

United States Senate Committee On

HOMELAND SECURITY & GOVERNMENTAL AFFAIRS

Chairman Gary Peters

A stylized eagle with its wings spread, rendered in a dark blue color. Above the eagle's head are seven gold stars, arranged in a slight arc. The eagle is centered on a dark blue background.

MISLABELED AS A THREAT

*How the Terrorist Watchlist &
Government Screening Practices
Impact Americans*

HSGAC Majority Staff Report

December 2023

TABLE OF CONTENTS

- I. EXECUTIVE SUMMARY 4**
- II. FINDINGS OF FACT AND RECOMMENDATIONS..... 6**
- III. INTRODUCTION 9**
- IV. GOVERNMENT SCREENING ACTIVITIES HAVE EXPANDED SIGNIFICANTLY OVER THE PAST 20 YEARS..... 9**
 - A. Today’s Terrorist Watchlist was Established in the Aftermath of 9/11 10**
 - B. How the Terrorist Watchlist Works 11**
 - C. Government Watchlisting and Screening Activities Have Expanded Significantly 14**
 - 1. Expansion of the Government Watchlisting..... 14
 - 2. Expansion of TSA and CBP Screening at Airports and Ports of Entry..... 16
 - D. In 2023, TSA and CBP Subject U.S. Citizens to Additional Screening for at Least 22 Different Reasons 19**
 - 1. TSA Conducts Additional Screening Based on at Least 10 Screening Lists and Processes 19
 - 2. CBP Conducts Additional Screening Based on at Least 10 Other Lists, Processes and Inspections..... 24
 - 3. Additional Screening Can Be Prompted for a Least 2 Other Reasons Separate from the Terrorist Watchlist..... 28
- V. AGENCIES HAVE USED OPAQUE PROCESSES TO ADD U.S. CITIZENS TO THE TERRORIST WATCHLIST 28**
 - A. Watchlist-Related Screening can have Severe Impacts on U.S. Citizens..... 28**
 - B. U.S. Citizens have been Misidentified as Matching the Watchlist During Screening Activities 29**
 - C. Groups Have Concerns about Agencies Using the “Reasonable Suspicion” Standard to Add U.S. Citizens to the Terrorist Watchlist..... 30**
 - D. The Extent to Which the Terrorist Watchlist Is Shared outside the Federal Government is Unclear. 31**
- VI. U.S. CITIZENS HAVE BEEN SUBJECTED TO ADDITIONAL SCREENING OR TRAVEL RESTRICTIONS WITH LITTLE INFORMATION OR RECOURSE 32**
 - A. DHS Generally Does Not Tell Travelers Why They Are Subjected to Additional Screening as Part of the Redress Process..... 32**
 - B. DHS Now Tells U.S. Persons if They Are on the No-Fly List, after a Court Found the Previous Redress Process Violated Individuals’ Due Process Rights 35**
 - C. Multiple Courts have found the Current Redress Process is Constitutional, but Legal Challenges are Ongoing..... 35**
- VII. WIDESPREAD DISCRIMINATION ALLEGATIONS EXACERBATE CONCERNS ABOUT TSA AND CBP SCREENING ACTIVITIES..... 38**

A. TSA Receives Thousands of Discrimination Complaints Each Year About Its Screening Practices ...	38
B. CBP Currently Faces Ongoing Litigation and an Internal Review Spurred by Religious Discrimination Accusations	39
VIII. OVERSIGHT OF TERRORIST WATCHLIST AND SCREENING ACTIVITIES HAS BEEN FRAGMENTED, PREVENTING A COMPREHENSIVE AND CONSISTENT INDEPENDENT ASSESSEMENT	40
IX. CONCLUSION	41

I. EXECUTIVE SUMMARY

After the September 11, 2001 attacks, Congress swiftly took action to better protect the nation against the threat of terrorist attacks. The federal government subsequently established one comprehensive “terrorist watchlist,” which federal agencies continue to use to identify known and suspected terrorists. In addition to the terrorist watchlist, Congress and the executive branch expanded traveler screening at airports and other ports of entry to combat threats of terrorism and other security risks. A portion of the screening is driven by the terrorist watchlist, but the Transportation Security Administration (TSA) and Customs and Border Protection (CBP) screen travelers for other reasons as well. Today, U.S. travelers may be screened for at least 22 different reasons. While redundancy is a valuable security tool, given the similarity between some of these reasons, there is a likelihood of unnecessary duplication, and repeated and unwarranted screening can have profound impacts on Americans. It can also spread limited national security resources out broadly rather than effectively target changing threats.

For years, individuals and community groups have expressed concern with the reach of the federal government’s terrorist watchlist and frustration with repeated screenings at airports they believed were driven by individuals’ inclusion on the terrorist watchlist. While protecting Americans from the threat of terrorist attacks is paramount, potential abuse and/or lack of meaningful redress for wrongful screening by our government risks eroding Americans’ civil rights and civil liberties. To date, absent a few limited court rulings following lawsuits challenging the constitutionality of government screening practices and several privacy impact assessments, the executive branch has revealed hardly any information about what watchlists it maintains, who is included, and why or how those lists are used. In addition, the executive branch has not revealed what agencies and private sector entities have access to this data and how that information is used. Many Americans are left in the dark as they continue to be repeatedly pulled aside to be interviewed and searched during travel, and in some cases, prevented from flying, resulting in harms ranging from embarrassment, to loss of employment opportunities, or even wrongful arrest.

At the direction of U.S. Senator Gary Peters, Chairman of the Senate Homeland Security and Governmental Affairs Committee, majority committee staff examined existing authorities and current uses for the terrorist watchlist and other reasons individuals may receive additional screening (sometimes referred to as secondary inspection or enhanced screening) while traveling. The report finds that, in some cases, intentionally redundant layers of screenings associated with the terrorist watchlist and other government screening practices may be subjecting U.S. citizens to avoidable and unnecessary harm. Additionally, the report finds that the federal government lacks safeguards necessary to prevent potential discrimination and the redress process established to resolve travelers’ concerns about screening problems and other travel issues does not provide actionable information or assistance. As a result, Americans misidentified or subjected to discrimination do not have meaningful options to resolve concerns.

In a necessary attempt to protect our country from terrorist threats, the federal government has created a system so opaque and complicated it is difficult for U.S. citizens to understand. Certain communities—Muslim, Arab, and South Asian Americans in particular—claim they have been unfairly targeted. Keeping our country safe and our screening systems

targeted and effective, while simultaneously giving innocent people a path out of never-ending screenings requires a clear understanding and holistic review of government screening systems to ensure specific individuals and communities are not unfairly and unnecessarily targeted and a substantive redress process exists. More information about the executive branch's watchlisting and redress processes needs to be shared with the public. And the federal government must create a more effective redress system to sufficiently protect Americans' civil rights and liberties. This will ensure that the government's limited counterterrorism resources are best spent on protecting Americans.

A watchlist that is not properly maintained, coupled with unnecessarily duplicative screening practices that are not frequently assessed for their effectiveness is a risk to our national security. It may not reflect the latest threats, it could overextend limited security resources that should be focused on the best ways to protect Americans, and it breaks the trust with innocent Americans who get caught up in this net with no way out. The goals of this report and its recommended reforms are to strengthen our national security and ensure our screening systems are effectively addressing the serious terror threats we face.

Congress and the executive branch must work together to ensure that processes to protect the United States from future terrorist attacks and other security threats more effectively meet their intended goals without inflicting an undue burden on the traveling public. Federal agencies that use or oversee watchlist data need to improve transparency with the public and Congress. Finally, Congress should ensure sufficient constitutional protections and oversight mechanisms are in place to guide executive branch actions. These steps will strengthen our national security by instilling confidence that government practices that protect Americans eliminate unnecessary redundancies and effectively use limited resources while also balancing Americans' civil liberties.

II. FINDINGS OF FACT AND RECOMMENDATIONS

FINDINGS OF FACT

1. **There are at least 22 different mechanisms that might lead Americans to receive additional screening at airports and other ports of entry or be denied the ability to travel.** Some of these reasons may be derived from the terrorist watchlist, but they may also be related to agencies' other security measures, including their agriculture, immigration, health, and law enforcement missions, as well as at the discretion of a primary screening officer. In fact, as of 2019, U.S. citizens and lawful permanent residents make up less than 0.5% of the terrorist watchlist, and therefore screening is more likely to be for reasons other than inclusion in the terrorist watchlist. When it comes to TSA, for example, the vast majority of pre-determined screenings are the result of random selection.
2. **The size of the terrorist watchlist has increased dramatically.** As of November 2022, there are approximately 1.8 million records in the terrorist watchlist, up from 150,000 in 2004.
3. **The executive branch watchlists more than just terrorists.** The Terrorist Screening Center (TSC) manages the Threat Screening System (TSS) which maintains records in multiple datasets including terrorist screening, military detainee, transnational-organized crime, and additional datasets. Additionally, the terrorist watchlist includes individuals who are relatives or associates of known or suspected terrorists, and individuals it suspects of being terrorists but does not have enough supporting evidence to list as terrorists.
4. **Non-governmental entities have access to terrorist watchlist data.** Executive branch agencies share terrorist watchlist information with state, local, Tribal, and foreign partners. Additionally, federal agencies have given over 500 entities in the private sector, such as police and security forces of colleges, hospitals, and prisons, access to a subset of the terrorist watchlist for law enforcement purposes.
5. **The executive branch is not holistically assessing whether discrimination is occurring across the full screening enterprise.** TSA and CBP screen travelers under different authorities and for different reasons, yet individuals experience their travel process as a whole. Although each component assesses the privacy and civil liberties impacts of different aspects of their screening systems, neither TSA nor CBP collect data to assess whether there are individuals and groups that face repeated screening because of the agencies' layered approach.
6. **The redress process is not transparent.** The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) does not provide individuals with information about why they are experiencing additional screening or if their application for redress will affect their status on the terrorist watchlist, nor does it provide Congress with information on how many errors, corrections, or revisions are made as a result of

redress efforts. Combined with the multiple reasons people might receive additional screening, travelers who apply for redress are left with little understanding of what they will experience the next time they travel or whether redress worked.

RECOMMENDATIONS

1. **Ensure Full Accountability of the Watchlist Enterprise:** Due to the scope of the terrorist watchlist, its opacity, the lack of oversight, and its impact on the lives of Americans and lawful permanent residents included on the list, Congress should request the relevant Inspectors General conduct a coordinated, full-scope review of the watchlist enterprise, including a quality assurance review of nominations and examination of information sharing practices.
2. **Reform the Redress Process:** Congress should require the Secretary of the Department of Homeland Security (DHS) to provide Congress with a plan to meaningfully reform the redress process. This plan should ensure there is a real path for U.S. citizens and lawful permanent residents to seek redress from the watchlist and other screening processes, improve transparency, and build confidence in the screening and redress processes. Further, to make sure this plan balances national security with civil liberties as well as integrates feedback from the public, the Secretary should develop the new redress process in coordination with representatives of impacted communities.
3. **Establish a Screening and Watchlisting Council:** Congress should create a Screening and Watchlisting Advisory Council at DHS composed of government and non-governmental representatives to advise the Secretary on the development, implementation, modification, and oversight of screening, watchlisting, and redress policies and processes at DHS. This council would create a venue for ongoing dialogue between relevant government representatives and members of communities impacted by DHS policies as well as outside experts.
4. **Holistically Track Screening Activities:** Congress should direct DHS to begin tracking all additional screenings by both TSA and CBP in a systematic manner across the screening enterprise, including the reasons for screenings, and whether they impact specific individuals and communities. DHS should provide annual reports to Congress outlining the full number of screenings each year, broken down by reasons for screening, individuals screened, and whether, in tracking this data, DHS uncovers discrimination or disproportionate impacts on specific individuals or communities. This would allow both DHS and Congress to assess the impact screenings across the enterprise have on groups and individuals and whether the redundancy DHS has built into the system also leads to discrimination.
5. **Terrorist Screening Center Should Annually Report to Congress:** The Terrorist Screening Center (TSC) should provide to all relevant congressional committees the 2023 Watchlisting Guidance and any new version each time it is updated as well as annually report the types of records contained within the Threat Screening System (TSS) and the entities that use information contained therein (e.g. list of executive branch departments

and agencies, law enforcement entities, and private sector entities). Furthermore, Congress should direct the TSC to analyze records in the TSS against the new Watchlisting Guidance and provide an annual report with the number of records added, edited, and removed to all relevant congressional committees.

6. **Evaluate Constitutional Protections:** Congress should consider whether existing watchlist and screening activities have sufficient constitutional protections for individuals who are subjected to them by conducting oversight and exploring legislation. Congress should also authorize the DHS Office for Civil Rights and Civil Liberties and direct it to review all relevant TSA and CBP policies to determine whether sufficient safeguards are in place. Additionally, Congress should direct the Government Accountability Office to evaluate the effectiveness and potential bias in CBP's Tactical Terrorism Response Teams, which is one screening mechanism at airports and other ports of entry.

III. INTRODUCTION

After the September 11, 2001 attacks, the federal government expanded screening at airports and other ports of entry to prevent and respond to threats of terrorism and other security risks, and consolidated and expanded the terrorist watchlist to list and identify known or suspected terrorists. Various agencies are responsible for populating, vetting, and reviewing proposals for nominating, or adding, individuals to this list. Since this expansion, which was put in place over the last two decades, no terrorists have succeeded in bringing down a U.S. aircraft, although there have been continuing successful and unsuccessful plots abroad. But government screening and the terrorist watchlist also affect individuals, sometimes with profound personal, professional, and constitutional concerns.

