ESSAY

Elhady Reversed: The Implications of Judicial Deference for Government Watchlist Plaintiffs

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ABSTRACT

Since their inception over twenty years ago, contemporary government terrorist watchlists have faced routine criticism. These watchlists are infamously secretive, with both the identities of the listees and the procedure for placement on the list largely undisclosed, despite government and public accountability investigations revealing errors, inconsistencies, and carelessness in their curation and review. In particular, plaintiffs seeking to challenge their placement on these watchlists suffer from this secrecy. Even after detention or enhanced screening resulting from alleged placement on a government watchlist, detainees must jump through numerous administrative hoops to, at best, be provided with a vague and undetailed summary of the reason for their placement on the list, and thus are unable to adequately challenge their placement.

In attempting to seek recourse, plaintiff detainees often bring due process claims in federal court, arguing that they were deprived of a fundamental liberty without adequate procedural due process. However, when evaluating these claims federal courts routinely defer to a purported governmental national security interest in maintaining secrecy around these watchlists over assertions of harms to plaintiffs, the value of additional procedures, and the risk of erroneous deprivation. In doing so, plaintiffs and advocates are left at a disadvantage and struggle to achieve recourse for alleged mistreatment.

This Essay compares the Eastern District of Virginia's recent decision on the issue in Elhady v. Kable *and the Fourth Circuit's subsequent reversal. In doing so,*

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this Essay argues that federal courts' routine deference to asserted national security interests diminishes real plaintiff harms and high risks of erroneous deprivation. Thus, given this tendency, courts should consider adopting other judicial mechanisms that may be better suited to adequately analyzing the effectiveness of due process protections in the context of government terrorist watchlists.

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INTRODUCTION

In May 2023, shortly before a White House Eid al-Fitr celebration, Syrian-born Mohamed Khairullah's invitation was rescinded.[1] The five-term mayor of Prospect Park, New Jersey, and longest-serving Muslim mayor in the country, was given no explanation for his denial other than that he had not been cleared by Secret Service.[2] This was not Mayor Khairullah's first encounter with American security agencies—he had been stopped and

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1 Aamer Madhani, *Muslim Mayor Blocked from White House Eid Celebration*, ASSOCIATED PRESS (May 1, 2023), https://apnews.com/article/new-jersey-mayor-white-house-eid-8e67495af3cd982a6560d1121a29e8ba [https://perma.cc/368V-MAQE]; Matthew Barakat, *Lawsuit by Islamic Rights Group Says US Terror Watchlist Woes Continue Even After Names Are Removed*, ASSOCIATED PRESS (Sept. 18, 2023), https://apnews.com/article/terror-watchlist-lawsuit-jersey-mayor-47765ad91468d7e04f0e7155d3baf134 [https://perma.cc/2TX9-Y2M4].

2 Madhani, *supra* note 1.

interrogated while attempting to enter the country numerous times since 2019.[3] He believes the reason for his White House disinvitation, and these other detentions and interrogations, is due to his inclusion in a federal terrorist watchlist database.[4]

Modern government terrorist watchlists were created in the aftermath of the September 11, 2001 terrorist attacks—the Transportation Security Administration's ("TSA") No Fly List being the most infamous.[5] The aim was to create a consolidated watchlisting effort, which had previously been spread among various agencies.[6] Key information about these watchlists remain classified and away from public knowledge.[7] Importantly, this includes who is on a government watchlist, under what criteria they were included, and what evidence the government has of their suspected or known terrorist activities.[8] Even after detention or enhanced screening resulting from alleged placement on a government watchlist, detainees must go through a number of administrative processes to, at best, be provided with a vague and undetailed summary of the reason for their placement on the watchlist.[9] However, many individuals, notably those on a government watchlist other than the No Fly List, are afforded even less information.[10]

While advocates for government watchlist detainees have made some progress in securing additional due process protections,[11] these victories are small, and plaintiffs generally come up short.[12] Of particular concern is the lack of due process that individuals receive when they are either denied boarding or subjected to enhanced screening when attempting to board a commercial aircraft due to their alleged placement on a government

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3 *Id.*

4 Daniel Han, *Muslim New Jersey Mayor Denied Entry to White House Plans Lawsuit Against 'Watchlist'*, POLITICO (Sept. 1, 2023), https://www.politico.com/news/2023/09/15/muslim-new-jersey-mayor-denied-entry-to-white-house-plans-lawsuit-00116358 [https://perma.cc/58VQ-ZEKM].

5 JEROME P. BJELOPERA, CONG. RSCH. SERV., R44529, THE TERRORIST SCREENING DATABASE: BACKGROUND INFORMATION 1 (2016) [hereinafter CRS REPORT (JUNE 2016)].

6 *Id.*

7 JARED P. COLE, CONG. RSCH. SERV., R43730, TERRORIST DATABASES AND THE NO FLY LIST: PROCEDURAL DUE PROCESS AND OTHER LEGAL ISSUES 1 (2016) [hereinafter CRS REPORT (JULY 2016)].

8 *See id.* at 6–9.

9 *See id.* at 8–9.

10 *See id.*

11 *See, e.g.*, Hina Shamsi & Hugh Handeyside, *Victory: No Fly List Process Ruled Unconstitutional*, ACLU (June 25, 2014), https://www.aclu.org/news/national-security/victory-no-fly-list-process-ruled-unconstitutional [https://perma.cc/H9DH-HQ25]; Shirin Sinnar, *Q&A on Court Decision Invalidating Administration's Terrorism Watchlist*, JUST SECURITY (Sept. 5, 2019), https://www.justsecurity.org/66068/shirin-sinnar-on-court-decision-invalidating-administrations-terrorism-watchlist [https://perma.cc/H7R7-GRUT].

