29]

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sensitive information and endanger national security).

23. No. 1:11-CV-50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015).

24. *See infra* Part IV (analyzing Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015) and its implications).

25. *See infra* Part V. Conclusion (arguing that the revisions to the procedures are minimal and ineffective).

26. *See infra* Part V (concluding that the revised procedures provide little due process protections alike the old unconstitutional procedures).

27. *See infra* Part V (discussing the various constitutional implications of being placed on the No-Fly List).

28. *See infra* Part V (analyzing the deficiencies in a system that gives no prior notice of placement coupled with the lack of ability to access all the information regarding one's case).

29. *See infra* Part IV. The "National Security" Blanket (implying that because the No-Fly List redress procedures were recently revised and because they still lack adequate redress, that little has been done to adequately protect American civil liberties because the government's interest in national security is compelling).

II. The Department of Homeland Security's Traveler Redress Program (DHS TRIP), the Old Procedures, and Judicial Dismissal

A. The Old Procedures

The redress procedures described in this section have been deemed unconstitutional according to some courts now more concerned with the due process implications of inadequate redress.[30] Understanding these procedures, however, proves important in analyzing the newly revised redress process and continuing constitutional violations.[31]

Individuals often remain unaware of their possible No-Fly or Selectee List placement until they arrive at the airport and experience a public disbarment from flying or face lengthy, inconvenient enhanced screenings.[32] Under the old redress procedures, a traveler who was blocked from flying or faced unusual scrutiny at the airport could file a complaint with the Department of Homeland Security's Traveler Redress Program (DHS TRIP).[33] If DHS TRIP determined that incident was due to an exact or near match to a watchlist, it forwarded the complaint to the Federal Bureau of Investigation's Terrorist Screening Center (TSC), the entity that maintains the consolidated terrorist database used to generate watchlists for various agencies.[34] The

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30. *See* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958, at *2 (E.D. Va. July 16, 2015) (concluding "that DHS TRIP . . . did not provide a constitutionally adequate opportunity to challenge denial of boarding at the time Mohamed was denied boarding."); Latif v. Holder, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014) (concluding "the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List violates Plaintiffs' rights to procedural due process.").

31. *See infra* Part IV. The "National Security" Blanket (analyzing the constitutionality of the revised procedures).

32. *See* Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2158 (2006) (expressing that airline passengers do not find out they cannot board ahead of time and are often detained at the ticket counter and do not know why; detailing when Senator Kennedy recalled being refused a ticket and when asked why he was told "We can't tell you.").

33. *See* Shirin Sinnar, *Towards A Fairer Terrorist Watchlist*, 40 ADMIN. & REG. L. NEWS 4, 4 (2015) (suggesting "that No Fly List standards have strayed from their original purpose of averting true threats to civil aviation.").

34. *See id.* (including in this database the Transportation Security

Transportation Security Administration's (TSA) No-Fly List is included as a subset of the larger Terrorist Screening Database (TSDB) TSC administers.[35]

The TSC then reviewed the complaint filed in consultation with the intelligence agencies that originally requested that person be listed.[36] The individual eventually received a letter that the review was complete.[37] The letter either said: "we can neither confirm nor deny any information about you which may be within federal watchlists" and that "[t]his letter constitutes our final agency decision" or "no changes or corrections are warranted at this time" and the decision will be final in thirty days unless the individual files an administrative appeal within that time.[38] Information regarding whether the individual was or was not on any list, the reasons for such inclusion, or whether any corrections were made was not described.[39] Overall, individuals seeking to contest their possible inclusion on a watchlist faced the impossible task of proving they do not threaten aviation or national security, while also being uninformed as to the accusations against them.[40] The only move contesters maintained at that point was to pursue the remedies described in the letter: pursue an administrative appeal of the determination letter with TSA or seek judicial review

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Administration's No-Fly List and Selectee List). The TSC is a multi-level agency center that connects law enforcement communities and is administered by the FBI with support from the Department of Homeland Security, the Department of State, the Department of Defense and other entities in the intelligence community. The TSC was created post 9/11 "to consolidate terrorist watchlists and provide 24-hour-a-day, seven-day-a-week operational support for thousands of federal screeners across and around the world." *Terrorist Screening Center*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Terrorist_Screening_Center (last modified Aug. 11, 2008).

35. Sinnar, *supra* note 33, at 4.

36. *Id.*

37. *See id.* (waiting for an undisclosed amount of time).

38. *See* Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted Noncustodial Prevention*, 99 CORNELL L. REV. 327, 346 (2014) (citing Latif v. Holder, 686 F.3d 1122, 1126 (9th Cir. 2012)).

39. *Id.*

40. *See Transp. Sec. Intelligence Serv.*, *supra* note 6, at 4 (stating the criteria for inclusion on the No-Fly List: a "person who is a known or suspected threat to aviation.").

in the United States Courts of Appeals pursuant to 49 U.S.C. § 46110.[41]

B. District Courts Dismiss No-Fly List Cases in a Post 9/11 World

The American Civil Liberties Union (ACLU) filed the first nationwide challenge to the No-Fly List and its secret procedures.[42] On January 7, 2005, the United States District Court for the Western District of Washington decided *Green v. Transportation Security Administration*.[43] Airline passengers who had no links to terrorist activity but had names similar or identical to names on the No-Fly List brought action against the TSA alleging that TSA's actions in maintenance, management, and dissemination of the No-Fly List were unconstitutional.[44] The Plaintiffs challenged the watchlists with a broad constitutional Fifth Amendment right to due process argument.[45] The Plaintiffs also argued a Fourth Amendment claim against unreasonable searches and seizures when the Defendants administered and maintained the watchlists.[46] The Defendants moved to dismiss

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41. *See* 49 U.S.C. § 46110(a) (2003) (discussing the procedure for an individual making disclosures when disclosing substantial interests). The code articulates:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation. . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

Id.

42. *See ACLU Files First Nationwide Challenge to the No Fly List*, ACLU, https://aclu-wa.org/news/aclu-files-first-nationwide-challenge-no-fly-list. (last visited Mar. 12, 2016) (filing in federal district court in Seattle, Washington and asking the court to declare that the No-Fly List violates airline passengers' Constitutional rights under the Fourth and Fifth Amendments).

43. 351 F.Supp.2d 1119 (W.D. Wash. 2005) (considering whether the TSA's actions in adoption, maintenance, and dissemination of the No-Fly List were unconstitutional).

44. *See id.* at 1122 (following that TSA filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim).

45. *See id.* (alleging that Defendants have "deprive[d] Plaintiffs of liberty and property interests protected by the Fifth Amendment.").

46. *See id.* (arguing that Defendants have "subjected [Plaintiffs] to unreasonable searches and seizures in violation of the Fourth Amendment" and

Plaintiffs' complaint, contending that the Security Directives were final orders issued by the TSA and that any action for judicial review must be filed with the court of appeals.[47] The Plaintiffs sought a remedy, but the district court dismissed the claims for lack of jurisdiction and failure to state a claim upon which relief could be granted.[48] The court held that the TSA directives establishing a No-Fly or Selectee List for enhanced screening were "orders" over which the court of appeals had exclusive jurisdiction, that procedures administered by the TSA to allow passengers with names identical or similar to names on the No-Fly List to be cleared were not "orders," and therefore, the district court had jurisdiction to consider passengers' constitutional claims relative to those procedures.[49] But, the court then held that the passengers' due process and Fourth Amendment challenges were "inescapably intertwined" with a review of the procedures and merits surrounding the adoption and maintenance of the No-Fly List and the security and screening procedures mandated by the TSA and therefore the district court ultimately lacked jurisdiction to consider these constitutional challenges.[50]

This was the first court challenge on the use of government watchlists.[51] Although the district court determined it lacked jurisdiction to hear the overall claims, it initially decided it could hear the claims regarding the constitutionality of the procedures

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seeking to require Defendants to remedy the due process and Fourth Amendment defects of the No-Fly List).

47. *See id.* at 1121 (discussing how the TSA established Security Directives relating to two groups of individuals—No-Fly List and Selectee List individuals—who have been assessed to pose a risk to aviation, procedures to be followed, and security measures to be taken by air carriers when these individuals seek to board).

48. *Id.* at 1130.

49. Green v. Transp. Sec. Admin., 351 F.Supp.2d 1119, 1121–30 (W.D. Wash. 2005).

50. *See id.* at 1127 ("Plaintiffs' challenge to the adoption, maintenance, and dissemination of the No Fly List under the Fourth and Fifth Amendments is inescapably intertwined with a review of the procedures and merits surrounding the adoption of the No Fly List.").

51. *See* Yousri Omar, Note, *Plane Harassment: The Transportation Security Administration's Indifference to the Constitution in Administering the Government Watch Lists*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 259, 274 (2006) (describing the development of aviation security and the due process issues with the old TSA redress procedures).

administered by TSA. Applying the "inescapable intertwinement" doctrine—under which a special review statute applies not only to *orders* by a covered agency that are challenged, but to *claims* inescapably intertwined with an order by a covered agency[52]—the court tied the claims it could hear with the claims it could not. In the short aftermath of the 9/11 attacks, the district court was uncomfortable analyzing the constitutionality of the No-Fly List as it attempted to navigate the No-Fly List jurisdictional statute[53] at a time when national security was one of the country's major concerns.

III. The District Courts Gain Jurisdiction and the New Redress Procedures Are Created

A. Ibrahim v. Department of Homeland Security

United States district courts dismissed No-Fly List cases and challenges to the redress procedures for lack of jurisdiction in the early years following 9/11.[54] The decision in *Green v. Transportation Security Administration* in 2005 provided a model for courts to determine that 49 U.S.C. § 46110(a) barred federal district courts from hearing cases filing suit against the TSA because Congress granted exclusive jurisdiction over such challenges to the court of appeals.[55]

Three years later in 2008, however, the Ninth Circuit concluded that the special jurisdiction statute that had previously been understood to prevent passengers from gaining access to

52. *See* Mokdad v. Lynch, 804 F.3d 807, 810 (6th Cir. 2015) (describing that doctrine of "inescapable intertwinement.").

