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## Secret Jurisdiction

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## SECRET JURISDICTION

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### ABSTRACT

*So-called “confidentiality creep” after the events of 9/11 has given rise to travel restrictions that lack constitutionality and do nothing to improve airline security. The Executive Branch’s procedures for imposing such restrictions rely on several layers of secrecy: a secret standard for inclusion on the no-fly list, secret procedures for nominating individuals to the list, and secret evidence to support that decision. This combination results in an overall system we call “secret jurisdiction,” in which individuals wanting to challenge their inclusion on the list are unable to learn the specific evidence against them, the substantive standard for their inclusion on the list, or the process used to put them there. The Executive Branch has argued that its decision to put someone on the no-fly list should be judged by a minimal “reasonable suspicion” standard. It has further stated that any plaintiff wishing to be removed from the list must demonstrate that the government’s suspicions are unreasonable, and must do so without hearing the evidence that led to those suspicions in the first place.*

*The momentum may have finally shifted with the litigation in *Latif v. Holder*, which recently led a federal court to recognize for the first time that, at a minimum, individuals have a due-process right to learn whether they are on the list and to have at least some opportunity to challenge their inclusion on the list. Many questions still remain, and no court has yet resolved the question of what “due process” means for individuals subjected to travel restrictions*

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*based on confidential government watchlists. We argue that a traditional procedural due process analysis is insufficient to protect individual rights when national security requires that much of the information relevant to that analysis be kept secret. To counter this deficit, we suggest that courts should incorporate elements of substantive due process by applying a unified due process standard that requires a higher evidentiary burden—and real evidence of national security benefits—before the government may curtail significant individual liberties.*

## I. INTRODUCTION

Flying is a ubiquitous part of many people's lives. Every day, eight million individuals fly.<sup>1</sup> We fly for work. We fly to visit loved ones and be present for births, graduations, weddings, and funerals. We fly to fulfill religious obligations or to go marvel at the beauty of various parts of the world. What if you were told you can never fly again? Would you feel like a prisoner in your own country? Like an exilee if trapped abroad? Certainly you would want to find out why an airline or government is telling you that you cannot board another plane ever again, or beyond one last time. If told that you have been deemed a danger to public safety, you would demand an explanation. And it better be good.

Now picture that when you ask for such an explanation, none is given to you. No more business trips, weddings, vacations, visits to relatives. Instead, you are stuck in a Kafkaesque nightmare replete with faceless bureaucrats, or with FBI agents who tell you that, sure, they can help you out—but only if you become an informant for them. When you attempt to challenge your placement on the list in court, the government first argues that national security forbids you from making any challenge at all.<sup>2</sup> After the court holds that due process requires you to be allowed to challenge your placement on the list, the

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<sup>1</sup> Press Release, Int'l Air Transp. Ass'n, New Year's Day 2014 Marks 100 Years of Commercial Aviation (Dec. 31, 2013), <http://www.iata.org/pressroom/pr/Pages/2013-12-30-01.aspx>.

<sup>2</sup> Defendant's Memorandum in Support of Motion to Dismiss Complaint at 34–37, 41, *Latif v. Holder*, No. 3:10-cv-00750-BR, 2011 WL 1667471 (May 3, 2011) (“The government does not publicly confirm or deny whether particular individuals are now or ever have been listed in the TSDB, because to do so would in effect disclose the fact that the individuals in question are currently or once were the subjects of counterterrorism intelligence-gathering or investigative activity by the federal government. Moreover, if the government were to disclose watchlist status, individuals who know they are on the TSDB could take steps to avoid detection and circumvent surveillance. Similarly, the disclosure that someone is *not* on the TSDB might lead that person to take advantage of that fact, so that he or she is in a better position to commit a terrorist act against the U.S. before he or she comes to the attention of government authorities.” (citations omitted)).

government begrudgingly modifies its position only slightly: now, it says, you may challenge your placement on the list, but the burden of proof is on you.<sup>3</sup> Furthermore, it argues, the court should apply a deferential “reasonable suspicion” standard—it is not enough to prove that you have not been involved in any act of terrorism, but instead, you must prove that the government has no reasonable basis even to suspect you of terrorist involvement.<sup>4</sup> And for an added degree of difficulty, you must prove the unreasonableness of any suspicion about you without learning what information caused the government to suspect you in the first place and without being granted a hearing at which you might cross-examine witnesses or otherwise challenge the government’s evidence.<sup>5</sup>

There is no way even to know if your viewpoints or religious affiliation were used in these determinations in contravention of the First Amendment because lodging a complaint to the Department of Homeland Security (DHS) or the Transportation Security Administration (TSA) will only result in “the need to ascertain that the complaint is based on a positive match to the No Fly List.”<sup>6</sup> Indeed, the government openly proclaims its latitude in deciding what information to use in its decisions when it states that “nominations must not be based *solely* on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment.”<sup>7</sup> One individual on the no-fly list has alleged in his legal filings that he was treated this way “in part because of certain alleged statements that, if accurately described in the letter, are plainly protected under the First Amendment.”<sup>8</sup> Secrecy provides a wall behind which the government can hide unconstitutional activity and engage in discrimination of individuals whose opinions or personas are considered undesirable.

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<sup>3</sup> See Defendant’s Consolidated Memorandum in Support of Cross-Motion for Partial Summary Judgment and Opposition at 50–53, *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 WL 1239925 (D. Or. Mar. 28, 2016) [hereinafter Defendant’s Consolidated Memorandum] (arguing that the plaintiffs bear the burden of proof to establish that the government erred in concluding that there was “reasonable suspicion” of the individuals added to the no-fly list); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1143 (D. Or. 2014) (explaining that the court will not review the petition unless the administrative record does not support the petitioner’s inclusion on the list).

<sup>4</sup> *Latif*, 28 F. Supp. 3d at 1153.

<sup>5</sup> *Id.* at 1152–53.

<sup>6</sup> JEFFREY KAHN, *MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* 190–91 (2013).

<sup>7</sup> Declaration of Michael Steinbach at 6, *Latif*, 2016 WL 1239925 (emphasis added).

<sup>8</sup> Memorandum of Points and Authorities in Support of Plaintiff Steve Washburn’s Renewed Motion for Partial Summary Judgment at 24–25, *Latif*, 2016 WL 1239925.

These are the types of scenarios that thousands of individuals on America's no-fly list have encountered. As one scholar has stated, the list "operates in total secrecy. And its effect is sudden, unpredictable, and absolute."<sup>9</sup> Created under the administration of President George W. Bush and maintained under that of President Barack Obama, the U.S. Terrorist Screening Center (TSC), housed within the FBI, uses its discretion to decide who should be placed on or off the list of individuals who are permitted to fly.<sup>10</sup> And when making these decisions, scholar Jeffrey Kahn explained that officials would rather "err on the side of watchlisting. After all, why take a risk?" and further described, "Who wants to be the one to let a terrorist slip onto a plane? When the buck stops with no one, no one has a reason to stop."<sup>11</sup>

The intent of the no-fly list is to identify individuals who may present a risk of engaging in terrorist activity.<sup>12</sup> The government asserts that its decision to add an individual to the list should be judged by a deferential "reasonable suspicion" standard—a substantive standard even lower than "probable cause," that was originally developed to assess the validity of a minor traffic stop.<sup>13</sup> Congress, however, never specified the substantive standard by which to measure the risk; it merely authorized the Executive Branch to "notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual" after identifying the individual believed to pose such a risk.<sup>14</sup>

The Executive Branch's overly broad interpretation of the congressional directive has created a list whose scope is neither clear nor rational, and whose effect is almost entirely disconnected from law enforcement activity. In fact, one U.S. citizen on the list alleges that when he found himself unable to fly back to the United States, he was explicitly told by the FBI that the

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<sup>9</sup> KAHN, *supra* note 6, at 72–73.

<sup>10</sup> *Ten Years After: The FBI Since 9/11*, FBI, <https://www.fbi.gov/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1> (last visited July 31, 2015).

<sup>11</sup> See KAHN, *supra* note 6, at 143, 156.

<sup>12</sup> 49 U.S.C. § 114(h)(3) (2012) (authorizing the TSA "to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security" and to "notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual").

<sup>13</sup> See *infra* note 254 and accompanying text; see also Defendants' Cross-Motion for Summary Judgment at 18, *Latif*, 2016 WL 1239925 [hereinafter Defendant's Cross-Motion], [https://www.aclu.org/sites/default/files/field\\_document/251%20Defendants%20Cross%20Motion%20for%20Summary%20Judgment\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/251%20Defendants%20Cross%20Motion%20for%20Summary%20Judgment_0.pdf) ("By its very nature, identifying individuals who 'may be a threat to civil aviation or national security' is a predictive judgment intended to prevent future acts of terrorism in an uncertain context.").

<sup>14</sup> 49 U.S.C. § 114(h)(3).

government is not actually concerned about him and that he should fly to Mexico and then cross into the United States on land.<sup>15</sup> Other individuals on the list have reportedly gotten around the list by flying on private jets<sup>16</sup> or travelling on cruise ships.<sup>17</sup>

In addition, placement on the no-fly list or a related watchlist does not trigger many, if any, non-travel security restrictions—thus, for example, when individuals in the database sought to purchase firearms, they succeeded 90% of the time.<sup>18</sup> Other individuals found in the Terrorist Screening Database have been approved for employment within the secure areas of airports.<sup>19</sup> Finally, law enforcement agencies at times choose not to place some of the most dangerous people on the list because it would disrupt investigative efforts to share this information with the airlines whose charge it is to prevent the

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<sup>15</sup> See John Solomon & Brian Ross, *US Apologizes to Billionaire Added to Terror No-Fly List*, ABC NEWS (May 21, 2010), <http://abcnews.go.com/Blotter/us-apologizes-billionaire-added-terror-fly-list/story?id=10698917>.

<sup>16</sup> See Matthew Mosk, Eric Longabardi & Richard Esposito, *Want to Fly Through a Loophole in the No-Fly List? Buy a Plane*, ABC NEWS (Mar. 23, 2010), <http://abcnews.go.com/Blotter/terrorism-loophole-fly-list/story?id=10149211>.

<sup>17</sup> See Matthew Barakat, *Michael Migliore, US Citizen, Allegedly Detained After Cruise to England*, HUFFINGTON POST (Sept. 12, 2011, 4:46 PM), [http://www.huffingtonpost.com/2011/09/12/michael-migliore-us-citiz\\_n\\_958992.html](http://www.huffingtonpost.com/2011/09/12/michael-migliore-us-citiz_n_958992.html).

<sup>18</sup> Ailsa Chang, *People on Terrorism Watch List Not Blocked from Buying Guns*, NPR (Apr. 24, 2013, 8:49 AM), <http://www.npr.org/sections/itsallpolitics/2013/04/24/178668578/people-on-terror-watch-list-not-blocked-from-buying-guns>. In light of the recent Paris attacks, Senator Dianne Feinstein has proposed blocking individuals in the database from being allowed to purchase guns. See Karoun Demirjian, *After Paris Attacks, Democrats Call For More Gun Control For Those on Terror Watchlist*, WASH. POST (Nov. 20, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/11/19/in-response-to-paris-attacks-democrats-call-for-more-gun-control-for-those-on-terror-watchlist/>. President Obama followed suit after the San Bernardino attack, stating that “Congress should act to make sure no one on a no-fly list is able to buy a gun. What could possibly be the argument for allowing a terrorist suspect to buy a semi-automatic weapon? This is a matter of national security.” Barack Obama, U.S. President, Address to the Nation (Dec. 6, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/06/address-nation-president>. The “argument” against this, of course, is the haphazard way in which individuals end up on the no-fly list or watchlists in the first place, as we discuss in this Article. Many commentators immediately criticized the President’s remarks on that and similar bases. See, e.g., Josh Sanburn, *Banning Gun Sales to People on No-Fly List May Not Be Constitutional, Experts Say*, TIME (Dec. 11, 2015), <http://time.com/4146025/guns-no-fly-list-constitution/> (explaining that the idea of “no fly, no gun” may be unconstitutional). That said, at least one state, Connecticut, plans to implement this idea via executive order and outlaw the sale of guns to individuals on the no-fly list or other government watchlists. See Elizabeth A. Harris & Eric Lichtblau, *Connecticut to Ban Gun Sales to Those on Federal Terrorism Lists*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/11/nyregion/connecticut-to-ban-gun-sales-to-those-on-federal-terrorism-lists.html>.

<sup>19</sup> See *TSA Can Improve Aviation Worker Vetting (Redacted)*, OFF. OF INSPECTOR GEN. (June 4, 2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-98\\_Jun15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-98_Jun15.pdf).

members of the list from boarding.<sup>20</sup> All this has resulted in a no-fly list that is both arbitrary in scope and ineffective to protect national security.

In spite of the list's ineffectiveness for law enforcement, the government has argued that disclosing particular security procedures that dictate inclusion on the no-fly list and related watchlists "could enable terrorists and other violent criminals to identify potential weaknesses in the current security system, and to circumvent or otherwise defeat the security measures mandated by the TSA in the Directives."<sup>21</sup> The agency similarly stated that disclosing the names on the no-fly list would create security risks.<sup>22</sup>

Defending against inclusion on the no-fly list thus becomes an exercise in shadow boxing.<sup>23</sup> Not only has the government not had to disclose the facts that led to a person's inclusion, but it has argued that the court should judge inclusion by the "reasonable suspicion" standard even though it is a secret whether that was the standard the government itself used or not.<sup>24</sup> In this setup, an individual has to prove a negative—that he is *not* deserving of suspicion and that the government has acted unreasonably in treating him as such—all the while not knowing what evidence, if any, led the government to be suspicious in the first place.

This Article argues that the no-fly list has suffered from the confidentiality creep<sup>25</sup> that has pervaded much of national security matters since 9/11, and that

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<sup>20</sup> See *infra* text accompanying note 239–43.

<sup>21</sup> Declaration of Lee S. Longmire at 3, *Green v. TSA*, 351 F. Supp. 2d 1119 (W.D. Wash. Jan. 7, 2005) (No. C04-763Z).

<sup>22</sup> *Id.* at 3–4.

<sup>23</sup> It is certainly not the first time in U.S. history that this happens given the intermittent practice of denying passports fairly arbitrarily, which caused one judge in the 1950s to comment:

How can an applicant refute charges which arise from sources, or are based upon evidence, which is closed to him? What good does it do him to be apprised that a passport is denied him due to associations or activities disclosed or inferred from State Department files even if he is told of the associations and activities in a general way? What files? What evidence? Who made the inferences? From what materials were those inferences made?