While each mechanism is intended to keep the country safe, certain communities, such as Muslim, Arab and South Asian Americans, report they continue to be subject to disparate screening during travel. It has become a multi-generational issue with children now experiencing the same delays at airports and other egregious experiences, such as separation from family members and loss of employment opportunities, as their parents. Moreover, the American people have a general lack of understanding of the terrorist watchlist and screening activities, making both the experience of screening and the process of seeking remedy, also known as redress, much more challenging.

For these reasons, Senator Peters directed majority committee staff to examine how the terrorist watchlist functions, how it may impact individuals, and what, if anything, should be done to address undue burdens while maintaining the safety and security of the traveling public. There are multiple, and sometimes unrelated, reasons why individuals may be subject to additional screening at ports of entry, particularly airports. As such, the report also discusses other government watchlists as well as a more expansive set of Transportation Security Administration (TSA) and U.S. Customs and Border Protection (CBP) activities at airports and other ports of entry that may result in additional screening.¹

Much of the information contained in this report is publicly available but remains difficult to connect and understand. Majority committee staff spoke to relevant executive branch agencies to learn more about their watchlist and screening processes and incorporated information from those interviews. Some of this information has previously been restricted from release to the public and some agencies have failed to be fully responsive to requests for additional information. Specifically, both the Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS) failed to fully provide responsive documents and information that the committee requested. The committee intends to ensure that agencies are accountable to these requests and will continue to follow-up.

IV. GOVERNMENT SCREENING ACTIVITIES HAVE EXPANDED SIGNIFICANTLY OVER THE PAST 20 YEARS

¹ U.S. Customs and Border Protection most often refers to this as secondary inspection, whereas the Transportation and Security Administration refers to this as enhanced screening. For simplicity in this report, all forms of this screening will be referred to as “additional screening.”

A. Today's Terrorist Watchlist was Established in the Aftermath of 9/11

To protect the United States, Congress has instructed federal agencies to assess potential threats to domestic air transportation as well as implement methods to identify individuals known to pose a terrorism threat, continuously monitor threats, share information about such threats, and prevent the entry of terrorists into the United States.² In response to the failure to share information between agencies that may have helped stop the 9/11 terrorists from entering the United States or boarding airplanes on that day, the executive branch took steps to consolidate its approach to terrorist watchlisting and use of terrorist and suspected terrorist information in screening processes.³

The terrorist watchlist, as it is commonly referred to and as it will be referred to in this report, is actually called the Terrorist Screening Dataset, which is managed by the Terrorist Screening Center (TSC).⁴ The TSC, a multi-agency body administered by the FBI, manages the terrorist watchlist and the broader system in which it is housed, the Threat Screening System.⁵ This watchlist, and the entity that administers it, are a consolidation of numerous watchlists and structures that pre-date 9/11 and were revised and reformed in the two decades that followed.

Two months following the 9/11 attacks, Congress established the Transportation Security Administration (TSA) to be responsible for the security of all modes of transportation, including airline travel and transferred screening responsibilities from the Federal Aviation Administration (FAA) to TSA.⁶ Congress also made TSA responsible for establishing procedures for air carriers to identify travelers who may pose a threat, deny boarding, and notify law enforcement, where necessary.⁷ The following year, Congress created DHS, and in 2003, President Bush issued a Presidential Directive instructing the Attorney General to establish an organization to consolidate the government's approach to terrorism screening and to provide for the appropriate and lawful use of suspected terrorist information in screening processes.⁸

The National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) found that at the time of 9/11 attacks, the FAA only had 12 people on its

² E.g., Aviation Security Improvement Act of 1990, Pub. L. No. 101-604; Aviation and Transportation Security Act, Pub. L. No. 107-71; Homeland Security Act of 2002, Pub. L. No. 107-296.

³ E.g., Homeland Security Presidential Directive-6: *Directive on Integration and Use of Screening Information to Protect Against Terrorism* (Sep. 16, 2003); Homeland Security Presidential Directive-11: *Comprehensive Terrorist-Related Screening Procedures* (Aug. 27, 2004).

⁴ The Terrorist Screening Dataset (TSDS) was previously called the Terrorist Screening Database (TSDB). The TSDS is the U.S. government's consolidated database comprised of identity records of those known to be or are reasonably suspected of being involved in terrorist activities, commonly referred to as the terrorist watchlist. Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel* (R44678) (Nov. 7, 2016); Terrorist Screening Center response to the Senate Homeland Security and Governmental Affairs Committee staff (Nov. 7, 2022), *on file with Committee*; Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023).

⁵ See Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel* (R44678) (Nov. 7, 2016).

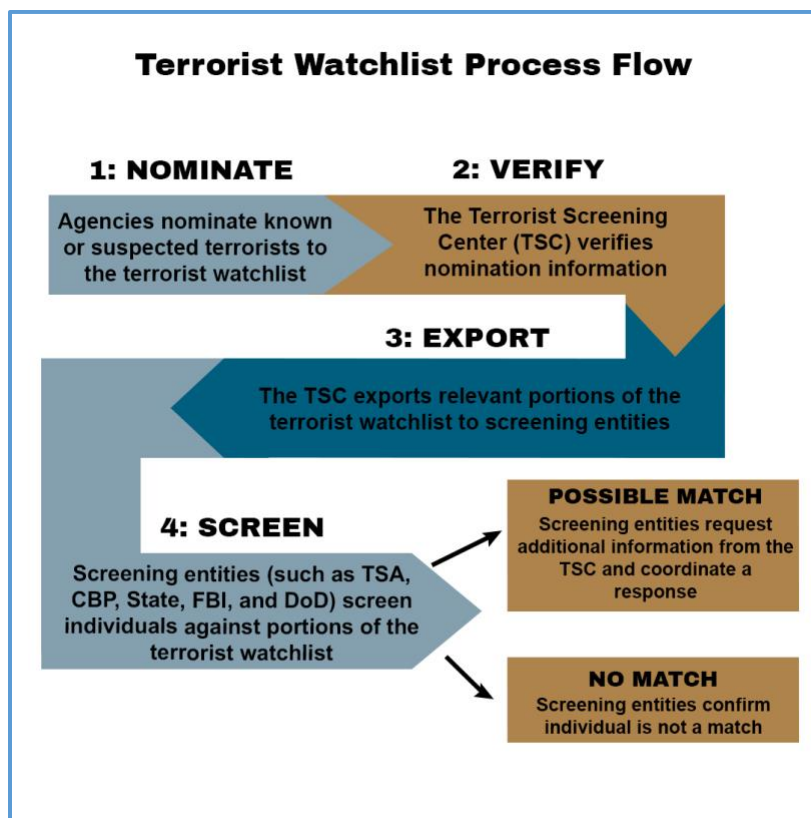
⁶ 49 U.S.C. § 114(d); Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71.

⁷ 49 U.S.C. § 114(h)(3).

⁸ Homeland Security Act of 2002, Pub. L. No. 107-296; Homeland Security Presidential Directive 6: *Directive on Integration and Use of Screening Information to Protect against Terrorism* (Sep. 16, 2003).

No Fly List despite calls on the Central Intelligence Agency and FBI to provide terrorist watchlist information four years earlier and was unaware of the State Department’s list of known or suspected terrorists.⁹ While some of the 9/11 terrorists were selected for additional screening, at the time, the only required additional screening was of their checked bags.¹⁰ To remedy these shortcomings, and to carry out the President’s directive, in 2003, the Attorney General—acting through the Director of the FBI, and in coordination with the Secretary of State, the newly created position of Secretary of Homeland Security, and the Director of Central Intelligence—created the TSC.¹¹ The TSC was tasked with maintaining a consolidated terrorist watchlist – then known as the Terrorist Screening Database.¹² Moreover, the Intelligence Reform and Terrorism Prevention Act of 2004, as amended, directed TSA to develop an advanced passenger prescreening system and assume from aircraft operators the responsibility of matching passenger information to the No Fly and Selectee Lists.¹³

B. How the Terrorist Watchlist Works



⁹ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, pg. 83 (July 22, 2004).

¹⁰ *See Id.* at pg. 1-4.

¹¹ Terrorist Screening Center, *Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism* (Sep. 16, 2003).

¹² Department of Justice, Office of Inspector General, *Audit of the Federal Bureau of Investigation’s Management of Terrorist Watchlist Nominations* (Audit Report 14-16) (Mar. 2014).

¹³ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-548.

For someone to be placed on this watchlist, the government must nominate that individual to be included. The U.S. embassies, consulates, and intelligence and law enforcement agencies responsible for making these nominations do so by proposing individuals known or reasonably suspected to be terrorists, as well as others, to the terrorist watchlist¹⁴ According to the FBI,

A known terrorist is:

an individual whom the U.S. government knows is engaged, has been engaged, or who intends to engage in terrorism and/or terrorist activity, including an individual (a) who has been charged, arrested, indicted, or convicted for a crime related to terrorism by U.S. government or foreign government authorities; or (b) identified as a terrorist or member of a designated foreign terrorist organization pursuant to statute, Executive Order, or international legal obligation pursuant to a United Nations Security Council Resolution.¹⁵

A suspected terrorist is:

an individual who is reasonably suspected to be, or has been, engaged in conduct constituting, in preparation for, in aid of terrorism and/or terrorist activities based on an articulable and reasonable suspicion.¹⁶

In testimony before Congress, in 2014, former TSC Director Christopher Piehota stated that an individual's inclusion in the terrorist watchlist must not be based solely on hunches, guesses, First Amendment protected activity, or identifying factors such as race, ethnicity, national origin, or religious affiliation.¹⁷ According to the Government Accountability Office (GAO), if an agency determines a nexus to terrorism no longer exists, it must provide information to remove the individual from the terrorist watchlist, consistent with Homeland Security Presidential Directive-6 (HSPD-6)-*Directive on Integration and Use of Screening*

¹⁴ Individuals are included in the terrorist watchlist when there is a reasonable suspicion the individual is known or suspected to have engaged in terrorist activities. To meet this "reasonable suspicion standard," nominating agencies must rely on articulable intelligence and rational inferences to provide an objective *factual basis* to believe an individual is a known or suspected terrorist. Congressional Research Service, *The Terrorist Screening Database and Prevent Terrorist Travel* (R44678) (Nov. 7, 2016); Terrorist Screening Center, *Frequently Asked Questions* (Apr. 11, 2016).

¹⁵ Terrorist Screening Center, *Frequently Asked Questions* (Apr. 11, 2016).

¹⁶ Congressional Research Service, *Terrorist Databases and the No-Fly List: Procedural Due Process and Other Legal Issues* (R43730) (July 27, 2016); Terrorist Screening Center, *Frequently Asked Questions* (Apr. 11, 2016); Federal Bureau of Investigation response to the Senate Homeland and Governmental Affairs Committee staff (Oct. 13, 2023), *on file with Committee*.

¹⁷ House Committee on Homeland Security, Subcommittee on Transportation Security, Testimony Submitted for the Record of Director Christopher Piehota, Terrorist Screening Center, *Hearing on Safeguarding Privacy and Civil Liberties While Keeping our Skies Safe*, 113th Cong. (Sep. 18, 2014) (H. Hrg. 113-86).

Information to Protect Against Terrorism.¹⁸ However, the FBI told the majority committee staff this requirement does not appear in HSPD-6.¹⁹

The information contained in the terrorist watchlist includes identifying information that helps the government conduct screening activities such as background checks, passport reviews, and visa applications.²⁰ In accordance with underlying policies and authorities, the primary U.S. government agencies that use a subset of the terrorist watchlist and broader Threat Screening System are:

- Department of Homeland Security (DHS), including:
 - TSA for transportation security;
 - CBP for screening travelers at ports of entry and individuals encountered between ports of entry;
- the FBI for restricted dissemination in the National Crime Information Center for domestic law enforcement screening;
- the Department of State for passport and visa screening; and
- the Department of Defense for base access screening.²¹

The TSC regularly reviews and audits the terrorist watchlist to ensure it contains accurate and timely information.²² The process to remove terrorist watchlist records is similar to the nomination process in that removal forms are submitted and reviewed prior to import into the terrorist watchlist, thereby removing the record.²³

¹⁸ Government Accountability Office, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (GAO-12-476) (May 2012); Homeland Security Presidential Directive-6: *Directive on Integration and Use of Screening Information to Protect against Terrorism* (Sep. 16, 2003).

¹⁹ Federal Bureau of Investigation response to Senate Homeland Security and Governmental Affairs Committee majority staff (Oct. 13, 2023), *on file with Committee*.

²⁰ Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel* (R44678) (Nov. 7, 2016).

²¹ Some federal and local agencies can see the known or suspected terrorist record in the National Crime Information Center when screening job applicants. Federal Bureau of Investigation response to the Senate Homeland Security and Governmental Affairs Committee staff (Oct. 13, 2023), *on file with Committee*; Terrorist Screening Center, *Frequently Asked Questions* (Apr. 11, 2016); Congressional Research Service, *The Terrorist Screening Database and Prevent Terrorist Travel* (R44678) (Nov. 7, 2016); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 14, 2023), *on file with Committee*.

²² Terrorist Screening Center, *Frequently Asked Questions* (Apr. 11, 2016).

²³ Department of Justice, Office of Inspector General, *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations* (Audit Report 14-16) (Mar. 2014).