53. 49 U.S.C. § 46110.

54. *See* Omar, *supra* note 51, at 276 (discussing the *Green* decision and how the court did not entertain the Fifth Amendment due process claim and the Fourth Amendment right to be free from unreasonable searches and seizures claim due to jurisdictional issues).

55. *See* Green v. Transp. Sec. Admin., 351 F.Supp. 2d 1119, 1130 (W.D. Wash. 2005) (determining that the TSA's Security Directives that established the No-Fly and Selectee lists were "orders" over which the Court of Appeals had exclusive jurisdiction, therefore only Plaintiffs' Fifth Amendment Due Process claim to procedures after the No-Fly List had been promulgated was able to proceed).

federal trial courts had been misinterpreted.[56] In *Ibrahim v. Department of Homeland Security*, the Court read § 46110(a) in a new way, concluding that would-be passengers could ask federal district courts to decide whether their likely inclusion in the nation's secret antiterrorism database violated their rights.[57]

Ibrahim was a Malaysian citizen who was in the United States from 2001 to 2005 on a valid student visa and was studying to obtain her doctoral degree at Stanford University.[58] She neither had a criminal record nor any link to terrorists.[59] She traveled to Kuala Lumpur, Malaysia to present her doctoral research but was stopped at the airport and could not board because the airline discovered she was on the No-Fly List.[60] After being handcuffed and detained for approximately two hours, the FBI requested her release.[61] Ibrahim was informed that her name would no longer be on the No-Fly List, but when she attempted to board the next day she was again informed she was on the No-Fly List.[62] She eventually boarded after enhanced screenings along the way.[63] It

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56. *See* Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250, 1255 (9th Cir. 2008) (holding that district court was not divested of subject matter jurisdiction over alien's claim for injunction directing removal of her name from the No-Fly List).

57. *See id.* (stating that the TSC's placement of alien on No-Fly List was "order" of agency not named in statute conferring exclusive jurisdiction on federal courts of appeals for review of specified agencies' orders).

58. *See* Brief for Ctr. for Constitutional Rights as Amicus Curiae Supporting Plaintiff-Appellant, Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250 (9th Cir. 2008) (No. 10-15873), http://ccrjustice.org/home/what-we-do/our-cases/ibrahim-v-department-homeland-security-amicus (last visited Dec. 11, 2016) (explaining that Ibrahim's status as a doctoral student and the consequences of her being on the No-Fly List) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

59. *See id.* (stating that she was included on the No-Fly List based on alleged secret evidence).

60. *See Ibrahim*, 538 F.3d at 1253 (stating that Ibrahim was handcuffed in front of her fourteen-year-old daughter and then taken to the police station without explanation).

61. *See id.* (explaining that an employee answered the phone at the Transportation Security Intelligence Service's office and instructed police to detain Ibrahim for further questioning and to call the FBI, who released her after two hours).

62. *See* Ibrahim v. Dep't of Homeland Sec., No. C 06–00545, 2009 WL 2246194, at *3 (N.D. Cal. July 27, 2009) (mentioning that exactly what occurred was not revealed).

63. *See id.* (saying she was allowed to fly to Kuala Lumpur from San

was discovered that Ibrahim was placed on the No-Fly List in November 2004 as a result of human error.[64] Despite being taken off of the No-Fly List shortly after her initial listing and the government determining that she had "no nexus to terrorism," she remained in the TSDB until September 18, 2006.[65] Shortly after her removal from the TSDB, Ibrahim was placed back in the TSDB before once again being removed at the end of May 2007.[66] On October 20, 2009, however, Ibrahim was again nominated to the TSDB.[67] She was not, however, placed on the No-Fly List.[68] Ibrahim instead faced various denials of her visa application and even her daughter, a United States citizen, was not permitted to board a flight to the United States because her name was in a section of the TSDB in which traveler admissibility to enter the United States is evaluated.[69] Ibrahim filed suit against the DHS, TSA, TSC, FBI, the Federal Aviation Administration (FAA), and individuals associated with these entities.[70]

The government argued that Ibrahim's challenge should be dismissed because TSA orders could only be heard by the court of appeals under the statute.[71] The Ninth Circuit concluded that the

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Francisco, but at the San Francisco airport and at every stopover, she was publicly subjected to enhanced searches before boarding any flights).

64. *See* Latif v. Holder, 28 F.Supp.3d 1134, 1155 (D. Or. 2014) (evaluating *Ibrahim* and the ways the Court applied the *Mathews* factors to Ibrahim's procedural due process challenge).

65. *See id.* (quoting *Ibrahim.*, No. C 06–00545 at 16–18).

66. *See id.* (explaining that Ibrahim's student visa had been revoked in January 2005 because of "law enforcement interest in her as a *potential* terrorist.").

67. *See id.* at 1155, 1141 (describing that TSC defines its reasonable-suspicion standard as requiring "articulable facts, which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be, or has engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.").

68. *See id.* at 1155 (discussing how Ibrahim applied for a visa in 2009 after supposedly not being placed on the No-Fly List again, but receiving a letter with the word "Terrorist" informing her of her visa denial).

69. *See id.* at 1155–56 (clarifying that United States Customs and Border Control discovered the error within six minutes and corrected it the next day, removing Ibrahim's daughter from the TSDB).

70. *See* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 991 (9th Cir. 2012) (reversing the district court denial of injunctive relief and remanding for further proceedings).

71. *See* Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250, 1255 (9th Cir.

district court had jurisdiction over Ibrahim's *substantive* challenge because, while § 46110 grants exclusive jurisdiction to the federal courts of appeals to review the *orders* of a number of agencies, including TSA, DHS, and the FAA, the statute did not include the TSC or FBI as one of its covered agencies.[72] The district court could therefore maintain federal question jurisdiction over substantive challenges to the inclusion of one's name on the No-Fly List since TSC—an agency not included in the statute—"actually compiled the list of names ultimately placed" on the List.[73]

But, unlike the substantive challenge, the Plaintiff's' *procedural* due process challenge required at least some review of TSA orders such as the policies and procedures implementing DHS TRIP and, therefore, § 46110 applied.[74] Essentially, if Plaintiffs were entitled to judicial relief, any remedy must involve both TSA and TSC.[75] The court therefore held that § 46110(a) requires all challenges to TSA's policies and procedures implementing the No-Fly and other lists to be filed directly in the court of appeals.[76] Unlike the procedural due process challenge, however, the substantive challenge remained open for district court analysis.

Seven years after the atrocities of 9/11 district courts could open their doors to substantive challenges of TSC and FBI orders and substantive challenges to List placement.[77] Some believed that *Ibrahim* was correctly decided and that courts across the country should adopt the Ninth Circuit's analysis to ensure the protection of rights from infringement by administrative agencies.[78] The

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2008) (arguing that the TSA "order" to place Ibrahim's name on the No-Fly List was inescapably intertwined with that agency's orders and is therefore still reviewable under § 46110).

72. *See id.* at 1255 (stating that the TSC is not part of the TSA or any other agency named in § 46110, but is a part of the FBI).

73. *See id.* (basing this assessment on undisputed facts).

74. *See id.* at 1256 (discussing how the statute provides jurisdiction to review an "order"—it says nothing about "intertwining," escapable or otherwise—with regards to the TSC's order to place Ibrahim on the No-Fly List).

75. *See id.* at 1257 (including TSA orders as reviewable under § 46110).

76. *See id.* (concluding that § 46110 stripped the district court of the jurisdiction it would otherwise have had over Ibrahim's APA claim regarding the government's policies and procedures implementing the No-Fly List).

77. *See generally id*. at 1257 *(*concluding that § 46110 did not divest district court of jurisdiction over alien's claim for injunction directing removal of her name from the No-Fly List).

78. *See generally* Shaina N. Elias, *Challenges to Inclusion on the No Fly List*

problem remained relevant because redress procedures for one's placement on the No-Fly List were inadequate and challenges continued to arise from annoyed false-positives and frustrated travelers.[79]

B. Latif v. Holder

Eleven years after 9/11, the Ninth Circuit decided *Latif v. Holder* and interpreted the jurisdictional statute in a new light. The Court held that the statute providing for the court of appeals' exclusive jurisdiction over challenges to certain agencies' aviation-related orders did not divest the United States District Court for the District of Oregon of jurisdiction over plaintiffs' substantive due-process challenge or over their procedural due-process challenge.[80] Once remanded back to the district court in 2013, the court heard oral argument on the parties' motions and issued an Opinion and Order granting in part Plaintiffs' Cross-Motion, denying in part Defendants' Motion, and deferring ruling on the remaining portions of the pending motions to permit additional development of the factual record and supplemental briefing.[81] The district court concluded that the Plaintiffs established the first factor under the Supreme Court's *Mathews v. Eldridge* test because they had protected liberty interests in their rights to travel internationally by air and had rights to be free from false governmental stigmatization that were affected by their inclusion on the No-Fly List.[82] However, the court found the record not

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Should Fly in District Court: Considering the Jurisdictional Implications of Administrative Agency Structure, 77 GEO. WASH. L. REV. 1015 (2009).

79. *See* Zoe Mintz, *No Fly List: The Mysterious Document That Can Leave You Grounded for Life*, INT'L BUS. TIMES (June 25, 2014, 3:37 PM), http://www.ibtimes.com/no-fly-list-mysterious-document-can-leave-you-grounded-life-1611756 (discussing how a "false-positive" is a passenger not on the No-Fly List who has a name that matches or is similar to a name on the List and often faces hardship at the airport) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

80. *See* Latif v. Holder, 686 F. 3d 1122, 1130 (9th Cir. 2012) (rejecting Defendant's argument that the claims should be dismissed on grounds that TSA was an indispensable party that could not be joined).

81. *See* Latif v. Holder, 28 F.Supp.3d 1134, 1139 (D. Or. 2014) (denying Defendants' motion and granting Plaintiffs' motion).

