

# Designating the Dangerous: From Blacklists to Watch Lists

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## I. INTRODUCTION

Ring Lardner, Jr. was one of the Hollywood Ten, a group of screenwriters cited for contempt of Congress in 1947 for refusing to answer the question: “Are you now or have you ever been a member of the Communist Party?”<sup>1</sup> He eventually served nine months in federal prison for contempt of Congress, but as soon as he refused to testify, he was placed on a blacklist—the widespread refusal by film, radio, and television producers to hire real or suspected Communists. Blacklisting, along with the dismissals or denial of employment as a result of “loyalty” and “security” investigations, truncated or distorted thousands of careers and was an integral part of the late 1940s and 1950s period of national suspicion that is now often referred to as the “McCarthy era.”<sup>2</sup> Lardner himself suffered professionally and financially for years, but he gradually recovered his career, first by writing under pseudonyms, and then, finally, in his own right. His refusal to “name names” ultimately led to his

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Careful readers may notice the difference in word formation for the two kinds of lists discussed in this article: “blacklists” and “watch lists.” Over time, the name for the 1950s lists of suspected Communists came to be expressed in one word. That has not (yet) happened for present day compilations of suspected terrorists. A search of the Westlaw law journal database reveals that “watch list” out-numbers “watchlist” by a ratio of over 10:1 in law journals. This Article follows the majority practice for both terms, producing non-parallel usage.

1. RING LARDNER, JR., I’D HATE MYSELF IN THE MORNING 2–3, 8–9 (2000).

2. The McCarthy era is named after Senator Joseph McCarthy of Wisconsin, who investigated and claimed to find Communists in influential positions in American society.

recognition by some as a hero of his time. By then he was often asked, “Can it happen again?” “Yes,” he replied, “but not in the same way.”<sup>3</sup>

We are once again in a period in which potential betrayers are believed to lurk in American society. Prevention of further attacks is one of the pillars of the post-September 11 national strategy,<sup>4</sup> prompting measures to identify and incapacitate possible terrorists before they act. Criminal prosecution, of course, is one form of preventive incapacitation but is now generally deemed insufficient—both because of its high standard of proof and because it fails to deter people who are prepared to die in a terrorist attack.<sup>5</sup> Administrative actions to inhibit terrorists range from denying aliens admission to the U.S. to banning individuals from flights and detention of so-called illegal combatants.<sup>6</sup>

One of the most extensive efforts to identify the dangerous is the growing phenomenon of terrorist watch lists: the compilation of names of “known” or “suspected” terrorists that is then checked against selected individuals at specified occasions, triggering certain consequences.<sup>7</sup> Watch lists existed even before September 11 but are now being consolidated, expanded, and applied in a greater number and variety of settings. Some of the impetus lies in the fact that “[t]he names of at least three of the [September 11] hijackers were in information systems of the intelligence community and thus potentially could have been watch listed.”<sup>8</sup> Interest in this technique is part of a larger effort to connect and exploit terrorism intelligence. Watch listing can now deny visas, bar access to air travel, and block employment in certain transportation sectors; additional uses are under active consideration.<sup>9</sup>

These measures can be seen as variations on the more general theme of governmental designation of the dangerous, something that oc-

3. Victory Navasky, *Introduction to LARDNER*, *supra* note 1, at x.

4. The 9/11 Commission recommended a “broad political-military strategy” of three policies: attacking terrorists and their organizations, preventing the growth of Islamic terrorism, and protecting against and preparing for terrorist attacks. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 363 (2003) [hereinafter *9/11 COMMISSION REPORT*].

5. RON SUSKIND, *THE ONE PERCENT DOCTRINE* 163–64 (2006) (describing the “Cheney Doctrine” as “liberating action from . . . accepted standards of proof”). On the al Qaeda strategy of suicide attacks, see DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* 12 (2005) (noting that such attacks are often successful and that “the key operatives are no longer around for interrogation”); MICHAEL SCHEUR [published as ANONYMOUS], *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* 134–37 (2004).

6. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1, 3 (2003) (contending that “the government invokes administrative processes to control . . . so that it can avoid the guarantees associated with the criminal process”).