*Boudin v. Dulles*, 136 F. Supp. 218, 221 (D.D.C. 1955).

<sup>24</sup> See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1153 (D. Or. 2014) (stating that in the government's eyes, "[j]udicial review only extends to whether the government reasonably determined the traveler meets the minimum substantive derogatory criteria; *i.e.*, the reasonable suspicion standard. Thus, the fundamental flaw at the administrative-review stage (the combination of a one-sided record and a low evidentiary standard) carries over to the judicial-review stage").

<sup>25</sup> Confidentiality creep has been defined as the "quiet, under-scrutinized expansion of the kinds of information deemed inappropriate for public consumption." David Levine, *Confidentiality Creep and the*

the way it has been operated not only lacks constitutionality but also does nothing to improve airline security. Rejecting the current model, this Article proposes a new standard that combines the elements of procedural and substantive due process and mandates a higher burden of proof before the government can put an individual on the no-fly list.

In Part II, this Article discusses the growth of secrecy as part of the government apparatus since 9/11 and how its use has affected the implementation of the no-fly list. Part III presents the procedural and substantive due process failures that the list currently entails. Part IV then argues in favor of a new, unified standard by which to evaluate each individual's placement on the no-fly list in a way that cures existing constitutional ills.

## II. SECRECY, NATIONAL SECURITY, AND THE NO-FLY LIST

This Part discusses the history and growth of the no-fly list. It situates the development of the list in the context of the general expansion of government powers that followed 9/11. The focus is on how secrecy became an increasingly used tool in the fight against terrorism, and how this turned into a significant obstacle for people seeking redress against false suspicions. Secrecy, as this Part shows, operates like a sticky spider web for which innocence does not provide an easy escape, when it provides one at all.

### *A. Development of the No-Fly List*

The no-fly list is created and maintained by the Federal Bureau of Investigation's Terrorist Screening Center (TSC).<sup>26</sup> The TSC shares the list with the TSA so that the latter can pre-screen airline passengers.<sup>27</sup> The TSC obtains "nominations" for inclusion in the Terrorist Screening Database from various federal departments and agencies, including the National Counterterrorism Center and the FBI, and it is supposed to add a nominated individual to the database if it concludes that there is a "reasonable suspicion" based on "articulable facts" and "rational inferences" that the individual "is known or suspected to be, or has been engaged in conduct constituting, in

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*Death Penalty*, CTR. FOR INTERNET & SOC'Y (July 31, 2015, 3:21 PM), <https://cyberlaw.stanford.edu/blog/2015/07/confidentiality-creep-and-death-penalty>.

<sup>26</sup> *Latif*, 28 F. Supp. at 1141.

<sup>27</sup> *Id.*

preparation for, in aid of or related to, terrorism or terrorist activities.”<sup>28</sup> While the nominator is advised against acting on “unfounded suspicions or hunches,”<sup>29</sup> the guidelines spell out that “irrefutable evidence or concrete facts are not necessary.”<sup>30</sup>

In addition, the TSC includes an unknown number of additional individuals in the database under a “secret exception to the reasonable suspicion standard”—though the nature and extent of that exception is unknown—and the government has asserted the state secrets defense to avoid its disclosure.<sup>31</sup> It is difficult to imagine why such an exception would be needed, given the existing breadth of the current criteria. For example, the reliance on “suspicion” in both parts of the test means that even under the government’s acknowledged criteria, it can include an individual on the list who is “suspected of being a suspected terrorist” as well as anyone who is “suspected of associating with people who are suspected of terrorism activity.”<sup>32</sup>

In addition to the nested layers of “suspicion” built into the existing watchlisting criteria, the U.S. government also asserts a right to consider race, religion, and speech protected by the First Amendment in determining whether to include an individual in the database.<sup>33</sup> According to the declaration of Michael Steinbach, Assistant Director of the FBI’s Counterterrorism Division, “nominations must not be based *solely* on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment.”<sup>34</sup> Left open, however, is the possibility that race, religious belief, and political speech could form part of the government’s basis for “reasonable suspicion.”

The TSC evaluates the individuals in the watchlisting database for inclusion on either the no-fly list (individuals forbidden from flying within U.S. airspace) or the “selectee” list (individuals selected for heightened

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<sup>28</sup> *Id.* (citation omitted).

<sup>29</sup> NAT’L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE 33, 34 (Mar. 2013), [https://www.eff.org/files/2014/07/24/2013-watchlist-guidance\\_1.pdf](https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf).34.

<sup>30</sup> *Id.*

<sup>31</sup> *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 923 (N.D. Cal. 2014).

<sup>32</sup> Jeremy Scahill & Ryan Devereaux, *Blacklisted: The Secret Government Rulebook for Labeling You a Terrorist*, INTERCEPT (July 23, 2014, 2:45 PM), <https://firstlook.org/theintercept/2014/07/23/blacklisted/>.

<sup>33</sup> Declaration of Michael Steinbach at 6, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750-BR), <https://www.aclu.org/legal-document/latif-et-al-v-holder-et-al-declaration-michael-steinbach> (emphasis added).

<sup>34</sup> *Id.*

screening).<sup>35</sup> The government has not released the criteria it uses to decide which of the individuals in the database will be placed on either of these lists, and individuals do not receive notice when they are placed on either list.<sup>36</sup> The government has previously asserted that the criteria for the selectee and no-fly lists are “considerably more stringent” than the “reasonable suspicion” standard used for initial placement in the database.<sup>37</sup> Yet, in moving for summary judgment against plaintiffs who asserted they were wrongly placed on the list, the government re-asserted the “reasonable suspicion” standard even for the no-fly list itself, arguing that “[a]s the Government has previously explained and this Court has previously acknowledged, the standard for inclusion on the No Fly List is ‘reasonable suspicion.’ The Government must have a reasonable suspicion that one of the criteria for inclusion is met.”<sup>38</sup>

Given the breadth of the criteria used to add individuals to the database and, potentially, to the no-fly list, it is not surprising that the no-fly list has grown rapidly. Although the government has not released official statistics, it has been reported that in the three years after 9/11, that list grew from sixteen names to more than 20,000.<sup>39</sup> By 2013, that number was said to have grown to over 47,000, of whom 800 were American citizens.<sup>40</sup> These numbers do not include more than one million individuals who are allegedly on terrorist watchlists and hence tend to experience more invasive screening but are not altogether barred from flying.<sup>41</sup>

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<sup>35</sup> OFFICE OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 9–13, app. E at 54 (July 2009), [https://www.oig.dhs.gov/assets/Mgmt/OIGr\\_09-64\\_Jul09.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIGr_09-64_Jul09.pdf).

<sup>36</sup> See, e.g., Third Amended and Supplemental Complaint for Injunctive and Declaratory Relief at 6, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750-BR) [hereinafter Third Amended Complaint] (describing how the defendants did not provide the plaintiffs with any post-deprivation notice and how most Plaintiffs only discovered the error when trying to board a plane).

<sup>37</sup> *Id.* at 7–9.

<sup>38</sup> Defendants’ Cross-Motion, *supra* note 13, at 41 (citation omitted).

<sup>39</sup> Sara Kehaulani Goo, *Faulty ‘No-Fly’ System Detailed*, WASH. POST (Oct. 9, 2004), <https://www.washingtonpost.com/archive/politics/2004/10/09/faulty-no-fly-system-detailed/2ec7e66c-6688-4985-b038-e378ae0caca0/>.

<sup>40</sup> *In First, Government Officially Tells ACLU Clients Their No Fly List Status*, ACLU (Oct. 10, 2014), <https://www.aclu.org/news/first-government-officially-tells-aclu-clients-their-no-fly-list-status>.

<sup>41</sup> Peter Eisler, *Terrorist Watch List Hits 1 Million*, USA TODAY (Mar. 10, 2009, 11:06 PM), [http://usatoday30.usatoday.com/news/washington/2009-03-10-watchlist\\_N.htm](http://usatoday30.usatoday.com/news/washington/2009-03-10-watchlist_N.htm).

### B. *Secrecy in National Security Law and Policy*

While the use of secrecy did not begin with the events of 9/11, the numbers and types of activities hidden from the public eye multiplied since then. That is the phenomenon of confidentiality creep to which we referred previously.<sup>42</sup> This section gives some examples of implementations of secrecy in the legal process and enforcement that can be traced back directly to the prevention and punishment of terrorism in the aftermath of 9/11.

One prominent example of an (in this case literal) island of secrecy involves the detention camp at Guantanamo Bay. Established in 2002 to house and interrogate detainees viewed as particularly dangerous and usually suspected of terrorism,<sup>43</sup> the camp continues to exist to this day and to hold numerous prisoners, including ones that President Obama promised to release over two years ago.<sup>44</sup> Guantanamo has been the subject of many controversies over the years, and secrecy has played a key role in many of them. To name just one example, British resident Omar Deghayes was wrongfully imprisoned in Guantanamo for almost six years, in part due to a misidentification of a man in a terrorist video in Chechnya as Deghayes, who had never been to that country.<sup>45</sup> Authorities refused to provide Guantanamo activist and human rights attorney Stafford Smith with a copy of the tape, though he later obtained one from the BBC and commented, “This was typical of the whole Guantánamo experience. . . . [t]hey said they had evidence and they wouldn’t let you see it. Then when you did, it was incorrect.”<sup>46</sup> Deghayes was allegedly tortured by his U.S. captors to the point of permanently losing sight in one eye.<sup>47</sup> He was also threatened with being handed over to the Libyan authorities who had murdered his father, about which his lawyer Stafford Smith stated, “I was appalled when my client later recounted these threats, made by Libyan agents with US complicity, on his life. Yet all the details of the abuse that take[] place in Guantanamo, Bagram and beyond remains classified and cannot

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<sup>42</sup> See *supra* Part I.

<sup>43</sup> *Guantanamo Bay Naval Station Fast Facts*, CNN (Jan. 9, 2016, 5:51 PM), <http://www.cnn.com/2013/09/09/world/guantanamo-bay-naval-station-fast-facts/>.

<sup>44</sup> See GTMO CLOCK, <http://www.gtmo-clock.com/> (last visited Mar. 1, 2016).

<sup>45</sup> Patrick Barkham, *How I Fought to Survive Guantánamo*, *GUARDIAN* (Jan. 20, 2010, 7:05 PM), <http://www.theguardian.com/world/2010/jan/21/i-fought-to-survive-guantanamo>.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.*

be revealed without the censors' permission."<sup>48</sup> Released in 2007, no charges were ever filed against Omar Deghayes.<sup>49</sup>

This emphasis on secrecy has extended to other terrorism-related contexts as well, including the Foreign Intelligence Surveillance Act (FISA) court, which hears applications and grants orders for electronic surveillance.<sup>50</sup> The FISA court has been widely criticized both for the breadth of its powers and for the secrecy under which it conducts its proceedings.<sup>51</sup> Some have expressed concerns that the use of secret evidence will become an increasingly significant issue and will limit the role of defense lawyers and diminish defendants' protections under the Fifth and Sixth Amendments.<sup>52</sup> While the FISA court remained under many Americans' radars for years, this dramatically changed with the disclosures by Edward Snowden, who revealed that the court had ordered Verizon to hand over daily the phone records of millions of Americans to the NSA.<sup>53</sup> The government has increasingly shrouded its actions in a veil of secrecy while individual citizens' privacy has been reduced, in part through the use of new technological means.<sup>54</sup> One scholar believes that the Obama Administration has made progress in a number of areas related to secrecy, but that other parts have significantly fallen short: "Although the administration

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<sup>48</sup> Clive Stafford Smith, *From Brighton to Camp Delta: Mis-Identification Leads to Three Years in Guantánamo Bay*, CAGE PRISONERS (Dec. 7, 2006), <http://old.cageprisoners.com/articles.php?id=15199>.

<sup>49</sup> *Former Detainee Talks of Desperation in Guantánamo Bay*, NPR (May 5, 2013, 12:57 PM), <http://www.npr.org/2013/05/05/181215131/former-detainee-talks-of-desperation-in-guantanamo-bay>.

<sup>50</sup> 50 U.S.C. § 1803 (2012).

<sup>51</sup> See, e.g., Dia Kayyali, *What You Need to Know About the FISA Court—And How It Needs to Change*, ELEC. FRONTIER FOUND. (Aug. 15, 2014), <https://www.eff.org/deeplinks/2014/08/what-you-need-know-about-fisa-court-and-how-it-needs-change>.

<sup>52</sup> Ellen Yaroshesky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1084 (2006).

<sup>53</sup> Alex Fitzpatrick, *NSA Secretly Collecting Millions of Verizon Subscribers' Records*, MASHABLE (June 5, 2013), <http://mashable.com/2013/06/05/verizon-nsa-phone-records/> ("The NSA was granted the authority to collect three months' worth of Verizon subscribers' data beginning April 25 and ending July 19 by the secret Foreign Intelligence Surveillance Court."); Lorenzo Franceschi-Bicchierai, *The 10 Biggest Revelations From Edward Snowden's Leaks*, MASHABLE (June 5, 2014), <http://mashable.com/2014/06/05/edward-snowden-revelations/> (stating that the "treasure trove of NSA documents" released came from Edward Snowden); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>54</sup> Irina Manta, *Hello and Musings on Rhetoric and Labeling in the Post-Snowden Era (Part 1)*, CONCURRING OPINIONS (Aug. 4, 2013), <http://concurringopinions.com/archives/2013/08/hello-and-musings-on-rhetoric-and-labeling-in-the-post-snowden-era-part-1.html>.

appears to have used secret law less frequently than its predecessors, we will not be able to determine that for a while, given all of the, well, secrecy.”<sup>55</sup>

### C. *How Secrecy Prevents Effective Redress*

When national security’s “confidentiality creep” collides with the broad and loosely defined watchlisting policies, individuals find that they have little recourse to challenge their placement on the no-fly list. This difficulty means that simple errors can go undetected for years, prohibiting individuals from flying even when the U.S. government did not intend to bar them from doing so. In 2005, for example, Stanford doctoral student Rahinah Ibrahim was detained at the San Francisco International Airport when she sought to board a flight to give a scholarly presentation in Hawaii.<sup>56</sup> Wheel-chair bound and denied medication after surgery, she was let go and flew back to her home country of Malaysia, but after suing, she was denied permission to take a return flight for her own trial.<sup>57</sup> Government officials allegedly made false statements about her case to hide the fact that Ibrahim was placed on the no-fly list due to a simple paperwork error—an FBI agent had checked the wrong box on a form, which resulted in years of litigation and \$3.8 million of attorney time.<sup>58</sup> Meanwhile, even after years of litigation and eventual removal from the no-fly list, a different individual named Jamal Tarhuni never found out why he was placed on it after he delivered medical supplies in Libya on behalf of Oregon-based relief organization Medical Teams International.<sup>59</sup>

Other errors have involved children, such as when JetBlue removed a toddler from a flight because the airline believed that she was on the no-fly list at the tender age of eighteen months, an incident which the airline blamed on a computer error.<sup>60</sup> The late Senator Ted Kennedy ended up on the list as well

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<sup>55</sup> Jason Ross Arnold, *Has Obama Delivered the ‘Most Transparent’ Administration in History?*, WASH. POST: MONKEY CAGE (Mar. 16, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/16/has-obama-delivered-the-most-transparent-administration-in-history/>.