82. *See id.* at 1139–60 (analyzing Mathews v. Eldridge, 424 U.S. 319 (1976),

sufficiently developed to balance the rest of the *Mathews* analysis.[83] It could not balance Plaintiffs' protected liberty interests with the Defendants' procedural protections and government interests at stake at that time.[84]

The court again took the motions under advisement in March 2014.[85] The district court now went far enough to determine that the DHS's existing procedures to contest one's placement on the list were "wholly ineffective" and ordered the government to fashion new, constitutionally adequate procedures.[86]

1. The District Court of Oregon's Mathews v. Eldridge *Analysis in the No-Fly List Context*

Thirteen United States citizens, including four United States military veterans and legal permanent residents barred from flying, brought this ACLU suit in the District of Oregon.[87] The *Latif* plaintiffs alleged that they were denied redress after they were not allowed to board airline flights to or from the United States or over United States airspace because they had been placed on the No-Fly List, in violation of their procedural due process rights under the Fifth Amendment.[88] Because they had not been given any post-deprivation notice or any meaningful opportunity to contest their inclusion, the Plaintiffs argued that they had not

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which challenged the constitutional validity of administrative procedures for establishing existence of a continuing disability, and found that the recipient was entitled to Social Security Disability benefits after he was notified his benefits would terminate without an opportunity for a hearing).

83. *See id.* at 1139 (including the utility of additional safeguards on the Defendants' side of the balancing factors).

84. *Id.*

85. *See id.* (stating that court heard oral argument on March 17, 2014).

86. *See id.* at 1161 (stating that the procedures fall short to be afforded notice "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present objections.").

87. *See id.* at 1140 (claiming that federal and/or local government officials told some of the plaintiffs that they were on the No-Fly List).

88. *See id.* (stating that each plaintiff submitted applications for redress through DHS TRIP and did not receive explanations or information as to whether they would be permitted to fly in the future).

been provided due process.[89] They also alleged that the government's actions violated Sections 706(2)(A) and 706(2)(B) of the Administrative Procedure Act.[90]

The court underscored that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[91] Analyzing the *Mathews v. Eldridge* three-factor test to evaluate the sufficiency of due process procedural protections, the court looked at (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[92]

The first prong of *Mathews* requires that the official action affect a private interest.[93] To analyze this prong, courts typically look to see if an individual has been deprived of property or liberty.[94] The right to travel has already been deemed as part of the "liberty" that a citizen cannot be deprived of without due process of law.[95] Specifically, the Supreme Court in *Saenz v. Roe* has declared that the right to travel freely using highways and other instrumentalities of interstate commerce is a protected

89. *See id.* (explaining how Plaintiffs alleged that Defendants violated their Fifth Amendment right to procedural due process and that Defendants' actions have been arbitrary and capricious, constituting "unlawful agency action" in violation of the APA).

90. *See id.* at 1163 (concluding that the DHS TRIP process violates § 706(2)(A) and § 706(2)(B) of the APA).

91. *See id.* at 1147 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

92. *See Mathews*, 424 U.S. at 335 (laying out the three-part test to analyze due process considerations).

93. *See id.* ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires. . . . First, the private interest [that] will be affected by the official action.").

94. *See id.* at 332 (stating that procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Fifth or Fourteenth Amendments).

95. *See* Dan Lowe, *The Flap with No Fly—Does the No Fly List Violate Privacy and Due Process Constitutional Protections?*, 92 U. DET. MERCY L. REV. 157, 170 (2015) (delving further into the Fourth Amendment and Privacy Act issues surrounding the No-Fly List redress procedures).

liberty.[96] The issue in *Latif v. Holder* was whether the taking of one's freedom to travel *internationally by aircraft* constitutes the deprivation of liberty without due process of law.[97] The Oregon district court answered this question and determined that the right to international travel is a part of the liberty of which a citizen cannot be deprived without due process of law.[98] The Defendants argued that there was no constitutional right to travel by airplane or the most convenient form of travel, and that Plaintiffs' rights to travel were not constitutionally burdened because the No-Fly List only prohibits travel by commercial aviation.[99] Case law on the right to international travel demonstrates a clear view that there is no absolute right to travel internationally afforded to United States citizens in the Constitution, but it does not mean due process can be ignored when denying an individual's ability to travel abroad.[100]

Courts have treated the right to travel internationally as a luxury until recently, and courts like the *Latif* court now view "air transport in modern times as practically the only form of transportation, travel by ship being prohibitively expensive."[101]

Today, denial of the right to travel will likely lead to loss of income and loss of employment in an evolving age of global markets and inter-country trade.[102] As it has been established that

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96. *See* Saenz v. Roe, 526 U.S. 489, 500–01 (1999) (determining that the right to travel embraces the right to enter and leave another state, the right to be treated as a welcome visitor while temporarily present in another State, and the right to be treated like other citizens of that State).

97. *See* Latif v. Holder, 28 F.Supp.3d 1134, 1148 (D. Or. 2014) (disagreeing with the Defendants' contention that international air travel is a mere convenience in light of the realities of the modern world).

98. *See id.* (citing Kent v. Dulles, 357 U.S. 116, 125 (1958) and concluding that Plaintiffs have a constitutionally-protected liberty interest in traveling internationally by air).

99. *See id.* (noting that the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, but clarifying that air transport in these modern times is practically the only form of transportation because traveling by ship is prohibitively expensive).

100. *See* Lowe, *supra* note 95, at 174 ("[I]nternational travel should be evaluated from the same perspective that domestic travel is viewed.").

101. *See* Latif v. Holder, 969 F.Supp.2d 1293, 1303 (D. Or. 2013) (stating that needs to travel oversees quickly because of the birth of a child, the death of a loved one, a business opportunity, or a religious obligation were ignored by the Defendants' arguments).

102. *See* Lowe, *supra* note 95, at 175 ("By placing a person's name on the No-

airline passengers have both a fundamental liberty interest in interstate travel,[103] as well as a property interest in their airline tickets, the contractual relationship that creates a property interest and statutory entitlement[104] to air travel means that the government cannot deprive such travel without due process.[105] The right to travel internationally has become viewed as a fundamental right that merits strong due process protections.[106]

The second *Mathews* factor analyzes the risk of erroneous deprivation and the probable value, if any, of additional or substitute procedural safeguards.[107] The placement of individuals who never did, or no longer, pose a threat to national security creates oversized lists.[108] The size of these lists coupled with the amount of those innocent and unable to correct their situation due to insufficient redress procedures poses a high risk of erroneous deprivation on the ability to fly.[109]

The third factor the court examined in *Latif* was the government's interest, including fiscal and administrative burdens

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Fly List, the government is effectively denying one the right to travel.").

103. *See* Omar, *supra* note 51, at 279 (citing United States v. Guest, 383 U.S. 745, 757–58 (1966) and Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), recognizing the right to travel to be a fundamental right under the Constitution).

104. *See id.* (citing 49 U.S.C. § 40103(a)(2) (2005), a citizen of the United States has a public right of transit through the navigable airspace).

105. *See id.* at 280 (discussing how an airline passenger purchases a ticket and therefore enters into a contractual relationship with an airline in which a seat is guaranteed in return for adequate consideration in the form of money).

106. *See* Latif v. Holder, 28 F.Supp.3d 1134, 1149 (D. Or. 2014) ("Accordingly, the Court concludes on this record that Plaintiffs have a constitutionally-protected liberty interest in traveling internationally by air, which is affected by being placed on the List."). Judge Brown discussed how inclusion on the No-Fly List severely restricted the Plaintiffs' ability to travel internationally and that realistic implications of being on the No-Fly List are potentially far reaching, rejecting the government's argument that that No-Fly List placement was merely a restriction on the most convenient means of international travel. *Id.*

107. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (listing the second prong of the three-part *Mathews* test).

108. *See Latif*, 28 F.Supp.3d at 1152 (analyzing the second prong against the risks that travelers will be placed on the No-Fly List under Defendants' procedures despite not having a connection to terrorism or terrorist activities).

109. *See id.* at 1153 (concluding that judicial review provides an independent examination but does little to cure the risk of error because the review is based on a one-sided and potentially insufficient record that the TSC relied on in its listing decision).

that may result from additional requirements.[110] The Plaintiffs argued that the government's interest was not sufficient[111] and the Defendants put forward their national security arguments.[112]

The government faces difficulty with these national security arguments because of issues with inaccuracy and secrecy in the nature of the Federal Watch Lists themselves.[113] Accompanying these issues is the alarming estimated amount of people on the No-Fly List. TSA has only confirmed "tens of thousands of names are on these lists."[114] Many individuals are placed on the No-Fly or Selectee Lists because they share a similar name to someone placed on the List.[115] The risk of erroneous deprivation is extremely high for those with Arabic or Islamic sounding names, as their names require translations from a language other than English and the translations often produce many variations of the same name.[116] Those who are placed on the List or have a name similar to someone on the List can do little to correct their situation.[117] Enhanced screenings, time delays at airports, and additional scrutiny at airports face those individuals placed on the List and those who choose to rectify the situation experience difficulty for an undisclosed amount of time trying to get on the

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110. *See id.* at 1154 (stating that the government's interest in combating terrorism is an urgent objective of the highest order).

111. *See id.* (disagreeing with the Plaintiffs and weighing the third *Mathews* factor heavily in Defendants' favor).

112. *See id.* (noting that the United States enjoys a privilege in classified information affecting national security so strong that a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality).

113. *See* Lowe, *supra* note 95, at 160 (explaining how the selection criteria for both TSDB subgroups, the No-Fly and Selectee Lists, are kept secret).

114. *See id.* at 161 (stating that the exact number of people on the No-Fly List constantly fluctuates).

115. *See id.* at 177 (stating that individuals whose names are similar to or the same as a name on the List are at risk to be excluded or delayed any time they attempt to travel by air).

116. *See* Omar, *supra* note 51, at 282 (emphasizing that the No-Fly List not only identifies and stops passengers whose names appear on the List, but it also flags passengers whose names are similar to those on the List).