7. See *infra* Part III.C.

8. *9/11 COMMISSION REPORT*, *supra* note 4, at 384 n.32.

9. See *infra* Part III.C.

curs, implicitly at least, in a variety of legal contexts. The most obvious is the criminal process: criminal prosecution is the classic mechanism of determining dangerousness and incapacitating those who are so found.<sup>10</sup> Even at the criminal investigative phase, searches and stops and frisks are frequently predicated on dangerousness, at least of a temporary kind.<sup>11</sup> Civilly, findings of future dangerousness figure in cases involving civil commitment,<sup>12</sup> registration of sex offenders,<sup>13</sup> and the removal of criminal aliens.<sup>14</sup>

Some designations of dangerousness are preceded by adversarial process. Again, criminal prosecution provides something of a model. Flowing as it does from that epitome of due process—a criminal trial (or its waiver)<sup>15</sup>—conviction can result in an implicit finding of dangerousness, so much so that a conviction is deemed to be an adequate proxy for an individualized finding of dangerousness in areas other than incarceration.<sup>16</sup> Outside of the criminal context, civil commitment that turns on a person's dangerousness to himself or others must also be preceded by a full hearing.<sup>17</sup>

On the other hand, some decisions about dangerousness are made *ex parte*, with no notice to the individual until they are put into effect. The investigative stops and searches referenced above fall into this category. This has also been true for enhanced security measures taken for preventative purposes. Stops and searches of travelers, for example, have been conducted on a variety of grounds, none of which has involved any

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10. Dangerousness figures in all sentencing, and in capital sentencing future dangerousness is often explicitly an aggravating factor. *Barefoot v. Estelle*, 463 U.S. 880, 896–903 (1983). Even before conviction, dangerousness can be an important factor in bail decisions. *United States v. Salerno*, 481 U.S. 739, 744 (1987).

11. In fact, only those persons who are “armed and dangerous” may be frisked during an investigative stop. *Terry v. Ohio*, 392 U.S. 1, 26–27 (1968); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

12. *Addington v. Texas*, 441 U.S. 418 (1979).

13. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

14. *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003)

15. *See, e.g., United States v. Cronin*, 466 U.S. 648, 656 (1984) (referring to the “crucible of meaningful adversarial testing”). *But see* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1589, 1592–1613 (2005) (summarizing obstacles to accuracy in the criminal process, including the partially countervailing pressure for dispute resolution).

16. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (registration of persons convicted of sexual offenses); *Demore*, 538 U.S. at 531 (mandatory detention pending removal hearing of aliens convicted of certain crimes).

17. *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding commitment of those likely to engage in “predatory acts of sexual violence”); *Jones v. United States*, 463 U.S. 354 (1983) (confinement of person found by a preponderance of the evidence to be not guilty by reason of insanity).

participation rights for the affected members of the public.<sup>18</sup> Watch lists fall squarely into this category of *ex parte* labeling, albeit one that is both more formalized and less situational. Indeed, as this Article demonstrates, watch lists represent a resurgence of *ex parte* labeling.

It is, therefore, time to ask if something equivalent to the blacklists of fifty years ago *is* happening again, and, if so, how the twenty-first century use of watch lists might or might not resemble the blacklisting of the McCarthy era. More importantly, it is worth examining how the experience of the McCarthy era might inform an evaluation of our present-day labeling of the most threatening individuals. To date, “the policy debate about the threats from terrorism and the most effective ways to counter these dangers has ignored the national experience with the cold war.”<sup>19</sup> This Article aims to remedy that gap with respect to one important component of the country’s current anti-terrorism strategy—watch lists—and to suggest some ways to avoid the worst excesses of the 1950s. A comparison of the two periods also serves to shed some light on the question of whether our institutions have learned from the experiences of the past in striking the balance between security and civil liberties.

Part II of this Article gives a brief and broad-brush description of the McCarthy era blacklists and loyalty-security programs. Part III then describes the operation, bases for inclusion, and uses of today’s terrorist watch lists. Part IV compares the two eras’ labeling mechanisms along several axes. This Article focuses especially on the issue of “false positives”—the identification of people as dangerous who in actuality are not. The task of watch listing is to find the very few real threats among the overwhelmingly innocent multitudes—the needle in the haystack, to use the familiar phrase. False positives are a concern of any adjudicatory system but have proven to be a particular problem with blacklists and watch lists.