<sup>56</sup> David Kravets, *How Obama Officials Cried ‘Terrorism’ to Cover Up a Paperwork Error*, WIRED (Feb. 11, 2014, 6:30 AM), <http://www.wired.com/2014/02/no-fly-coverup/>. For a discussion of Rahinah Ibrahim’s legal case, see *infra* Part III.B.2.

<sup>57</sup> Kravets, *supra* note 56.

<sup>58</sup> *Id.*

<sup>59</sup> Editorial, *No-Fly List Victory Stemmed from Tigard Man’s Resolve Despite Government Roadblocks: Editorial*, OREGONIAN (Feb. 26, 2015, 4:46 PM), [http://www.oregonlive.com/opinion/index.ssf/2015/02/no-fly\\_list\\_victory\\_stemmed\\_fr.html](http://www.oregonlive.com/opinion/index.ssf/2015/02/no-fly_list_victory_stemmed_fr.html); see also Tarhuni v. Holder, 8 F. Supp. 3d 1253, 1262, 1264 (2014).

<sup>60</sup> Mary Forgiione, *JetBlue Blames ‘Computer Glitch’ for Removing Toddler from Flight*, L.A. TIMES (May 11, 2012), <http://articles.latimes.com/2012/may/11/news/la-trb-jetblue-no-fly-20120511>.

because his name resembled the alias of a terrorist.<sup>61</sup> Others were placed on the list despite the direct risks to their careers, such as was the case for commercial pilot, veteran, and convert to Islam Erich Scherfen.<sup>62</sup> Singer and fellow convert Cat Stevens was mistakenly denied boarding because his adopted new name Yusuf Islam led to a mix-up with the name on the list Youssef Islam.<sup>63</sup>

Even more troubling than the difficulty in correcting simple clerical errors, however, is the difficulty individuals face in trying to clear their names when it appears that their presence on the list is due to a policy choice rather a mere clerical error. Originally, the government refused even to give official confirmation that an individual was on the list—much less a reason for their inclusion. Airline employees, however, occasionally suggested that religious or political views could play a role in boarding decisions.<sup>64</sup> Walter Murphy, an emeritus professor at Princeton University at the time, claimed that upon being denied boarding, an airline employee asked if he had been in any peace marches because that can lead to flight bans.<sup>65</sup> Murphy replied that he had not done so but had spoken critically about then-President George W. Bush on the topic of constitutional violations, to which the airline employee retorted, “That’ll do it.”<sup>66</sup> And, as mentioned above, one of the plaintiffs in *Latif v. Holder* has reason to believe that his views played a role in his placement on the no-fly list.<sup>67</sup>

The United States has a longer history of refusing the right to travel to individuals with views perceived as contrary to the national interest, including at one point through the mechanism of refusing to issue passports to them

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<sup>61</sup> Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES (Aug. 20, 2004), <http://www.nytimes.com/2004/08/20/us/senator-terrorist-a-watch-list-stops-kennedy-at-airport.html>.

<sup>62</sup> See Jeanne Meserve, *Name on Government Watch List Threatens Pilot's Career*, CNN (Aug. 22, 2008, 10:07 AM), <http://www.cnn.com/2008/US/08/22/pilot.watch.list/>.

<sup>63</sup> Sally B. Donnelly, *You Say Yusuf, I Say Youssef*. . . , TIME (Sept. 25, 2004), <http://content.time.com/time/nation/article/0,8599,702062,00.html>. As a separate matter, however, accusations have been made that Cat Stevens has provided funding to Hamas. See *Israel Departs Former Pop Star Cat Stevens*, ABC NEWS (July 13, 2000), <http://abcnews.go.com/International/story?id=83179>. But see *Cat Stevens 'In the Dark' over No-Fly List*, ABC NEWS (Oct. 1, 2004), <http://abcnews.go.com/2020/News/story?id=139607> (explaining that Cat Stevens denies knowing that money he gave for charities ended up in the hands of Hamas).

<sup>64</sup> See Don Melvin & Diana Magnay, *UK Muslims with Disneyland Plans: We Were Barred from a Plane Due to Religion*, CNN (Dec. 24, 2015, 6:08 A.M.), <http://www.cnn.com/2015/12/23/europe/british-muslims-denied-boarding-to-la/>.

<sup>65</sup> Naomi Wolf, *Fascist America, in 10 Easy Steps*, GUARDIAN (Apr. 24, 2007, 3:02 PM), <http://www.theguardian.com/world/2007/apr/24/usa.comment>.

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* Part I.

altogether.<sup>68</sup> Whether the airline employee in Murphy's case was correct or not, it shows (1) that people in the airline industry do believe that political activity could lead to placement on the list, (2) the government refuses to say that this conclusion is incorrect, and (3) as mentioned, the government specifically reserves the right to use this kind of activity as part of its determinations. Hence, there is a well-founded perception that political activity can at least contribute to placement on the list, and even if it is incorrect, this perception is likely to have a chilling effect on core political speech and other activities.<sup>69</sup>

Over the years, a number of lawsuits were mounted to respond to the restrictions imposed on the many people on the no-fly list.<sup>70</sup> The most high-profile of these cases and most successful thus far has been the ACLU's litigation in *Latif v. Holder*.<sup>71</sup> The ACLU identified thirteen plaintiffs—all U.S. citizens, including four veterans of the U.S. armed forces—to present the “strongest possible challenge to the government's listing policy.”<sup>72</sup> None of the plaintiffs were officially informed of their status on the list prior to filing the lawsuit; instead, they learned of their potential placement on the list only when they were denied boarding at the airport.<sup>73</sup>

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<sup>68</sup> See generally KAHN, *supra* note 6, at 154–55.

<sup>69</sup> See Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 745–46 (2008) (noting the chilling effects in this type of context).

<sup>70</sup> See, e.g., *Mokdad v. Lynch*, 804 F.3d 807, 815 (6th Cir. 2015) (“We reverse the judgment of the district court dismissing Mokdad's challenge to his alleged placement on the No Fly List by TSC and remand for further proceedings in the district court.”); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254, 1256 n.9 (9th Cir. 2008) (allowing a plaintiff to challenge placement on the no-fly list). Many of these cases are still pending. See *Fikre v. Fed. Bureau of Investigation*, No. 3:13-cv-00899-BR, 2015 WL 6756121, at \*10 (D. Or. Nov. 4, 2015) (“Plaintiff's allegations provide a sufficient Factual basis at this early stage of the proceedings to state a procedural due-process claim based on Plaintiff's right to international travel and freedom from false government stigmatization.”); *Mohamed v. Holder*, No. 1:11-cv-50 (AJT/MSN), 2015 WL 4394958, at \*13–14 (E.D. Va. July 16, 2015) (explaining that because the Department of Homeland Security had adopted new redress and review procedures after the *Latif v. Holder* decision, a plaintiff challenging his placement on the list should “state whether at this point he wishes to request review of his status under the revised DHS TRIP, and if so, whether this action should be stayed pending the completion of that process”); *Beydoun v. Holder*, No. 14-cv-13812, 2015 WL 631948, at \*4 (E.D. Mich. Feb. 13, 2015) (staying a plaintiff's challenge to the no-fly list to wait for the Sixth Circuit's decision in *Mokdad*).

<sup>71</sup> 28 F. Supp. 3d 1134 (D. Or. 2014).

<sup>72</sup> See Cassandra Burke Robertson & Irina D. Manta, *Challenging the No-Fly List: The Status of the Litigation After Five Years*, ABA SEC. OF LITIG.: C.R. (Aug. 17, 2015), <http://apps.americanbar.org/litigation/committees/civil/articles.html>.

<sup>73</sup> Third Amended Complaint, *supra* note 36, at 4.

None of the plaintiffs were formally accused of committing any crime prior to their placement on the list. One of the plaintiffs—former Air Force officer Steven Washburn—was allegedly interviewed by FBI agents who told him that they had “no concern” about him, and suggested that he “get around the no-fly list by flying to Mexico” and then driving into the United States.<sup>74</sup> Because none of the plaintiffs were wanted by law enforcement—and recognizing that placement on the no-fly list has no connection to other security restrictions, and would not preclude individuals on the list from successfully passing an ordinary background check for security-sensitive positions<sup>75</sup>—the plaintiffs characterized the government’s position as deeming them “too dangerous to fly, but too harmless to arrest.”<sup>76</sup>

The individual stories alleged by the plaintiffs in this case illustrate the hardships that individuals on the no-fly list experience, and they are worth mentioning as the case forms a key part of the analysis in the next Part<sup>77</sup>:

– *Ayman Latif*: A U.S. Marine Corps veteran with a wife and children, Latif was disallowed from returning to the United States after living in Egypt with his family for a year and a half. As a result, his veteran disability benefits were reduced. He eventually received a one-time permission to fly back to the United States but then was prohibited from flying again after that, which interfered with his desire to conduct studies and fulfill religious obligations in Saudi Arabia.<sup>78</sup>

– *Mohamed Sheikh Abdirahm Kariye*: Kariye lived in Oregon with his wife and children and was prevented from boarding flights out of the United States, preventing him from visiting his daughter in Dubai or traveling to Saudi Arabia for religious pilgrimages.<sup>79</sup>

– *Raymond Earl Knaeble IV*: Knaeble is a U.S. Army veteran who worked in Kuwait and then married his Colombian wife in Bogota, after which he was disallowed from flying to the United States. Among the later problems he

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<sup>74</sup> Solomon & Ross, *supra* note 15.

<sup>75</sup> See *supra* note 18 and accompanying text (explaining that when individuals in the TDSB underwent background checks to purchase firearms, they were able to pass 90% of the time).

<sup>76</sup> *Latif, et al. v. Holder, et al.—ACLU Challenge To Government No Fly List*, ACLU, <https://www.aclu.org/cases/latif-et-al-v-holder-et-al-aclu-challenge-government-no-fly-list> (last updated Aug. 10, 2015).

<sup>77</sup> For the district court’s summary of these cases, see *Latif, v. Holder*, 28 F. Supp. 3d at 1134, 1143–46 (D. Or. 2014).

<sup>78</sup> *Id.* at 1143–44.

<sup>79</sup> *Id.* at 1144.

experienced, Knaeble's employer rescinded an offer for a position in Qatar because Knaeble was unable to fly to a required medical examination in the U.S.<sup>80</sup>

– *Faisal Nabin Kashem*: Kashem enrolled in a language and Islam study program in Saudi Arabia and was subsequently prevented to return to the United States from vacation; he turned down a one-time waiver to return because officials refused to confirm that he would be able to go to back to Saudi Arabia to finish his studies.<sup>81</sup>

– *Elias Mustafa Mohamed*: Like Kashem, Mohamed enrolled in studies in Saudi Arabia, was denied return, and refused a one-time waiver due to uncertainty over being able to complete his studies.<sup>82</sup>

– *Steven William Washburn*: A U.S. Air Force veteran, Washburn was prohibited from flying from Ireland to Boston in 2010, though he eventually returned to the U.S. via a complicated route and a pedestrian border crossing from Mexico. Two years later, an FBI agent told him that he would help to remove Washburn's name from the no-fly list if Washburn agreed to speak to the FBI. Washburn was separated from his wife for years because she was in Ireland and could not obtain a visa to the U.S. while he was prevented from flying to go see her.<sup>83</sup>

– *Nagib Ali Ghaleb*: Ghaleb was unable to return to the United States after travel to Yemen via Frankfurt, Germany. The FBI offered him a deal if he agreed to rat out the “bad guys” in Yemen and San Francisco, and the agency allegedly threatened him with arrest. Ghaleb eventually returned on a one-time waiver but could not go visit his relatives in Yemen any more.<sup>84</sup>

– *Abdullatif Muthanna*: Muthanna was prevented from flying to the U.S. after visiting his wife and children in Yemen, accepted a one-time waiver, and was “not allowed to board flights on four separate occasions” until February 2013 when he finally boarded a flight to Dubai to see his family. He was repeatedly denied plane boarding and was prevented from boarding a ship upon the recommendation of U.S. Customs and Border Protection.<sup>85</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1144–45.

<sup>84</sup> *Id.* at 1145.

<sup>85</sup> *Id.*

– *Mashaal Rana*: Rana began pursuing Islamic studies in Pakistan in 2009, and the following year she was unable to board a flight to the U.S. In 2012, she tried to fly to the U.S. again to receive pregnancy-related medical care, but despite initially receiving clearance to fly, this was withdrawn five hours before her flight. She had turned down the one-time waiver she was offered in 2010 because of fear that she would be unable to return to Pakistan where her husband lives.<sup>86</sup>

– *Ibraheim Y. Mashal*: A U.S. Marine Corps veteran, Mashal was not allowed to board a flight in the U.S. and was offered removal from the no-fly list as well as compensation if he agreed to become an FBI informant. When he requested the presence of an attorney, the FBI agents terminated the meeting. Mashal has lost numerous business opportunities and was prevented from attending personally meaningful events such as weddings and funerals due to his inability to fly.<sup>87</sup>

– *Salah Ali Ahmed*: Ahmed has been repeatedly prevented from traveling from the U.S. to Yemen, including when his brother died and when he wanted to visit family or attend to property matters.<sup>88</sup>

– *Amir Meshal*: Meshal was prohibited from taking a flight from California to New Jersey in 2009 and was offered removal from the no-fly list in exchange for serving as a government informant. He remained unable to visit family in Egypt due to his placement on the list.<sup>89</sup>

– *Stephen Durga Persaud*: Persaud was prevented from boarding a flight from St. Thomas to Miami, and an FBI agent told him that he would have to talk to the agency if he wanted off the no-fly list. Persaud experienced numerous hassles as a result of his placement on the list and cannot fly to Saudi Arabia to fulfill religious obligations.<sup>90</sup>

The Department of Justice confirmed in a letter on October 10, 2014 that Latif, Mohamed, Ghaleb, Muthanna, Mashal, Ahmed, and Rana were no longer on the no-fly list.<sup>91</sup> The ACLU commented that the letter

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<sup>86</sup> *Id.* at 1145–46.