C. Government Watchlisting and Screening Activities Have Expanded Significantly

1. Expansion of the Government Watchlisting

Growth in Size

Since the consolidation of the government’s approach to terrorism screening after the 9/11 attacks, the number of records added to the terrorist watchlist has grown significantly. The Department of Justice (DOJ) Inspector General testified before Congress that in April 2004, shortly after the TSC was established, the database included approximately 150,000 records.²⁴ As of November 2022, there are approximately 1.8 million records; U.S. citizens and lawful permanent residents made up less than 7,000 of those records (less than half a percent of the total records in the terrorist watchlist).²⁵ Because multiple records may relate to one individual, the actual number of individuals in the terrorist watchlist is fewer than the number of records. Regardless, this growth reflects a significant change.

Growth in Categories

Additionally, over the course of its existence, the terrorist watchlist has further expanded into categories beyond known and suspected terrorists. These categories include “exception records” which may include information about relatives, associates, or others closely connected with known or suspected terrorists, as well as endorsers and inciters of terrorism, whose precise terrorist support activity is unknown.²⁶ Exception records do not meet the same minimum standard for inclusion required for other records in the terrorist watchlist and are used primarily to determine the admissibility of individuals trying to enter the United States.²⁷ The exceptions records might also be used for other reasons too, such as background screenings for TSA credentials like Transportation Worker Identification Credential (TWIC), which is for workers who need access to certain maritime facilities and vessels.²⁸

²⁴ Terrorist watchlist records only include “terrorist identifiers” such as name and date of birth. Until the government can confirm those identifiers are connected to one individual, they remain separate records in the terrorist watchlist. Senate Committee on Homeland Security and Governmental Affairs, Testimony Submitted for the Record of Inspector General Glenn A. Fine, Department of Justice, *Hearing on Watching the Watch Lists: Building an Effective Terrorist Screening System*, 110th Cong. (Oct. 24, 2007) (S. Hrg. 110-621); House Homeland Security Committee, Subcommittee on Transportation Security, Testimony Submitted for the Record of Director Christopher M. Piehota, Terrorist Screening Center, *Hearing on Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe*, 113th Cong. (Sep. 18, 2014) (H. Hrg. 113-86).

²⁵ Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023); Terrorist Screening Center response to the Senate Homeland Security and Governmental Affairs Majority Committee staff (Nov. 7, 2022), *on file with Committee*.

²⁶ National Counterterrorism Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (May 23, 2023); Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee majority staff (Sept. 22, 2022); *See also, Salloum v. Kable*, Declaration of Jason V. Herring, (June 21, 2021), ECF 37-1.

²⁷ Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023).

²⁸ *Id.*; Transportation Security Administration, *TWIC* (<https://www.tsa.gov/for-industry/twic>) (accessed July 27, 2023).

After the failed terrorist attack in 2009 by Umar Farouk Abdulmutallab, also known as the “Underwear Bomber,” who attempted to detonate two high explosives and a syringe containing other chemicals on Northwest Airlines Flight 253, the watchlisting community reexamined its terrorist watchlisting procedures.²⁹ The government had failed to include Abdulmutallab on the terrorist watchlist and prevent him from boarding an airplane destined for Detroit, Michigan, despite having sufficient information to do so. Following the incident, the TSC updated its procedures to address gaps in information sharing and weaknesses in the nominations process. The updated guidance increased the number of nominations received, subsequently resulting in an increase in the number of records within the terrorist watchlist after 2010.³⁰

In 2015, because of threats posed by transnational organized crime (TOC) and following President Obama’s issuance of the “Strategy to Combat Transnational Organized Crime,” the U.S. Attorney General broadened the TSC authority to extend watchlisting to include TOC actors, thereby further expanding government watchlisting.³¹ CBP uses the TOC list for screening, and while TSA does not use it for airport screening, TSA does use the TOC list for credential vetting purposes.³² Moreover, in 2018, the Attorney General also granted the TSC authority to maintain additional datasets.³³

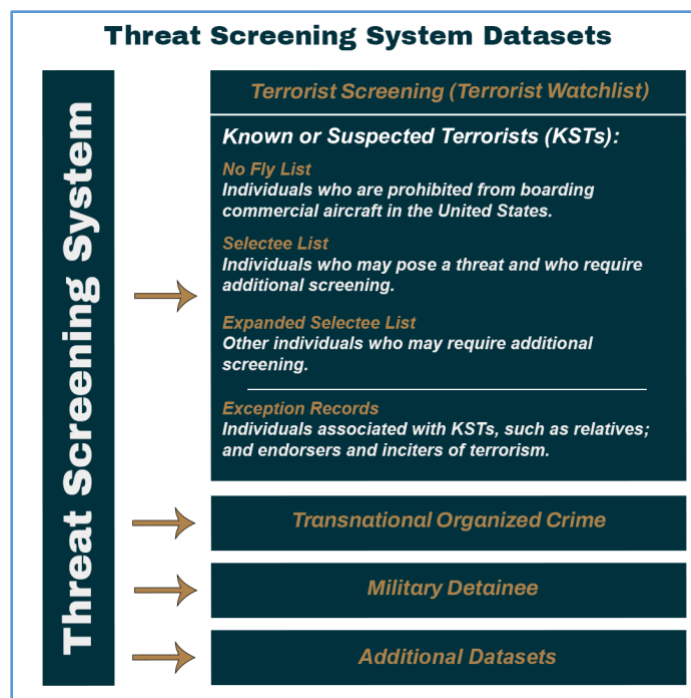
²⁹ Federal Bureau of Investigation, “Underwear Bomber” Umar Farouk Abdulmutallab Pleads Guilty (Oct. 12, 2011) (<https://archives.fbi.gov/archives/detroit/press-releases/2011/underwear-bomber-umar-farouk-abdulmutallab-pleads-guilty>); Government Accountability Office, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (GAO-12-476) (May 2012).

³⁰ *Id.* Federal Bureau of Investigation, “Underwear Bomber” Umar Farouk Abdulmutallab Pleads Guilty (Oct. 12, 2011) (<https://archives.fbi.gov/archives/detroit/press-releases/2011/underwear-bomber-umar-farouk-abdulmutallab-pleads-guilty>); Government Accountability Office, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (GAO-12-476) (May 2012).

³¹ Department of Justice, Attorney General Order No. 3548-2015 (Aug. 2015).

³² Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 7, 2023), *on file with Committee*.

³³ Federal Bureau of Investigation briefing and response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 14, 2023).



2. Expansion of TSA and CBP Screening at Airports and Ports of Entry

Like the government’s terrorist watchlist activities, other screening activities at airports and other ports of entry have also expanded in the last twenty years.³⁴ Over time, TSA and CBP have come to rely on a growing number of lists and screening activities to accomplish their missions in securing the nation’s aviation system and borders as well as CBP’s other missions, including but not limited to those related to the terrorist watchlist.³⁵ Their multi-layered approaches include prescreening passengers prior to arrival at the airport against law enforcement and national security databases, including terrorist watchlist information, as well as screening at security checkpoints.³⁶

For example, beginning in December 2002, TSA deployed explosive detection systems across the country.³⁷ Then, following a plot to detonate liquid explosives onboard multiple aircraft in 2006, TSA banned liquids, aerosols, and gels over 3.4 ounces from carry-on

³⁴ U.S. Customs and Border Protection most often uses the terms exams or inspections. However, for consistency, this report uses the term screening.

³⁵ *E.g.* Aviation and Transportation Security Act of 2001, Pub. L. No.107-71 established the Transportation Security Agency (TSA) and transferred screening responsibilities from Federal Aviation Administration to TSA; Homeland Security Act of 2002, Pub. L. No. 107-296 authorized the Department of Homeland Security; 49 U.S.C. § 114(h)(3)(A) gave TSA the responsibility to establish procedures for air carriers to identify travelers who may pose a threat and if such an individual is identified, deny boarding and notify law enforcement.

³⁶ The Department of Homeland Security has also developed Trusted Traveler Programs, including Global Entry, NEXUS, SENTRI, and FAST, and TSA PreCheck®, which provide modified screening for preapproved members. Department of Homeland Security, *Trusted Traveler Programs* (Dec. 1, 2023) (<https://www.cbp.gov/travel/trusted-traveler-programs>).

³⁷ Transportation Security Administration, *Transportation Security Timeline* (<https://www.tsa.gov/timeline>) (accessed Mar. 7, 2023).

baggage.³⁸ Around the same time, TSA implemented more stringent identity verification practices at screening checkpoints and began requiring travelers to remove their shoes as part of screening based on a continuing threat.³⁹

In 2009, after the failure of the “Underwear Bomber,” CBP implemented a pre-departure system to push the borders out to the first point of foreign departure.⁴⁰ By 2012, TSA fully implemented Secure Flight, a passenger pre-screening program, which compares passenger manifests to the No Fly, Selectee, and Expanded Selectee Lists.⁴¹ Secure Flight replaced an FAA system and TSA security directives that required airlines to conduct passenger watchlist matching using lists provided by the federal government.⁴²

Following the publication of instructions to build a non-metallic bomb by Al Qaeda in the Arabian Peninsula in December 2014, TSA applied improvements to its deployment of Advanced Imaging Technology (AIT), explosive detection systems, and pat-down procedures to enhance officer’s ability to detect concealed items.⁴³ Then, in 2015, CBP began deploying Tactical Terrorism Response Teams (TTRTs) as an immediate counterterrorism response capability at some ports of entry.⁴⁴ In 2017, in response to information about overseas threats, TSA strengthened screening procedures requiring a passenger to remove personal electronic devices from their carry-on luggage.⁴⁵

Since then, TSA has begun testing advanced technology such as facial recognition, enhanced advanced imaging technology, and computed tomography (CT) to automate identification processes and improve detection capabilities.⁴⁶ Similarly, CBP has implemented biometric facial comparison into entry processes and currently uses such technology at all U.S. international airports.⁴⁷

Now, upon arrival at a TSA checkpoint, typical standard screening may include a review of identification and travel information, x-ray or CT screening of accessible property (e.g., carry-

³⁸ Transportation Security Administration, *Transportation Security Timeline* (<https://www.tsa.gov/timeline>) (accessed Mar. 7, 2023).

³⁹ *Id.*

⁴⁰ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁴¹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458.

⁴² See Department of Homeland Security, *Privacy Impact Assessment for the Secure Flight Program* (Aug. 9, 2007).

⁴³ See Transportation Security Administration, *Mission Hall Exhibit: Remembering the Past, Informing the Future* (https://www.tsa.gov/sites/default/files/9003_layout_mission_hall_exhibit_the_evolution.pdf) (accessed May 4, 2023); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁴⁴ *Clear v. CBP*, Howard Decl., Exhibit F, Exhibit H (Feb. 21, 2021).

⁴⁵ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁴⁶ Transportation Security Administration, *Transportation Security Timeline* (<https://www.tsa.gov/timeline>) (accessed Mar. 7, 2023).

⁴⁷ U.S. Customs and Border Protection, *Say hello to the new face of efficacy, security and safety* (Dec. 5, 2023) (<https://www.cbp.gov/travel/biometrics>).

on luggage), and traveler screening via metal detector or AIT.⁴⁸ DHS told the majority committee staff, these processes may generate alarms (i.e. a concern about the authenticity of identification documents provided, a potential prohibited item discovered in a bag, or an anomaly detected during AIT screening) that prompt additional screening.⁴⁹ According to DHS, alarms may also be generated randomly as part of unpredictable screening procedures. CBP screening at a port of entry also includes a review of identification and travel information and may include additional questioning.⁵⁰

Separately from these processes, use of law enforcement or security information including the terrorist watchlist may prompt additional screening of travelers or their belongings.⁵¹ Additional screening by TSA may include a pat-down, explosive trace detection screening, and a more in-depth search of luggage.⁵² Additional screening by CBP may include similar processes to TSA as well as a more extensive interview and further vetting against intelligence, law enforcement, and biometric databases.⁵³

With all of the additional screenings used by TSA and CBP, individuals can be screened multiple times during a single trip or subjected to additional screenings for a combination of several reasons. Even if one reason is addressed, individuals may continue to be subjected to additional screening. DHS asserts that because TSA and CBP have unique missions and authorities, TSA checkpoints and CBP inspection stations remain distinct from each other in the airport.⁵⁴ A passenger who travels domestically will be screened by TSA but will not be screened by CBP, and an international passenger arriving from abroad at their final destination will be screened by CBP but will not be screened by TSA.⁵⁵ However, international passengers arriving from most international locations and continuing their travel by air upon their arrival in the United States will be inspected by CBP to gain admission into the United States and then screened by TSA prior to continuing their domestic air travel.⁵⁶ Therefore, it is logical that such a traveler would experience both CBP and TSA screening and question why they were being screened multiple times by the U.S. government.

⁴⁸ Government Accountability Office, *Aviation Security: TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Compliant Process* (GAO-23-105201) (Nov. 7, 2022); Government Accountability Office, *Land Ports of Entry: CBP Should Update Policies and Enhance Analysis of Inspections* (GAO-19-658) (Aug. 6, 2019).

⁴⁹ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁵⁰ *Id.*

⁵¹ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 14, 2023), *on file with Committee*.

⁵² Government Accountability Office, *Aviation Security: TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Compliant Process* (GAO-23-105201) (Nov. 7, 2022).

⁵³ *Id.*; Government Accountability Office, *Land Ports of Entry: CBP Should Update Policies and Enhance Analysis of Inspections* (GAO-19-658) (Aug. 6, 2019).

⁵⁴ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.