117. *See id.* at 283 (describing how people falsely accused and placed on the List face scrutiny at every airport they travel from and then do not receive adequate procedures from the TSA to ensure that they have the opportunity to be heard in a meaningful manner).

"cleared list."[118] In light of the *Mathews* test, the *Latif* court ordered that the government revise the No-Fly List redress procedures, deeming those procedures unconstitutional.

C. Mokdad v. Lynch

In 2015, the Sixth Circuit interpreted § 46110 to authorize the district court to hear No-Fly List cases.[119] On October 26, 2015, the Sixth Circuit issued an opinion taking a stance on an issue of first impression involving subject matter jurisdiction.[120] In *Mokdad v. Lynch*, on appeal from the Eastern District of Michigan, Saeb Mokdad challenged his placement on the No-Fly List and challenged the adequacy of the procedures to contest his inclusion.[121] This suit followed after Mokdad applied for redress on three occasions through DHS TRIP.[122] Mokdad is a naturalized United States citizen who was denied boarding on commercial airline flights between the United States and his native country of Lebanon on at least three occasions.[123] After receiving a letter on November 19, 2012 that neither confirmed nor denied his placement on the No-Fly List, he filed suit in district court for a violation of his Fifth Amendment rights and for a violation of the Administrative Procedure Act.[124] The letter read, "[i]n response to

118. *See id.* at 270 (describing the effectiveness of being placed on the so-called "cleared list" as extremely uncertain because no formal procedures for permanent removal from the watch lists are in place).

119. *See* Mokdad v. Lynch, 804 F.3d 807, 808 (6th Cir. 2015) (holding that the district court has subject-matter jurisdiction over the Plaintiff's direct challenge to his placement on the No-Fly List).

120. *See* Justin Jennewine, *Divided Sixth Circuit Addresses "No Fly" List*, SIXTH CIRCUIT APPELLATE BLOG (Oct. 26, 2015), http://www.sixthcircuitappellate blog.com/recent-cases/divided-sixth-circuit-addresses-no-fly-list (explaining that the Sixth Circuit determined that they did not have exclusive jurisdiction over a challenge to No-Fly List placement) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

121. *See Mokdad*, 804 F.3d at 808 (stating that Mokdad alleged that he has been placed on the No-Fly List).

122. *See id.* (applying for redress under DHS TRIP after being denied boarding at least three times).

123. *Id.*

124. *See id.* (noting that Mokdad did not file an administrative appeal with TSA or a petition with the Court of Appeals but instead filed a complaint in the United States District Court for the Eastern District of Michigan).

[your] request, we have conducted a review of any applicable records in consultation with other federal agencies, as appropriate. It has been determined that no changes or corrections are warranted at this time."[125]

Mokdad's claim against his placement included his argument that § 46110 did not require special review by the court of appeals exclusively because the TSC is not on the list of agencies included in the statute.[126] The government sought dismissal based on the "inescapable intertwinement" doctrine.[127] Essentially, because the TSC's orders were so intertwined with TSA orders due to the nature of their relationship in redress procedures, the argument followed that TSC was therefore covered under the statute and subject to exclusive jurisdiction in the court of appeals because the TSA is an included agency.[128] The doctrine has been interpreted to apply to "challenges to *orders* by a covered agency [and] to *claims* inescapably intertwined with an order by a covered agency," and *not* interpreted to apply to a direct challenge of "one agency's order inescapably intertwined with another agency's order." [129]

The Sixth Circuit disagreed with the district court's earlier dismissal.[130] It determined that accepting the district court's reading "would run the risk of inadvertently expanding the number and range of agency orders that might fall under exclusive-jurisdiction provisions that Congress did not intend to sweep so broadly."[131] The Sixth Circuit interpreted the statute to apply only to *claims* made by the agency not included in the statute

125. *See id.* (citing Compl. Ex. 2, 3, ECF No. 6-2, informing Mokdad that if he did not file a request for administrative appeal with the TSA within thirty days, the DHS TRIP determination would become final).

126. *See id.* at 810 (arguing that he sought to challenge his underlying TSC placement on the No-Fly List and not TSA's redress letter issued to him).

127. *See id.* at 812 (explaining that the inescapable intertwinement doctrine means that statutes that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims "inescapably intertwined" with review of such orders).

128. *See id.* (rejecting this argument and finding this to be a misreading of the doctrine).

129. *See id.* at 810 (citing Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250, 1255 (9th Cir. 2008)).

130. *See id.* at 814 (stating that the government's argument would result in an unprecedented departure from the doctrine of inescapable intertwinement as applied in other circuits).

131. *Id.* at 815.

and could not be extended to *orders* made by the agency not included in the statute.[132] Here, the case involved a TSC order to place Mokdad on the No-Fly List so the statute was not applicable.[133] The district court therefore had subject-matter jurisdiction over the issues and the Sixth Circuit would not maintain exclusive jurisdiction.[134] The Court also dismissed Plaintiff's claims without prejudice because he failed to join the TSA as a defendant regarding the redress challenge and remanded the case back to the district court for further proceedings.[135] The Court chose not to analyze whether the district court would have jurisdiction over Mokdad's claims challenging the adequacy of the redress process—including any constitutional claims—if he were to file a new suit naming TSA as a defendant,[136] therefore leaving the district courtroom door open for this question regarding the redress procedures specifically.

Issues with the government's redress procedures remain more pressing than ever as courts across the country have begun to accept No-Fly List cases into their dockets and keep courtroom doors open for redress constitutionality consideration.[137] What was once an acceptable interpretation of 49 U.S.C. § 46110 in an immediate post-9/11 world—requiring district court dismissal of No-Fly List cases because these courts lacked jurisdiction—is becoming an increasingly former one.[138] The jurisdictional statute

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132. *See id.* at 813–14 (citing the Second Circuit and the Fifth Circuit).

133. *See id.* at 812 (noting that Mokdad brought a direct challenge to his placement by TSC on the No-Fly List and was therefore challenging a TSC order, not a TSA order).

134. *See id.* at 815 (concluding that the district court has subject matter jurisdiction under 28 U.S.C. § 1331 that has not been displaced by 49 U.S.C. § 46110).

135. *See id.* at 811 (explaining that Mokdad's challenge of the adequacy of the redress procedures amount to a challenge of a TSA order and therefore TSA is a required party).

136. *See id.* at 812 (noting that § 46110 would come into play if that question was analyzed).

137. *See generally* Mokdad v. Lynch, 804 F.3d 807 (6th Cir. 2015); Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015); Latif v. Holder, 28 F.Supp.3d 1134 (D. Or. 2014); Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250 (9th Cir. 2008).

138. *See* Green v. Transp. Sec. Admin., 351 F.Supp.2d 1119, 1126 (W.D. Wash. 2005) (concluding the challenge to TSA adoption, maintenance, and dissemination of the No-Fly List were TSA orders, and thus the court of appeals

can now be read to allow district courts to question the constitutionality of the DHS redress procedures desperately in further need of change and to consider fundamental due process violations in need of judicial scrutiny.[139]

D. The New Procedures

Under the newly revised procedures established in the aftermath of *Latif v. Holder*, individuals who are denied boarding and apply for redress through DHS TRIP will now receive a letter stating whether or not that individual is listed on the No-Fly List, with the option to receive and/or submit additional information.[140] If the individual elects to receive additional information, DHS TRIP will provide a second and more detailed letter identifying the specific criterion under which the individual has been placed on the No-Fly List.[141] An unclassified summary of information supporting the individual's No-Fly List status will be provided, taking into account the national security and law enforcement interests at stake.[142] The government admits that an unclassified summary may not be possible because the amount and type of information provided will vary on a case-by-case basis.[143] The second letter will also allow the individual to submit written responses and other materials so that the TSA Administrator can review such submissions and issue a final determination based on unclassified and classified information.[144] TSA will provide the

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had exclusive jurisdiction because they were intertwined with procedures and merits surrounding the adoption of the No-Fly List and security and screening procedures).

139. *See generally* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015) (leaving the door open for Plaintiff to apply through the revised procedures and sue Defendants again on the constitutionality of the revised procedures).

140. *See id.* at *25 (describing the current redress procedures and noting that Plaintiff Mohamed has never been charged with nor alleged to have committed a crime related to terrorism or otherwise).

141. *See id.* (distinguishing from when DHS TRIP neither confirmed nor denied placement on the No-Fly List).

142. *See id.* (evolving from when DHS TRIP did not provide any summary).

143. *See id.* (noting that the government explains that in some circumstances, an unclassified summary may not be possible).

144. *See id.* at *26 (including exhibits and other materials that the individual

individual with a final written determination containing the basis for the decision and notify the individual of the ability to seek further judicial review under 49 U.S.C. § 46110.[145]

IV. The "National Security" Blanket

A. Mohamed v. Holder *and "State Secrets"*

The installation of new redress procedures will further welcome judicial scrutiny as people challenge the new procedures as unconstitutional. The flaws inherent in the new redress process coupled with the government's treatment of national security will make the No-Fly List a controversial topic in years to come.

The interest in No-Fly List cases may stem from the government's use of the "national security" argument.[146] In No-Fly List litigation, the government often argues that "state secrets" and national security interests prevent them from litigating a plaintiff's core claims because revealing classified information would endanger the nation.[147] This argument may be used to dismiss cases because the theory rests on the assumption that national security interests outweigh individual liberties.[148] The theory might have gained more ground in the immediate months and years following 9/11, but over fifteen years have passed since the tragic attack on American soil and the government maintains its strong position now as it did then: that individual civil liberties

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deems relevant).

145. *See id.* (determining that the court could not conclude that the newly revised procedures would provide a constitutionally adequate opportunity for Mohamed to have his status reviewed).

146. *See id.* at *24 (allowing the court to adjudicate whether Mohamed had a constitutionally adequate opportunity to contest his No-Fly List status without any information claimed by the government to be protected by the state secrets privilege, and leaving to door open for re-litigation once Mohamed applies through the newly revised procedures).

147. *See id.* at *3 (claiming that Plaintiff's procedural due process claims should be dismissed on the basis of the state secrets privilege).