<sup>87</sup> *Id.* at 1146.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Letter from Amy Powell, U.S. Dep't of Justice, to Hina Shamsi, Am. Civil Liberties Union Found. (Oct. 10, 2014), [https://www.aclu.org/sites/default/files/assets/no\\_fly\\_letter.pdf](https://www.aclu.org/sites/default/files/assets/no_fly_letter.pdf).

also makes clear to the six other clients in the case that they're still banned from flying. And while that may not seem like good news, it's the first time the government has confirmed—albeit through negative implication rather than a direct confirmation—that people are on the No Fly List.<sup>92</sup>

As of March 2016, Kashem, Karieye, Knaeble, Meshal, Persaud, and Washburn remained on the list.<sup>93</sup> Confirmation of their status on the no-fly list represented a major litigation victory for the plaintiffs; without that ruling, they could not have pursued their challenge.<sup>94</sup> Disclosure of some of the plaintiffs' continued presence on the list thus paves the way for the court to address the more fundamental question: On what basis may the government restrict a citizen's right to fly, and how should courts review claims by those who allege they were wrongfully restricted?

### III. THE NO-FLY LIST AND DUE PROCESS

The Fifth Amendment of the U.S. Constitution provides that the government may not deprive an individual of life, liberty, or property without due process of law.<sup>95</sup> Courts have developed two largely separate frameworks for analyzing whether the constitutional due process requirement is met. The first framework, procedural due process, “asks whether the government has followed the proper procedures when it takes away life, liberty or property,”<sup>96</sup> and typically requires notice and a hearing before such deprivation can occur.<sup>97</sup> The doctrine of substantive due process is much less developed than

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<sup>92</sup> Noa Yachot, *A Great Day for Seven Americans Formerly on the No Fly List*, ACLU (Oct. 11, 2014, 11:19 AM), <https://www.aclu.org/blog/great-day-seven-americans-formerly-no-fly-list>.

<sup>93</sup> *Latif v. Lynch*, 3:10-cv-00750-BR, 2016 WL 1239925, at \*5 (D. Or. Mar. 28, 2016).

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

<sup>95</sup> U.S. CONST. amend. V.

<sup>96</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999); see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1807 (2012) (“Fundamentally, [due process] was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies, and that legislatures would not be able to step beyond their properly legislative roles of enacting general rules for governance of future behavior.”).

<sup>97</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

procedural due process, but it “looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.”<sup>98</sup>

#### A. *Procedural Due Process*

When a court evaluates a procedural due process claim in the first instance, it conducts what is in essence a cost–benefit analysis, weighing the risk that the plaintiff will be erroneously deprived of liberty against the cost of providing additional procedures to safeguard against such error.<sup>99</sup> In the leading case of *Mathews v. Eldridge*, the Supreme Court listed the factors that the court should take into account in conducting that analysis.<sup>100</sup> First, the court must consider the plaintiff’s “private interest that will be affected by the official action.”<sup>101</sup> Second, the court must examine “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”<sup>102</sup> Finally, the court must weigh “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>103</sup> In short, when plaintiffs seek additional procedural protections against loss of liberty or property, the court must evaluate whether the benefits gained from the proposed procedures would outweigh the administrative burden and costs of administering them.

The Supreme Court’s prior cases concerning travel raise difficult issues that the courts grappling with these cases must address. Specifically, how should national security—and its concomitant need for secrecy—be integrated into the procedural due process analysis? The procedural due process analysis, after all, necessarily relies on predictions of risk and estimates of future harm—it requires the judge to make a reasonable estimate of the costs and benefits for the requested procedural protections. When the underlying evidence is kept secret from the petitioners and even from the judge, then the procedural due process analysis transforms from an estimate to a mere guess.<sup>104</sup>

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<sup>98</sup> Chemerinsky, *supra* note 96.

<sup>99</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See generally Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1 (2005).

<sup>100</sup> 424 U.S. at 335.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See *infra* Part III.A.1.

### 1. *Procedural Due Process in Cases Touching on National Security*

Some have argued that the *Mathews* test is largely unhelpful in the national security context, given the overwhelming strength of the issues on both sides—liberty on the one hand, and national security on the other.<sup>105</sup> Nonetheless, the Supreme Court reiterated the importance of a rigorous procedural due process analysis even in the midst of the war on terror when it applied the *Mathews* balancing test in *Hamdi v. Rumsfeld*, a suit challenging a citizen's classification as an enemy combatant.<sup>106</sup> The Court acknowledged the strong interests on both sides of the *Mathews* equation but concluded that procedural due process required that a citizen have the right “to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.”<sup>107</sup> To protect the detainee's ability to challenge his detention, the Court held that the government's proposed standard (requiring only “some evidence” to support indefinite detention) was insufficient to meet the demands of due process.<sup>108</sup> The Court did not, however, specify what such proceedings would look like—or how the detainees would develop the evidentiary record to challenge their detention.<sup>109</sup>

The difficulty in applying the procedural due process analysis is compounded when secrecy obligations obstruct the development of a full evidentiary record. Because the procedural due process analysis turns on the relative weight of each of the three factors, it is difficult for a court to conduct

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<sup>105</sup> Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 400 (2006) (“The *Mathews* balancing test is especially unsuitable for use in the war on terrorism, since the clash of individual and national security interests allows the judicial decisionmaker to reach any plausible outcome.”).

<sup>106</sup> 542 U.S. 507, 532–33 (2004).

<sup>107</sup> *Id.* at 529, 535.

<sup>108</sup> *Id.* at 537 (“Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed ‘some evidence’ standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”).

<sup>109</sup> *See id.* at 538–39 (anticipating that district courts would engage in “a factfinding process that is both prudent and incremental. . . . pay[ing] proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns”). In the years after *Hamdi*, the D.C. Circuit has generally applied a “preponderance of the evidence” standard to judge enemy-combatant detention, and other courts have developed evidentiary rules and procedures. *See Almerfed v. Obama*, 654 F.3d 1, 6 (D.C. Cir. 2011) (“We have said that this *Hamdi* approach ‘mirrors’ the preponderance standard.”); Jasmeet K. Ahuja & Andrew Tutt, *Evidentiary Rules Governing Guantánamo Habeas Petitions: Their Effects and Consequences*, 31 YALE L. & POL'Y REV. 185, 187 (2012) (“[A]s the government and detainees began to appeal habeas decisions on the basis of adverse evidentiary rulings, the Court of Appeals announced binding evidentiary rules limiting the district courts' discretion to admit, exclude, weigh, and consider evidence as the district courts saw fit.”).

the analysis when the government asserts a right to secrecy covering the very procedures challenged by the plaintiffs. The right that the government seeks to protect—the “government’s interest” underlying prong three—is a right of confidentiality and nondisclosure. But if those procedures are unknown, then the court will not be able to effectively assess the plaintiff’s risk of erroneous deprivation of liberty.

The district court’s 2014 opinion in *Latif v. Holder* demonstrated this difficulty when it struggled with the due process analysis because so many of the factors underlying the cost–benefit equation were unknown and ill-defined. The easiest factor for the court to delineate was the plaintiffs’ private interest.<sup>110</sup> The court identified two relevant interests that were abridged by placement on the no-fly list: an interest in exercising a right to travel internationally and an interest in avoiding the stigma of being marked as a suspected terrorist.<sup>111</sup> The risk of erroneous deprivation was much more difficult to assess—the court cited several cases where individuals had been mistakenly placed on the no-fly list, and it concluded that such erroneous deprivation was likely to occur under the then-current no-fly procedure where the government refused to reveal whether individuals were on the list or to offer any reasons for their inclusion on the list.<sup>112</sup> The government’s interest in “combating terrorism and protecting classified information” weighed heavily in the government’s favor—the court characterized this interest as “particularly compelling,”<sup>113</sup> but ultimately the court was persuaded that additional procedural protections would not necessarily “jeopardiz[e] the government’s interest in national security.”<sup>114</sup> The *Latif* court concluded that it had enough information to determine that existing procedures were constitutionally deficient, and it ordered defendants to provide plaintiffs, at a minimum, with notice of their status on the no-fly list and an unclassified explanation of the reason for their placement on the list.<sup>115</sup>

In a later proceeding in the case (now styled *Latif v. Lynch*) the court reiterated the interests at stake in the *Mathews* analysis.<sup>116</sup> This time the court weighed those interests in light of the revised procedures that the government

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<sup>110</sup> 28 F. Supp. 3d 1134, 1149–50 (D. Or. 2014).

<sup>111</sup> *Id.* at 1150–51.

<sup>112</sup> *Id.* at 1152–53.

<sup>113</sup> *Id.* at 1154.

<sup>114</sup> *Id.* at 1160–62.

<sup>115</sup> *Id.* at 1161–63.

<sup>116</sup> 3:10-cv-00750-BR, 2016 WL 1239925, at \*7–9 (D. Or. Mar. 28, 2016).

had adopted in the wake of the first opinion, and the court concluded that, at least in the abstract, those procedures could protect the plaintiffs' due process interests and were thus "facially adequate."<sup>117</sup> The question of whether the actual implementation of those procedures in fact complied with the plaintiffs' due process rights was left unresolved, to await further briefing.<sup>118</sup> The court concluded that if the government defendants provided the plaintiffs enough information to allow them to "respond meaningfully" in challenging their placement on the no-fly list, then the constitutional safeguards would be met.<sup>119</sup> However, because the record before the court neither disclosed what information had been withheld from the plaintiffs nor "provide[d] justification for withholding that information," the court could not rule that the revised procedures met the constitutional standard.<sup>120</sup> The court required the government defendants to "include with the administrative record submitted to the appropriate court an affidavit or declaration from a competent witness" that "identifies for the court the information that was withheld, provides justification for withholding that information, and explains why Defendants could not make additional disclosures."<sup>121</sup> This ruling is unlikely to settle the matter, however, as the government defendants have continuously objected that such disclosures would harm national security interests.

Because the first *Latif* court determined that additional procedures could be granted without sacrificing the government's interest, it did not need to reach the more difficult question: how much process is due? The question was also left unresolved after the second opinion, as the court found the record to be insufficiently developed to determine whether the implementation of the new procedures was sufficient to protect the plaintiffs' due process rights.

Similarly, the issue of "how much process is due" is the same question that the Supreme Court had earlier kept open in *Hamdi*, when the Court left lower courts to determine how the principles of due process should be applied to individuals detained as potential enemy combatants.<sup>122</sup> In both cases, the government has made a determination that individuals pose certain security risks—in the detention cases, the risk is a more immediate one, and in the aviation security context, it may be a lesser or more attenuated one—and in

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<sup>117</sup> *Id.* at \*14.

<sup>118</sup> *Id.* at \*14–15.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at \*15–16.

<sup>121</sup> *Id.* at \*19.

<sup>122</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 538–39 (2004).

both cases, classified intelligence information is essential to making that determination. As courts have grappled with the detention cases, their procedures have converged with ordinary criminal process to a significant degree.<sup>123</sup> Perhaps this is not surprising; after all, detention and criminal confinement share a common restriction of liberty.<sup>124</sup>

In the aviation security context, courts have yet to define the parameters of due process. Now that the government has provided notice to the plaintiffs still on the list and has given a minimal (and concededly incomplete) answer as to why each of the remaining plaintiffs is still on the list, that question is both paramount and difficult to answer. It was easy enough for the court to decide that the former procedure was insufficient—but how much is enough, and do the government’s incremental additions now meet that requirement?

## 2. *Measuring Risks by a Secret Yardstick*

In cases touching on national security issues—including litigation challenging the no-fly procedures—the government’s asserted interest in secrecy prevents the court from fully assessing either the risk of erroneous deprivation or the scope of the potential threat to national security. The revised no-fly procedures required by the *Latif* court, which required the government to confirm or deny that a given individual is on the list and to offer a minimal reason for placement on the list, should reduce the risk of complete misidentification or confusion regarding similar names.<sup>125</sup> But what about the harder case—where the government indeed intends to include an individual on the list due to suspicions about his or her ties to terrorism, but those suspicions are unfounded, and thus fail to meet even the low standard of “reasonable suspicion”? Unfortunately, there is no way for the court to analyze the reasonableness of the government’s suspicions—and therefore evaluate the risk of erroneous deprivation—unless the judge knows the full range of

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<sup>123</sup> See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (explaining that the military and criminal justice systems “have converged on procedural and especially substantive criteria for detention”).

<sup>124</sup> *Id.* (“The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate.”)

<sup>125</sup> See *supra* Part II.C.

evidence underlying the government's decision, and not just the "general nature of the Government's concerns."<sup>126</sup>

Likewise, the court cannot estimate the potential risk to national security interests (including the exposure of surveillance efforts and the potential that investigative targets will be apprised of the government's interest) if it lacks key information about those efforts. Are the government's efforts focused narrowly on high-risk individuals, more broadly on members of ethnic and religious subgroups, or even, at the most extreme, on the public generally?<sup>127</sup> The risk of disclosing the government's interest in a single high-risk identifiable individual may be more of a threat to national security than disclosing the government's interest in investigating larger groups of people with few if any known connections to terrorism. And, as the plaintiffs point out, the court cannot assess legal challenges to governmental surveillance programs if the government refuses to provide information about the nature and scope of those surveillance efforts.<sup>128</sup>

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<sup>126</sup> Defendant's Consolidated Memorandum, *supra* note 3, at 34 & n.18; *see also* Soumya Panda, Note, *The Procedural Due Process Requirements for No-Fly Lists*, 4 PIERCE L. REV. 121, 154 (2005) ("Because the TSA does not publish its procedures or selection criteria for the lists, the court cannot demonstrate that the agency has a reasonable basis for its actions.").

<sup>127</sup> This challenge is further compounded by cognitive biases and heuristics that may systematically overestimate the risk of harm from terrorism. *See* Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415, 1468–69 (2014) (explaining "how perceptions of risk, influenced by psychological, social, and cultural biases, affect judges' decisions about terrorism"); Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 198–99 (2010) (explaining how "[p]resentist bias" can lead national security decisionmakers to adopt policies that favor "short-term fixes like mass detentions or curbs on free speech with troubling long-term consequences," and how "hindsight bias" leads juries and judges to "overestimate officials' ability to correctly decide whom to arrest, detain, or interrogate").