⁵⁵ *Id.*; 49 U.S.C. 44901(a-b)

⁵⁶ *Id.*

D. In 2023, TSA and CBP Subject U.S. Citizens to Additional Screening for at Least 22 Different Reasons

22 Screening Mechanisms that Could Impact Traveler Experience


TSA

	No-Fly List*	TSA Deny Boarding List
	Selectee List*	TSA Enhanced Screening List
	Expanded Selectee List*	CDC Do Not Board List
	Silent Partner List**	Airline Designations and Referrals
	Quiet Skies List**	Random Selection

BOTH

Officer Discretion	Canine Unit Flags
--------------------	-------------------

CBP

Terrorist Watchlist*	Immigration Inspections	
National Security Threat Actors List	Customs Inspections	
CBP's Rules-based Targeting Lists**	Law Enforcement Alerts	
Tactical Terrorism Response Team Interviews**	CDC Public Health Lookout List	
Agricultural Inspections	Enforcement of Other Laws	

**These lists are derived exclusively from the terrorist watchlist*
***The terrorist watchlist may be one of multiple inputs for these screening activities*

1. TSA Conducts Additional Screening Based on at Least 10 Screening Lists and Processes

TSA screens over 14 million travelers every week.⁵⁷ All aviation travelers must undergo security screening prior to entering the secure area of an airport and boarding an aircraft, and any passenger may be selected for additional screening.⁵⁸ According to DHS, TSA applies the same checkpoint screening procedures to all travelers designated for additional screening, regardless of whether the designation is due to terrorist watchlist status, random selection, or for other reasons, and boarding passes do not indicate why someone has been selected.⁵⁹ DHS claims that a very small subset of travelers are designated for additional screening by Secure Flight and will see a “SSSS” or Secondary Security Screening Selection designation on their boarding pass.⁶⁰

⁵⁷ Department of Homeland Security, *Preventing Terrorism Results* (June 1, 2023) (<https://www.dhs.gov/topic/preventing-terrorism-results>).

⁵⁸ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁵⁹ *Id.*

⁶⁰ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

Generally, neither the Transportation Security Officer nor the passenger knows why the SSSS is there, though it could be one of the several reasons described below.

According to data provided by TSA, the vast majority of “SSSS” designations in recent years are due to random selection.⁶¹ TSA may also designate travelers for additional screening based on inclusion on the terrorist watchlist or other prescreening information.⁶² As part of its passenger vetting process, TSA uses the Secure Flight Program, a pre-screening program that compares passenger manifests submitted by an airline to information on the terrorist watchlist, as well as other lists maintained by TSA.⁶³ TSA does not use non-terrorist related information from the Threat Screening System for airplane traveler pre-board screening.⁶⁴

TSA’s Secure Flight program implements three subsets of the terrorist watchlist:

- **No-Fly List.** TSA uses the No-Fly List, a subset of the larger terrorist watchlist developed by the TSC for TSA’s screening purposes. Any individual, regardless of citizenship, may be included on the No Fly List when it is determined that the individual meets the criteria.⁶⁵ According to the TSC, the minimum information required to form a basis for inclusion on the No-Fly List is higher than for inclusion on the terrorist watchlist.⁶⁶ Inclusion on the No-Fly List prohibits an individual from receiving a boarding pass and boarding a commercial aircraft that departs from or arrives in the United States or traverses U.S. airspace.⁶⁷
- **Selectee List.** TSA also uses the TSC’s Selectee List, another subset of the terrorist watchlist developed by the TSC.⁶⁸ The criteria for inclusion on the Selectee List are not public. The Selectee List is used to perform additional screening on individuals who may pose a threat. Individuals on the Selectee List are not prevented from boarding an aircraft but must receive additional screening at the TSA checkpoint.⁶⁹
- **Expanded Selectee List.** Additionally, TSA uses the Expanded Selectee List, for which DHS stated the criteria for inclusion is not public.⁷⁰ According to a publicly available

⁶¹ Department of Homeland Security response to the Senate Homeland Security and Governmental Affairs Committee staff (Dec. 12, 2023), *on file with Committee*.

⁶² Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(i)) (Apr. 19, 2019).

⁶³ Secure Flight also identifies individuals on other watchlists maintained by the Federal Government. Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(i)) (Apr. 19, 2019).

⁶⁴ Department of Homeland Security response to the Senate Homeland Security and Governmental Affairs Committee staff (Dec. 12, 2023), *on file with Committee*.

⁶⁵ 49 CFR. § 1560.105(b)(1).

⁶⁶ Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023).

⁶⁷ Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel* (R44678) (Nov. 7, 2016).

⁶⁸ Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel* (R44678) (Nov. 7, 2016).

⁶⁹ *Id.*

⁷⁰ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

Congressional Research Service report, however, this list is based on all terrorist watchlist records not already on the No Fly or Selectee lists that include the first and last name and date of birth of an individual.⁷¹ Individuals on the Expanded Selectee List are subject to additional screening.⁷²

DHS told majority committee staff that TSA also relies on intelligence driven risk-based rules to increase efficiency and security effectiveness by allowing it to focus less on lower-risk travelers and more on higher-risk passengers or those about whom it has less information.⁷³ TSA formulates rules to address unknown and partially identified threats. For example, travelers may match a rule based upon travel patterns matching intelligence regarding terrorist travel, upon submitting traveler information matching the information used by a partially identified terrorist, or upon submitting traveler information matching the information used by a known or suspected terrorist. DHS stated these rules are applied to a limited set of travelers who are designated for additional screening and may result in other operational responses, including deployment of Federal Air Marshals to cover the flight to ensure security.⁷⁴

The rules used to create the lists described below are regularly audited by the DHS Office for Civil Rights and Civil Liberties (DHS CRCL) and DHS's Offices of Privacy and General Counsel as well as similar TSA offices.⁷⁵ Individuals matching to these rules are not considered as known or suspected terrorists and are not nominated to the terrorist watchlist merely for falling within a security rule but may be nominated if they are involved in a security incident that supports such a nomination.⁷⁶ While individuals can stop matching a certain pattern or rule after a period of time, they may still match a separate pattern or rule, and so continue to get additional screening.

- **Silent Partner List.** Silent Partner rules apply to international flights that are bound for the United States.⁷⁷ TSA uses Silent Partner as an indication that there may be an elevated risk that merits additional screening. According to TSA, matching to the Silent Partner list does not mean that the individual has or is suspected of engaging in terrorist

⁷¹ Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel* (R44678) (Nov. 7, 2016).

⁷² Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁷³ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*; See 49 U.S.C. § 44917(a)(10-11); FAA Reauthorization Act of 2018, Pub. L. 115-254, Sec. 1949(d)(2018), which calls on TSA to incorporate Silent Partner and Quiet Skies into the Federal Air Marshal Service's risk-based scheduling methodology.

⁷⁴ *Id.*; Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 13, 2023), *on file with Committee*

⁷⁵ While statute calls for reviews every 120 days, these offices have reviewed the Transportation Security Administration's rules programs on a quarterly basis since implementation of the program. FAA Reauthorization Act of 2018, Pub. L. 115-254, Sec. 1949(c)(2018); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁷⁶ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*; Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018)(i)) (Apr. 19, 2019).

⁷⁷ Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018)(i)) (Apr. 19, 2019).

activities.⁷⁸ Inclusion on the Silent Partner List is “based on aggregated travel data, intelligence, and trend analysis of the intelligence and suspicious activity.”⁷⁹ A traveler matching a Silent Partner rule will receive additional screening prior to their international inbound flight to the United States. Travelers remain on the Silent Partner List for the period of the international inbound flight.⁸⁰

- **Quiet Skies List.** Quiet Skies rules are a subset of Silent Partner rules linked to aviation security threats within the United States.⁸¹ Travelers who match a Quiet Skies rule receive additional screening prior to flights within the United States for a period of time following international travel that matches the corresponding Silent Partner rule.⁸² The Quiet Skies List continually changes as travelers are added based on matches to a Quiet Skies rule and automatically removed upon matching the program’s defined removal thresholds, which are not public.⁸³

In addition, TSA implements three other lists based on its own aviation security authorities.⁸⁴ These lists include persons who “pose, or are suspected of posing, (1) a threat to transportation or national security, (2) a threat of air piracy or terrorism, (3) a threat to airline or passenger safety or (4) a threat to civil aviation security.”⁸⁵ According to DHS, these lists are separate from the TSC’s terrorist watchlist and allow TSA to take immediate action to mitigate threats pending further investigation or TSC watchlisting action and mitigate non-terrorist threats to transportation or national security posed by individuals not in the terrorist watchlist.⁸⁶

Two of the lists may affect travel and are discussed below. The third list, the Security Notification List, includes individuals who may pose a threat to aviation security, but who do not warrant additional screening.⁸⁷ These individuals may seek to intentionally evade or defeat security measures or may attempt to disrupt the safe and effective completion of screening, such

⁷⁸ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 14, 2023), *on file with Committee*.

⁷⁹ Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(i)) (Apr. 19, 2019).

⁸⁰ *Id.*; Government Accountability Office, *Aviation Security: TSA Coordinates with Stakeholders on Changes to Screening Rules but Could Clarify Its Review Processes and Better Measure Effectiveness* (GAO-20-72) (Nov. 2019); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁸¹ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁸² *Id.*; Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(i)) (Apr. 19, 2019).

⁸³ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁸⁴ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee Majority Staff (July 11, 2022).

⁸⁵ 49 U.S.C. § 114(h); Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(h)) (July 12, 2017).

⁸⁶ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*; Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 13, 2023), *on file with Committee*.

⁸⁷ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee Majority Staff (July 11, 2022).

as individuals who assault TSA personnel during the screening process. Individuals on this list may not be referred for additional screening solely by virtue of their placement on this list, but TSA personnel may be given forewarning of their travel.⁸⁸

On July 1, 2017, fewer than 20 individuals were included within these lists.⁸⁹ Although the number of assaults on TSA and airport/airline personnel have increased, as of October 1, 2023, fewer than 200 individuals were identified on these lists.⁹⁰

- **TSA Deny Boarding List.** The Deny Boarding List includes individuals who meet criteria established by TSA that indicate the individual poses a threat warranting denial of boarding.⁹¹ People on this list will not be permitted to enter the sterile area of an airport or board aircraft.⁹²
- **TSA Enhanced Screening List.** The Enhanced Screening List includes individuals TSA believes pose or are suspected of posing a threat warranting additional screening or deployment of Federal Air Marshals to cover the flight to ensure security.⁹³ Individuals on this list may be violent and subject to additional screening.

TSA also implements other lists and alerts that are not exclusively based on security threats, which may result in additional screening or denial of boarding.

- **CDC Do Not Board List.** TSA implements the Centers for Disease Control and Prevention (CDC) Do Not Board List.⁹⁴ CDC maintains the Do Not Board list to prevent individuals with serious communicable illnesses, such as tuberculosis, from traveling or being admitted into the United States.⁹⁵ Individuals on the Do Not Board List are

⁸⁸ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁸⁹ Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(h)) (July 12, 2017).

⁹⁰ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁹¹ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee Majority Staff (July 11, 2022); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁹² *Id.*

⁹³ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee Majority Staff (July 11, 2022); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁹⁴ The Do Not Board list is enforced by TSA for commercial air travel. Travelers on the Do Not Board list are not part of the No-Fly List. CDC has restricted travel for individuals with tuberculosis, multidrug-resistant tuberculosis, and measles, but restrictions can also be used for other contagious diseases. During 2020-2022, CDC also restricted travel for individuals with COVID-19. Centers for Disease Control and Prevention, *FAQs for Public Health Do Not Board and Lookout Lists* (Jan. 28, 2022) (<https://www.cdc.gov/quarantine/do-not-board-faq.html>); Centers for Disease Control and Prevention, *Travel Restrictions* (Oct. 5, 2022) (<https://www.cdc.gov/quarantine/travel-restrictions.html>).

⁹⁵ The CDC Do Not Board List includes individuals who are known or believed to be infectious with, or at risk for, a serious contagious disease that poses a public health threat to others during travel; and 1) the individual is not aware of diagnosis or not following public health recommendations; 2) the individuals is likely to travel on a commercial

prevented from obtaining a boarding pass for any flight into, out of, or within the United States.

- **Airline Designations and Referrals.** Individual airlines maintain lists of individuals who are barred from future flights for violating contract-of-carriage terms, such as unruly behavior aboard an aircraft.⁹⁶ Airlines and crewmembers may refer information about passengers who are unruly or who cause disturbances to TSA or the FAA for further investigation.⁹⁷ Any referral to TSA does not, by itself, lead to an individual being denied boarding or being designated for additional screening by TSA.⁹⁸ According to DHS, TSA may review the information available regarding the incident and determine if the facts and circumstances warrant placement of the individual on a TSA list.⁹⁹
- **Random Selection.** As stated previously, the vast majority of individuals are subject to additional screening by TSA on a random basis. For example, air travelers may receive additional screening based on random Secure Flight-generated selection or be designated for random selection at security checkpoints by screening technologies.¹⁰⁰

2. CBP Conducts Additional Screening Based on at Least 10 Other Lists, Processes and Inspections

CBP enforces the customs, immigration, and agriculture laws of the United States and hundreds of other federal laws at the border, including laws related to deterring and preventing terrorists and terrorist weapons from entering the United States. In furtherance of this mission, CBP officers inspect persons and merchandise that are attempting to cross the U.S. border at ports of entry which includes airports, seaports, and land borders. For CBP, additional screening typically occurs after a traveler is referred by a CBP officer at a primary inspection area at a port of entry.¹⁰¹ CBP officers screen passengers to ensure they are admissible into the United States, and there are no national security concerns or violations of customs or other laws, such as the introduction of harmful plants or animals.

Given the multitude of laws that CBP enforces, including a variety of statutes and regulations on behalf of other agencies, DHS said there could be many reasons why an individual is referred for additional screening, and there may also be other locations within an airport or a

flight involving the United States or travel internationally by any means; or 3) there is a need to issue a travel restriction to respond to a public health outbreak or to help enforce a public health order. Centers for Disease Control and Prevention, *Travel Restrictions* (Oct. 5, 2022) (<https://www.cdc.gov/quarantine/travel-restrictions.html>).