148. *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (stating that a court is obliged to honor the Executive's assertion of the state secrets privilege if it is satisfied and if there is reasonable danger that compulsion of the evidence will expose military matters which will harm national security).

must often be sacrificed for national security.[149] Now, however, more and more courts question this position.[150]

Take, for example, the United States District Court for the Eastern District of Virginia's treatment of the "state secrets" privilege in *Mohamed v. Holder*.[151] Plaintiff Gulet Mohamed, a United States citizen, challenged his placement on the No-Fly List after an American carrier denied him boarding on an international flight.[152] He is of Somali descent, and in 2009, at the age of sixteen, he temporarily left the United States to travel to Yemen, Somalia and Kuwait in order to meet family, study Arabic, and attend school.[153] On December 20, 2010, Kuwait authorities detained him at a deportation facility, during which time he alleged he was interrogated, beaten, and tortured.[154] Mohamed had never been charged with a crime of terrorism nor alleged to have committed any criminal offense.[155] FBI agents visited him twice at a deportation facility before Mohamed's family purchased a ticket for him to return to the United States at the suggestion of Kuwaiti officials.[156] Mohamed was again denied boarding.[157] On January 18, 2011, Mohamed filed suit against the heads of the DOJ, FBI, TSC, DHS, and the TSA.[158] On January 20, 2011, the Defendants advised the court that arrangements had been made for Mohamed

149. *See generally* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015) (arguing that Mohamed's entire claim should be dismissed and litigation prohibited because of state secrets and national security interests).

150. *See id.* at *2 (rejecting the government's use of the state secrets privilege here).

151. *See id.* (determining that there was no information protected from disclosure under the state secrets privilege that is necessary either for Mohamed to establish liability under his procedural due process claims or for the Defendants to establish an available defense to that claim).

152. *See id.* at *4 (listing the background of the case).

153. *Id.*

154. *Id.*

155. *See id.* at *1 (emphasizing that applying the No-Fly List to such an American citizen represents an unprecedented application of Executive Branch authority in the name of national security through secret administrative proceedings based on undisclosed information according to undisclosed criteria).

156. *See id.* at *4 (visiting him once on December 28, 2010 and again on January 12, 2011).

157. *Id.*

158. *See id.* at *5 (seeking emergency relief to return to the United States).

to return to the United States, and Mohamed returned to the United States on a commercial airliner on January 21, 2011.[159]

Echoing previous discussion, the Fourth Circuit Court of Appeals concluded that its exclusive jurisdiction pursuant to 49 U.S.C. § 49110 did not extend to claims and remedies against TSC—an agency not included in the statute—and then remanded the case for further proceedings to the district court.[160] The district court would host the battleground for this No-Fly List case, not the court of appeals.

The court questioned the information that must be made available to a United States citizen in order to provide that citizen with a constitutionally adequate opportunity to challenge his or her placement on the No-Fly List.[161] Mohamed claimed that he was denied a meaningful opportunity to challenge his inability to fly on a commercial aircraft in violation of his Fifth Amendment procedural due process rights.[162] His claim focused on the lack of notice provided him before and after his boarding prohibition and the lack of any meaningful opportunity to refute any information that was used to place him on the No-Fly List.[163] Mohamed essentially desired an opportunity to show that he posed no threat to commercial aviation.[164] In his claim, Mohamed depended on his liberty interests in traveling by air, being able to return to the United States after travelling abroad, and being free from false governmental stigmatization as a terrorist.[165]

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159. *See id.* (responding to Mohamed's request inter alia for emergency relief to return to the United States).

160. *See id.* at *6 (transferring earlier to the Fourth Circuit Court of Appeals on the grounds that the Fourth Circuit Court of Appeals had exclusive jurisdiction pursuant to 49 U.S.C. § 49110(a)).

161. *See id.* at *1–*2 ("The constitutional inquiry presents unsettled issues that are complicated in their resolution by the criteria used to compile the No-Fly List and the classified information that, of necessity, is used to determine whether a person satisfies that criteria.").

162. *See id.* at *2 (noting specifically his lack of notice of placement and lack of meaningful opportunity to refute placement).

163. *See id.* (arguing that he had no opportunity to refute any derogatory information specifically).

164. *See id.* (claiming that because he did not receive this opportunity, he suffered liberty deprivations).

165. *See id.* (claiming that he had no opportunity to refute any "derogatory" information specifically and this resulted in constitutional violations and liberty deprivations).

The government responded that DHS TRIP was constitutionally adequate and that any constitutional issues with that process were cured through revised review procedures and, therefore, Mohamed's procedural due process claims were moot.[166] In the alternative, the government submitted that Mohamed's procedural due process claims should nevertheless be dismissed on the basis of the state secrets privilege.[167] On May 28, 2014, the Defendants filed a motion to dismiss the case in its entirety based on their invocation of the state secrets privilege.[168] Because the government asserted the state secrets privilege, the court ordered the Defendants to submit for *ex parte, in camera* review the documents pertaining to the due process claims that they considered covered by the state secrets privilege and law enforcement privilege.[169]

On October 20, 2014, the court concluded that those documents did not prevent Mohamed from litigating his procedural due process claims and did not prevent the Defendants from defending against those claims.[170] The court would allow the Defendants to raise the state secrets privilege for specific documents later if the Defendants believed that they could not adequately defend their position using the specific documents during actual adjudication.[171] The Defendants took advantage of the opportunity and again attempted to invoke state secrets to dismiss Mohamed's procedural due process claim.[172] The court held a closed hearing on March 17, 2015 concerning the existence of state secrets and their relevance to the claims at hand.[173]

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166. *See id.* at *2–*3 (explaining that DHS TRIP is a review process by which a person denied boarding may request review of his status).

167. *See id.* at *3 (arguing litigation impossible because the information was sensitive).

168. *See id.* at *7 (facing rejection by Judge Anthony J. Trenga).

169. *See id.* (indicating that these documents are not available to the public).

170. *See id.* (stating that the court would consider documents in the specific context if the Defendants contended during actual adjudication that it could not adequately defend against such claims without the use of specific documents claimed to be protected under the state secrets privilege).

171. *Id.* at *8.

172. *See id.* (attempting to dismiss the procedural due process claim as an alternative grounds for their summary judgment motion).

173. *See id.* (providing the Defendants with the opportunity to provide and the court to consider additional information concerning the Defendants' claims

Judge Anthony J. Trenga decided the case and stated on the first page of his opinion that when the No-Fly List was applied to a United States citizen like Mohamed, the List represented "an unprecedented application of Executive Branch authority in the name of national security through secret administrative proceedings based on undisclosed information according to undisclosed criteria"[174]—the United States acknowledged this application.[175] The court concluded that DHS TRIP did not provide a constitutionally adequate opportunity to challenge one's denial of boarding at the time it existed when Mohamed was denied.[176] The court then concluded that there was no information protected from disclosure under the state secrets privilege that was necessary either for Mohamed to establish his procedural due process claims or for the Defendants to establish an available defense to that claim.[177] Finally, the court decided that it could not conclude as a matter of law whether the revised DHS TRIP process now available to Mohamed due to the change in redress procedures was constitutionally adequate.[178] Judge Trenga therefore left Mohamed an opportunity to challenge the revised redress process after requesting his status again via the new procedures.[179]

This opinion represents a recent example of a court taking on a No-Fly List case, interpreting a constitutional question on the redress procedures, keeping the door open for it to reevaluate the constitutionality of the *new* procedures, and setting the stage to address issues and flaws with an amended approach to individual due process.[180] Mohamed can now choose to pursue a review of his

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concerning the existence of state secrets and their relevance to the pending procedural due process claims).

174. *See id.* at *1 (mentioning the government's concession to the statement regarding application of Executive Branch authority to this individual as unprecedented in the name of national security).

175. *See id.* (conceding Judge Trenga's belief in this unprecedented application).

176. *See id.* (reinstating the belief that the old procedures were constitutionally inadequate).

177. *See id.* (following Defendants' attempt to invoke the state secrets privilege to bar litigation).

178. *Id.*

179. *See id.* (concluding that the constitutionality of the revised procedures could not be analyzed before Mohamed applies through them).

180. *See id.* (determining that the present record cannot lead to conclusive

status under the revised procedures, wait for the TSA and TSC to respond, and compile an administrative record for his next suit.[181]

B. Core Issues

> The concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism . . . .
>
> -Justice Brennan in *Brown v. Glines* [182]

The new redress procedures and No-Fly List placement create a too flawed and too classified system for the state secrets doctrine and national security arguments to reasonably and constitutionally apply to individuals.[183] Government agencies may nominate individuals to be included in the TSDB, of which the No-Fly List is a subset.[184] The known standard for inclusion on the TSDB is "reasonable suspicion to establish that the individual is a known or suspected terrorist," also described as "known or appropriately suspected to be or to have engaged in conduct constituting, in preparation for, in aid of, or related to terrorism."[185] Sufficient identifying information and substantive

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answers on presented constitutional inquiries).

181. *See id.* at *28 (asking Mohamed to state in a report by August 7, 2015 whether he wishes to request review of his status under the revised DHS TRIP, and if so, whether this action should be stayed pending completion of that process).

182. *See* Brown v. Glines, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting) (reversing the Court of Appeals in this case where a United States Air Force Reserve officer brought suit based on allegations that the Air Force's regulations relating to the circulation of petitions on air force bases violated the First Amendment).

183. *See generally* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015) (determining that the state secrets doctrine did not apply in preventing the Plaintiffs' litigation).

184. *See* Lowe, *supra* note 95, at 160 (discussing how these subsets of the larger TSDB are administered by the TSC, which was created to consolidate terrorist watch lists and provide 24/7 operational support for thousands of federal screeners across the world).