12 Sinnar, *supra* note 11.

watchlist. In attempting to seek recourse for these harms, detainees often bring due process claims in federal court, arguing that they were deprived of a fundamental liberty interest without adequate procedural due process.[13] When addressing these claims, courts conduct a balancing test, weighing the individual's interest, the government's interest, and the added value that additional procedures may bring.[14] Consistently, when applying this balancing test in the context of TSA watchlists, federal courts routinely defer to a purported governmental national security interest in maintaining secrecy around these terrorism watchlists.[15] This asserted governmental interest will typically outweigh other assertions of the harm to plaintiffs, the added value of any additional procedures, or the risk of erroneous deprivation of due process.[16] Thus, advocates and detainees struggle to gain any victories or achieve recourse for any alleged mistreatment in federal courts.

To illuminate this point, this Essay analyzes and compares the Eastern District of Virginia's recent decision in *Elhady v. Kable*[17] and the Fourth Circuit's subsequent reversal.[18] Ultimately, in doing so, this Essay argues that courts' strong and routine deference to asserted government national security interests when evaluating the adequacy of due process procedures diminishes both real plaintiff harms and the high risk of erroneous deprivation of liberty interests created by an unwieldy, ill-managed, and secretive system. Given this tendency, courts should consider adopting other judicial mechanisms more suited to adequately analyzing the effectiveness of due process protections in the context of government terrorist watchlists.

I. GOVERNMENT TERRORISM WATCHLISTS: HISTORY AND CONTEMPORARY CONCERNS

Since their origination over twenty years ago, contemporary government terrorist watchlists have faced routine criticism. On one hand, these watchlists are infamously secretive, and both the identities of the listees and the procedure for placement on the lists are undisclosed. On the other hand, both government and public accountability investigations into these watchlists reveal inconsistencies, errors, and carelessness in the curation and

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13 *See, e.g.*, Elhady v. Kable, 391 F. Supp. 3d 562, 572–73 (E.D. Va. 2019).

14 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

15 *See, e.g.*, Elhady v. Kable, 993 F.3d 208, 213 (4th Cir. 2021); Abdi v. Wray, 942 F.3d 1019, 1023 (10th Cir. 2019); Beydoun v. Sessions, 871 F.3d 459, 462 (6th Cir. 2017).

16 *See, e.g.*, *Elhady*, 993 F.3d. at 228 (describing the government's "counterterrorism" interest as "extraordinarily significant"); *cf. Beydoun*, 871 F.3d at 462, 468–69 (characterizing the enhanced preflight security screening that plaintiffs were subjected to and the associated inconveniences and delays as "incidental," "negligible," and "relatively minor").

17 391 F. Supp. 3d 562 (E.D. Va. 2019).

18 Elhady v. Kable, 993 F.3d 208 (4th Cir. 2021).

review of the watchlists. This secrecy extends to plaintiffs attempting to challenge their placement on government terrorist watchlists and often federal courts' treatment of their due process procedures.

A. History and Origin of the Terrorist Screening Database and Government Terrorism Watchlists

The Terrorist Screening Center ("TSC") is an interagency organization housed within the Federal Bureau of Investigation ("FBI") but which involves the Department of Homeland Security ("DHS"), the National Counterterrorism Center ("NCTC"), the Transportation Security Administration ("TSA"), and the United States Customs and Border Protection Agency ("CBP").[19] Notably, the TSC maintains the Terrorist Screening Dataset ("TSDS"),[20] which was created by presidential directive in response to the terrorist attack on September 11, 2001.[21] In maintaining the TSDS, the TSC consolidated the federal government's watchlisting efforts, which previously had been spread among various agencies.[22]

The TSDS is a centralized database of individuals who are either suspected or known to be affiliated with terrorist activity.[23] Federal agencies and foreign governments will "nominate" individuals to be placed in the TSDS.[24] The TSC will then verify and screen these individuals to ensure that

> upon articulable intelligence or information which, based on the totality of the circumstances and, taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in conduct constituting, in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities.[25]

Placement into the TSDS does not require evidence that the person has engaged in any sort of criminal activity and "individuals who have been acquitted of a terrorism-related crime may still be listed" in the database.[26]

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19 *See Elhady*, 391 F. Supp. 3d at 568; CRS REPORT (JUNE 2016), *supra* note 5, at 1–3 & fig.1.

20 The TSDS was previously referred to as the Terrorist Screening Database ("TSDB"). U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AMTRAK RAIL PASSENGER THREAT ASSESSMENT 1 n.1 (2023), https://www.dhs.gov/sites/default/files/2023-06/privacy-pia-tsa050a-amtrak-june2023.pdf [https://perma.cc/7E6M-Q6D9].

21 CRS REPORT (JUNE 2016), *supra* note 5, at 1.

22 *Id.*

23 *Id.* at 4–6.

24 *Id.*

25 Elhady v. Kable, 391 F. Supp. 3d 562, 568 (E.D. Va. 2019); *see also* CRS REPORT (JUNE 2016), *supra* note 5, at 9–10.

26 *Elhady*, 391 F. Supp. 3d at 569.