⁹⁶ Congressional Research Service, *Aviation Security Measures and Domestic Terrorism Threats* (IF11731) (Jan. 15, 2021).

⁹⁷ *Id.*; Federal Aviation Administration, *Unruly Passengers* (<https://www.faa.gov/unruly>) (accessed Dec. 6, 2023).

⁹⁸ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

⁹⁹ *Id.*

¹⁰⁰ Department of Homeland Security, *Privacy Impact Assessment Update for Secure Flight* (DHS/TSA/PIA-018(b)) (Aug. 15, 2011); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁰¹ Department of Homeland Security response to the Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

reasonable distance from the U.S. border where an individual is stopped by CBP.¹⁰² The additional lists and activities below are not derived exclusively from the TSC maintained terrorist watchlist, although some may use the terrorist watchlist as one input.

- **Terrorist Watchlist.** CBP applies additional scrutiny to the screening of individuals identified on the terrorist watchlist.¹⁰³ Terrorist watchlist information is transmitted from the TSC to DHS through the DHS Watchlist Service.¹⁰⁴
- **National Security Threat Actors List.** According to DHS, CBP also receives additional information from the TSC beyond known or suspected terrorists, such as individuals who may pose a threat to national security and who do not otherwise meet the criteria for inclusion in the terrorist watchlist.¹⁰⁵ Such individuals may include those who have been officially detained in military operations, who are known or suspected of engaging with transnational organized crime, and who are identified as possible threats to national security.¹⁰⁶ Individuals who are identified as a National Security Threat Actors may receive additional screening. Additionally, CBP may take other appropriate actions, such as denying an Electronic System for Travel Authorization application.¹⁰⁷
- **CBP Rules-based Targeting Lists.** CBP relies on its own data and rules-based processes to help officers identify unknown high-risk individuals by comparing travelers' information against a set of targeting rules based on intelligence, law enforcement, and other information. As with Silent Partner and Quiet Skies Lists, the information is constantly changing, which affects who may match.¹⁰⁸ CBP uses the passenger module of its Automated Targeting System (ATS) to help identify individuals who may require

¹⁰² 8 CFR § 287(a)(1) defines a reasonable distance as 100 air miles from the border; Department of Homeland Security response to the Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁰³ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁰⁴ Department of Homeland Security, *Privacy Impact Assessment for the Watchlist Service* (DHS/ALL/PIA-027(d)) (Jul. 10, 2020).

¹⁰⁵ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁰⁶ *Id.*; Department of Homeland Security, *Privacy Impact Assessment for the Watchlist Service* (DHS/ALL/PIA-027(d)) (Jul. 10, 2020).

¹⁰⁷ House Subcommittee on Transportation and Protective Security, Testimony Submitted for the Record of CBP Office of Field Operations Executive Assistant Commissioner Todd Owen, Department of Homeland Security, *Hearing on Raising the Standard: DHS's Efforts to Improve Aviation Security Around the Globe*, 115th Cong. (Sep. 26, 2017) (H. Hrg. 115-28).

¹⁰⁸ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*; Government Accountability Office, *Border Security: CBP Aims to Prevent High-Risk Travelers from Boarding U.S.- Bound Flights, but Needs to Evaluate Program Performance* (GAO-17-216) (January 2017); Government Accountability Office, *Land Ports of Entry: CBP Should Update Policies and Enhance Analysis of Inspections* (GAO-19-658) (August 2019); Department of Homeland Security, *Privacy Impact Assessment Update for the Automated Targeting Systems* (DHS/CBP/PIA-006(e)) (Jan. 13, 2023).

additional screening.¹⁰⁹ ATS cross-compares traveling data with law enforcement and intelligence data (including the terrorist watchlist) and patterns of suspicious activity identified in past investigations.¹¹⁰ ATS also uses predictive analytics to assist CBP officers in identifying travelers for additional screening.¹¹¹ As with TSA's rules-based targeting, DHS's Offices of General Counsel, Privacy, and Civil Rights and Civil Liberties, and CBP review the targeting rules to ensure they are relevant, in compliance with privacy, and do not excessively affect the traveling public.¹¹²

- **Tactical Terrorism Response Team Interviews.** CBP also deploys Tactical Terrorism Response Teams (TTRTs) made up of CBP officers who are specially trained and located at many ports of entry.¹¹³ TTRTs are responsible for the examination of travelers identified on the terrorist watchlist as well as other travelers, their associates, or co-travelers who arrive at a port of entry and are suspected of having a nexus to terrorist activity.¹¹⁴ TTRTs work closely with analysts to use information derived from targeting and screening to mitigate threats.¹¹⁵ TTRTs may handle additional screenings of travelers identified as potential counterterrorism and/or counterintelligence risk or otherwise decide to pull aside individuals they deem to pose a national security concern based on officers' training, discretion, and experience.¹¹⁶
- **Agricultural Inspections.** Together with or on behalf of other agencies, including U.S. Department of Agriculture, Animal and Plant Health Inspection Service, and Plant Protection and Quarantine, CBP conducts agricultural inspections by screening travelers and cargo for harmful pests, diseases, and other contaminants.¹¹⁷ Individuals suspected of carrying such prohibited items may be referred for additional screening.¹¹⁸
- **Immigration Inspections.** In accordance with the Immigration and Nationality Act, CBP officers question travelers seeking to enter the United States to determine their

¹⁰⁹ Department of Homeland Security, *Privacy Impact Assessment Update for the Automated Targeting System* (DHS/CBP/PIA-0006(e)) (Jan. 13, 2017); Department of Homeland Security, *2019 Data Mining Report to Congress* (Dec. 2, 2020).

¹¹⁰ Department of Homeland Security, *Privacy Impact Assessment Update for the Automated Targeting System* (DHS/CBP/PIA-0006(e)) (Jan. 13, 2017).

¹¹¹ See *Id.*; Department of Homeland Security, *2019 Data Mining Report to Congress* (Dec. 2, 2020).

¹¹² Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹¹³ Members of TTRTs receive counterterrorism training. Government Accountability Office, *Land Ports of Entry: CBP Should Update Policies and Enhance Analysis of Inspections* (GAO-19-658) (Aug. 2019); U.S. Customs and Border Protection, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (Dec. 12, 2022).

¹¹⁴ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; U.S. Customs and Border Protection, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (Dec. 12, 2022).

¹¹⁷ Department of Homeland Security, *Agriculture Inspections—Contaminated Products Fiscal Year 2021 Report to Congress* (Oct. 19, 2021).

¹¹⁸ *Id.*; U.S. Customs and Border Protection, *The Agriculture Inspection Process* (July 18, 2017).

admissibility.¹¹⁹ CBP officers may conduct routine immigration inspections and searches of travelers and their belongings.¹²⁰ Individuals suspected of being inadmissible may be referred for additional screening.

- **Customs Inspections.** CBP officers also conduct customs inspections to ensure prohibited or restricted items are not imported into the United States.¹²¹ According to DHS, CBP conducts routine examinations for weapons, contraband, undeclared merchandise, and undeclared currency.¹²² CBP also uses radiation detection technology to prevent the entry of potential nuclear or radiological threats.¹²³ As part of these inspections, CBP officers must also determine if duty or tariff are owed on items being imported into the country.¹²⁴
- **Law Enforcement Alerts.** CBP officers can see and act on (including execute arrest warrants) law enforcement alerts from CBP and other law enforcement agencies, including information pertaining to known criminals, individuals who may be engaging in illicit activity, and individuals subject to additional screening.¹²⁵
- **CDC Public Health Lookout List.** CBP manages the CDC Public Health Lookout List as a complement to the CDC Do Not Board List.¹²⁶ Individuals on the Public Health Lookout List are not necessarily prevented from travel; instead, this list prompts a public health review prior to admittance into the United States.¹²⁷ Individuals are removed from this list once public health officials confirm the individual is no longer contagious (typically within 24 hours).¹²⁸
- **Other Federal Laws Enforced by CBP.** CBP also enforces numerous other federal laws on behalf of other U.S. agencies. For example, on behalf of the Department of the Treasury, Financial Crimes Enforcement Network, CBP enforces the requirement to report currency or other monetary instruments that exceed \$10,000 in total that are transported at one time from the United States to any foreign country, or into the United

¹¹⁹ A reasonable suspicion is generally required for non-routine or highly intrusive border searches. Congressional Research Service, *Searches and Seizures at the Border and the Fourth Amendment* (R46601) (Mar. 30, 2021); *See* Immigration and Nationality Act, Pub. L. No. 82-414.

¹²⁰ *Id.*

¹²¹ 19 CFR § 162.6; Department of Homeland Security response to the Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹²² Department of Homeland Security response to the Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; U.S. Customs and Border Protection, *CBP Search Authority* (June 30, 2023) (<https://www.cbp.gov/travel/cbp-search-authority>).

¹²⁶ U.S. Customs and Border Protection enforces the Public Health Lookout List to ensure proper isolation or other public health management, as necessary. Centers for Disease Control and Prevention, *FAQs for Public Health Do Not Board and Lookout Lists* (Jan. 28, 2023) (<https://www.cdc.gov/quarantine/do-not-board-faq.html>).

¹²⁷ *Id.*

¹²⁸ Centers for Disease Control and Prevention, *Travel Restrictions to Prevent the Spread of Disease* (Oct. 5, 2023) (<https://www.cdc.gov/quarantine/travel-restrictions.html>).

States from a foreign country.¹²⁹ CBP may refer a traveler for additional screening to verify the traveler is accurately reporting the amount of currency being moved or to confirm the traveler is not smuggling bulk cash.¹³⁰

3. Additional Screening Can Be Prompted for a Least 2 Other Reasons Separate from the Terrorist Watchlist

TSA and CBP also subject individuals for additional screening based on other internal processes.

- **Officer Discretion.** TSA Transportation Security Officers may use their discretion to require an individual to undergo additional screening when there is an articulable basis for why the additional screening is needed to address a potential threat.¹³¹ Additionally, because CBP’s primary screening is meant to be a short exchange, primary screening officers may send a traveler to additional screening at their discretion, consistent with law and policy.¹³²
- **Canine Units.** TSA and CBP leverage canine units at security checkpoints to screen passengers for explosives (TSA) and to detect and seize controlled substances or contraband (CBP).¹³³ If a canine unit flags an individual, they may be required to undergo additional screening to address the concern.¹³⁴

V. AGENCIES HAVE USED OPAQUE PROCESSES TO ADD U.S. CITIZENS TO THE TERRORIST WATCHLIST

A. Watchlist-Related Screening can have Severe Impacts on U.S. Citizens

Since the creation of the centralized terrorist watchlist, countless Americans have been negatively impacted by the federal government’s use of the terrorist watchlist and related screening activities. Inclusion on the terrorist watchlist may result in an individual being detained, subjected to invasive searches, or even prohibited from flying. Courts have recognized that the impact of being placed on the terrorist watchlist or any of its subsets can be severe. For instance, inclusion on the No Fly List, a subset of the terrorist watchlist, can result in “long-term

¹²⁹ Government Accountability Office, *Moving Illegal Proceeds: Challenges Exist in the Federal Government’s Effort to Stem Cross-Border Currency Smuggling* (GAO-11-73) (Oct. 2010).

¹³⁰ *Id.*; U.S. Customs and Border Protection, *Currency Reporting* (June 2006) (https://www.cbp.gov/sites/default/files/documents/currency_reporting.pdf); Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹³¹ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹³² Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (Aug. 4, 2023).

¹³³ See Transportation Security Administration, *TSA’s National Explosive Detection Canine Program* (Dec. 9, 2020) (<https://www.tsa.gov/blog/2020/12/09/tsas-national-explosive-detection-canine-program>); U.S. Customs and Border Protection, *Canine Program* (Aug. 4, 2022) (<https://www.cbp.gov/border-security/canine-program>).

¹³⁴ *Id.*

separation from spouses and children; the inability to access desired medical and prenatal care; the inability to pursue an education of [one's] choosing; the inability to participate in important religious rites; loss of employment opportunities; loss of government entitlements; [and] the inability to visit family.”¹³⁵ Even for individuals who are not barred from flying, the consequences of inclusion on the terrorist watchlist can be significant.¹³⁶ Individuals who are repeatedly subjected to lengthy or intrusive additional screening may feel frustration and humiliation leading to mistrust of the federal government.¹³⁷ Severe treatment such as subjecting young children and elderly family members to full-body pat downs and questioning about religious beliefs has deterred U.S. citizens from flying, leading to lost business opportunities and missed family gatherings and celebrations.¹³⁸

B. U.S. Citizens have been Misidentified as Matching the Watchlist During Screening Activities

Since the creation of the terrorist watchlist, individuals and advocacy groups have raised concern over misidentifications and resulting impacts. Elected officials, including former U.S. Senator Ted Kennedy and former U.S. Representative John Lewis, and even babies, have been stopped at airports because they shared biographical information with individuals on the terrorist watchlist.¹³⁹ The risk of misidentification continues to be a problem, especially as the number of identities in the terrorist watchlist increases. This is further exacerbated by the fact the terrorist watchlist contains names from languages other than English for which there may not be a standardized transliteration.¹⁴⁰ This results in records with variations of the same name, thereby increasing the chance of an incorrect potential match. TSA told majority committee staff that internalizing terrorist watchlist matching at TSA through Secure Flight helps to minimize misidentification errors because TSA relies on additional information to verify identities.¹⁴¹

Nevertheless, misidentifications are of particular concern for the Muslim American community because alleged leaked versions of the terrorist watchlist show the overwhelming majority of names on the terrorist watchlist are Muslim.¹⁴² In amicus briefs in recent litigation, the Muslim American community raised concerns that the number of common Arabic names

¹³⁵ *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019).