<sup>128</sup> Memorandum of Points and Authorities in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment at 4, *Latif v. Lynch*, 3:10-cv-00750-BR, 2016 WL 1239925 (D. Or. Mar. 28, 2016) [hereinafter Memorandum of Points] ("It is undisputed that the letters did not confirm or deny whether any surveillance techniques were used to procure information that formed a basis for including the Plaintiffs on the No Fly List, including techniques that could render the use of such evidence unlawful."); *see also* Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & the Right to Notice*, 54 SANTA CLARA L. REV. 843, 862 (2014) ("[M]ere notice that the government had used a wiretap in its investigation would not tell a defendant whether the government had relied on Title III, FISA, or some other legal authority. And, therefore, notice of the bare fact of the wiretap would not permit the defendant to effectively challenge either the validity of the statute itself or the government's compliance with the applicable statutory procedures.").

Courts have acknowledged that the use of secret evidence makes the *Mathews* balancing test difficult to apply. In a pre-9/11<sup>129</sup> immigration case, for example, the Ninth Circuit examined whether undisclosed classified information could be used in proceedings seeking to deport individuals who were members of a political party associated with terrorist ideology—even though there was no evidence that the individuals themselves presented a risk to national security.<sup>130</sup> In that case, the court concluded that “[b]ecause of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional” in the absence of extraordinary circumstances.<sup>131</sup>

In another pre-9/11 immigration case, the D.C. Circuit similarly examined whether a permanent resident could be excluded from the United States on the basis of secret evidence.<sup>132</sup> Rafeedie, the petitioner, had traveled to Syria and subsequently sought to re-enter the United States.<sup>133</sup> The INS, however, alleged that his purpose in traveling to Syria had been “nefarious” and therefore supported his exclusion from the United States.<sup>134</sup> The government did not provide evidence of its assertion, resting instead on an unproven allegation.<sup>135</sup> The court explained that the petitioner could prevail under the government’s proposed standard only “if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the Government’s confidential information.”<sup>136</sup> The court noted that “[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.”<sup>137</sup> The court concluded that the petitioner was entitled to due process in the proceeding determining whether or not he had a right to return:

The Government cannot assert as an argument against procedural safeguards that the accused is guilty as charged. The whole point of due process is that the facts must be determined according to certain

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<sup>129</sup> Professor Avidan Cover has pointed to a “post-9/11 heuristic,” in which cases decided prior to the events of September 11, 2001, weigh the risk of terrorism less heavily than cases decided post 9/11. *See* Cover, *supra* note 127, at 1419–20.

<sup>130</sup> *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1071 (9th Cir. 1995).

<sup>131</sup> *Id.* at 1070.

<sup>132</sup> *Rafeedie v. Immigration & Naturalization Servs.*, 880 F.2d 506, 507 (D.C. Cir. 1989).

<sup>133</sup> *Id.* at 508–09.

<sup>134</sup> *Id.* at 520.

<sup>135</sup> *Id.* at 523.

<sup>136</sup> *Id.* at 516.

<sup>137</sup> *Id.*

procedures that have been agreed upon in advance for reasons of enduring policy divorced from the exigencies of any particular case.<sup>138</sup>

The Ninth Circuit returned to this issue in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*, a post-9/11 lawsuit filed by a nonprofit organization challenging a decision by U.S. government that designated it a terrorist organization and froze its funds.<sup>139</sup> This time, the court concluded that even if the use of such secret information was presumptively unconstitutional, “the use of classified information in the fight against terrorism, during a presidentially declared ‘national emergency,’ qualify[ed] as sufficiently ‘extraordinary’ to overcome the presumption.”<sup>140</sup> Nonetheless, the court pointed out that the use of secret evidence increased the risk of error: “Without disclosure of classified information, the designated entity cannot possibly know how to respond to OFAC’s concerns. Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations.”<sup>141</sup> Without a way to gauge the scope and extent of those risks, there is no way to evaluate the costs and benefits of requiring additional procedural protections.

### 3. *Can Secret Evidence Be Judicially Managed?*

In theory, careful judicial management and in camera review of classified evidence could offer some room for compromise. Even as it accepted that the post-9/11 fight against terrorism constituted an “extraordinary” circumstance warranting the use of secret information, the Ninth Circuit in *Al Haramain Islamic Foundation* nevertheless concluded that the *Mathews* test required examination of potential additional “safeguards” to offset the use of secret information.<sup>142</sup> It held that the district court should explore possibilities such as providing an “unclassified summary” of the evidence against the petitioner or allowing petitioner’s counsel “who has the appropriate security clearance” to view the evidence.<sup>143</sup>

Other courts and scholars have similarly suggested that courts could enact procedures that would protect sensitive information from broader disclosure

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<sup>138</sup> *Id.* at 523–24.

<sup>139</sup> 686 F.3d 965, 974 (9th Cir. 2012).

<sup>140</sup> *Id.* at 982.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 983.

while still ensuring that individuals have the opportunity to challenge the restriction of their liberty.<sup>144</sup> This idea, after all, was the impetus behind the Foreign Intelligence Surveillance Act (FISA) of 1978, which created a specialized court to hear requests for surveillance warrants.<sup>145</sup> Although the FISA court's mandate is limited, the basic concept of judicial management for classified or sensitive information has been applied more broadly; for example, at an earlier stage in the *Latif* litigation, the Ninth Circuit suggested that the district court might use the Classified Information Procedures Act to handle "sensitive intelligence information" in discovery.<sup>146</sup>

Although the availability and utility of such procedures should certainly be included in the *Mathews* weighing, neither the government nor individuals subject to government restrictions have found them to eliminate the essential collision of secrecy and due process. In the *Latif* litigation, the government defendants have argued that the use of such procedures may violate constitutional protections, stating that "[u]nder well-established separation of powers principles, decisions about who may access or use classified information and under what circumstances are not subject to judicial review."<sup>147</sup> The defendants went on to argue that, even if such procedures could be judicially imposed, they would create a significant enough national security threat that a *Mathews* analysis should not require their use.<sup>148</sup> The defendants characterized even the procedures of the Classified Information Procedures Act as only "purportedly secure," and suggested that limiting access to attorneys with proper security clearances would not protect against this perceived threat.<sup>149</sup> Plaintiffs in the *Latif* case, on the other hand, expressed support for the use of sealed evidence, protective orders, and an opportunity

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<sup>144</sup> See, e.g., Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT'L L.J. 515 (2002) (proposing that immigration judges take on a more inquisitorial role when classified evidence is used in an immigration proceeding); Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1982 (2005) (recommending reforms to the military tribunal process). *But see* Yaroshesky, *supra* note 52, at 1064 (arguing that, at least when used in criminal prosecutions, such procedures fail to protect defendants' constitutional right to mount a defense).

<sup>145</sup> 50 U.S.C. § 1803 (2012).

<sup>146</sup> *Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012) ("We also leave to the sound judgment of the district court how to handle discovery of what may be sensitive intelligence information." (citing Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16)).

<sup>147</sup> Defendants' Cross-Motion, *supra* note 13, at 43 (first citing *CIA v. Sims*, 471 U.S. 159, 180 (1985); then citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988); and then citing *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)).

<sup>148</sup> *Id.* at 43–45.

<sup>149</sup> *Id.* at 45.

for “cleared counsel” to view classified evidence, referring to these procedures as “robust . . . trusted and proven to protect national security.”<sup>150</sup> Nonetheless, the plaintiffs also expressed concern that if procedures such as “unclassified summaries” are used, the defendants must still disclose enough information to give each of the plaintiffs “substantially the same ability to make his defense as would disclosure of the specific classified information.”<sup>151</sup> Thus, the essential conflict remains: the government defendants object to disclosing the full range of evidence used to place the plaintiffs on the no-fly list, and the plaintiffs argue that they cannot defend against this decision without knowing the scope of the evidence against them.<sup>152</sup> Any other procedure, no matter how robust, cannot satisfy both sides—either the information is turned over, or it is not.

### B. *Substantive Due Process*

In addition to procedural protections, substantive due process also plays an important role in protecting individual liberty—especially when the procedural protections are difficult to weigh on their own. That is, it may matter less what procedures are granted in deciding whether particular liberty restrictions are constitutionally valid, and more whether there is “a sufficient substantive justification” for the deprivation of liberty.<sup>153</sup> Essentially, the procedural due process analysis offers a utilitarian and consequentialist view, conducting an interest-balancing review of the risks and benefits of procedural mechanisms.<sup>154</sup> The substantive due process analysis, on the other hand, is most closely related to deontological philosophy: it is founded on a protection of “[o]ur country’s basic norms of fairness, not merely our institutional procedural protections.”<sup>155</sup>

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<sup>150</sup> Memorandum of Points, *supra* note 128, at 17, 32–34.

<sup>151</sup> *Id.* at 33 (quoting 18 U.S.C. app. 3 §§ 4, 6(c)); *United States v. Sedaghaty*, 728 F.3d 885, 906 (9th Cir. 2013)).

<sup>152</sup> The proposal for “national security courts” raises similar issues. As Professor Steve Vladeck has pointed out, such proposals failed to answer the question of “[j]ust who are the terrorism suspects who can be subjected to this ‘third’ way, and what checks are there to protect against false positives?” Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 524 (2009) (emphasis omitted).

<sup>153</sup> Chemerinsky, *supra* note 96, at 1501.

<sup>154</sup> Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 263 (2012).

<sup>155</sup> Walter C. Long, *Appeasing a God: Rawlsian Analysis of Herrera v. Collins and a Substantive Due Process Right to Innocent Life*, 22 AM. J. CRIM. L. 215, 219 (1994); Robertson, *supra* note 154, at 281 n.136 (“[S]ubstantive due process . . . may well have a basis in deontological philosophy.”).

Of course, substance and procedure can never be entirely separated.<sup>156</sup> Legal scholar Jenny Martinez has described the “elusive relationship” between the two as “one of the recurring and unresolved debates in legal theory.”<sup>157</sup> Both courts and scholars have recognized that fair procedures are insufficient alone to guarantee protection of life, liberty and property.<sup>158</sup>

Scholar Timothy Sandefur used the Shirley Jackson short story “The Lottery” to illustrate the role played by substantive due process.<sup>159</sup> In the story, villagers follow strict procedures to randomly choose an individual to be killed by stoning.<sup>160</sup> The procedures bear every hallmark of fairness and neutrality, but ultimately there is no justification for the killing, which is carried out only because it is a long-standing tradition—it is a “fundamentally arbitrary, yet regular procedure.”<sup>161</sup> The very fact that the procedural protections are scrupulously enforced, ensuring that each citizen has an equal chance of selection, only emphasizes the horror of the government’s action.

As with the procedural due process analysis, the substantive due process framework raises special challenges in the context of national security. In national security cases, the need for secrecy makes it difficult to judge when

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<sup>156</sup> Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 321 (2004) (“We can easily rationalize the sacrifice of procedural justice from a consequentialist perspective . . . . In the end, however, these rationalizations ring hollow. Procedure without justice sacrifices legitimacy.”); Ann Woolhandler, *Procedural Due Process Liberty Interests* 6 (Univ. Va. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 41, Aug. 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2641869](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641869) (“[S]ubstantive constitutional rights are in fact late-coming procedural due process interests, and . . . the procedural protections for them may in some ways be more limited than for natural liberty and traditional property.”).

<sup>157</sup> Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1019 (2008).

<sup>158</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999) (arguing that due process was created to protect property rights, and that judicial decisions that place property in a “subordinate constitutional category are historically unsound”); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 NYU J.L. & LIBERTY 115, 171–72 (2010) (“Either the Constitution means what it says about protecting individual freedom, or it does not. Either there are rights that no state may justly take from us, as the authors of Constitution and of the Fourteenth Amendment believed, or rights are permissions which may be contracted or expanded to meet the needs of the collective.”).

<sup>159</sup> Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 297 (2012) (citing Shirley Jackson, *The Lottery* (1949), reprinted in SHIRLEY JACKSON: NOVELS AND STORIES 227–35 (Joyce Carol Oates ed., 2010)).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

government action meets the “fundamentally arbitrary” standard. Certainly, individual error can appear both arbitrary and unreasonable, as when an individual is placed on the no-fly list merely because an agent accidentally checked the wrong box on a form.<sup>162</sup> But the more difficult challenge is to identify the non-individualized, systematic deprivations of liberty that nonetheless are fundamentally arbitrary. In the no-fly context, the substantive due process question focuses on the standard of proof: Is “reasonable suspicion” of a connection to terrorism a sufficient justification to forbid someone from flying, or is the standard so low as to be fundamentally arbitrary?

### *I. Doctrinal Uncertainty*

The Supreme Court has never clearly defined the contours of the doctrine of substantive due process. It is true that the application of a substantive gloss on the Due Process Clause has deep historical roots.<sup>163</sup> In spite of this historical pedigree, the doctrine remains indeterminate; as constitutional scholar Erwin Chemerinsky has pointed out, “[S]trangely enough, if you look through Supreme Court opinions you will never find a definition [of substantive due process].”<sup>164</sup> Instead of defining the doctrine, the Court has treated it as a gap-filler to be applied when procedural due process fails to adequately protect against individual liberty; it has explained that substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>165</sup>

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<sup>162</sup> *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 928 (N.D. Cal. 2014).

<sup>163</sup> Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 669 (2009) (“On balance, the historical evidence shows that one widespread understanding of the Due Process Clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of unenumerated natural and customary rights against congressional action.”); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 495, 500 (2010) (arguing that the framers of the Fourteenth Amendment would have given “due process” a substantive meaning as well as a procedural one, as “[b]y 1868, a recognizable form of substantive due process had been embraced by a large majority of the courts that had considered the issue, including the U.S. Supreme Court . . . , and by courts in at least twenty of the thirty-seven then-existing states,” but suggesting that the framers of the Fifth Amendment in 1791 would likely have given only a procedural meaning to the due process clause).

<sup>164</sup> Chemerinsky, *supra* note 96, at 1501.

<sup>165</sup> *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Further compounding the lack of definitional clarity, the Court's use of the doctrine has varied significantly over time.<sup>166</sup> Its earliest application was to invalidate laws that interfered with freedom of contract and economic liberty, as exemplified in *Lochner v. New York*, where the Court struck down a state law limiting the hours of bakery employees.<sup>167</sup> The Court, however, backed away from this application in *West Coast Hotel Co. v. Parrish*,<sup>168</sup> which upheld state minimum-wage laws and “ended the *Lochner* era” by changing direction to hold that economic regulations should instead be measured by a deferential rational-basis standard.<sup>169</sup> Although the Court distanced itself from substantive due process to invalidate economic regulations, it continued to apply it in other areas—most notably, striking down restrictions on abortion,<sup>170</sup> on “excessive” punitive damage awards,<sup>171</sup> as well as on sodomy laws,<sup>172</sup> and, most recently, in upholding a right to same-sex marriage.<sup>173</sup>

The cases in which the Court has declined to find a substantive due process right best illustrate the limits of the doctrine. In *Washington v. Glucksberg*, the Court held that there was no substantive due process right to physician-assisted suicide.<sup>174</sup> Although the Court was divided, a majority agreed that substantive

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<sup>166</sup> F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique”?*, 60 FLA. L. REV. 349, 377–78 (2008) (“The Court’s development of its substantive due process framework has been characterized by a preference for ad hoc decisions instead of the construction of an underlying theoretical framework.”).