Importantly, the TSDS contains "sensitive but unclassified terrorist identity information"[27] and is shared with a wide number of other federal, state, and foreign government agencies who use the information for "screening, vetting, credentialing, diplomatic, military, intelligence, law enforcement, visa, immigration, and other security functions."[28] For example, the Coast Guard uses the TSDS to screen passenger and crew manifests for ships traveling through domestic waters, and the United States Citizenship and Immigration Services checks the TSDS when making determinations for individuals applying for naturalization, asylum, or other immigration benefits.[29]

Perhaps most infamously, the TSDS is the source of the TSA terrorism watchlists.[30] The TSA maintains a number of watchlists of differing severity including the "No Fly List," the Selectee List, and the Expanded Selectee List.[31] An individual on the No Fly List is barred from boarding a flight to or above U.S. airspace, while an individual on the Selectee List is subject to enhanced security screenings while attempting to board a similar flight.[32] However, in neither situation is the individual informed of their placement on either list before attempting to board a flight.[33] Nor, in many situations, is the individual informed of whether or not they remain on the watchlist after.[34]

Advocates maintain a number of concerns over the maintenance of both the TSDS and the TSA watchlists. Little information is known or made public about the contents of the lists, including who and how many people are included. The majority of public information about the contents of these watchlists come from agency leaks,[35] sporadic government testimony or

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27 CRS REPORT (JULY 2016), *supra* note 7, at 2 (quoting Mohamed v. Holder, 995 F. Supp. 2d 520, 526 n.8 (E.D. Va. 2014)).

28 *Elhady*, 391 F. Supp. 3d at 569.

29 *Id.* at 569–70; *see also* U.S. CUSTOMS & BORDER PROT., CBP DIRECTIVE 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES para. 5.1.4 (Jan. 4, 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf [https://perma.cc/SR2K-RQAQ].

30 CRS REPORT (JULY 2016), *supra* note 7, at 4 n.31.

31 *Id.* at 5–6.

32 *Id.* at 4.

33 *Id*.

34 *Id*. at 7–9 (noting that the revised redress procedures enacted following ruling adverse to the government in *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) that required DHS's Traveler Redress Inquiry Program to inform an individual who has applied for redress whether they are on a TSA list applied solely to those on the No Fly List, not to those on a lesser TSA watchlist).

35 *See* Mikael Thalen & David Covucci, *EXCLUSIVE: U.S. Airline Accidentally Exposes 'No Fly List' On Unsecured Server*, DAILY DOT (Jan. 19, 2023), https://www.dailydot.com/debug/no-fly-list-us-tsa-unprotected-server-commuteair [https://perma.cc/SQ6Q-WSKR].

oversight reports,[36] and limited releases of information made public during litigation.[37] These informational barriers are not only presented to the general public but additionally exist for those litigating their placement on these watchlists. Courts have generally been hesitant to release information regarding national security for fear that it might aid or tip off potential terrorists or malicious actors.[38] However, in practice, this means that plaintiffs must navigate an informational disadvantage when attempting to litigate over their inclusion on a watchlist.

Further, concerns arise over the low standard required for placement on the list and reports of inconsistencies and carelessness when reviewing listings. Placement on the list only requires the lower standard of "reasonable suspicion" and "[t]he process of nomination to the No Fly List is based on a suspected level of future dangerousness that is not necessarily related to any unlawful conduct."[39] In reality, government oversight reports have found that only a very small percentage of individuals in the TSDS either had an active arrest warrant or were under investigation regarding association with terrorism.[40] Additionally, the DOJ Inspector General has flagged serious problems with the watchlist removal process:[41] a 2006 GAO report found tens of thousands of entries were mistakenly added to the No Fly List,[42] and

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36 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-531, SECURE FLIGHT: TSA SHOULD TAKE STEPS TO DETERMINE PROGRAM EFFECTIVENESS (2014); *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 113th Cong. 25 (2014) (testimony of Christopher M. Piehota, Director of the Terrorist Screening Center); AUDIT DIV., OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT REP. 05-27, REVIEW OF THE TERRORIST SCREENING CENTER (2005) [hereinafter TSC REVIEW], https://oig.justice.gov/reports/FBI/a0527/final.pdf [https://perma.cc/AQ2Z-566H].

37 *See* January 2018 Overview of the U.S. Government's Watchlisting Process and Procedures, *Elhady v. Piehota*, 1:16-cv-00375-AJT-JFA, Dkt. 196-16 at 4 (E.D. Va. Apr. 27, 2018), https://www.aclu.org/sites/default/files/field_document/ex._7_elhady_-_overview_of_watchlisting_system_-_4-27-18_cover.pdf [https://perma.cc/2JN7-VMLE].

38 *See, e.g.*, Shearson v. Holder, 865 F. Supp. 2d 850, 857 (N.D. Ohio 2011), *aff'd*, 725 F.3d 588 (6th Cir. 2013) ("The Government does not reveal whether or not an individual is on a watchlist because disclosing this information would undermine the purpose of terrorist watchlists, which is to provide the Government with information about security threats without alerting security threats of the Government's knowledge."); Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 930 (N.D. Cal. 2014); *see also* United States v. Reynolds, 345 U.S. 1, 10 (1953) (demonstrating reluctance to require government to disclose national security information).

39 Mohamed v. Holder, 995 F. Supp. 2d 520, 531 (E.D. Va. 2014).

40 TSC REVIEW, *supra* note 36, at viii.

41 *See generally* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT REP. 08-16, AUDIT OF THE DEPARTMENT OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESS (2008), https://oig.justice.gov/reports/plus/a0816/index.htm [https://perma.cc/ZYA5-7W5F].