¹³⁶ See *Kariye v. Mayorkas*, 650 F. Supp. 865 (C.D. Cal. 2022).

¹³⁷ *Id.*

¹³⁸ See *El Ali v. Barr*, 473 F. Supp. 3d 479, 496-498 (D. Md. 2020); *Kariye v. Mayorkas*, 650 F. Supp. 865 (C.D. Cal. 2022); Memorandum from Office for Civil Rights and Civil Liberties, Department of Homeland Security to Commissioner of U.S. Customs and Border Protection Kevin McAleenan, Religious Questioning at Ports of Entry – Multiple Complaints (Feb. 26, 2019).

¹³⁹ 'No-fly list' grounds some unusual young suspects: Similarly-named babies were barred, *The Boston Globe* (Aug. 16, 2005) (https://web.archive.org/web/20160305023816/http://www.boston.com/news/nation/articles/2005/08/16/no_fly_list_grounds_some_unusual_young_suspects/).

¹⁴⁰ Department of Homeland Security, *Report on Effects on Privacy and Civil Liberties: DHS Privacy Office Report Assessing the Impact of the Automatic Selectee and No-Fly Lists on Privacy and Civil Liberties as Required Under Section 4012(b) of the IRTPA of 2004* (Apr. 27, 2006).

¹⁴¹ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 12, 2023), *on file with Committee*.

¹⁴² Council on American-Islamic Relations, *Twenty years Too Many: A Call to Stop the FBI's Secret Watchlist* (Mar. 2023).

within the Muslim American community has led to a significant number of misidentifications.¹⁴³ Further, in Sikh culture, most men share the same last name and most women the same last name, which may lead to excessive additional screening for members of this community.¹⁴⁴

As a result of misidentifications, an expanded set of people with no relationship to terrorists or suspected terrorist activity are affected by the terrorist watchlist and the corresponding screenings, as well as the associated fear and frustration. Because the terrorist watchlist is so opaque and the ability to learn whether someone has been included on it is so limited, individuals do not understand why their travel difficulties are happening. In addition, once matched to the terrorist watchlist, an individual's only recourse is to appeal to the government for redress, which as noted below, can be difficult and ineffective. Even if redress does work, the misidentifications can create a sense in certain communities that individuals are targeted for screenings more often than other communities.

C. Groups Have Concerns about Agencies Using the “Reasonable Suspicion” Standard to Add U.S. Citizens to the Terrorist Watchlist

Courts have held that the government can add individuals to the terrorist watchlist based on a “reasonable suspicion” that they are a known or suspected terrorist.¹⁴⁵ For years, organizations like the American Civil Liberties Union (ACLU) and the Brennan Center for Justice, have raised concerns about the use of the reasonable suspicion threshold.¹⁴⁶ According to federal government policy, “mere guesses or ‘hunches’ or reporting of suspicious activity alone are not sufficient to establish reasonable suspicion.”¹⁴⁷

However, a 2016 ACLU report states the reasonable suspicion standard can be met with “uncorroborated or even questionably reliable information and, on its face, does not require that it be more probable than not that an individual is involved in terrorism-related activities.”¹⁴⁸ Additionally, because this standard requires less evidence than is needed in other legal contexts, individuals can remain on the terrorist watchlist even if charges against them are dismissed or they are found not guilty of terrorist activities in court.¹⁴⁹ While a person may still meet the

¹⁴³ Brief of Muslim Advocates as Amicus Curiae in Support of Respondents (Feb. 12, 2020), *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020).

¹⁴⁴ Sikh Coalition, Briefing with Senate Homeland Security and Governmental Affairs Committee majority staff (October 2, 2021).

¹⁴⁵ *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019) (holding that the “reasonable suspicion standard satisfies due process.”).

¹⁴⁶ E.g., American Civil Liberties Union, *Trapped in a Black Box: Growing Terrorism Watchlisting in Everyday Policing* (Apr. 2016); American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences* (Mar. 2014); Brennan Center for Justice, *Overdue Scrutiny for Watch Listing and Risk Prediction* (Oct. 19, 2023).

¹⁴⁷ House Committee on Homeland Security, Subcommittee on Transportation Security, Testimony Submitted for the Record of Director Christopher Piehota, Terrorist Screening Center, *Hearing on Safeguarding Privacy and Civil Liberties While Keeping our Skies Safe*, 113th Cong. (Sep. 18, 2014) (H. Hrg. 113-86).

¹⁴⁸ American Civil Liberties Union, *Trapped in a Black Box: Growing Terrorism Watchlisting in Everyday Policing* (Apr. 2016), pg. 19.

¹⁴⁹ *Elhady v. Kable*, 391 F. Supp. 3d 562, 569 (E.D. Va. 2019); *Even Those Cleared of Crimes Can Stay on F.B.I.'s Watch List*, The New York Times, (Sep. 27, 2011) (<https://www.nytimes.com/2011/09/28/us/even-those-cleared-of-crimes-can-stay-on-fbis-terrorist-watch-list.html>).

criteria for inclusion on the terrorist watchlist, individuals can be left frustrated with their inability to prove their innocence if they remain on the terrorist watchlist even after being found not guilty of a crime.

According to the TSC, additions to the watchlist must not be based solely on an individual's race, ethnicity, or religious affiliation, nor solely on beliefs and activities protected by the First Amendment.¹⁵⁰ However, the reasonable suspicion standard entails a significant risk of error because it does not require it be more probable than not that an individual is involved in terrorism-related activities; therefore, the ACLU has alleged that the government likely uses conduct protected by the First Amendment to establish a reasonable suspicion.¹⁵¹ The ACLU claims that a leaked copy of the 2013 Watchlisting Guidance states that while First Amendment activity alone should not be the basis for nominating an individual to the terrorist watchlist, First Amendment-protected activity, such as a single social media post or anonymous letter, may be considered as part of the reason for inclusion.¹⁵² The U.S. Government has not acknowledged the alleged leak of this guidance.

Moreover, as noted above, not everyone identified on the terrorist watchlist meets the reasonable suspicion standard. As it has expanded to include exception records, the terrorist watchlist includes certain relatives and associates of known or suspected terrorists as well as individuals whose exact terrorist support activities are unknown.¹⁵³ These records are used primarily, though not exclusively, for immigration vetting.¹⁵⁴

D. The Extent to Which the Terrorist Watchlist Is Shared outside the Federal Government is Unclear

Considering only a reasonable suspicion standard is needed for inclusion on the terrorist watchlist, and in the case of exception records not even that, it is all the more important that individuals have the opportunity to seek meaningful redress. However, individuals seeking to contest their inclusion as unwarranted, and advocacy groups supporting these individuals, have expressed concern about the scope of information sharing of the terrorist watchlist with entities outside of the federal government, the full extent of which is unknown, and how that sharing may also negatively impact certain communities and groups. Without this information, it is impossible for the public to fully understand all the ways the terrorist watchlist may impact them.

Terrorist watchlist information is shared with state, local, and tribal governments and law enforcement agencies, and select international partners as well as certain private entities for screening purposes and to assist in the coordination of threat awareness, analysis, and

¹⁵⁰ Federal Bureau of Investigation, *Terrorist Screening Center* (<https://www.fbi.gov/investigate/terrorism/tsc>) (accessed Aug. 3, 2023).

¹⁵¹ American Civil Liberties Union, *Trapped in a Black Box: Growing Terrorism Watchlisting in Everyday Policing* (Apr. 2016), pg. 19.

¹⁵² *Id.*

¹⁵³ Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023); Terrorist Screening Center response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 7, 2022), *on file with Committee*.

¹⁵⁴ Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023).

response.¹⁵⁵ In 2019, the FBI reported sharing a subset of terrorist watchlist information with more than 18,000 state, local, county, city, university, and college, tribal, and federal law enforcement agencies and approximately 533 private sector entities.¹⁵⁶

Although the Secure Flight program transferred passenger watchlist matching responsibilities from major air carriers to TSA, TSA continued to share watchlist information with regulated U.S. airports and U.S. aircraft operators that could not use Secure Flight or required terrorist watchlist access to supplement TSA's employee vetting requirements.¹⁵⁷ In 2023, TSA finalized alternative methods to allow regulated parties to obtain watchlist matching results and cease all distribution of terrorist watchlist information.¹⁵⁸

Even though the federal government puts in place security requirements and audit functions when granting private entities access to terrorist watchlist information and the practical security benefits this access may provide, the vastness of terrorist watchlist information sharing raises concerns about how these non-U.S. government entities ensure privacy, human rights, civil rights, and civil liberties when using terrorist watchlist data in their counterterrorism and law enforcement efforts. It also leaves unanswered questions about other uses of the terrorist watchlist and whether individuals understand or are aware that a specific experience is caused by the terrorist watchlist and, if so, the best mechanism to seek redress. It may also cause individuals to speculate that the experiences they have might be caused by the terrorist watchlist, even if they may not be, because they do not have a full understanding of how the government shares terrorist watchlist information.

VI. U.S. CITIZENS HAVE BEEN SUBJECTED TO ADDITIONAL SCREENING OR TRAVEL RESTRICTIONS WITH LITTLE INFORMATION OR RECOURSE

A. DHS Generally Does Not Tell Travelers Why They Are Subjected to Additional Screening as Part of the Redress Process

Individuals with questions regarding how to seek resolution on issues related to travel screening and the terrorist watchlist can pursue redress through the DHS Traveler Redress Inquiry Program (DHS TRIP). This program was developed to help individuals seek recourse

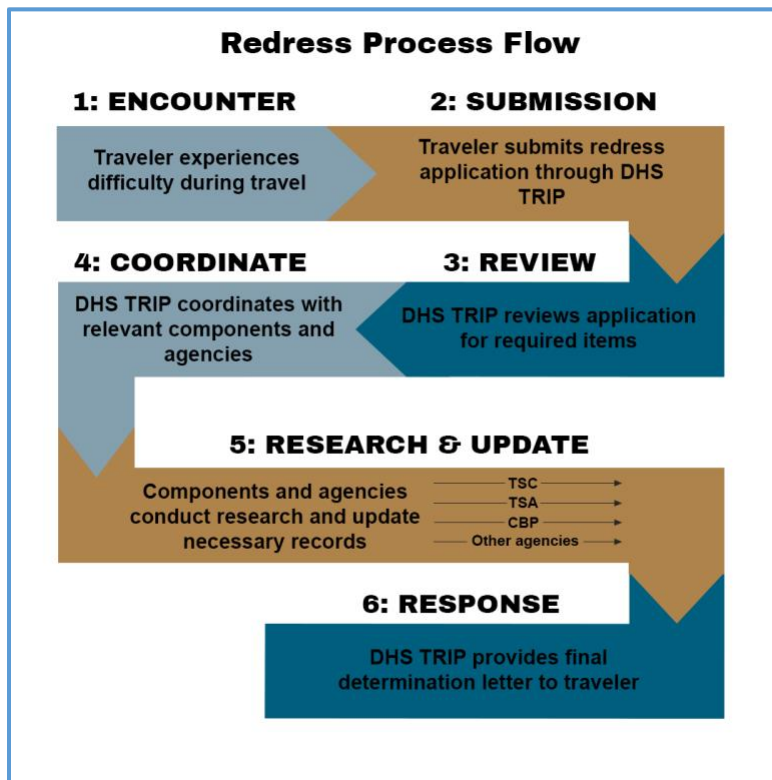
¹⁵⁵ See Federal Bureau of Investigations, *Privacy Act of 1974; System of Records*, 72 Fed. Reg. 47073 (Aug. 22, 2007) (proposed rule).

¹⁵⁶ *Elhady v. Kable*, 391 F. Supp. 3d 562, 570 (E.D. Va. 2019). The TSC exports terrorist watchlist data to the National Crime Information Center (NCIC), and private sector entities that meet certain requirements can be granted access to the NCIC, including terrorist watchlist information. Types of these private entities with access to terrorist watchlist information through the NCIC include the police and security forces of private railroads, colleges, universities, hospitals, and prisons, as well as the law enforcement divisions of certain animal welfare organizations; information technology, fingerprint databases, and forensic analysis providers; and private probation and pretrial services that have been determined by the FBI to be authorized criminal justice agencies performing the administration of criminal justice, pursuant to 28 CFR Part 20.

¹⁵⁷ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁵⁸ *Id.*

from difficulties during travel screenings.¹⁵⁹ DHS TRIP receives approximately 16,000-18,000 redress requests each year.¹⁶⁰



Once received, DHS TRIP coordinates with other departments, agencies, and DHS components to review the case, including determining the source of the traveler’s screening issue, whether it is terrorist watchlist related, and if the issue can be rectified.¹⁶¹ After the review is complete, DHS TRIP will provide a final determination letter to the traveler.

For example, a plaintiff in the case *Jibril v. Mayorkas*, received a final determination letter which included the following:

“DHS has researched and completed our review of your case. DHS TRIP can neither confirm nor deny any information about you which may be within federal watchlists or reveal any law enforcement sensitive information. However, we have made any corrections to our records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding incidents of misidentification.”¹⁶²

¹⁵⁹ See 49 U.S.C. §44926.

¹⁶⁰ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (May 31, 2023).

¹⁶¹ Department of Homeland Security, *Step 2: How to Use DHS TRIP* (Nov. 3, 2023) (<https://www.dhs.gov/step-2-how-use-dhs-trip>); Department of Homeland Security, *Redress Control Numbers* (Nov. 3, 2023) (<https://www.dhs.gov/redress-control-numbers>).