<sup>167</sup> 198 U.S. 45 (1905) (invalidating a law that limited the hours that could be worked by bakery employees in New York).

<sup>168</sup> 300 U.S. 379 (1937); see also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 2* (2011) (“The Supreme Court withdrew constitutional protection for liberty of contract in the 1930s. Since then, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court’s liberty of contract decisions.”).

<sup>169</sup> 300 U.S. at 391, 399; Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 543 (2015).

<sup>170</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion); *Roe v. Wade*, 410 U.S. 113 (1973); see also Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 72 (2006) (“*Roe* brought modern substantive due process into full flower.”).

<sup>171</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996); Max N. Helveston, *Judicial Deregulation of Consumer Markets*, 36 CARDOZO L. REV. 1739, 1753 (2015) (“In the early nineties, however, the Supreme Court found that it was possible that punitive damages awards could violate defendants’ procedural and substantive due process rights.”); Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1259 (2015) (conducting an empirical review of court decisions analyzing punitive-damage awards).

<sup>172</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>173</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“[T]he Court has reiterated that the right to marry is fundamental under the Due Process Clause.”); *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013) (invalidating the federal Defense of Marriage Act).

<sup>174</sup> 521 U.S. 702, 728 (1997).

due process should protect only “fundamental rights found to be deeply rooted in our legal tradition.”<sup>175</sup> By limiting the protection to such “fundamental rights,” the Court concluded that “it avoids the need for complex balancing of competing interests in every case.”<sup>176</sup> Infringing on such “deeply rooted” fundamental rights would require a compelling state interest, but governmental infringement on individual liberties not meeting the “fundamental” threshold would require only a rational basis.<sup>177</sup> The Court acknowledged that it had earlier held that there was a fundamental right to refuse unwanted lifesaving treatment, but it distinguished “the long legal tradition protecting the decision to refuse unwanted medical treatment” from the more recent development of support for assisted suicide.<sup>178</sup> After concluding that assisted suicide could not be considered a fundamental right, the Court applied a rational-basis standard of review and concluded that the state law prohibiting assisted suicide was “reasonably related” to the state’s goals of “protecting the vulnerable from coercion” and “protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference.’”<sup>179</sup>

More recently, the Court has divided over the question of whether substantive due process would give rise to a protectable interest in a spouse’s immigration status.<sup>180</sup> A majority of the Court agreed that the claim—brought by a U.S. citizen, seeking review of the denial of her Afghani husband’s visa—should be dismissed.<sup>181</sup> The petitioner, Fauzia Din, had come to the United States as a refugee in 2000 and obtained citizenship in 2007.<sup>182</sup> When her husband sought to join her in the United States, his visa was denied under the “terrorism bar” with no explanation.<sup>183</sup> Because he had no ability to enter the United States or otherwise seek judicial review of the visa denial, Din filed suit “on his behalf, alleging that the Government’s denial of her *husband’s* visa application violated *her* constitutional rights” and claiming “that the Government denied her due process of law when, without adequate

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<sup>175</sup> *Id.* at 722.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 725; *see also id.* at 728 (“The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.”).

<sup>179</sup> *Id.* at 732.

<sup>180</sup> *Kerry v. Din*, 135 S. Ct. 2128 (2015) (plurality opinion); *see also Woolhandler, supra* 156, at 52–53 (suggesting that Din’s claim might be best characterized as a “hybrid liberty interest” with both procedural and substantive aspects).

<sup>181</sup> *Kerry*, 135 S. Ct. at 2131.

<sup>182</sup> *Id.* at 2132.

<sup>183</sup> *Id.* at 2131–32.

explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse.”<sup>184</sup>

Interestingly, however, there was no majority agreement on the question of whether the case raised a substantive due process issue. Four dissenting Justices—Breyer, Ginsburg, Sotomayor, and Kagan—would have granted relief; in an opinion authored by Justice Breyer, they identified a fundamental right of marriage, “which encompasses the right of spouses to live together and to raise a family,” and concluded that the government’s failure to offer a reason for the visa denial violated the petitioner’s due process rights.<sup>185</sup> Five justices—a majority of the Court—voted to deny relief, but for different reasons. Chief Justice Roberts and Justice Thomas joined the plurality opinion authored by Justice Scalia, which concluded that no fundamental right had been infringed; the opinion pointed to historical limits placed on immigration matters, and emphasized that under the Expatriation Act of 1907, a female U.S. citizen who married a foreigner would automatically take his nationality.<sup>186</sup> Justices Kennedy and Alito concurred in the result, but would not reach the question of substantive due process, instead deferring to the strength of the government’s interest in national security.<sup>187</sup> Thus, they concluded that even if the petitioner did have a “protected liberty interest” in her husband’s immigration status, “the Government satisfied due process when it notified Din’s husband that his visa was denied under the immigration statute’s terrorism bar.”<sup>188</sup>

Finally, the Court again returned to the question of substantive due process in *Obergefell v. Hodges*, in which the Court struck down state prohibitions against same-sex marriage.<sup>189</sup> Justice Kennedy’s majority opinion in *Obergefell* concluded that marriage was a fundamental right and that prohibitions against same-sex marriage “would be unjustified under the Fourteenth Amendment.”<sup>190</sup> Four other Justices—Ginsburg, Breyer, Sotomayor, and Kagan—signed on to the majority opinion in its entirety. Two

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<sup>184</sup> *Id.* at 2131.

<sup>185</sup> *Id.* at 2142 (Breyer, J., dissenting).

<sup>186</sup> *Id.* at 2135 (plurality opinion) (“Thus, a woman in Din’s position not only lacked a liberty interest that might be affected by the Government’s disposition of her husband’s visa application, she lost her *own* rights as a citizen upon marriage.”).

<sup>187</sup> *Id.* at 2141 (Kennedy, J., concurring) (“[T]he notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses.”).

<sup>188</sup> *Id.* at 2139 (Kennedy, J., concurring).

<sup>189</sup> 135 S. Ct. 2584, 2604–05 (2015).

<sup>190</sup> *Id.* at 2606.

of the dissents in the case emphasized the dissenting Justices' objections not just to same-sex marriage itself but also to the larger doctrine of substantive due process. Justice Thomas, in a dissent joined by Justice Scalia, criticized the Court's opinion more broadly, but described the doctrine of substantive due process as entirely indefensible.<sup>191</sup> This position was consistent with Justices Scalia and Justice Thomas's earlier repudiation of substantive due process in the punitive-damages context.<sup>192</sup> In *Obergefell*, however, Chief Justice Roberts (joined again by Justices Scalia and Thomas) also wrote a lengthy dissent that sharply criticized the doctrine of substantive due process, writing that the Court's "aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*."<sup>193</sup> Chief Justice Roberts' dissent stopped short of condemning the doctrine in its entirety, but made clear that, in his opinion, the doctrine should be applied only to rights that are "grounded in history."<sup>194</sup> Justice Alito also issued a short dissent in the case that set out his objections to the majority opinion without defining his view of the contours of a right to substantive due process;<sup>195</sup> in an interview after the opinion was released, he was quoted as saying, "I don't know what the limits of substantive liberty protection under the 14th Amendment are at this point."<sup>196</sup>

## 2. *Substantive Due Process, National Security, and Secrecy*

Even though the doctrine of substantive due process is less than clear, it is still possible to sketch out the Court's likely approach to a substantive due process claim against the no-fly list. The first step is to identify the liberty interest protected—one that is "deeply rooted" in history and tradition and is so

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<sup>191</sup> *Id.* at 2632 (Thomas, J., dissenting) ("Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim.").

<sup>192</sup> *Philip Morris USA v. Williams*, 549 U.S. 346, 361 (2007) (Thomas, J., dissenting); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting); see also Hubbard, *supra* note 166, at 357 ("Justices Scalia and Thomas have consistently dissented from the opinions establishing the substantive framework, arguing that the Constitution provides no substantive limit on the size of punitive damages awards and that the framework cannot be applied in a principled fashion.").

<sup>193</sup> *Obergefell*, 135 S. Ct. at 2618–19 (Roberts, C.J., dissenting).

<sup>194</sup> *Id.* at 2618 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 504 (1977)).

<sup>195</sup> *Id.* at 2640–43 (Alito, J., dissenting).

<sup>196</sup> Ed Whelan, *Justice Alito's Conversation with Bill Kristol: Substantive Due Process*, NAT'L REV. (July 20, 2015, 10:27 AM), <http://www.nationalreview.com/bench-memos/421391/justice-alitos-conversation-bill-kristol-substantive-due-process-ed-whelan>.

fundamental to “the concept of ordered liberty” that “neither liberty nor justice would exist” in its absence.<sup>197</sup>

Delineating this right can be difficult, as its definition—and thus its protection—can vary greatly depending on what level of abstraction or generality is applied.<sup>198</sup> The Supreme Court has held that there is a fundamental right to interstate travel, which would appear to make an easy case for a substantive due process challenge to the no-fly list.<sup>199</sup> However, persons on the no-fly list may still travel relatively easily by car or bus.<sup>200</sup> So travel in general is not restrained, only air travel—but if the right is defined as a right to travel by air, then it loses its “deeply rooted” place in history, as air travel has existed only in the modern era.

The Supreme Court has previously recognized a constitutional right to international travel.<sup>201</sup> It held, however, that this right is not a fundamental one that will be protected by strict scrutiny; instead, it has stated that “the ‘right’ of international travel has been considered to be no more than an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment. As such this ‘right,’ the Court has held, can be regulated within the bounds of due

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<sup>197</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (first quoting *Moore v. East Cleveland*, 431 U.S. 494 (1977); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

<sup>198</sup> See, e.g., Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 242 (2014) (explaining that higher levels of generality increase definitional similarity, whereas lower levels of generality emphasize definitional distinctions); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (“The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection. For instance, did the Court in *Griswold v. Connecticut* recognize the narrow right to use contraception or the broader right to make a variety of procreative decisions?”).

<sup>199</sup> *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (“The ‘right to travel’ . . . protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien[,] . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”).

<sup>200</sup> *Latif v. Holder*, 969 F. Supp. 2d 1293, 1303 (D. Or. 2013) (“Although there are perhaps viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with Defendants’ contention that international air travel is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation.”); *Ibrahim v. Dep’t of Homeland Sec.*, No. C 06-00545 WHA, 2012 WL 6652362, at \*7 (N.D. Cal. Dec. 20, 2012) (“While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for *international* travel, air transport in these modern times is practically the only form of transportation, travel by ship being prohibitively expensive or so it will be presumed at the pleading stage.”).

<sup>201</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

process.<sup>202</sup> Professor Jeffrey Kahn has argued convincingly that the Supreme Court should recognize a fundamental right to travel internationally, rooted in the Citizenship Clause of the Fourteenth Amendment.<sup>203</sup> Nevertheless, the Supreme Court has not yet done so, and even if it did, recognition of such a right could still leave substantial travel restrictions in place even if the no-fly list were limited to domestic air travel.

Another potential liberty interest is the individual's right to be free of "stigma and humiliation" that come from being accused of terrorism and publicly denied boarding.<sup>204</sup> The Northern District of California identified such an interest in *Ibrahim v. Department of Homeland Security*, when it found that due process required the government to correct its records and remove Rahinah Ibrahim from the no-fly list after an FBI agent's accidental mark in the wrong check-box landed her on the list.<sup>205</sup> The Supreme Court has held that reputation alone is not a fundamental interest,<sup>206</sup> but it has left open the possibility that reputational stigma may rise to such a level when combined with other governmental action that curtails or denies individual rights.<sup>207</sup> It may be that the restriction of travel, combined with the reputational harm and stigma associated with placement on the no-fly list would together meet the "stigma plus" test to qualify for heightened scrutiny.<sup>208</sup> The recent debates regarding

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<sup>202</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Califano v. Aznavorian*, 439 U.S. 170, 317 (1978)). Of course, procedural due process would still require appropriate procedural measures to protect against erroneous deprivation. *See supra* note 99.

<sup>203</sup> *See* Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271, 348 (2008) ("[I]nternational travel should be considered a fundamental right protected by strict judicial scrutiny. Denial of the citizen's right to leave his or her country and return home again should be permitted only when that restriction is the least restrictive means of accomplishing a compelling state interest.").

<sup>204</sup> *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 928 (N.D. Cal. 2014).

<sup>205</sup> *Id.* at 916 ("Agent Kelley misunderstood the directions on the form and erroneously nominated Dr. Ibrahim to the TSA's no-fly list and the Interagency Border Information System ("IBIS"). He did not intend to do so. . . . He checked the wrong boxes, filling out the form exactly the opposite way from the instructions on the form.").

<sup>206</sup> *Paul v. Davis*, 424 U.S. 693, 712 (1976) ("[P]etitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause.").

<sup>207</sup> Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1126 (2012) ("And so was born the concept of 'stigma plus,' which demands not only proof of injury to one's reputation, but also that the injury was accompanied by the denial or curtailment of a tangible interest.").

<sup>208</sup> *See Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005) ("[A] 'stigma plus' claim requires a plaintiff to allege (1) the utterance of a statement about her that is injurious to her reputation, 'that is capable of being proved false, and that he or she claims is false,' and (2) 'some tangible and material state-imposed burden . . . in addition to the stigmatizing statement.'" (citations omitted) (ellipsis in original) (quoting *Doe v. Dep't of Pub. Safety ex rel. Lee*, 271 F.3d 38, 47 (2d Cir. 2001))); Eric J. Mitnick, *Procedural Due Process and*

prohibiting gun purchases to anyone on the no-fly list and other watchlists further demonstrate politicians' and the public's view of individuals on these lists.<sup>209</sup> New York Governor Andrew Cuomo commented that selling guns to people in that category is "madness," adding, "I am a gun owner. Nobody is demonizing the ownership of guns. But not for the mentally ill, not for people who committed crimes and not for people who are suspected terrorists."<sup>210</sup> The consequences of being put on the no-fly list are substantial and only risk growing as politicians try to devise new ways of showing that they are taking decisive action.