42 U.S. GOV'T ACCOUNTABILITY OFF., GAO-0 6-103, TERRORIST WATCH LIST SCREENING EFFORTS TO HELP REDUCE ADVERSE EFFECTS ON THE PUBLIC 4 (2006).

a separate 2007 DOJ Inspector General Report found that forty-three percent of No Fly List records reviewed contained errors.[43] All this has led some advocates to believe that once an individual is placed on a government terrorism watchlist, they may remain marked by it forever and are rendered permanent second-class citizens.[44]

B. Administrative Procedures Available for Government Terrorism Watchlist Detainees

Pursuant to the Implementing Recommendations of the 9/11 Commission Act of 2007, Congress directed DHS to create redress procedures for those who wished to challenge their detention, denial of boarding, or subjugation for heightened scrutiny while traveling via commercial aircraft.[45] Subsequently, DHS created the Traveler Redress Inquiry Program ("DHS TRIP") which remains the mechanism by which detainees pursuant to the No Fly List or other government watchlists may challenge or resolve their complaints.[46] Since its creation, the DHS TRIP redress procedure has undergone one significant revision in response to adverse litigation challenging its due process procedural adequacy in the context of detainees on the No Fly List.[47] However, these procedural alterations are largely relevant to individuals challenging their No Fly List status and have not been extended to those challenging placement on a lesser government watchlists or the TSDS generally.[48]

Originally, passengers denied boarding or subjected to heightened security screenings were permitted to file a complaint with DHS TRIP.[49] After reviewing the complaint, if DHS believed the individual to be a match or a near match to someone in the TSDS, the complaint would be referred to

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43 OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT REP. 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, at iv (2007), https://oig.justice.gov/reports/FBI/a0741/final.pdf [https://perma.cc/4N6R-YPDZ].

44 For example, Mayor Khairullah was told that his name had been removed from government watchlists while previously stopped when trying to enter the country. He was still, however, denied entry to the White House. Barakat, *supra* note 1.

45 Pub. L. 110-53, 121 Stat. 482 (2007) (codified as amended at 49 U.S.C. § 44926(a)).

46 *DHS Traveler Redress Inquiry Program (DHS TRIP)*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/dhs-trip [https://perma.cc/EMH6-XSE7].

47 *See* Latif v. Holder (*Latif II*), 28 F. Supp. 3d 1134, 1161–62 (D. Or. 2014); Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983 (9th Cir. 2012); Mohamed v. Holder, 995 F. Supp. 2d 520 (E.D. Va. 2014).

48 Elhady v. Kable, 391 F. Supp. 3d 562, 582 (E.D. Va. 2019) ("Nor is DHS TRIP, as it currently exists, a sufficient safeguard because, in the context of individuals challenging their placement on the TSDB rather than on the No Fly List, it is a black box—individuals are not told, even after filing, whether or not they were or remain on the TSDB watchlist and are also not told the factual basis for their inclusion.").

49 *See Latif II*, 28 F. Supp. 3d at 1141–43.

the TSC, which would confirm whether the individual was an actual match and, if so, if they should continue to be in the TSDS and/or on the respective government watchlist.[50] At the conclusion of review, the individual would receive notice of review from DHS TRIP.[51] However, this notice would contain no information about whether the individual was in the TSDS or on a government watchlist.[52] Individuals were then permitted to seek judicial review in a federal appellate court under 49 U.S.C. § 46110—however, judicial review consisted solely of review of the administrative record and, at best, resulted in remand to the agency.[53] At no point was the individual informed of their present or past status on a watchlist or in a database or the reason for their inclusion. Nor were they provided any formal or informal written or oral hearing or mechanism to challenge their placement on the list or to provide exculpatory evidence.[54]

It was precisely the failure to provide a meaningful postdeprivation opportunity to understand or contest placement on the No Fly List that ultimately led to the government revision of the DHS TRIP procedures.[55] In *Latif v. Holder*,[56] thirteen United States citizens or lawful permanent residents, including four veterans of the United States Armed Services, were denied boarding flights over United States airspace and believed they were included on the No Fly List.[57] Among other claims, plaintiffs challenged the due process sufficiency of the procedural process offered by DHS TRIP.[58] Ultimately, the court determined that DHS TRIP's procedural process fell short of due process requirements and that the government must

> provide [detainees] . . . with notice regarding their status on the No-Fly List and the reasons for placement on that List . . . [and that] notice must be reasonably calculated to permit each [detainee] to submit evidence relevant to the reasons for their respective inclusion on the No-Fly List.[59]

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50 *See id.*

51 *See id.*

52 *See id.*

53 *See id.*

54 *See id.*; *see also* CRS REPORT (July 2016), *supra* note 7, at 8–9.

55 *See* Latif v. Holder (*Latif I*), 969 F. Supp. 2d 1293, 1296 (D. Or. 2013).

56 28 F. Supp. 3d 1134 (D. Or. 2014).

57 *See id.* at 1140, 1143.

58 *See id.* at 1147.

59 *Id.* at 1162. Notably, the court cautioned this requirement by providing that it "cannot foreclose the possibility that in some cases such disclosures may be limited or withheld altogether because any such disclosure would create an undue risk to national security." *Id.*

Following *Latif*, the government provided updated DHS TRIP procedures.[60] Under the updated process a U.S. person[61] who is denied boarding and has submitted a complaint to DHS TRIP will receive notice detailing if they are on the No Fly List, and, if so, provide them the option to receive or submit additional information regarding their status.[62] If the individual requests additional information they will be provided a second letter that includes the "specific criteria" under which they have been placed on the No Fly List and an unclassified summary of information supporting their placement.[63] At this stage, the individual may seek further review or provide additional information challenging their placement.[64] This response is reviewed by the TSC redress office which provides a recommendation to the TSA Administrator who will ultimately issue a final decision to remove the individual from the list, maintain them on the list, or remand to TSC for further evaluation.[65] This final order is similarly appealable in federal court under 49 U.S.C. § 46110.[66]

C. Continuing Issues for Government Watchlist Detainees

Fundamentally, these enhanced—but still meager—postdeprivation procedures function as a narrow exception to the general governmental policy not to disclose any information about an individual's status on a terrorist watchlist. Thus, despite the additional due process protections provided by the revised procedures, the current DHS TRIP procedures still invoke a number of procedural due process issues. First, despite providing postdeprivation notice and some semblance of disclosure of the reason the individual was placed on the No Fly List, these reasonings are incredibly limited and vague. For example, one individual waited nearly two years for an "unclassified summary" from DHS that simply read:

> You are on the U.S. Government's No Fly list because the Government has concerns about your activities during frequent and extended travel to Yemen between 2011 and 2017. The information

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60 Mohamed v. Holder, 995 F. Supp. 2d 520 (E.D. Va. 2014).