185. *See Mohamed*, 2015 WL 4394958 at *3 (summarizing the TSDB and No-Fly List nomination processes).

criteria, known as "derogatory information," must support nomination.[186] That criteria and intelligence often remains classified.[187] To be placed on the No-Fly List specifically from the TSDB, the individual must be a "known or suspected threat to aviation."[188]

The List itself creates a high risk of error and mistake.[189] Those who are wrongly identified or believe they have been wrongly delayed or prohibited from boarding aircrafts face an extremely burdensome infringement on their right to travel.[190] The TSC's internal auditing process periodically determines the appropriateness of an individual's inclusion on the List, but the List continues to misidentify individuals and produce false-positives and false-negatives despite removing almost 3,700 names between July and October of 2004.[191] The DOJ found multiple deficiencies in the watchlist: errors of both over-inclusion and under-inclusion and 35% of the names on the list are characterized as "outdated."[192]

A common complaint against the No-Fly List involves error: people are often placed on the List because they have a name similar in sound or spelling to someone who probably should be on the List.[193] For example, *60 Minutes* brought together a group of

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186. *See id.* at *5 (noting that derogatory information is used to nominate individuals).

187. *See* Lowe, *supra* note 95, at 160 (explaining that selection criteria for the No-Fly List is kept secret).

188. *See Transp. Sec. Intelligence Serv., supra* note 6, at 4 (laying out the undisclosed criteria with the disclosed criteria).

189. *See* Lowe, *supra* note 95, at 186 (describing how one subgroup of individuals consists of individuals who have been mistakenly placed on the No-Fly List and who wish to have their names removed).

190. *See* Hu, *supra* note 12, at 1789 (noting that No-Fly List placement means prohibition on boarding aircraft).

191. *See id.* at 1791 (providing three examples of No-Fly List misidentification: individuals denied access to a commercial flight or repeatedly detained include a U.S. Marine, a U.S. Senator, and a U.S. House Representative).

192. *See id.* at 1791–92 (emphasizing the unreliability of the List).

193. *See* Sid Lipsey, *8 Ways You Can End Up On The No Fly List*, FOX NEWS (Sept. 9, 2015), http://www.foxnews.com/travel/2015/09/09/8-ways-can-end-up-on-no-fly-list/ (providing an example where one man was placed on the No-Fly List because he shared a name with an Irish Republican Army operative who was active in the 1960s and 1970s, which also landed his son on the List who was not even born during the operative's heyday) (on file with the Washington and Lee

twelve people named Robert Johnson in 2007 who experienced problems flying, likely because a man named Robert Johnson had been convicted of plotting to bomb a Hindu temple and movie theatre in Toronto.[194] The man the government was looking for was a 62-year-old black man who was convicted, served twelve years, and was then deported to Trinidad.[195] Unfortunately, airline ticket agents currently do not have any of that crucial identifying information on their computer screens, apart from a name, suggesting further flaws at the enforcement level of the No-Fly List.[196] Incorrect and mistaken placements continue to occur even after Congress directed the DHS to establish a timely and fair process for mistaken and wrongly-included individuals after 9/11.[197]

A redress process is questionable when secrets can be found at every turn.[198] In a closed session, the United States District Court for the Eastern District of Virginia in *Mohamed* issued an order identifying all the issues to be discussed in closed session after the government raised a "state secrets" defense.[199] The issues the court heard in closed session are issues potentially essential to a United States citizen's case and defense. For example, the court ordered the government to discuss (1) how the under seal documents as to which the state secrets privilege was claimed precluded adjudication of the procedural due process claims without their use and disclosure; (2) how the Defendants applied the criteria for

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Journal of Civil Rights and Social Justice).

194. *See id.* (describing the No-Fly List as "America's Most Controversial List."); *see also Unlikely Terrorists On No Fly List*, CBS NEWS (Oct. 5, 2006), http://www.cbsnews.com/news/unlikely-terrorists-on-no-fly-list/2/ (describing in detail the "60 Minutes" report and interview of twelve Robert Johnsons) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

195. *See id.* at *2 (indicating that the other Robert Johnsons suffered humiliation because they were mistaken for this Robert Johnson).

196. *See id.* (suggesting that this information should be provided as a matter of common sense).

197. *See* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958, at *5, n.2 (E.D. Va. July 16, 2015) (describing limited Congressional authorization of the No-Fly List).

198. *See* Hu, *supra* note 12, at 1788 ("In recent years, litigation has forced the disclosure of information on what specific data ultimately supports a decision to place an individual on the No-Fly List.").

199. *See Mohamed*, 2015 WL 4394958, at *8, n.4 (identifying the issues to be discussed in closed session).

placement on the No-Fly List consistent with the restrictions listed in its publicly disclosed criteria; (3) any criteria other than those publicly disclosed for the purposes of placing the United States citizens on the No-Fly List; (4) how Defendants distinguished between United States citizens that are placed on the No-Fly List and those placed on the Selectee List and the need to have a level of security beyond those protections afforded through the Selectee List; (5) whether, and if so, how national security considerations make it impractical or undesirable to submit for *ex parte, in camera* judicial review and approval the placement of United States citizens on the No-Fly List, either before a citizen's placement on the No-Fly List or within a specific time period after placement on the No-Fly List; and (6) whether, and if so, how national security considerations make it impractical or otherwise undesirable for United States citizens who challenge their inability to board a commercial aircraft to receive information concerning their placement on the No-Fly List under procedures comparable to those employed in criminal matters under the Classified Information Procedures Act (CIPA); and (7) any other national security information that the Defendants believed was necessary for the court to consider in connection with its consideration of the procedural due process claims and any remedies that may be ordered with respect to any constitutional violations that the court may ultimately find.[200]

The answers to these questions were meant for closed session, and individuals are not currently privy to all the information crucial to their defense against List inclusion and deprivation of liberty. These questions and answers are imperative in analyzing the constitutionality of the newly revised No-Fly List procedures. If the government's answers remain secret and hence unavailable to the public deserving of explanation, the new procedures will likely face serious due process implications, especially if the government's actions unconstitutionally prevent an individual from defending herself.

200. *See id.* at *8–*9 (listing eight different issues for the court to consider, including additional information concerning the Defendants' claims concerning state secrets and relevance to the pending procedural due process claims).

C. Analyzing the Constitutionality of the Revised DHS TRIP

Judge Trenga's court order and his questions to the government suggest the importance and strength assigned to a United States citizen's liberty interests implicated by placement on the No-Fly List.[201] These matters also suggest, however, that the government's interest in protecting the safety of commercial aircraft is compelling and a balance must therefore be considered.[202] In the past, the government attempted to argue that United States persons have no constitutionally protected right to fly.[203] In August of 2013, the United States District Court of Oregon disagreed and held that constitutional rights are at stake when the government condemns Americans as suspected terrorists and bans them from international travel.[204]

The government also maintained that national security concerns meant that the United States could not confirm or deny whether people were on the No-Fly List— even though boarding prohibition at the airport would likely suggest No-Fly List placement—and that it could not provide reasons or a hearing before a neutral decision maker.[205] This firm stance clearly violates due process. Though individuals can now discover if they are in fact on the No-Fly List, it is still unclear what reasons, if any, will be provided to an individual under the revised procedures. The government's continuing refusal to provide proper due process in

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201. *See id.* at *10 (stating that No-Fly List placement has an inherent, substantial risk of erroneous deprivation, particularly with respect to a total exclusion through the No-Fly List as opposed to the Selectee List's heightened screening).

202. *Id.*

203. *See id.* at *11 (arguing that a traveler does not have a constitutional right to the most convenient mode of travel and characterizing Mohamed's liberty interest in international travel as "weak.").

204. *See* Nusrat Choudhury, *Victory! Federal Court Recognizes Constitutional Rights of Americans on the No Fly List*, ACLU (Aug. 29, 2013, 2:31 PM), https://www.aclu.org/blog/victory-federal-court-recognizes-consti tutional-rights-americans-no-fly-list (explaining the outcome of the *Latif* decision, an ACLU challenge to the No Fly List) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

205. *See id.* (asserting that this argument is absurd as a practical matter and violates due process as a constitutional matter).

the context of No-Fly List placement and redress violates the Constitution.[206]

1. Constitutional Rights Affected by No-Fly List Placement

The current redress procedures still carry an inherent, substantial risk of erroneous deprivation. Americans not only face deprivation of their due process rights with No-Fly List placement, but also face deprivation of other constitutional rights as years pass and No-Fly List redress remains inadequate.[207] For example, as a result of the of the tragic attack in San Bernardino, California, President Barack Obama urged Congress to ensure that people on the No-Fly List be prohibited from purchasing guns.[208] United States citizens chosen for the No-Fly List now face threats to their Second Amendment rights with simple placement.[209] Luckily, Congress defeated a proposal suggesting just that,[210] but the proposal of such a bill remains a horrifying nightmare for citizens unable to fight and address their potential erred placement on such a secretive watchlist.

Non-violent political activists issued complaints suggesting things they said in the past might have included them on the No-Fly List,[211] implicating First Amendment rights.[212] Former

206. *See id.* (resulting from *Latif* was the government's announcement that it would tell United States citizens and lawful permanent residents whether they are on the No-Fly List after placement, and possibly offer reasons, but no hearing is yet available).

207. *See* Lipsey, *supra* note 193 (discussing First Amendment implications from being placed on the No-Fly List).

208. *See* Hina Shamsi, *Until the No Fly List is Fixed, It Shouldn't Be Used to Restrict People's Freedoms,* ACLU (Dec. 7, 2015, 5:30 PM), https://www.aclu.org/blog/speak-freely/until-no-fly-list-fixed-it-shouldnt-be-used-restrict-peoples-freedoms (discussing President Obama's response to the San Bernardino attack, where 14 people were killed in a mass shooting and attempted bombing) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

209. *See id.* (proposing that people placed on the No-Fly List should be prohibited from purchasing guns).

210. *Id.*

211. *See* Lipsey, *supra* note 193 (indicating that something you said in the past can result in your No-Fly List placement).