Finally, aside from the doctrinal difficulty of prevailing on a traditional substantive due process claim, there is also a practical difficulty. The two most recent Supreme Court substantive due process cases—*Kerry* and *Obergefell*—suggest it would be difficult to get a majority of the Court to support a substantive due process challenge to the no-fly list. Justice Thomas has rejected the doctrine in its entirety, and Chief Justice Roberts has expressed a very narrow view of the doctrine. Justice Kennedy, who was willing to apply the doctrine expansively in *Obergefell*, appeared to take a much narrower approach when national security was a countervailing interest, and Justice Alito likewise gave great deference to the national security interest in *Kerry*. Only four justices were willing to recognize a substantive liberty interest in both *Kerry* and *Obergefell*, suggesting that the no-fly plaintiffs may have an uphill battle in obtaining relief on their substantive due process claim even if the Court were to agree that their asserted rights could qualify as sufficiently deep-rooted in history to qualify as fundamental.

This difficulty is compounded by the judiciary's traditional deference to the Executive Branch in matters of national security. The Supreme Court has acknowledged this deference, writing that "[w]e have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government

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*Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 131 (2009) ("[T]here should be no question that an individual wrongfully branded a terrorist by a state agency in this way has suffered a deprivation of liberty.").

<sup>209</sup> Mark Hensch, *NY Governor: 'Madness' Not to Ban No-Fly List Gun Sales*, HILL: BRIEFING ROOM (Dec. 14, 2015, 10:37 AM), <http://thehill.com/blogs/blog-briefing-room/news/263108-governor-its-madness-not-banning-no-fly-list-gun-sales>.

<sup>210</sup> *Id.*

may detain individuals whom the Government believes to be dangerous.”<sup>211</sup> This deference is especially strong in matters within the Executive Branch’s sphere of competence, which includes the development and maintenance of “many different kinds of powerful databases that implicate individuals’ interests in privacy, due process and equal protection,” which “courts review leniently” if at all.<sup>212</sup> As with procedural due process, the importance of national security and the secrecy inherent in the security process make it difficult to ensure protection of individual liberty.

#### IV. TOWARD A UNIFIED MODEL OF DUE PROCESS

Under the current doctrinal formulations, neither procedural nor substantive due process analyses sufficiently protect liberty interests in the shadow of national security secrecy. The court cannot weigh the risks and benefits of additional procedural protections when the evidence illuminating those elements is kept secret—and especially when the very interest that the government seeks to protect is secrecy itself. The most current formulation of substantive due process, with its sharp dividing line between “fundamental” and “non-fundamental” rights, also seems to be an imperfect fit. It is not clear that either international travel or an individual’s reputation interest would rise to the level of a fundamental right to be protected by strict scrutiny—and, in any case, national security itself is a compelling state interest. Thus, the government’s interest in secrecy may well trump the individual’s liberty interest, at least in the abstract. At a broad level of generality, courts are likely to agree that there are compelling state interests in keeping terrorism investigations confidential and in preventing known terrorists from boarding commercial aircraft.<sup>213</sup>

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<sup>211</sup> *United States v. Salerno*, 481 U.S. 739, 748 (1987).

<sup>212</sup> Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 697 n.63 (2005) (“Generally, the courts defer to the superior position of executive officials designing and maintaining databases to evaluate their necessity and attendant risks to individual rights relative to available alternatives, and to consider ways to minimize infringements of individual rights beyond the relatively blunt requirements that a court is equipped to propose or enforce.”); *see also* Wayne McCormack, *U.S. Judicial Independence: Victim in the “War on Terror,”* 71 WASH. & LEE L. REV. 305, 401 (2014) (“[U]ndue deference to the Executive in ‘time of crisis’ has undermined the independent role of the Judiciary. Torture, executive detentions, illegal surveillance, and now killing of U.S. citizens, have escaped judicial review under a variety of excuses.”).

<sup>213</sup> *See* *Latif v. Holder*, 28 F. Supp 3d 1134, 1154 (D. Or. 2014) (“[T]he Government’s interest in combating terrorism is an urgent objective of the highest order.” (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010))); Gail Sullivan, *Why the No-Fly List Was Declared Unconstitutional*, WASH. POST (June 25, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/06/25/judge-rules-no-fly-list-unconstitutional/> (“In her opinion, Brown recognized the government’s compelling interest in combatting

But even if these interests are compelling in the abstract, there is a growing recognition among courts and scholars that, in numerous cases, significant liberty interests are losing out not to valid security needs, but instead to bureaucratic error and overreach.<sup>214</sup> The broad “reasonable suspicion” standard for inclusion on the no-fly list creates room for error, where even an FBI agent’s accidental mark on a check-box form has led to an innocent traveler’s inclusion on the no-fly list.<sup>215</sup> Because the review process was secret, the traveler had no way to prove that the government made a mistake—several years after she sued, the government reviewed its records and realized that her inclusion on the list was solely due to a typo.<sup>216</sup> Finally, there are repeated stories of government officials placing people on the list for reasons not authorized under their own procedures, such as coercing them to become informants on members of their ethnic or religious community.<sup>217</sup> When there

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terrorism. However, well-established case law says even compelling government interests must be balanced against citizens’ constitutional rights. The issues with the no-fly list aren’t exactly new—the opinion cites several post-911 cases where that balancing act involved national security interests.”)

<sup>214</sup> Kahn, *supra* note 203, at 321; Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 *BUFF. L. REV.* 461, 463 (2013) (“[T]he incentive structures surrounding terrorist watch lists push agents and agencies to exaggerate dangers, putting names on watch lists that do not belong there.”); Danielle Keats Citron, *Technological Due Process*, 85 *WASH. U. L. REV.* 1249, 1256 (2008) (“Every week, approximately 1,500 airline travelers reportedly are mislabeled as terrorists due to errors in the data-matching program known as the ‘No Fly’ list. Innocent individuals face extensive questioning and miss flights, never knowing why the automated system has targeted them.” (footnote omitted)); Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 *CORNELL L. REV.* 327, 377 (2014) (“It might be legitimate, for example, to prevent a suspected terrorist from boarding a plane soon after the government learns of his involvement in a nascent terrorist plot. But why is it legitimate for the restraint to last months or years in the absence of sufficient evidence to bring a criminal charge for an inchoate conspiracy or attempt crime?”); Erin Murphy, *Paradigms of Restraint*, 57 *DUKE L.J.* 1321, 1410 (2008) (arguing that the no-fly list, “if impermeable to challenge or inspection in any reasonable way, should cause a court pause”); Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 *YALE L.J.* 2148, 2180 (2006) (“Decisions by the agency concerning who is listed on the No Fly List or denied a transportation-sector job should be subject to judicial review in Article III courts.”)

<sup>215</sup> *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 928 (N.D. Cal. 2014).

<sup>216</sup> *Id.* at 928–29. Some argue that “the watchlists were riddled with errors” from the start. SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* 68 (2011). A 2009 report revealed that “in 78 percent of cases, nominations to the list were not timely and sometimes were based on outdated or simply incorrect information . . . . At the same time, the FBI failed to remove names of cleared people in a timely manner in 72 percent of cases.” *Id.*; see also KAHN, *supra* note 6, at 153 (“Once on the list, it is hard to get off the list.”).

<sup>217</sup> See Shirin Sinnar, *Towards A Fairer Terrorist Watchlist*, *ADMIN. & REG. L. NEWS*, Winter 2015, at 4, 5 (“Recurrent allegations that FBI agents threaten individuals with watchlisting to coerce them into becoming government informants lends support to the idea that No Fly list standards have strayed from their original purpose of averting true threats to civil aviation.”); Spencer Ackerman, *No-Fly List Used by FBI to Coerce Muslims into Informing, Lawsuit Claims*, *GUARDIAN* (Apr. 22, 2014, 10:00 PM), <http://www.theguardian.com/world/2014/apr/23/no-fly-list-fbi-coerce-muslims>; Kevin Gosztola, *Hundreds of Thousands of People*

is no disclosure of what information was used to support the government's decision to add the individual to the list, there is no way to challenge that determination, regardless of whether the decision was supported by the evidence, and, importantly, regardless of whether it was made in good faith.

Thus, a narrowly applied procedural due process doctrine and a narrowly applied substantive due process doctrine both fail to protect individuals' liberty interests and also give rise to a widespread sense of perceived injustice. This perception is highly relevant—the idea of due process is not merely a legal doctrine, but is woven into the very fabric of the American identity.<sup>218</sup> A perception that liberty has been arbitrarily restrained weakens the rule of law within the national identity.<sup>219</sup>

There is no obvious answer to reducing the disconnect between the failure to protect liberty interests via procedural and substantive due process doctrines and the widespread sense of perceived injustice. Procedural due process rights could be added, requiring greater disclosure of evidence and additional mechanisms by which individuals can challenge the government's restrictions.<sup>220</sup> This change would create difficulties on both sides, however—first, it may not fully account for governmental interests in keeping classified information secret, and second, it still may not correct arbitrary deprivations of liberty that come from the low “reasonable suspicion” standard applied to inclusion on the no-fly list.<sup>221</sup> Substantive due process protections could likewise be expanded to protect against such arbitrary deprivations of liberty, but the “compelling state interest” requirement traditionally associated with

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*Unaffiliated with Terrorist Group on US Government Watchlist*, SHADOWPROOF (Aug. 5, 2014), <https://shadowproof.com/2014/08/05/hundreds-of-thousands-of-individuals-not-associated-with-terrorist-group-on-us-governments-watchlist/> (“The presence of Dearborn in the list of top five cities is one of the most obvious indicators that the watchlist is filled with the names of people, who would not be on the list if the national security state did not have a cultural bias toward Muslims. Dearborn, as described in the report, is a city ‘much smaller than the other cities.’ It only has 96,000 residents. Forty percent of the Dearborn population is ‘of Arab descent,’ according to the US Census Bureau.”).

<sup>218</sup> See Robertson, *supra* note 154, at 262 (“[D]ue process is more than a legal principle; it is also a personal value that carries a special weight in the American identity. When people talk about what it means to be American, the respect for procedural rights is paramount.”).

<sup>219</sup> *Id.* at 260 (noting that “the concept of procedural due process derives from a commitment to the rule of law”).

<sup>220</sup> JARED COLE, CONG. RESEARCH SERV., R43730, TERRORIST DATABASES AND THE NO FLY LIST: PROCEDURAL DUE PROCESS AND HURDLES TO LITIGATION 13–15 (2015).

<sup>221</sup> See *supra* Part III.A.

substantive due process may restrict executive power more than the judiciary is willing to do when national security is at stake.<sup>222</sup>

A better solution may be found by combining the essential elements of procedural and substantive due process. After all, there is no real historical or textual reason why the two doctrines should be separate; they are both founded in the same constitutional language,<sup>223</sup> and both have long been viewed as part of the essential guarantee of liberty that the constitution protects.<sup>224</sup> This combined standard would not replace the familiar doctrinal analysis of procedural and substantive due process in the ordinary case. Instead, it would apply in the limited situation where the dictates of national security require a higher deference to interests of confidentiality and secrecy—but where there is nonetheless a significant danger that liberty will be restricted in ways that are not warranted by these interests.

A combined standard would begin with recognition of, and some level of protection for, even non-fundamental rights. At a basic level, this position is non-controversial. After all, even the Supreme Court’s framework for rational-basis review provides some substantive protection to non-fundamental rights, albeit one that requires only that the governmental restriction be rationally related to a legitimate state interest.<sup>225</sup> Of course it is rare that rational-basis review will act to constrain governmental action, but this has more to do with the procedure by which the Court has applied the standard, and not with the standard itself. In particular, the Court has applied “a strong presumption of validity”<sup>226</sup> to government action subject to rational basis review, has specified that “a legislature that creates these categories need not ‘actually articulate at any time the purpose or rationale supporting its classification,’”<sup>227</sup> and has

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<sup>222</sup> See *supra* Part III.B.

<sup>223</sup> U.S. CONST. amend. V.

<sup>224</sup> Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 848 (2003) (“Of course, substance and procedure cannot be so ‘neatly separated.’ . . . At the margin, at least, the distinction between substance and procedure blurs.”); see also F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 1* (Cambridge Univ. Press 1963) (1909) (“[S]ubstantive law [is] . . . being gradually secreted in the interstices of procedure.” (quoting Henry Sumner Maine, *Dissertations on Early Law and Custom* 389 (1891))); Woolhandler, *supra* note 156, at 4–5 (“Modern discussions of procedural due process often focus on the Supreme Court’s requiring hearings or other process in administrative agencies . . . . But another pervasive aspect of procedural due process is the Court’s requiring judicial process when particular interests are at stake.”).

<sup>225</sup> *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987).

<sup>226</sup> *Heller v. Doe*, 509 U.S. 312, 319 (1993).

<sup>227</sup> *Id.* at 320 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 25 (1992)).

provided that “any reasonably conceivable state of facts”<sup>228</sup> will support a rational-basis finding, whether or not there is evidentiary support for it.<sup>229</sup>

Because the Court’s application of the rational basis test erects such a high procedural barrier, it effectively insulates some governmental restrictions even when they lack a real relationship to legitimate government interests.<sup>230</sup> But even though the Supreme Court made it difficult to challenge illegitimate governmental action, the Court has always been clear that the constitutional legitimacy of governmental action requires a rational basis.<sup>231</sup> And in some cases—especially when significant liberty issues are at stake—the Court has been less willing to presume the validity of governmental action, applying the rational-basis standard “with bite.”<sup>232</sup> Thus, the Court has applied the rational-basis standard to strike down a prohibition on allowing former Communists to practice law,<sup>233</sup> a zoning law that would exclude group homes for individuals with developmental disabilities,<sup>234</sup> and a state law that sought to prohibit local governments from including sexual orientation in antidiscrimination ordinances.<sup>235</sup>

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<sup>228</sup> *Id.* at 313 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

<sup>229</sup> *Id.*; see also *Munn v. Illinois*, 94 U.S. 113, 132 (1876) (“If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did.”).

<sup>230</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 679 (3d ed. 2006) (“[I]t also can be argued that the Court has gone too far in its deference under the rational basis test. Unfair laws are allowed to stand because a conceivable legitimate purpose can be identified for virtually any law.”); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & LIBERTY 898, 910 (2005) (“There comes a point where the deck is stacked so thoroughly against a litigant that the result of the case is effectively preordained. Saddling rational basis plaintiffs with a technically unattainable burden of proof and requiring them to construct a trial court record sufficient to rebut arguments that have not even been made yet would seem to reach that point.”).

<sup>231</sup> *Beach Commc’ns, Inc.*, 508 U.S. at 313 (“[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

<sup>232</sup> See Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 215, 234 (2014) (“[T]here are signs the Court may be willing to inquire into the ‘rationality’ of legislation a bit more skeptically.”); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 NYU J.L. & LIBERTY 1055, 1069 (2014) (“‘[R]ational basis with bite’ has reappeared recently in several circuits’ review of statutes infringing economic liberty.”).