¹⁶² *Jibril v. Mayorkas*, 20 F.4th 804, 810-11 (D.C. Cir. 2021).

This response neither confirms the reasons for their travel difficulties nor what, if any, changes were made to prevent them in the future. This response is likely similar to many letters received by those who apply for redress through DHS TRIP.¹⁶³

The determination letter may include a redress control number, which an individual can include in future airline reservations or present to screening officials as a unique identifier to help clarify their identity and connect to their redress case.¹⁶⁴ In conjunction with TSA's Secure Flight Program, airlines have modified their reservation systems to allow individuals with a redress control number to enter it into the reservation system.¹⁶⁵ However, a redress control number does not ensure additional screening will not occur in the future.

In fact, a redress control number is neither a guarantee that an individual was or was not on the terrorist watchlist, nor that that individual has now been removed, as the government does not share that information. Moreover, even if that individual was removed from the terrorist watchlist, that individual could be screened for one of the other reasons listed above the very next time they go to the airport.¹⁶⁶

Due to national security concerns, the government generally will not inform an individual of the reason they have received additional screening. DHS told the majority committee staff disclosure of terrorist watchlist status during the redress process to individuals who have not been denied boarding would be detrimental to transportation security and disclosure of any underlying derogatory information would cause additional harm.¹⁶⁷ According to DHS, such disclosure could provide known or suspected terrorists with information to help them evade security measures and gain access to the commercial aviation system to perpetrate attacks.¹⁶⁸ DHS also claimed, requiring disclosure of whether an individual is on the terrorist watchlist or the reason for their status could jeopardize ongoing counterterrorism investigations or intelligence activities.¹⁶⁹

Because of the nontransparent nature of the process, the redress applicant has no idea whether they were ever on the terrorist watchlist or if their status has changed. The lack of acknowledgement of a change of status and repeated additional screenings for different reasons

¹⁶³ *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 988 (9th Cir. 2012) (“In a form letter, TSA responded to Ibrahim's request by explaining that ‘[if] it has been determined that a correction to records is warranted, these records have been modified.’ The letter did not state whether Ibrahim was, or was not, on the No-Fly List or other terrorist watchlists.”).

¹⁶⁴ Department of Homeland Security, *Redress Control Numbers* (Nov. 3, 2023) (<https://www.dhs.gov/redress-control-numbers>).

¹⁶⁵ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁶⁶ Department of Homeland Security, *Step 3: Tracking Your Inquiry* (Nov. 3, 2023) (<https://www.dhs.gov/step-3-tracking-your-inquiry>).

¹⁶⁷ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

creates the possibility of a breakdown in trust and communication between the government and those who experience this cycle.

While many individuals seeking redress may suspect the treatment they received was due to inclusion on the watchlist, in a briefing with majority committee staff, TSA said that 98 percent of redress requests are from individuals who are not on the terrorist watchlist.¹⁷⁰ Additionally, as of 2019, U.S. citizens and lawful permanent residents make up less than 0.5 percent of the terrorist watchlist.¹⁷¹ These statistics are consistent with the idea that there are many reasons for screening at airports beyond the terrorist watchlist, but individuals may be less familiar with the other reasons listed in the report.

B. DHS Now Tells U.S. Persons if They Are on the No-Fly List, after a Court Found the Previous Redress Process Violated Individuals' Due Process Rights

Several legal challenges have contested the constitutionality of the government's watchlist and redress practices. In 2014, a U.S. District Court in Oregon found the DHS TRIP process was "wholly ineffective" and lacked "any meaningful procedures" for challenging one's placement on the No-Fly List.¹⁷² The plaintiffs in this case were 13 U.S. citizens who were prevented from flying, resulting in extended separations from family, disruptions to education, and in one instance, the loss of veteran disability benefits.¹⁷³ Each of them submitted DHS TRIP complaints and received response letters that provided no information about their watchlist status, leaving them without the ability to challenge their presumed inclusion on the No-Fly List.¹⁷⁴ The court found that the DHS TRIP process violated their constitutional due process rights and ordered the government to revise its redress procedures.¹⁷⁵ In 2015, DHS revised its procedures to allow U.S. Persons who are on the No-Fly List to receive confirmation of that status and some information about the reasons for inclusion.¹⁷⁶ Americans and lawful permanent residents may now dispute their placement on the No-Fly List.¹⁷⁷

C. Multiple Courts have found the Current Redress Process is Constitutional, but Legal Challenges are Ongoing

In recent years, multiple appeals courts have rejected due process challenges brought by individuals who have not been barred from flying, but who suspect they are on the terrorist watchlist due to treatment they received while traveling.¹⁷⁸ For example, in 2021, a group of 23

¹⁷⁰ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (May 31, 2023).

¹⁷¹ See Memorandum in Support of Defendant's Motion for Summary Judgement at 7, *Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019).

¹⁷² *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014).

¹⁷³ *Id.* at pg. 1143-1146.

¹⁷⁴ *Id.* At pg. 1143.

¹⁷⁵ *Latif v. Holder*, 28 F. Supp. 3d 1163. On appeal, the Circuit Court upheld the constitutionality of the revised DHS TRIP process.

¹⁷⁶ Department of Homeland Security, *Annual Performance Report for Fiscal Years 2015-2017* at pg. 104.

¹⁷⁷ See *Id.*

¹⁷⁸ See *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021); *Ghedi v. Mayorkas*, 16 F.4th 456 (5th Cir. 2021); *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019); *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019); *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017).

U.S. citizens alleged their inclusion on the terrorist watchlist resulted in treatment ranging from repeated additional screening and delays, to being placed under arrest and interrogated for multiple hours.¹⁷⁹ However, in that case, *Elhady v. Kable*, the Fourth Circuit Court of Appeals found that the impacts described did “not rise to the level of constitutional concern” as none of them had been barred from flying or prevented from entering the United States.¹⁸⁰

Nevertheless, two district courts have recently found being barred from flying or entering the country is not necessary to challenge the constitutionality of the watchlist and redress procedures. In 2020, a Maryland district court recognized due process rights are implicated “when watchlist status results in repeated, prolonged delays” that deter travel.¹⁸¹ Several of the plaintiffs in the case tried unsuccessfully to seek a resolution through DHS TRIP. Based on their accounts, the court described the DHS TRIP procedures as providing “little to no opportunity to be heard, before, during, or after” being placed on the watchlist.¹⁸² A district court in Michigan also recently allowed a case to proceed in which a U.S. citizen argues his suspected inclusion on the watchlist violated his right to due process.¹⁸³ Although the plaintiff was not barred from flying, he experienced “lengthy and intrusive interrogations” every time he traveled, resulting in great economic harm to his business.¹⁸⁴ He also sought redress through DHS TRIP on several occasions, but “those efforts [went] nowhere.”¹⁸⁵

Even though the government has said that individuals have been removed from the watchlist through DHS TRIP, during fiscal years 2018 through 2022, 710 U.S. citizens and/or lawful permanent residents submitted DHS TRIP applications.¹⁸⁶ Of those, only five were removed from the No Fly List and 99 total were removed from the terrorist watchlist.¹⁸⁷ Many individuals have complained the only effective way to get off the terrorist watchlist is to sue the federal government.¹⁸⁸

¹⁷⁹ *Elhady v. Kable*, 993 F.3d 208, 215-16 (4th Cir. 2021).

¹⁸⁰ *Id.* at pg. 221.

¹⁸¹ *El Ali v. Barr*, 473 F. Supp. 3d 479, 508 (D. Md. 2020).

¹⁸² *Id.* at pg. 512.

¹⁸³ *Salloum v. Kable*, 2020 WL 7480549 (E.D. Mich. 2020).

¹⁸⁴ *Id.* at pg. *8.

¹⁸⁵ *Id.* at pg. *3.

¹⁸⁶ Federal Bureau of Investigation response to Senate Homeland Security and Governmental Affairs Committee majority staff (Oct. 13, 2023), *on file with committee*.

¹⁸⁷ *Id.*

¹⁸⁸ *E.g. Congress Should Reform the Unconstitutional ‘Terrorism’ Watchlist*, Medium (Mar. 2, 2022) (<https://cairnational.medium.com/congress-should-reform-the-unconstitutional-terrorism-watchlist-9fd2a96509e6>).

Timeline of Notable Watchlist Cases

- **Jan. 2014** – In *Ibrahim v. DHS*, a California District Court found that the government violated the due process rights of a traveler who was mistakenly placed on the No-Fly List as a result of an FBI agent misreading a form.¹⁸⁹ As the court explained, that mistake “was no minor human error but an error with palpable impact, leading to the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler.”¹⁹⁰ The court ordered the government to review every government watchlist and database to ensure all records of the traveler’s mistaken No-Fly List designation were removed.¹⁹¹
- **June 2014** – In *Latif v. Holder*, an Oregon District Court found that the DHS TRIP process for individuals on the No-Fly List was unconstitutional, prompting DHS to revise the redress process.¹⁹² Under the revised TRIP procedures, DHS will confirm a U.S. citizen or permanent resident is on the No-Fly List and provide some information about the reasons for inclusion.¹⁹³
- **Oct. 2019** – In *Kashem v. Barr*, the Ninth Circuit Court of Appeals upheld the constitutionality of the revised DHS TRIP procedures.¹⁹⁴
- **Jan. 2021** – In *Elhady v. Kable*, the Fourth Circuit Court of Appeals held that plaintiffs’ inclusion on the Selectee or Expanded Selectee Lists did not violate their due process rights and that the impacts of repeated enhanced screening did not “rise to the level of constitutional concern.”¹⁹⁵
- **Oct. 2021** – In *Ghedi v. Mayorkas*, the plaintiff alleged that he had been placed on the watchlist after refusing to be an informant for the FBI, and as a result experienced repeated “extreme burdens and hardship while traveling.”¹⁹⁶ The Fifth Circuit Court of Appeals rejected the plaintiff’s due process claims, finding that additional burdens faced while travelling did not deprive him of his constitutionally protected right to travel.¹⁹⁷
- **Dec. 2021** – In *Jibril v. Mayorkas*, the District of Columbia Circuit Court of Appeals allowed a due process challenge to the watchlist and redress processes based on “extensive and intrusive security screenings” the plaintiffs experienced, which they alleged occurred due to inclusion on the Selectee List.¹⁹⁸ In 2023, the U.S. District Court for the District of Columbia dismissed the case based on *ex parte, in camera* review of an affidavit provided by

¹⁸⁹ *Ibrahim v. DHS*, 62 F. Supp. 3d 909 (N.D. Cal. 2014). The plaintiff, Dr. Ibrahim, was arrested and detained when she attempted to board a plane to travel to an academic conference in Hawaii and subsequently had her student visa revoked. As a result of the lawsuit, the government acknowledged that Dr. Ibrahim did not pose a threat to national security and admitted that she had been added to the No-Fly List by mistake.

¹⁹⁰ *Id.* at pg. 927.

¹⁹¹ *Id.* at pg. 928.

¹⁹² *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161-62 (D. Or. 2014).

¹⁹³ *Id.*

¹⁹⁴ *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019). This case was an appeal of the continued litigation following the 2014 District Court decision in *Latif v. Holder*.

¹⁹⁵ *Elhady v. Kable*, 993 F.3d 208, 216-21 (4th Cir. 2021).

¹⁹⁶ *Ghedi v. Mayorkas*, 16 F.4th 456, 461 (5th Cir. 2021).

¹⁹⁷ *Ghedi v. Mayorkas*, 16 F.4th 456, 461 (5th Cir. 2021).

¹⁹⁸ *Jibril v. Mayorkas*, 20 F.4th 804, 807 (D.C. Cir. 2021).

the government explaining that the plaintiffs are not on the watchlist. In April 2023, the plaintiff appealed this decision and the review is ongoing.¹⁹⁹

- **June 2022** – In *Fikre v. FBI*, the plaintiff was removed from the No Fly List after initiating a due process challenge based on his inclusion on the list.²⁰⁰ The Ninth Circuit Court of Appeals held that his claims could still proceed because “there is no reason to believe the government would not place [the plaintiff] on the list ‘for the same reasons that prompted the government to add him to the list in the first place.’”²⁰¹ In September 2023, the U.S. Supreme Court granted the government’s petition for certiorari and will hear the case in January 2024.²⁰²

VII. WIDESPREAD DISCRIMINATION ALLEGATIONS EXACERBATE CONCERNS ABOUT TSA AND CBP SCREENING ACTIVITIES

A. TSA Receives Thousands of Discrimination Complaints Each Year About Its Screening Practices

In addition to DHS TRIP redress applications, TSA receives numerous complaints and allegations of discrimination in its screening processes.²⁰³ According to a GAO report, the TSA Contact Center received 34,542 civil rights and civil liberties complaints of discrimination from 2016 to 2021. Of those filed, racial profiling or discrimination was the most cited basis for the complaint. Further, despite concerns, GAO found that TSA has not consistently collected data on the frequency individuals from certain religious and ethnic communities are referred for additional screening nor assessed whether its screening practices comply with the agency's anti-discrimination policy. As a result, GAO has found that TSA has been unable to determine the extent to which discrimination occurs.²⁰⁴

Additionally, in 2013 and 2017, GAO reported TSA’s use of behavioral indicators to screen passengers was not backed by sufficient evidence to support their continued use to identify threats to aviation security.²⁰⁵ Since then, TSA has integrated behavior awareness training into the standard duties of the Transportation Security Officer workforce rather than fielding specific Behavioral Detection Officers. Further, in response to GAO recommendations, TSA integrated training on preventing racial, ethnic, and religious profiling into its behavioral detection training.²⁰⁶

¹⁹⁹ *Jibril v. Mayorkas*, 2023 WL 2240271 (D.D.C. 2023).