212. *See* U.S. CONST. amend. I ("Congress shall make no law. . . abridging the freedom of speech, or of the press . . . and to petition the government for a redress

Princeton University Professor Walter Murphy was denied a boarding pass at Newark International Airport, suspecting that his high-profile lecture criticizing then-President Bush placed him on the No-Fly List.[213] Wade Hicks, the spouse of a Navy lieutenant, claimed that his comments about 9/11 placed him on the No-Fly List.[214] Whether these complaints hold truth or not, redress at that time would not have disclosed what evidence placed these individuals on the No-Fly List.[215] Under today's procedures, it is still questionable whether TSC would disclose this information.[216]

Government-led big data programs like the No-Fly List may implicate substantive due process issues regarding privacy interests as well.[217] Currently, however, the Supreme Court has raised but largely avoided answering the question of whether and how the Fourth Amendment might apply and protect individuals from government surveillance in the context of law enforcement investigation.[218] If these questions find answers, however, the No-Fly List may implicate informational privacy conflicts.[219]

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of grievances.").

213. *See* Lipsey, *supra* note 193 (stating that Murphy told *The Guardian* his suspicions in 2007).

214. *See id.* (claiming that he was told he was on the No-Fly List).

215. *See* Lowe, *supra* note 95, at 163 (discussing how DHS TRIP did not confirm whether or not someone was placed on the No-Fly List and did not provide any further details as to whether the complainant may or may not be in the TSDB or on the No-Fly List).

216. *See* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958, at *25 (E.D. Va. July 16, 2015) (analyzing how the revised procedures provide a letter stating whether or not a person is on the No-Fly List, with the option to receive and/or submit additional information, however, clarifying that in some circumstances an unclassified summary of reasons for the individual's placement may not be possible).

217. *See generally* Hu, *supra* note 12 (arguing that big data blacklisting harms interfere with and obstruct fundamental liberty interests in a way that now necessitates an evolution of the existing due process jurisprudence).

218. *See id.* at 1794 ("The applicability of substantive due process protections as a vehicle to shield individuals from overreaching and normalized government dataveillance under newly emerging big data tools remains a complicated and perhaps wishful potentiality, but one that must be considered.").

219. *See id.* (describing how the informational right of privacy is not necessarily unprecedented, but unestablished and opposed by former Justice Antonin Scalia and currently serving Justice Clarence Thomas). Professor Hu also argues that even if the Fourth Amendment was found to apply to cyber surveillance of law enforcement authorities, it will provide no assistance to individuals outside the law enforcement context. *Id.*

The secrecy surrounding the No-Fly List placement criteria coupled with the public's inability to effectively challenge its inability to fly make these redress procedures problematic. The government admits that it uses "predictive assessments" instead of hard evidence when determining No-Fly List placement.[220] What happened to the No-Fly List placement standard where you have to be "a known or suspected threat to aviation" to be included? The United States essentially places people on the No-Fly List today if they pose a broader threat to national security based on guess-work of whether a person may or may not commit a crime or act of terrorism in the future. The secret criteria formulated to place an individual on the No-Fly List versus the Selectee List also blurs the distinctions between who should be placed on the No-Fly List, and who should simply receive the enhanced screening of the Selectee List. Government agencies continue to participate in secret predictive judgments to place citizens on the No-Fly List and this classified analysis poses a high risk of error and a high risk of constitutional deprivation on the public as a whole—especially for those citizens who have never been charged or convicted of a crime.[221]

D. Suggestion: Treating No-Fly List Redress Like Criminal Prosecutions

> I had to take off my pants, I had to take off my sneakers, then I had to take off my socks. I was treated like a criminal.
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> -One of the Robert Johnsons interviewed by "60 Minutes" in 2007.[222]

National security concerns do not function as an automatic blanket justification to treat American citizens as criminals before

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220. *See* Spencer Ackerman, *No-Fly List Uses 'Predictive Assessments' Instead of Hard Evidence, US Admits*, GUARDIAN (Aug. 10, 2015, 12:51 PM), https://www.theguardian.com/us-news/2015/aug/10/us-no-fly-list-predictive-assessments ("The Obama administration's no-fly lists and broader watchlisting system is based on predicting crimes rather than relying on records of demonstrated offenses, the government has been forced to admit in court.").

221. *See* Choudhury, *supra* note 204 (suggesting that the Plaintiffs' reputations were "smeared.").

222. *See Unlikely Terrorists On The No Fly List*, *supra* note 194 (describing the humiliation endured from mistakenly being placed on the No Fly List).

they commit the crime. Such treatment requires finding probable cause and providing opportunity for a trial.[223] In order for the No-Fly List to succeed in maintaining its important national security purpose and yet provide proper redress for United States citizens, some form of hearing or adversarial forum must be accessible to those citizens who wish to fight for their complete removal from the List.[224] The legislature or the agencies themselves must formulate a constitutional set of rules and procedures for citizens to find out *why* they were put on the No-Fly List, and then allow citizens the opportunity to present their defense as criminal defendants do.[225]

It has been suggested that because the No-Fly List does not involve physical incapacitation and because it serves a preventative and not a punitive purpose, criminal law procedural protections do not apply.[226] Professor Jennifer C. Daskal counters this argument and describes the No-Fly List and other restrictions proliferating over the past decade as "targeted, noncustodial pre-crime restraints."[227] She argues that these noncustodial restraints can so thoroughly constrain an individual's functioning that they are equivalent to *de facto* imprisonment and ought to be treated as such.[228] Professor Margaret Hu suggests that big data programs operated by the government, such as the No-Fly List, can assign a

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223. *See* Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1206 (2010) (stating that it is both proper and desirable for law enforcement agencies to identify criminal suspects, gather information about them, and prosecute them if probable cause exists to believe they have committed crimes).

224. *See* Omar, *supra* note 51, at 271 (describing how the effectiveness of being placed on the so-called "cleared list" is extremely uncertain).

225. *See* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958, at *17 (E.D. Va. July 16, 2015) (pointing out that when hearings are deferred, risks of error rise).

226. *See* Daskal, *supra* note 38, at 328 (explaining how the restraints are justified by asserted security needs, based on an assessment that a particular individual or entity is likely to commit a future bad act).

227. *See id.* at n.4 (referencing both the story and movie *Minority Report*, focusing on the nonpunitive measures that take place outside and on the margins of the criminal justice system and are designed to prevent future bad acts without any explicit retributive purpose).

228. *See id.* at 333 (clarifying that restraints are partial rather than total in most cases but still significantly diminish one's capacity to make choices central to a meaningful life, thus stamping targets as second-class individuals).

heightened suspicion and facilitate inferences of guilt.[229] Before being charged or convicted of a crime, United States citizens are being forced to relinquish their constitutional rights to travel.[230] For those who discover they are on the No-Fly List while abroad, they find themselves trapped in another country unable to return to their home in the United States without any realistic or practical means of returning.[231] These selected United States citizens are essentially being punished for something they have not been convicted of and, further, have little to no means of seeking proper due process to defend themselves from such punishment.

The No-Fly List therefore does serve a punitive purpose.[232] Selection is punishment in disguise.[233] Take for example the federal lawsuit heard in New York where four Muslims say they were put on the No-Fly List because they refused to spy for the FBI and act as government informants.[234] Their names were eventually removed from the List due to their challenge, [235] suggesting perhaps that the No-Fly List is wrongfully being used as a tool for intelligence-gathering rather than its intended purpose of preventing suspected or known threats to aviation from flying.

The Department of Homeland Security and the TSC are treating United States citizens as criminals,[236] and so citizens should therefore be able to seek redress through procedures akin to those in a criminal trial. Unlike those agencies collecting information for the No-Fly List, law enforcement agencies identify

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229. *See* Hu, *supra* note 12, at 1761 (concluding that these programs may facilitate the assessment of a "guilty until proven innocent" status).

230. *See Mohamed*, 2015 WL 4394958, at *12 (noting that the general right of free movement is a long recognized, fundamental liberty and that the right to travel, even internationally, cannot be taken from a citizen without due process of law).

231. *See id.* at *2 (stating that Mohamed argued that his liberty interests, in being able to return to the United States after travelling abroad, were denied).

232. *See* Daskal, *supra* note 38, at 371 ("[W]hat I call pre-crime restraint is actually 'punitive prevention' and ought to be either channeled through the criminal law or categorically prohibited.").

233. *See* Caplan, *supra* note 223, at 1240 (focusing on selection for the No-Fly List as punishment).

234. *See* Lipsey, *supra* note 193 (suggesting that not becoming an informant can place a person on the No-Fly List).

235. *See id.* (noting that the men sued the FBI for damages).

236. *See* Shamsi, *supra* note 208 (describing that individuals on the No-Fly list have often never committed a crime).

criminal suspects, gather information about them, and prosecute them if probable cause exists to believe they have committed crimes.[237]

A specified set of procedures needs to be formulated to ensure that an individual who seeks redress learns of the exact facts and circumstances which pertain to her and why the DHS and TSC "reasonably suspected" that she be deemed a "known or suspected terrorist"[238] and why it was determined that she represents a threat to aviation and a threat of committing an act of international or domestic terrorism.[239] A United States citizen must be presented with the "derogatory information" pertaining to her that caused the TSC to place her in the TSDB, further place her on the No-Fly List, and prohibit her from boarding a plane thereby confiscating her constitutional right to travel.[240] Because as it stands currently, persons appearing on the No-Fly "blacklist" are not treated as suspected wrongdoers, but as confirmed wrongdoers who face consequences and deprivations as a result.[241] Those selected are in fact "guilty until proven innocent,"[242] lacking the ability to adequately and effectively prove innocence.

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237. *See* Caplan, *supra* note 223, at 1206 (describing the differences between lists like the No-Fly List and lists of criminal suspects that law enforcement agencies might legitimately compose as long as the investigation does not exceed constitutional boundaries).

238. Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958, at *5 (E.D. Va. July 16, 2015).

239. *See* Hu, *supra* note 12, at 1787 (stating that the No-Fly List requires a higher standard than the broader TSDB "reasonable suspicion" standard for placement).

240. *See Mohamed*, 2015 WL 4394958, at *5 (noting the nature of derogatory information).

241. *See* Caplan, *supra* note 223, at 1206 (describing the No-Fly List as a form of "blacklist" and stating that "listed person's freedom is restricted without the scrutiny of an independent judge and without the approval of a jury.").