61 The term "U.S. person" refers to a U.S. citizen or Lawful Permanent Resident. CRS REPORT (July 2016), *supra* note 7, at 8 n.75.

62 *See id.* at 8–9.

63 *See id.*

64 *See id.*

65 *See id.*

66 Courts have previously required potential plaintiffs in some situations to exhaust all administrative proceedings before appealing in federal court. *See, e.g.*, Shearson v. Holder, 865 F. Supp. 2d 850, 857 (N.D. Ohio 2011), *aff'd*, 725 F.3d 588 (6th Cir. 2013).

> you shared during your interview at the U.S. Consulate in Jeddah in November 2017 did not assuage the Government's concerns.[67]

In practice, plaintiffs claim that even this measured notice does not provide detainees enough actual substance to meaningfully challenge or understand their placement on the No Fly List.[68]

Second, and more relevant to this Essay, these additional due process protections provided in the revised redress measures are implicated *only* for detainees on the No Fly List and not extended to individuals placed on the Selectee List.[69] While not necessarily automatically barred from boarding their flights, these individuals are still subject to heightened interrogation and scrutiny when attempting to board commercial flights.[70] For example, one of the plaintiffs in the *Elhady* case, who claims to have suffered while undergoing enhanced screening due to placement on the Selectee List, was forced to undergo hours of interrogation in a freezing cold room, which ultimately required him to be hospitalized.[71]

In this context, the validity of procedural due process protections is incredibly important, and judicial review remains one of the most viable pathways for redress for these individuals. As it stands, individuals are provided with little to no information or ability to challenge their placement on a government watchlist through executive branch administrative redress processes. Although Congress frequently conducts oversight into the watchlist process, no major legislative overhaul has occurred since the inception of the TSDS.[72] Considering that the TSDS contains an unknown thousands of individuals and reported high rates of error,[73] meaningful judicial avenues for process are especially important.

II. THE *ELHADY* OPINION AND SUBSEQUENT REVERSAL

Despite the judicially mandated increase in postdeprivation procedural measures for those on the No Fly List, plaintiffs continue to struggle to access further procedural due process protections. This is especially true for those included on the Selectee List as opposed to the No Fly List. In part,

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67 Complaint at 13, Exhibit C, Moharam v. FBI, No. 21-cv-2607-JDB (D.D.C. Oct. 16, 2021).

68 *See, e.g.*, *id.* at 2.

69 *See* Elhady v. Kable, 391 F. Supp. 3d 562, 582 (E.D. Va. 2019).

70 *See id.* at 569.

71 *See id.* at 571–73.

72 *See* Letter from Sen. Elizabeth Warren, et al., to The Hon. Merrick Garland, Dep't of Just., et al. (Dec. 20, 2023) (requesting information on the TSDB), https://www.warren.senate.gov/imo/media/doc/2023.12.20%20Terrorism%20Watchlist%20Letter.pdf [https://perma.cc/2JEB-36HC].

73 *See id.* at 3.

this is reflected in reviewing courts' routine and strong deference to governmental national security claims in litigation.

Typically, when assessing the adequacy of procedural due process protections, courts engage in a three-part balancing test derived from *Mathews v. Elridge*.[74] Under the *Mathews* test the reviewing court weighs: (1) the private interest at stake; (2) the effect on the private interest in the event of an erroneous determination as well as the value of any additional procedural safeguards; and (3) the government's interest, including the administrative burden of providing additional procedural safeguards.[75] Frequently, as exemplified in the Fourth Circuit's *Elhady* opinion, in the context of TSA watchlists, the court will routinely defer to a purported governmental national security interest in maintaining secrecy around these terrorism watchlists.[76] Without necessarily grappling with the ramifications, this asserted governmental interest will outweigh other assertions of the harm to plaintiffs, the risk of erroneous deprivation, or the added value of any additional procedures.

A. The Fourth Circuit's Elhady *Opinion Shows Strong Deference to Government National Security Interests*

The district court's opinion in *Elhady* was particularly exciting for advocates opposed to government watchlists as it represented the first time a federal judge held that the current due process procedures for detainees on the Selectee List were insufficient.[77] As the *Latif* court had held previously,[78] the *Elhady* district court held that while predeprivation procedures were not required, some measures of postdeprivation procedures were, and the current procedures were inadequate.[79]

Specifically, the district court first found that the plaintiffs had established a protected liberty interest by showing that their "movement-related interests" were actually harmed by the enhanced screenings, burdening and deterring their ability to travel freely, and under a "stigma-plus" theory.[80] Under the "stigma-plus" theory, the court determined that plaintiffs were stigmatized by their placement on a watchlist of suspected terrorists, which was then disseminated to multiple local, state, and federal agencies that could affect an individual with respect to "traffic stops, field

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74 424 U.S. 319 (1976).

75 *See id.* at 340–49.

76 Elhady v. Kable, 993 F.3d 208, 229 (4th Cir. 2021).

77 *See* Elhady v. Kable, 391 F. Supp. 3d 562, 584–85 (E.D. Va. 2019); *see also* Shamsi & Handeyside, *supra* note 11.

78 Latif v. Holder, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014).

79 *See Elhady*, 391 F. Supp. 3d at 584–85.

