Towards a Fairer Terrorist Watchlist

Shirin Sinnar[*]

In the scope of a year, the legal terrain regarding terrorist watch lists has shifted dramatically. For over a decade, the government has used the "No Fly List" to summarily bar certain individuals deemed terrorist threats from flying on U.S. airliners or over U.S. airspace. Others have been subjected to rigorous scrutiny at airports and land borders. Federal courts dismissed several post-9/11 constitutional challenges to watchlists on jurisdictional or other preliminary grounds. But in 2014, two district courts in the Ninth Circuit ruled that the bare procedures available to challenge one's No Fly List status violated due process. The government, which had already lost two appeals in one case (*Ibrahim v. DHS*) and a third appeal in another (*Latif v. Holder*), chose not to appeal either decision. Outside the Ninth Circuit, too, courts asserted themselves. In October, a district court in the Eastern District of Virginia (*Mohamed v. Holder*) refused to dismiss a No Fly List plaintiff's case despite the Attorney General's declaration that state secrets should prevent its adjudication.

These decisions are long overdue. For years, individuals have been barred from flying on essentially the government's say-so—even U.S. citizens stranded overseas with no other realistic way of returning to the United States. In 2012, 500 of the 21,000 people on the No Fly List were reportedly U.S. citizens. For many, the inability to fly to, from, or over the United States resulted in lost job opportunities, prolonged separation from spouses and children, and the stigma of being branded a terrorist too dangerous to fly.

Under existing procedures, a traveler who is blocked from flying or who faces unusual scrutiny can file a complaint with the Department of Homeland Security's Traveler Redress Inquiry Program (DHS TRIP). If DHS TRIP determines that the incident was due to an exact or near match to a watchlist, it forwards the complaint to the FBI's Terrorist Screening Center (TSC), the entity that maintains the consolidated terrorist database used to generate watchlists for various agencies (such as the Transportation Security Administration's No Fly List). The TSC reviews the complaint in consultation with the intelligence agencies that originally requested that the person be listed. Eventually, the individual receives a letter notifying her that the review of her complaint is complete—without informing her whether she is or was on any list, the reasons for any such inclusion, or whether corrections were made. Given this opaque process, individuals seeking to contest their possible inclusion on a watchlist face the impossible task of proving a negative—that they do not threaten national security—while completely in the dark as to any accusations against them.

Latif v. Holder

The most significant case triggering reform is *Latif v. Holder*, an ACLU suit in the District of Oregon brought by thirteen U.S. citizens and legal permanent residents barred from flying. In 2013, Judge Anna Brown made the threshold determination that placement on the No Fly List implicated liberty interests protected by the Due Process Clause. This past June, the court further ruled that existing procedures to contest one's placement on the list were "wholly ineffective" and ordered the government to fashion new, constitutionally adequate procedures. *Latif v. Holder*, 2014 WL 2871346 (D. Or. June 24, 2014). To satisfy due process, the court held, the plaintiffs must receive notice of their No Fly List status and a statement of reasons that would enable them to submit responsive evidence. The court further suggested that, should classified evidence be involved, the government could submit unclassified summaries of its evidence or disclose classified information to counsel cleared to review it.

In response, the government promised to revise its redress procedures following a six-month interagency review. It suggested that it would apply the new procedures not just to the *Latif* plaintiffs but to an unspecified, broader class of individuals barred from flying. The court set an expedited timetable with respect to the *Latif* plaintiffs themselves, who had already waited four years since filing their claims. Complying with this schedule, the government informed the thirteen plaintiffs of their No Fly list status in October and supplied statements of reasons (with varying levels of detail)—a momentous development in light of the government's longstanding refusal to confirm or deny a person's inclusion on the list. If any plaintiffs remain listed when the government makes its final determinations early in 2015, they will undoubtedly return to court to challenge the adequacy of the government's newly applied procedures.

The Hard Questions

Finding a due process violation was a substantial step, but only the first one. The harder questions pertain to just how much process is actually required—especially at a time when national security officials are sounding the alarm over Americans traveling abroad to join terrorist groups. Policymakers designing new watchlist redress procedures face at least five crucial questions, some of which the *Latif* court and others will eventually confront.