242. *See* Hu, *supra* note 12, at 1777 (concluding that big data harms impose an administratively "guilty until proven innocent" status upon entire classes and subclasses of individuals in a way that is inconsistent with fundamental liberty interest protections under substantive due process).

1. A Hearing

The availability of a pre-deprivation hearing would be ideal. In this scenario, the TSC would issue notice before placement to those individuals chosen for the No-Fly List. The notice would inform individuals that unless they chose to seek redress within an allotted amount of time, placement will be automatic but redress post-placement would be available after a specified period. For those who choose to seek redress before placement, an adversarial setting would function very much like a trial. The government would come forward and present its case about why an individual should be placed on the No-Fly List. The individual would hear all the incriminating evidence and present her defense.[243] A neutral adjudicatory body presiding over the hearing, preferably a third-party separate from the TSC or DHS, would then issue a decision.

Although ideal, a pre-deprivation hearing is unrealistic.[244] Pre-deprivation notice of No-Fly List placement severely affects the government's compelling interest in protecting national security.[245] For example, say an actual terrorist discovers the TSC's intention to place her on the No-Fly List before placement occurs. The terrorist then has a few options. These options include, but are not limited to: accelerating her plans against the United States, potentially cutting ties with or tipping off her affiliated terrorist organization, or potentially fleeing the country to wreak havoc against the United States abroad.[246] Disclosure of potential placement may also encourage terrorists to take further steps to avoid detection, destroy evidence, coerce witnesses, alter plans from what is known by law enforcement or intelligence agencies, and recruit new members.[247] Judicial and agency resources may

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243. *See Mohamed*, 2015 WL 4394958, at *2 (suggesting that derogatory information is used to place someone on the No-Fly List).

244. *See id.* at *17 (concluding that the balancing of respective interests did not weigh in favor of pre-deprivation notice and hearing and are, therefore, not constitutionally required).

245. *See id.* at *10 ("[T]he government's interest in protecting the safety of commercial aircraft is compelling.").

246. *See id.* at *22 (arguing that disclosure would alert those subjects to the government's interest in them and could cause them to attempt to flee, destroy evidence, or alter their conduct to avoid detection).

247. *See* Caplan, *supra* note 223, at 345 (quoting Christopher Piehota, Latif

also play a role considering the sheer amount of estimated names on the No-Fly List at the present time.[248] The availability of a pre-deprivation hearing, therefore, is unlikely ever to occur.[249] The balance unduly tips far from the nation's interest in national security and places the United States and the public in great danger.

A post-deprivation hearing is the next appropriate option. Because the courts have recently begun taking on No-Fly List cases and because the redress procedures in place now are relatively new, little has been done to allow an individual to present her defense in court.[250] The state secrets privilege may largely function as the reason.[251]

A post-deprivation hearing would thus fix this problem, again functioning like a criminal trial. But how can a person reasonably defend herself when the government will not share what the "reasonable suspicion" standard fully entails and what criteria, facts, and information it used to place someone on the List?[252] The government claims the information concerned is "sensitive security information," but if the agencies continue and are permitted to continue to use this justification to prevent Americans from defending themselves against prohibition of travel, the No-Fly List will remain a death sentence to liberty with no hope of escape. [253]

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v. Holder, No. 3:10-cv-00750-BR 12–13 (D. Or. Nov. 17, 2010)).

248. *See* Lipsey, *supra* note 193 (suggesting that more than 47,000 people were on the No-Fly List as of August 2013).

249. *See generally* Mohamed v. Holder, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958 (E.D. Va. July 16, 2015) (concluding that the constitutionality of the newly revised procedures cannot be analyzed until Mohamed applies through them).

250. *See id.* at *9 (preventing Mohamed from pursing his due process claims because the procedures were recently revised and Mohamed had to apply in order for the court to consider their constitutionality).

251. *See id.* (suggesting the possibility that a claim might be thrown out completely because of national security concerns).

252. *See* Latif v. Holder, 28 F. Supp. 3d 1134, 1151 (D. Or. 2014) (stating that nominations to the TSDB are based on "reasonable suspicion" that requires "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual meets the substantive derogatory criteria.").

253. *See* Latif v. Holder, 969 F.Supp.2d 1293, 1306 (D. Or. 2013) (presenting the Defendants' argument that the government is not required to provide an

A detailed set of criteria needs to be formulated and needs to be accessible to the public.[254] The certain, limited amounts of information that cannot be publicly shared because they pose a true threat to national security must also be specified to the nominating agencies.[255] When a post-deprivation hearing takes place, however, an individual must be presented with all of the information gathered in order to prepare a proper defense.[256] Following guidelines similar to the Classified Information Procedures Act's (CIPA) § 6(a) Hearing would prove useful in this endeavor.[257] CIPA § 6(b) provides that a defendant in a criminal case give notice of classified information that is at issue in her case before a hearing regarding the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.[258] This hearing protects against harmful disclosures. A confidential hearing modeled after CIPA would ensure possible "state secrets" are protected, but the individual facing constitutional deprivation would have to be presented with the specific facts and incriminating evidence against her to ensure proper due process.[259] Just as the court in

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opportunity for Plaintiffs to confront or rebut grounds for No-Fly List inclusion because confrontation and rebuttal are not absolute requirements for all government proceedings, especially when highly sensitive information is involved).

254. *See* Hu, *supra* note 12, at 1776 (calling the No-Fly List and Terrorist Watchlist "classified and semi-classified programs.").

255. *See generally* United States v. Reynolds, 345 U.S. 1 (1953) (supporting the notion that national security interests sometimes warrant non-disclosure).

256. *See* Gete v. Immigration and Naturalization Servs., No. C94-8812, 1999 U.S. Dist. LEXIS 11806, at *11 (W.D. Wash. July 21, 1999).

> Owners are furnished with copies of evidence to be used against them, such as officers' reports detailing the facts upon which the claim of probable cause is based, would permit them to understand the true nature of the INS' charges and afford them a fair opportunity to prepare a . . . defense.

Id.

257. *See* Classified Information Procedures Act, 18 U.S.C.A. APP. 3 § 6(a) (West 2015) (providing that the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information held *in camera*).

258. *See id.* at § 6(b) (distinguishing between whether the United States previously made the information available to the defendant or did not make the information previously available).

259. *See id.* (stating that this hearing is done *in camera*).

Mohamed stated, the government's "state secrets" claim was not enough to bar litigation of the Plaintiff's case, perhaps further implicating that the information sometimes claimed "protected" does not in fact always warrant said protection.[260]

V. Conclusion

In the immediate post-9/11 world, the No-Fly List was created with context in mind and with an aim geared towards preventing members of al-Qaeda from flying on airplanes.[261] In the wake of the recent Islamic State of Iraq and the Levant (ISIL or ISIS) crisis, it will be interesting to see how courts deal with new No-Fly List litigation.[262] Will state secrets play a more critical role in barring litigation now as it did in the post-9/11 era? Or will courts continue to question the state secrets doctrine and favor individual liberty interests in allowing such litigation to go forward?[263] No-Fly List redress, therefore, remains a timely issue. Reorganizing agency placement and redress processes should be a high priority in a United States facing serious terrorist threats.

Procedures like those in criminal law, where a person is put on notice for her potential wrongdoing, serve as opportunities for citizens to hear and present evidence. Procedures like these must

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260. *See* Mohamed v. Holder, No. 1:11-cv-50 (AJT/MSN), 2015 WL 4394958, at *3 (E.D. Va. July 16, 2015) (concluding that there was no information protected from disclosure under the state secrets privilege that was necessary either for Mohamed to establish liability under his procedural due process claims or for the Defendants to establish an available defense to that claim).

261. *See* Caplan, *supra* note 223, at 1244 (stating that Congress had a good idea of who it had in mind, as did the agency implementing Congress's instructions, suggesting that "persons known to pose a risk to terrorism" is equivalent to "members of Al Qaeda shall not ride in airplanes.").

262. *See* Frida Ghitis, *What 2016 Presidential Candidates Can't Avoid*, CNN (Feb. 16, 2015 4:53 PM), http://www.cnn.com/2015/02/16/opinion/ghitis-foreign-policy-2016/ (stating that the next United States president will have to decide how America will fight ISIS and al Qaeda, the rival terror groups who share an anti-modern, anti-Western ideology backed by brutal terrorist tactics and have killed thousands of Americans) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

263. *See Mohamed*, 2015 WL 4394958, at *9 (questioning in an Order to the government why national security considerations should make it undesirable for United States citizens to receive information concerning their No-Fly List placement).

be made available for those placed on the No-Fly List in fear of further due process deprivation.[264] The No-Fly List is an Executive Branch-imposed[265] restraint on individual liberties, existing in its current state as an abuse of executive power. Until the legislative or executive bodies provide the agencies with concrete rules as to what information must be made available to those seeking redress for removal from the No-Fly List, the No-Fly List will continue to serve as an overarching abuse of power against Americans.[266]

Fifteen years after September 11, 2001, national security maintains its position as an important American issue.[267] National security, however, does not automatically place higher on the spectrum of priorities over the liberties and values of the citizens United States security seeks to protect. It is time to fashion proper redress for the individuals placed on the No-Fly List to prevent this automatic national-security-blanket-assumption from taking hold.

264. *See* Latif v. Holder, 28 F. Supp. 3d 1134, 1153–62 (D. Or. 2014) (determining that the old redress procedures were unconstitutional, suffered a fundamental deficiency, and did little to cure the risk of error).

265. *See* Florence, *supra* note 32, at 2155 (stating that the No-Fly List is maintained by TSA, but based on information from the FBI's TSC database).

266. *See* Omar, *supra* note 51, at 274 (explaining how Congress has continually requested and mandated that passengers' due process rights not be abridged, but the TSA does not seem to think that protecting constitutional rights are a priority).

267. *See* Ghitis, *supra* note 262 (suggesting that 2016 presidential candidates cannot avoid talking about national security and terrorism).