<sup>233</sup> *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 246–47 (1957) (“There is no evidence in the record which rationally justifies a finding that Schwart was morally unfit to practice law.”).

<sup>234</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (emphasizing that even under rational basis review, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational”).

<sup>235</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996) (concluding that the ostensible purposes of the legislation were “so far removed” from the “breadth of the amendment” that it was “impossible to credit them”).

The current “reasonable suspicion” standard for inclusion on the no-fly list may violate even a rational-basis standard of review—especially if courts are willing to give teeth to the rational-basis standard. Certainly, the government has a strong—even compelling—interest in preventing terrorist attacks.<sup>236</sup> But the evidence appears overwhelming that the current procedure to include people on the no-fly list does absolutely nothing to assist in preventing such attacks.<sup>237</sup> When individuals on the list can still enter the country at border crossings, can work in the secured area of domestic airports, can purchase guns, can obtain commercial driver’s licenses and work as school bus drivers, then has the list done anything to reduce the threat of terrorism?<sup>238</sup>

Indeed, the list may be counterproductive, as law enforcement agencies are reportedly reluctant to place the most dangerous terrorism suspects on the list at all.<sup>239</sup> In some cases, “agencies who have genuine leads on suspected terrorists purposely choose not to add those suspects’ names to the No Fly List because they believe the need to circulate the list to airlines means its contents cannot be made sufficiently secure.”<sup>240</sup> Similarly, the sheer number of individuals on the list—and the widely varying and, sometimes, tenuous reasons for inclusion on the list—may obscure the much smaller number of individuals on the list who pose a more immediate threat.<sup>241</sup> “Reasonable suspicion” can apply so broadly that it fails to do its job in identifying those who are most likely to pose a threat to aviation security.<sup>242</sup> As a result, it is likely to be less effective than a more narrowly targeted standard.<sup>243</sup>

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<sup>236</sup> See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1153 (D. Or. 2014).

<sup>237</sup> See *supra* Part III.

<sup>238</sup> See *supra* Part I. One of the plaintiffs in the litigation surrounding the no-fly list was, in fact, a bus driver. Third Amended Complaint, *supra* note 36, at 6. He lost his employment, however, when co-workers complained about having to work with someone who is on the No-Fly list once the story aired on television. Declaration of Amir Meshal in Opposition to Defendants’ Cross-Motion for Summary Judgment at 4, *Latif v. Lynch*, 3:10-cv-00750-BR, 2016 WL 1239925 (D. Or. Mar. 28, 2016).

<sup>239</sup> See Chang, *supra* note 18 (noting that opponents of using the terrorist watchlist for gun control raise the question, “Why tip off an actual terrorist that we’re on to him by telling him he failed a background check?”).

<sup>240</sup> Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1255.

<sup>241</sup> See Chang, *supra* note 18 (noting a former counterterrorism official’s explanation that “a lot of totally innocent people end up on the terrorism watch list—such as business associates, roommates or landlords of suspected terrorists”).

<sup>242</sup> See KAHN, *supra* note 6, at 151 (“From a policy perspective, a terrorist screening database that contains the names of nonterrorists is worse than unhelpful—it is a resource-consuming distraction.”).

<sup>243</sup> Moreover, the current costs of the list at its current size are exorbitant, having been estimated at \$536 million to \$966 million as of 2009. See Marcus Holmes, *Just How Much Does That Cost, Anyway? An Analysis of the Financial Costs and Benefits of the “No-Fly” List*, HOMELAND SEC. AFF., Jan. 2009, at 1, 18.

Even if the Supreme Court would not strike down the “reasonable suspicion” standard under rational basis review, it should modify the doctrinal formulation used to evaluate due process in national security cases that implicate both governmental secrecy interests and significant individual liberty interests. Such a model would not be unprecedented.<sup>244</sup> In recent years the Court’s due process jurisprudence has evolved away from bright-line categories toward a more flexible model of due process, especially where constitutional protections intersect.<sup>245</sup> This flexible standard motivated the Supreme Court’s opinion in *Obergefell*, where the Court’s opinion invalidating same-sex marriage restrictions rested on the “synergy” between the due process and equal protection guarantees.<sup>246</sup> Without due process protection for the substantive right to marry, “central precepts of equality” would be abridged.<sup>247</sup>

A similar synergy of core constitutional rights arises in the travel sphere. First Amendment rights to practice religion and engage in political speech are some of the most fundamental rights protected by the Constitution.<sup>248</sup> If the government is allowed to use religious practice and nonviolent political opinion in restricting individuals’ freedom of travel, then those rights are necessarily abridged.<sup>249</sup> At a minimum, individuals (especially those who are members of “suspect” religions and those who hold political opinions opposing the political party in power) would suffer a chilling effect, fearing that a choice to exercise their constitutional speech and religious rights would restrict their

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<sup>244</sup> See Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 358 (2006).

<sup>245</sup> *Id.* (“While *Romer* adds teeth to rational basis equal protection analysis, *Lawrence* reciprocally strengthens the liberty guarantees of substantive due process. Together, the two cases strengthen the overall protections of the Fourteenth Amendment by focusing on the substantive rights at stake rather than allowing strict nomenclatures or narrow classifications to determine the results of cases preemptively.”).

<sup>246</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

<sup>247</sup> *Id.* at 2604.

<sup>248</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.”); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”).

<sup>249</sup> See *Mohamed v. Holder*, 995 F. Supp. 2d 520, 532 (E.D. Va. 2014).

ability to engage in international travel.<sup>250</sup> Even worse than a chilling effect, however, is the possibility that those individuals could face actual discrimination, suffering restricted liberty because of how they worship or which political party they support.<sup>251</sup>

In the absence of national security concerns limiting plaintiffs' access to confidential government information, plaintiffs could potentially litigate challenges to their placement on the no-fly list even under the "reasonable suspicion" standard.<sup>252</sup> In such a scenario, the government would have to articulate a basis for suspecting that the plaintiffs were connected to terrorist organizations or activity, and a court could determine the reasonableness of that determination.<sup>253</sup> The context in which the "reasonable suspicion" standard was developed—search and seizure under the Fourth Amendment—relies on such litigation to protect individual rights, albeit with a much smaller deprivation of liberty at stake than permanent placement on the no-fly list.<sup>254</sup>

When the full range of evidence used in the no-fly list determination is unavailable to the plaintiff, however, due process should require a higher substantive standard. The Supreme Court has explained that the function of the Due Process Clause is to "prevent unfair and mistaken deprivations" of the constitutional protection of life, liberty, and property.<sup>255</sup> Procedural protections alone cannot adequately safeguard against such unfair and mistaken deprivation of the right to travel when secret evidence is combined with the low "reasonable suspicion" standard—this combination leaves too much room for error and abuse. The government's position is that the standard is required by statutory language "which determined that the standard for inclusion on the

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<sup>250</sup> Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1089 (10th Cir. 2006) ("[P]laintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced.").

<sup>251</sup> See, e.g., *Mohamed*, 995 F. Supp. 2d at 532 (questioning whether being "a member of a lawfully operating social or religious organization whose membership may include other persons suspected of terrorism" or "studying Arabic abroad" may permit inclusion on the no-fly list).

<sup>252</sup> See, e.g., *Latif v. Holder*, 28 F. Supp. 3d 1141, 1151 (D. Or. 2014).

<sup>253</sup> Defendant's Consolidated Memorandum, *supra* note 3, at 41.

<sup>254</sup> *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968); see Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 337 (2015) ("The 'reasonable suspicion' standard first arose in *Terry v. Ohio*, when the Supreme Court created a new threshold for Fourth Amendment suspicion, lower than probable cause, to justify a brief detention.").

<sup>255</sup> U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972).

List should be based on predictive judgments about who ‘may’ be a threat to civil aviation or national security.”<sup>256</sup> This requirement, however, should be interpreted consistently with constitutional guarantees of liberty. At its broadest interpretation, anyone and everyone *may* be a threat to aviation security; even in the pre-9/11 days, all passengers were required to go through a metal detector.<sup>257</sup>

There is nothing in this directive that requires the application of a “reasonable suspicion” standard. It may be a good basis on which to subject passengers to heightened screening as opposed to placement on the no-fly list, where liberty is maximally restricted—but in a way that avoids contact with law enforcement and security officials.<sup>258</sup> Nonetheless, when applied to the much more serious risk of prohibiting air travel together, the risk of error under such a standard is incompatible with the requirements of due process, especially when considered in synergy with the chilling effect imposed on fundamental speech and religious-practice rights.

An intermediate standard of proof requiring “clear and convincing” evidence that an individual poses a risk to national security better balances the interests of protecting both individual liberty and national security. The Supreme Court has stated that it uses “the ‘clear, unequivocal and convincing’ standard of proof to protect particularly important individual interests in various civil cases,”<sup>259</sup> and has written that “[i]n cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.’”<sup>260</sup> Thus, the Court has upheld this standard in the context of civil commitment of the mentally ill, which likewise balances both liberty interests and public safety.<sup>261</sup> Professor Alexander Tsesis has persuasively argued that the standard for civil commitment should meet the criminal law standard of “beyond a reasonable

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<sup>256</sup> Defendant’s Consolidated Memorandum, *supra* note 3, at 41 (citing 49 U.S.C. § 114(h)(3) (2012), which requires the government “to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security”).

<sup>257</sup> Robert S. Johnson, *Metal Detector Searches: An Effective Means to Help Keep Weapons out of Schools*, 29 J.L. & EDUC. 197, 200 (2000) (noting that in 2000, people were accustomed to metal detector searches in airports).

<sup>258</sup> Caplan, *supra* note 240 (“If our actual airport security systems are functioning, even Osama bin Laden himself should be allowed to board an aircraft, because all weaponry would be removed before boarding.”).

<sup>259</sup> *Addington v. Texas*, 441 U.S. 418, 424 (1979).

<sup>260</sup> *Id.* at 425 (alteration in original) (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir 1971)).

<sup>261</sup> *Id.* at 423 (“The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”).

doubt,” given that incarceration and institutionalization both result in the same deprivation of liberty,<sup>262</sup> and indeed, a number of states have adopted that standard.<sup>263</sup> In the national security context, however, where the deprivation of liberty is not as significant as institutionalization—but much more significant than a mere traffic stop—a clear and convincing standard provides a balanced approach.

Of course, adopting a higher standard of proof means that the government must disclose its supporting evidence, at least to the court, if not also to the petitioner.<sup>264</sup> With the substantive bar increased, however, the procedural analysis becomes less complicated, and makes it more likely that the judiciary can manage secrecy interests through in-camera review. After all, it is nearly impossible for individuals to prove that it is unreasonable for the government to be suspicious of them—especially when they have no information about what gave rise to the government’s suspicions. If, however, the standard required “clear and convincing,” evidence of terrorist ties, then the list should encompass a much more narrowly targeted group of individuals. In turn, because there is more evidence tying those individuals to specific terrorist threats, it is likely that people on the more limited list would have a better idea of the government’s fears, and thus a better chance to rebut them even without knowing, for example, the full range of information collected through surveillance or other activities. In the remaining cases where an individual struggles to rebut unknown evidence, the judge may take a more inquisitorial role, directing the submission of evidence on both sides to make a reasoned determination of the risk.<sup>265</sup>

Such a procedure would combine the essential bases of both substantive and procedural due process. It would ensure that important freedoms—including the right to travel and the right to be free of reputational stigma—would achieve some level of protection even if they do not rise to the level of

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<sup>262</sup> Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 307 (2011).

<sup>263</sup> *Addington*, 441 U.S. at 430–31 (“That some states have chosen—either legislatively or judicially—to adopt the criminal law standard gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states.”).

<sup>264</sup> *See id.* (noting that the clear and convincing standard would increase the government-plaintiff’s burden of proof).

<sup>265</sup> Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3, 39–41 (2009) (explaining how inquisitorial management can aid the development of secret evidence, though warning that “[i]n countries like the United States, where adversarial tradition runs very deep and judges are not accustomed to performing investigatory roles, transitioning to judicial management to scrutinize secret evidence is difficult”).

“fundamental rights” to be protected by strict scrutiny. Most importantly, it would require that the government target its restrictions only where there is a clear evidentiary basis for doing so. By clearly prohibiting the most arbitrary and unsubstantiated liberty restrictions, this standard would then ease the way for a more thorough analysis of the procedural protections due in the remaining disputes and would enhance the judge’s ability to more accurately estimate the risks and benefits of extending additional procedural protections.

### CONCLUSION

Only immediate legislative or judicial intervention can put a halt to the unconstitutional implementation of the no-fly list that the United States has experienced so far. While people like Ted Kennedy did not remain on the no-fly list for long, less connected individuals like Rahinah Ibrahim and many others were not so lucky, receiving recourse after many years, if at all. In the meantime, they were stuck in undesirable regions, separated from their families, unable to pursue their professions, and generally impaired in their livelihoods. The price of secrecy is high, indeed. What unites a lot of the individuals on the no-fly list with those in Guantanamo and in other national security settings is that once the government was forced to disclose the information it was using to eliminate personal rights and freedoms, it often either chose not to do so or was unable to sustain a valid case. The suspicion arises that if we grant significant latitude to the government to maintain secrecy over decisions and proceedings, the victory will belong not to liberty interests but rather to unfettered power.

While the proposal in this Article does not purport to resolve all the questions surrounding secrecy in the national security context, it takes an important step in restoring the balance between security and individual freedom. Further research is warranted before this model can be adapted to other types of cases as well, but there is nothing inherently standing in the way of using a similar standard to adjudicate different matters that rely on secret factual determinations. This may include the judicial treatment of enemy combatants or some of the decisions related to surveillance such as those made by the FISA Court. It is at least worth considering the question in any scenario where fundamental liberties are at stake, such as freedom from incarceration, the right to travel, privacy interests, and so on. The fatalistic attitude that has reigned in matters of secrecy must come to an end. Love him or hate him, Edward Snowden’s revelations have shown that invasions into liberty do not just happen to “other people” and that we are currently all at the mercy of the

national security apparatus in one way or another.<sup>266</sup> When the government refuses to reveal its basis for inclusion on the list and further insists that race, religion, and even protected speech can form part of its consideration, we should assume that we are all a simple pen stroke away from being prevented from boarding a plane.

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<sup>266</sup> Pastor Niemöller famously warned against such shortsighted self-interest: “Then they came for me—and there was no one left to speak for me.” *Martin Niemöller: “First They Came for the Socialists. . .”*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392> (last updated Jan. 29, 2016).