²⁰⁰ *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022).

²⁰¹ *Id.* at 772.

²⁰² *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), *cert. granted*, 2023 WL 6319658 (U.S. Sept. 29, 2023) (No. 22-1178); U.S. Supreme Court Argument Calendar, Session Beginning Jan. 8, 2024 (https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalJanuary2024.pdf).

²⁰³ Government Accountability Office, *Aviation Security: TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Complaint Process* (GAO-23-105201) (Nov. 2022).

²⁰⁴ *Id.*

²⁰⁵ Government Accountability Office, *Aviation Security: TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Complaint Process* (GAO-23-105201) (Nov. 2022).

²⁰⁶ Government Accountability Office, *Aviation Security: TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Complaint Process* (GAO-23-105201) (Nov. 2022).

TSA has also initiated actions to minimize discrimination. For example, TSA is implementing new procedures and is updating AIT algorithms which DHS assesses will reduce the rate of false positive alarms of transgender and gender-nonconforming travelers and travelers with religious head coverings.²⁰⁷

B. CBP Currently Faces Ongoing Litigation and an Internal Review Spurred by Religious Discrimination Accusations

In 2019, DHS CRCL provided recommendations to CBP based on an investigation of multiple allegations of religious insensitivity. These included allegations that officers had, over the course of eight years, inappropriately asked questions about the religious practices and geographic or cultural origin of names of travelers during interviews, and that they were insensitive to objections to officers seeing photographs of female travelers without their religious head coverings.²⁰⁸ DHS CRCL recommended that CBP develop clear policy that bars CBP personnel from discriminating against travelers solely based on real or perceived religion as well as make clear the specific circumstances when personnel may take religion into account, and that CBP then train to that standard.²⁰⁹ In response, DHS published a First Amendment protected activities memorandum.²¹⁰ Not long after DHS CRCL's report, the ACLU filed a lawsuit against CBP on behalf of individuals who have claimed they were unfairly questioned by CBP about their religious beliefs.²¹¹

In addition, DHS CRCL has opened an investigation into CBP's TTRTs, as a result of discrimination complaints. The complaints include repeated and unnecessary screening as well as questioning about religious and political beliefs and participation in First Amendment protected activities.²¹² Further, TTRTs were established to identify individuals who might be terrorists that were unknown to the system. To date, U.S. citizens and legal permanent residents represent the largest population of individuals the teams have examined.²¹³ Although this may indicate a focus on domestic terrorism, it also raises some questions about TTRT activities. While CBP awaits the results of DHS CRCL's investigation, CBP should continue to take steps to minimize discrimination, similar to those processes TSA is implementing, as described above.

²⁰⁷ Department of Homeland Security response to Senate Homeland Security and Governmental Affairs Committee majority staff (Nov. 17, 2023), *on file with Committee*.

²⁰⁸ For example, a male officer viewing an image of a female traveler without her hijab. Memorandum from Office of Civil Rights and Civil Liberties, Department of Homeland Security to Commissioner of U.S. Customs and Border Protection Kevin McAleenan, Religious Questioning at Ports of Entry – Multiple Complaints (Feb. 26, 2019).

²⁰⁹ *Id.*

²¹⁰ Memorandum from Acting Secretary McAleenan to All Department of Homeland Security Employees, Information Regarding First Amendment Protected Activities (May 17, 2019).

²¹¹ *Kariye v. Mayorkas*, 650 F. Supp. 3d 865 (C.D. Cal. 2022).

²¹² Memorandum from Office for Civil Rights and Civil Liberties, Department of Homeland Security to U.S. Customs and Border Protection, Concerning Tactical Terrorist Response Team (April 5, 2022).

²¹³ *Clear v. CBP*, Howard Decl. Exhibit D, Exhibit H (Feb. 21, 2021); U.S. Customs and Border Protection response to Senate Homeland Security and Governmental Affairs Committee majority staff (Dec. 21, 2022), *on file with Committee*.

As mentioned previously, CBP looks at the potential impact of specific rules in its rules-based targeting lists. When asked whether CBP tracks the impact of its screening practices on specific individuals or groups, CBP explained to committee staff that individual program offices or field offices track whether their policies or implementation is having an impact on specific individuals.²¹⁴ CBP does not, however, look at issues of the impacts of all their screenings combined on individuals and communities²¹⁵

VIII. OVERSIGHT OF TERRORIST WATCHLIST AND SCREENING ACTIVITIES HAS BEEN FRAGMENTED, PREVENTING A COMPREHENSIVE AND CONSISTENT INDEPENDENT ASSESSEMENT

Despite the expansion of the terrorist watchlist and screening activities, no single entity has conducted a comprehensive assessment of how the changes to government watchlisting authorities, in conjunction with all screening activities, impact the public. Although the departments and agencies that use and maintain the terrorist watchlist established the Watchlist Advisory Council (WLAC) to coordinate policies and procedures related to the terrorist watchlist, these actions only consider the policies and processes related to the terrorist watchlist and do not account for other screenings.²¹⁶

Moreover, this guidance is supposed to be reviewed by the WLAC every three years, but the guidelines may be modified more frequently if needed.²¹⁷ Nevertheless, the National Counterterrorism Center reported the 2018 Watchlisting Guidance was not updated until September 2023.²¹⁸ As a result, needed changes to nomination and removal procedures may not have been implemented in a timely manner. Furthermore, the details of these procedures, including changes to expand the identification and sharing of watchlist information, is not releasable to the public. Additionally, while the FBI reports that the TSC monitors the timeliness and quality of new nominations, deletions, and edits to the terrorist watchlist on a monthly basis and all nominations of U.S. citizens and legal permanent residents are internally audited every six months, these efforts provide little assurance as the results are not shared with the public.²¹⁹ All of these efforts are internal oversight mechanisms with little to no transparency.

Even though some external entities have also provided fragmented reviews of watchlisting and screening procedures, these reviews only looked at portions of the combined terrorist watchlist and screening enterprise. The Inspectors General at DOJ and the Intelligence Community have each carried out audits of the watchlisting processes at FBI and other agencies

²¹⁴ Department of Homeland Security, Briefing with Senate Homeland Security and Governmental Affairs Committee Staff (August 4, 2023).

²¹⁵ *Id.*

²¹⁶ National Counterterrorism Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (May 23, 2023); *See also Salloum v. Kable*, Transcript of Matthew J. DeSarno (Apr. 9, 2018).

²¹⁷ National Counterterrorism Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (May 23, 2023).

²¹⁸ National Counterterrorism Center response to Senate Homeland Security and Governmental Affairs Committee majority staff (Sep. 29, 2023), *on file with Committee*.

²¹⁹ Federal Bureau of Investigation, *FY 2021 Authorization and Budget Request to Congress* (Feb. 2020); Terrorist Screening Center, Briefing with Senate Homeland Security and Governmental Affairs Committee staff (June 26, 2023).

under their purview.²²⁰ GAO has also conducted its own assessments, and the DHS Inspector General has examined aspects of DHS components' work.²²¹ Nevertheless, these assessments did not examine the comprehensive impact these combined processes have on Americans.

In addition, the Privacy and Civil Liberties Oversight Board, an independent executive oversight agency, is currently examining the terrorist watchlist, particularly the standards used to place individuals on the terrorist watchlist and processes for nominations and removals.²²² However, this board has not yet completed its review of the terrorist watchlist. Likewise, in 2020, then-Ranking Member Peters requested GAO study the impacts TSA's and CBP's screening procedures have on communities of diverse backgrounds.²²³ GAO provided the results of the TSA study in 2022.²²⁴

Further, because so many federal agencies are involved in the watchlisting and screening processes, no congressional committee has full oversight over the enterprise. Multiple committees oversee the watchlisting process from nominations to screening and redress. Some of these same committees also oversee TSA and CBP's screening processes. Nonetheless, from the perspective of the traveling public, all of these programs together significantly impact their lives.

IX. CONCLUSION

The centralization of the terrorist watchlist and the expansion of its use, as well as the creation and growth of TSA and CBP's screening processes, were implemented in response to 9/11 and other failed terrorist attacks in its aftermath. This has resulted in a layered and, in some instances redundant, system to ensure the homeland, our borders, and our aviation system are protected from future terrorist attacks. However, more than twenty years after 9/11, the issues described within this report underscore the need to reassess how these processes impact Americans and whether this redundancy and overlap experienced by Americans is the best use of resources to effectively address today's threats. Action is needed now to increase transparency and ensure there is proper oversight of government watchlisting and screening practices, as well as effective and fair redress processes regardless of what threats drive these practices in the future. We must also assess whether this redundancy is an effective use of limited resources and

²²⁰ E.g. Department of Justice Office of the Inspector General, *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations* (Audit Report 14-16) (Mar. 2014); Department of Justice Office of the Inspector General, *Audit of the Department of Justice Terrorist Watchlist Nomination Processes* (Audit Report 08-16) (Mar. 2008); Office of the Intelligence Community Inspector General, *Annual Report* (Jan. 30. 2009).

²²¹ E.g. Government Accountability Office, *Terrorist Watch List Screening: Opportunities Exist to Enhance Management Oversight, Reduce Vulnerabilities in Agency Screening Processes, and Expand Use of the List* (GAO-08-110) (Oct. 2007); Department of Homeland Security Office of Inspector General, *DHS Has Controls to Safeguard Watchlist Data* (OIG-22-53) (Jul. 25, 2022).

²²² U.S. Privacy and Civil Liberties Oversight Board, *Current Oversight Projects* (<https://www.pclob.gov/OversightProjects>) (accessed Jun. 2, 2023).

²²³ Letter from Senator Gary Peters to Comptroller General Gene Dodaro, Government Accountability Office (Nov. 18, 2020).

²²⁴ Government Accountability Office, *Aviation Security: TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Compliant Process* (GAO-23-105201) (Nov. 2022).

whether we have done a sufficient job of balancing national security with civil right and civil liberties.

After reviewing government watchlisting and screening processes, committee staff concluded the following:

1. **Oversight is Disjointed.** Although external entities have reviewed watchlisting procedures, oversight entities have not conducted a coordinated and full-scope assessment of the terrorist watchlist enterprise. As a result, the effectiveness of the system, quality of nominations, timeliness of removals, and information sharing practices has not been comprehensively evaluated.
2. **Redress Options Are Insufficient.** DHS TRIP serves as the primary mechanism for individuals to seek resolution for travel difficulties, including potential removal from the terrorist watchlist. However, agencies do not provide the individual with the reason they received additional screening, such as inclusion on the terrorist watchlist, because of the risk that disclosure may undermine security processes. Further, individuals seeking redress do so with little ability to advocate for themselves or avoid issues in the future. Despite outreach efforts by DHS to better explain the process, the ongoing cycle of applying for redress, but continually being subjected to additional screening is breaking trust between the government and communities who have claimed they are being over-screened and watchlisted.
3. **Communities Have Diminished Faith in Government.** Leaders in the Muslim, Arab American and South Asian communities, who believe that they bear the disproportionate brunt of this nontransparent watchlist and screening system, have shared concerns with the Committee that continued screening and the inability to seek real redress has broken trust between their communities and the federal government. Despite intermittent efforts by the federal government to do outreach, provide more transparency into the watchlisting process and into DHS screening practices, and build relationships, the patchwork nature of these efforts and the ultimate continued screening with no real redress has eroded trust and faith in government and institutions.
4. **Layered Screening is Missing a Coordinated Approach.** Government watchlisting has expanded in the last twenty-plus years in size and scope. The TSC is involved in watchlisting not only terrorists, but also individuals involved in transnational organized crime, the associates and family members of potential terrorists, as well as others. Moreover, both TSA and CBP have created their own layers of watchlisting and screening for security and for many other reasons. Today, there are at least 22 mechanisms that may affect someone's travel. Although this may reduce the likelihood that a potential threat is missed, the extent to which these efforts are coordinated across agencies is unclear. Furthermore, as the size of the watchlist and screening enterprise grows, so does the chance of misidentification, the need for additional resources, and the risk that existing limited resources may be spent on low risks, overlooking real threats.

5. **Processes Lack Sufficient Transparency.** Though not generally classified as national security information, the information about watchlisting and screening processes, including the Watchlisting Guidance, are categorized as sensitive security information or law enforcement sensitive and not publicly releasable. The complete lack of transparency makes oversight by Congress challenging and by civil society virtually impossible. While the executive branch must be able to keep some issues of national security secret in order to protect Americans, this opaqueness does not allow for a discussion of whether the system is working and whether there are individuals who are disproportionately harmed by its implementation.
6. **Potential Discrimination Is Not Fully Analyzed.** There is not a government-wide effort to assess whether this system of screening and watchlisting discriminates against certain groups or quantify the comprehensive impact multiple, repeated screenings may have on specific individuals or communities. Outside groups, such as those representing Muslim, Arab, and South Asian Americans, have claimed certain communities and individuals are screened more than others; however, agencies do not maintain the data necessary to assess whether certain individuals or groups are disproportionately impacted. Without this data, Congress cannot provide sufficient oversight, government agencies cannot improve their practices, and communities continue to feel targeted.

To address the lack of transparency surrounding the terrorist watchlist and travel screening activities and the potential harms caused by their redundancies, and to create a meaningful redress process for Americans unfairly impacted, Congress and the executive branch should implement the recommendations identified in the report. This Committee will continue to conduct oversight of the watchlisting and screening enterprises to ensure the executive branch addresses the concerns raised and will work to make reforms to these systems.