First, how broadly should new procedures apply? Thus far, the government has said little about whether it will limit new procedures to U.S. citizens, legal permanent

[*]Shirin Sinnar is Assistant Professor of Law, Stanford Law School.

residents, individuals with substantial relationships with the United States, or other classes of individuals. Non-citizens may suffer serious deprivations from No Fly List placement. Indeed, in *Ibrahim v. DHS*, the Ninth Circuit ruled that a Malaysian woman who had studied at Stanford before being blocked from flying could assert constitutional claims based on her "significant voluntary connection" to the United States; the district court, five months before *Latif*, went on to find a due process violation in her case. Yet as a practical matter, the larger the pool of eligible individuals, the more the government will resist robust redress procedures. (And as a constitutional matter, those with more attenuated relationships with the United States will have a harder time convincing courts that their interests push the *Mathews v. Eldridge* balance in their favor).

Second, who should make the final decision in the revised administrative redress process? Currently, the Redress Office of the TSC, the agency that decides whether individuals meet the standard for inclusion in the consolidated watchlist, evaluates complaints from watchlisted individuals. But a more independent decision-maker—perhaps a redress board of Justice Department officials outside the TSC—could offer a somewhat more neutral perspective than TSC analysts strongly incentivized to err on the side of adding a name to the watchlist rather than deleting or omitting one.

Third, how much evidence should an individual be able to access when the government relies on classified or sensitive information? Can substitute procedures supply adequate notice when such information is denied? Courts have now wrestled with similar questions in terrorism prosecutions (using the Classified Information Procedures Act), in Guantanamo habeas detainee litigation, and in civil suits by charities contesting their designation as terrorist organizations. They have experimented with permitting unclassified summaries of evidence, disclosure to specially cleared counsel, and other imperfect but pragmatic compromises. Recent proposals to create "public advocates" to argue before the Foreign Intelligence Surveillance Court offer another model; perhaps specially designated internal advocates for watchlisted individuals could point out shortcomings in the government's case, especially where the individual in question is unrepresented or where the government claims that even cleared counsel cannot access certain evidence.

Fourth, who would bear the burden of proof in the administrative process? Would an individual on the No Fly List be presumed to meet the standard, and bear the burden of overcoming that presumption, or would the TSC have to "prove" its case to the decision-maker?

Fifth, under what standard of review should a court review the watchlist determination on appeal? Could a court reassess the determination *de novo*, in light of the security-driven incentives of executive decision-makers, or would it be bound by an abuse of discretion standard that defers to those officials' security expertise? Especially if the administrative decision-makers are officials within mission-driven national security agencies, due process may require more robust judicial review than in administrative contexts where agency missions are relatively aligned with claimants' own interests.

Three Broader Principles

Beyond the immediate task of establishing a new redress process, policymakers, courts, and the public ought to keep three broader points in mind. First, the fairness of procedures to contest watchlist status intersects with the substantive standards for listing individuals in the first place. In recent years, security agencies have lowered the substantive thresholds for watchlisting individuals; to the extent that these standards are inappropriately low, riddled with exceptions, or disconnected from the core threats that they were intended to address, then tightening these standards at the front end would reduce the demand for back-end redress. 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.

Second, policymakers and courts should question the premise of the No Fly List itself: that certain individuals who are not charged with any crime are nonetheless too dangerous to fly under any circumstances. Is it truly the case that *no* set of extra security procedures, especially with respect to U.S. citizens and residents, could sufficiently mitigate the threat posed? The government has sometimes granted "one-time waivers" allowing Americans abroad to fly back to the United States, especially after they filed suit; in such cases, the government conditioned air travel on special security measures, such as advance submission of travel itineraries and extra screening (and perhaps also seated the individuals next to undisclosed federal air marshals). Even for individuals who are judged to meet the standards for inclusion on the No Fly List, measures short of total air travel bans might be available without compromising security.

Third, terrorist watchlists *beyond* the No Fly List also create substantial harm to U.S. individuals and communities. Thousands of Americans experience intrusive scrutiny and lengthy detentions as a result of traveler watch lists, such as those used by U.S. Customs and Border Protection to screen returning travelers at U.S. borders. Repeated encounters with law enforcement officers at airports, borders, and other contexts—even when they do not result in denial of entry or boarding—impose stigma and foster distrust in minority communities, no less than stop-and-frisk detentions or traffic stops on streets and highways. Although the court decisions currently forcing the government's hand principally concern the No Fly List, they provide an opportunity to reevaluate fairness with respect to traveler watchlists as a whole.