80 *Id.* at 577–79.

interviews, house visits, municipal permit processes, firearm purchases, certain licensing applications, and other scenarios."[81] Next, the court evaluated both the risk of erroneous deprivation and the asserted government national security interest.[82] Here, although the court acknowledged the strong national security interest the government has in maintaining secrecy around the government watchlists, it ultimately decided that the vagueness of how and why an individual is placed on a government watchlist, the "black box" or near complete lack of additional information provided to individuals when challenging their placement, and the lack of a neutral decisionmaker created too high a risk of erroneous deprivation.[83]

The Fourth Circuit disagreed. At base, the circuit court disagreed that plaintiff's liberty interests were implicated, articulating that there is no individual right to travel unqualified or without burdens.[84] Further, the circuit court rejected the argument that plaintiff's claim survived under a "stigma-plus" theory particularly because government stigmatization was not enough.[85] In addition, the plaintiff must suffer a loss of a legal right in connection with the stigmatization.[86] Here, the potential loss of a legal right through government dissemination of the government watchlist to other agencies was not enough, especially given that placement on the list does not mandate denial of opportunities but rather provides information to third parties to make informed choices.[87]

Finally, when conducting the *Mathews* three-part balancing test, the Fourth Circuit described the government's interest as "extraordinarily significant" and entitled to judicial deference.[88] In contrast, the court described the weight of the private interest as relatively weak, differentiating what it views as plaintiff's right to unqualified travel as significantly less important than the plaintiff's interest in *Hamdi v. Rumsfeld*,[89] in which the Supreme Court had held that plaintiff's interest in being free from detention was weighted with great significance.[90] Similarly, the Fourth Circuit dismissed the lower court's assessment of the high risk of erroneous deprivation with asserted deference to Congress's judgement in creating the proper balance between counterterrorism efforts and air traveler desires to fly uninhibited, determining ultimately that:

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81 *Id*. at 580.
82 *Id.* at 580–83.
83 *Id.* at 582–84.
84 Elhady v. Kable, 993 F.3d 208, 220–21 (4th Cir. 2021).
85 *Id.* at 225–27.
86 *Id.*
87 *Id.*
88 *Id.* at 228.
89 542 U.S. 507 (2004).
90 *Elhady*, 993 F.3d. at 228–29 (citing *Hamdi*, 542 U.S. at 530, 533).

> Congress made a policy choice, balancing the burdens imposed on the victims of false positives with the costs imposed on the entire country when a terrorist attack occurs. When such competing interests are at stake, value judgments must be made. Striking the balance in this most sensitive of areas belongs principally with the people's representatives.[91]

The Fourth Circuit's opinion heavily defers to the government's ability to regulate national security interests. Notably, the appellate court's discussion differed from the lower court's in that it spent little time discussing the harm to plaintiffs or the high risk of erroneous deprivation. Instead, the appellate court diminished the implicated liberty interest as minimal and limited plaintiffs' listed harms to be generally nonindicative of the typical experience.[92] The appellate court further took a step back, citing general judicial incompetence to make decisions of this kind, effectively deferring the decision to intervene in the current redress process to the legislature.[93] This is not exclusively limited to analysis of the government's interest prong of the *Mathews* test but can be seen throughout the court's opinion in providing a wide berth for Congress and the TSA when "regulating travel, guarding the nation's borders, and protecting the aspirations of the populace for tranquility and safety."[94]

B. Governmental Deference Often Trickles into the Analysis of the Other Two Prongs of the Mathews *Analysis*

Even further, courts' deference to governmental national security assertions often seems to impact its analysis and characterization of the other two *Mathews* balancing factors: private interest and probable value of additional procedural safeguards. The Fourth Circuit's *Elhady* opinion similarly demonstrates this.

i. A Subjective Versus Objective Liberty Interest

In *Elhady*, the Fourth Circuit dismissed plaintiff's arguments that their liberty interests have been subjectively deterred through placement on the TSA Selectee List.[95] In sum, while plaintiffs were not expressly barred from travel, they argued that the resulting enhanced screening, interrogation, and humiliation from placement on the Selectee List hindered their protected liberty interest in traveling.[96] Initially, the Fourth Circuit rejected the

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91 *Id.* at 229.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.* at 221–23.
96 *Id.* at 222.

assertion that due process is "implicated by mere *subjective* deterrence" especially in context of travel burdens.[97] The court continued, stating that even if this subjective deterrence were enough to implicate due process, there is no protected liberty interest to travel through a specific means of transportation.[98] The Sixth and Tenth Circuits in *Beydoun v. Sessions*[99] and *Abdi v. Wray*[100] made similar determinations.

However, in other contexts, courts have held that subjective deterrence of a liberty interest was enough to implicate due process. For example, in *Campbell v. District of Columbia,*[101] the D.C. Circuit recognized stated evidence from a plaintiff that she had applied to numerous jobs outside of her chosen field as sufficient to demonstrate that she had "difficulty finding work . . . due to negative publicity surrounding her termination" in conflict with her recognized liberty interest in "the right to 'follow a chosen profession free from unreasonable government interference.'"[102]

Of course, when conducting the *Mathews* balancing test, courts are called to take into account the various severity of deprivation of liberty to determine the extent of due process required.[103] Surely, however, in many government watchlist cases, the subjective deterrence imposed by enhanced screenings would be sufficient to implicate some manner of additional due process. Mr. Elhady's enhanced screening ultimately required a hospital visit.[104] Other detainees have reported being separated from their small children during the interrogation process, and others have undergone strip searches to prove they were menstruating.[105] Whereas the Fourth, Sixth, and Tenth Circuits were not bound to consider implicated liberty interests so narrowly, in those cases, they choose to read them as such.[106]

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97 *Id.*

98 *Id.*

99 871 F.3d 459, 468 (6th Cir. 2017).

100 942 F.3d 1019, 1026 (10th Cir. 2019).

101 894 F.3d 281 (D.C. Cir. 2018).

102 *Id.* at 288–89 (quoting Abdelfattah v. U.S. Dep't of Homeland Sec., 787 F.3d 524, 538 (D.C. Cir. 2015)).

103 *Compare* Gilbert v. Homar 520 U.S. 924, 930, 934 (1997) (temporary suspension), *with* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543–44 (1985) (termination).

104 Elhady v. Kable, 391 F. Supp. 3d 562, 571–72 (E.D. Va. 2019).

105 Malka Abramoff, *Americans on FBI Watchlist Face Detention, Extra Screenings When Flying*, ABC (Apr. 5, 2022), https://abcnews.go.com/Primetime/americans-fbi-watchlist-face-detention-extra-screenings-flying/story?id=83870081 [https://perma.cc/NJW6-WLXW].

106 *See supra* notes 95, 98–100 and accompanying text.

ii. Focus on the Generality of Circumstances

Additionally, underlying much of the Fourth Circuit's opinion is the notion that these anecdotes of aggressive enhanced screenings and humiliation are nonrepresentative of individual's general experience flying while on a government terrorist watchlist.[107] Because the majority of plaintiffs in *Elhady* did not experience "anything particularly dramatic"[108] and because *Mathews* counsels courts to focus on the "generality of cases, not the rare exceptions[,]"[109] these isolated incidents were deemed not a "sound basis for redesigning the entire TSDB system."[110]

This assessment may be true as limited to the twenty-three plaintiffs in the *Elhady* case, but it brings to mind a larger disconnect between judicial opinions and advocates' commonsense arguments. In reality, while the exact number and demographic makeup of government watchlists are unknown, there is widespread belief that government watchlists disproportionately include and target individuals with Muslim or Middle Eastern sounding names.[111] Portions of government watchlists have leaked several times over the last two decades, most recently of the 2019 government watchlist.[112] CAIR, the Center for American-Islamic Relations, analyzed this leak and determined that ninety-eight percent of the names included on the leaked list were identifiably Muslim or Middle Eastern.[113] While direct evidence is unlikely to be available to corroborate, this leak, in combination with anecdotal evidence from those subjected to enhanced screening, may lead to the determination that the majority of individuals subject to these experiences were Muslim, Arab, or Middle Eastern.[114] This is especially likely given that constitutionally protected factors, such as ethnicity, religion, and First Amendment protected speech, may be permissibly

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107 Elhady v. Kable, 993 F.3d 208, 225 (4th Cir. 2021).

108 *Id.*

109 Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

110 *Elhady*, 993 F.3d at 225.

111 Press Release, CAIR, CAIR Announces Lawsuit in D.C., Mass., N.J., Mich. Seeking End to Secret Government Watchlist (Sept. 18, 2023), https://www.cair.com/press_releases/cair-announces-lawsuit-in-d-c-mass-n-j-mich-seeking-end-to-secret-government-watchlist [https://perma.cc/2DEF-23F5].

112 *See id*. (discussing leaked 2019 watchlist); *How 'the Terrorist Watch List' Works*, ABC NEWS (June 17, 2016), https://abcnews.go.com/US/terrorist-watch-list-works/story?id=39931316 [https://perma.cc/8GQL-MPMJ] (discussing leaked 2013 watchlist); Ians, *Nearly 2 Million Terrorist Watchlist Records Leaked Online*, DECCAN HERALD (Aug. 17, 2021), https://www.deccanherald.com/world/nearly-2-million-terrorist-watchlist-records-leaked-online-1020915.html [https://perma.cc/QKA3-PG8U] (discussing leaked 2021 watchlist).

113 CAIR, *supra* note 111.

114 *Id*.

considered when determining inclusion into the TSDS.[115] Consideration is impermissible only if these protected categories are the sole reason for the inclusion.[116]

While the *Elhady* plaintiffs focused on other arguments, as more litigants bring claims, what should courts make of an assertion that the vast majority of individuals subject to government watchlist deprivations are from a particular minority subgroup? In other contexts, advocates and scholars have argued that in the absence of statutory mandates and protections for disenfranchised groups, constitutional due process protections from disparate treatment in administrative proceedings are appropriate.[117] This could mean courts should consider whether a particular administrative process results in a disproportionate focus on a particular protected group when conducting the *Mathews* balancing test. In particular, the second prong of the test, the "risk of erroneous deprivation" and the potential value of additional procedures, may be implicated here.[118] Where the underlying system behind a name being entered into the TSDS may intentionally or unintentionally result in disproportionate targeting of a certain demographic of individuals, the risk of erroneous deprivation should be given a substantial weight.

In *Elhady*, the district court articulated how high the risk of erroneous deprivation is for government watchlist cases generally.[119] The lower court highlighted that inclusion in the TSDS based on status as a "suspected terrorist"[120] was fundamentally based on "subjective judgements"[121] that could implicate "completely innocent conduct."[122] The government could provide no evidence that the plaintiffs were "known terrorists"[123] or had been "convicted, charged or indicted for any [] offense related to terrorism,"[124] meaning that there is effectively no restraining limits on inclusion into the TSDS.[125] Even further, when challenging their suspected status on the list detainees remain limited in their ability to challenge their placement because

115 Elhady v. Kable, 391 F. Supp. 3d 562, 569 (E.D. Va. 2019).

116 *See id*.

117 *See* Risa E. Kaufman, *Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Developed Welfare System*, 3 HASTINGS RACE & POVERTY L. J. 1, 3–4 (2005); Brief for Juvenile Law Center, National Juvenile Defender Center, et al. as *Amici Curiae* in Support of Appellant at 5–7, Ohio v. Bunch, 220 N.E.3d 773 (Ohio 2022) (No. 2021– 0579).

118 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

119 *See Elhady*, 391 F. Supp. 3d at 577.

120 *Id.* at 581.

121 *Id.* (quoting Mohamed v. Holder, 995 F. Supp. 2d 520, 531 (E.D. Va. 2014)).

122 *Id.*

123 *Id*.

124 *Id*.

125 *Id*.

the information remains a "black box."[126] They are not told if they were and/or remain on a watchlist or the factual basis for their inclusion.[127] Regardless, the Fourth Circuit held that the government national security interest still outweighed this risk of erroneous deprivation.[128] However, coupled with an assertion that government watchlist inclusion disproportionately affects those with Muslim or Middle Eastern identifying names,[129] the high risk of erroneous deprivation could plausibly be afforded more weight.

C. The Elhady Opinions Demonstrate the Potential for Deviation from the Mathews *Test When Considering These Procedural Due Process Claims*

Even outside the scope of national security concerns, critics challenge courts' expertise and ability to conduct a balancing test of this nature.

In practice, various circuit court analysis of similar factual circumstances frequently leads to widely different results. For example, the Third Circuit in *McDaniels v. Flick*[130] held that the provision of an oral summary of sexual assault allegations and a brief, informal predeprivation hearing was sufficient process for a tenured professor given the availability of post-termination proceedings.[131] However, the Eighth Circuit, only a few years later, held that multiple investigations, witness interviews, and an opportunity for written statements was insufficient predeprivation process for a high school teacher accused of child abuse.[132] In situations where the consequences of an adverse action are as severe as remaining on and being inhibited by a government terrorist watchlist, it may be prudent to implement a judicial analytical test that ultimately results in more consistent results.

Additionally, critics of the *Mathews* test generally argue that because courts are ill-prepared to routinely engage in this type of cost-benefit analysis, they should strongly defer to legislative or agency decisions.[133] However, as discussed previously, when courts defer so routinely to government assertion of national security secrecy in these situations, it cripples an important check on governmental abuse and leaves detainees with little to no form of recourse or action.

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126 *Id*. at 582.

127 *Id*.

128 Elhady v. Kable, 993 F.3d 208, 229 (4th Cir. 2021).

129 *See* CAIR, *supra* note 111.

130 59 F.3d 446 (3d Cir. 1995).

131 *See id.* at 460.

132 Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 901 (8th Cir. 1994).

133 *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

While the *Mathews* test may be the most common standard utilized to analyze procedural due process protections, it is not absolutely required. In some cases, courts may choose to depart from the three-part balancing test and utilize alternative tests. This has already been seen in national security and terrorism threat contexts.[134] Justice Kennedy in his concurrence in *Kerry v. Din*[135] did not apply the *Mathews* balancing test in deciding whether the government had satisfied due process requirements when denying a visa to a naturalized citizen's spouse under an immigration statute's terrorism bar.[136] Instead, Justices Kennedy and Alito found the rationale of *Kleindienst v. Mandel*[137] instructive.[138] In *Mandel*, a self-described "Marxist" professor was denied a visa to enter the country under a then-existing visa ineligibility for those "who advocate[d] the economic, international, and governmental doctrines of world communism."[139] However, instead of balancing the professor's asserted First Amendment right against congressional plenary power to make rules regarding the admission of noncitizens, the *Mandel* Court asked whether the government had provided a "facially legitimate and bona fide" reason for their action.[140] Similarly, Justices Kennedy and Alito applied the "facially legitimate and bona fide" standard in *Kerry v. Din* as opposed to a rights balancing test.[141]

Of course, both in *Mandel* and Justice Kennedy's concurrence in *Kerry v. Din*, this alternative to the *Mathews* balancing test leaned towards increased judicial deference to legislative intent or agency determinations. As discussed above, further deference to legislative or agency determinations in government watchlist cases promotes further harms to detainees. However, these cases are indicative of the potential to incorporate revised or alternative tests when the standard balancing test produced deficient results. Scholars over the last few years have proposed numerous examples of alternative and additional procedures courts could implement to provide additional due process protections.[142]

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134 *See, e.g.*, Kerry v. Din, 576 U.S. 86 (2015).

135 576 U.S. 86 (2015).

136 *See id.* at 103–04 (Kennedy, J., concurring); 8 U.S.C. § 1182(a)(3)(B).

137 408 U.S. 753 (1972).

138 *See Kerry*, 576 U.S. at 103–04 (Kennedy, J., concurring).

139 *Mandel*, 408 U.S. at 754–56 (quoting 8 U.S.C. § 1182(a)(28)(D) (1964 ed.)).

140 *Id.* at 770.

141 *Kerry*, 576 U.S. at 104 (Kennedy, J., concurring) (quoting *Mandel*, 408 U.S. at 770).

142 *See, e.g.*, Shirin Sinnar, *A Label Covering a "Multitude of Sins": The Harm of National Security Deference*, 136 HARV. L. REV. F. 59 (2022); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991 (2018); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016); Shirin Sinnar, *Towards a Fairer Terrorist Watchlist*, 40 ADMIN. & REG. L. NEWS 4 (2015); Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115

While Mayor Khairullah had the political and social capital to challenge his TSDS status, an unknown number of Americans who are similarly detained or hindered do not. At base, true due process requires a meaningful ability to understand and challenge the deprivation of a right. Absent congressional action creating an additional statutory requirement for process, if courts' routine deference to national security concerns prevent them from properly considering, weighing, and balancing the various interests at stake, a different analytical mechanism more suited to judicial strengths may be required. If not, detainees will remain unable to meaningfully challenge their placement and subsequent harassment with no alternative mechanism for recourse.

YALE L. J. 2148 (2006); Elena Chachko, *Administrative National Security*, 108 GEO. L. J. 1063 (2020).