Part V draws some lessons from the past in order to address this question of accuracy. After rejecting the idea of abandoning watch lists entirely, this Article assesses three possible reforms: narrowing the sub-

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18. The government has used traditional criminal investigation standards of reasonable suspicion or probable cause; profiling of personal characteristics, like nationality, ethnicity, or religion, believed to correlate with terrorist proclivity; and the profiling of behavior. Enhanced security has also been employed randomly or applied to all persons. Neither of these last two bases implies any judgment about dangerousness, but the others do.

19. Ronald D. Lee & Paul M. Schwartz, *Beyond the “War” on Terrorism: Towards the New Intelligence Network*, 103 MICH. L. REV. 1446, 1450 (2005) (reviewing PHILLIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003)). Cf. Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 16 (2004) (contending that free speech scholars have paid insufficient attention to the McCarthy era’s relevance for First Amendment theory and doctrine).

stantive standard for selection; adding procedural protection, particularly some form of adversarial process; and restricting the uses of watch list results. Although these reforms are not mutually exclusive and some combination of all three could be adopted, this Article recommends that watch lists alone be used only to trigger investigation and other relatively minor impositions, along with visa and immigration admissions processing. In so doing, this Article highlights the relationship between substance, procedure, and effect in the law's designation of the allegedly dangerous.

## II. MCCARTHY ERA BLACKLISTS AND LOYALTY-SECURITY PROGRAMS

Aside perhaps from the attack on Pearl Harbor, the advent of the Cold War in the late 1940s triggered the greatest national wave of trepidation the United States had ever experienced prior to the September 11 attacks. As Morton Horwitz summarizes the period:

From the time of former British Prime Minister Winston Churchill's famous 1946 warning that an iron curtain was descending across Europe, the level of postwar American anxiety had begun to soar. Within a very short time, the Soviets took control of Eastern Europe and aided the Communists in the Greek civil war. The announcement in 1949 that the Soviet Union had tested an atomic bomb, years before anyone in the West had imagined this could happen, dramatically punctured the sense of security that two oceans had for so long provided. . . . The fall of China to the Communists in 1949 and the invasion of South Korea by Communist North Korea in 1950 magnified the feeling that the world was falling to the Communists.<sup>20</sup>

These external threats were, in the view of many, accompanied by internal ones as well. Even the Association of the Bar of the City of New York, a relatively mainstream group, stated in a 1956 report:

Communism is the weapon as well as the creed of the most aggressive and imperialistic of modern nations. It is a threat to the United States from the outside, intensified by the developments of modern science. Communism is also a threat to the United States from the inside because of the agents it employs to do its work here.<sup>21</sup>

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20. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 54 (1998).

21. ASS'N OF THE BAR OF THE CITY OF N.Y., *REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM* 3 (1956) [hereinafter *NY BAR REPORT*]. *Cf.* *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952) (upholding deportation of former members of Communist Party) ("Certainly no responsible American would say that there . . . are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.").

Reaction took many forms, but the identification of suspected Communists and “fellow travelers” was prominent among them.<sup>22</sup> The following presents a very abridged account of the legal features and effects of blacklists and of the federal and state loyalty-security screening programs.<sup>23</sup>

### A. Blacklists

Blacklisting was first triggered by a series of investigations by the House Un-American Activities Committee (HUAC), which called witnesses and asked if they had been members of the Communist Party.<sup>24</sup> If the individuals answered affirmatively, they were required to identify others who were members or who had supported allegedly Communist activities.<sup>25</sup> The blacklisting of some of the witnesses that ensued is a colorful, if disturbing, story. Thanks to the fact that many of those affected were accomplished writers, it has been fully and vividly documented.<sup>26</sup> This brief account will forego that vast literature in favor of a brief description of the blacklist as a legal phenomenon.

Witnesses subpoenaed by HUAC had several choices. They could refuse to testify, which resulted in being held in contempt of Congress and, probably, incarceration. They could object to questioning on First Amendment grounds, as the Hollywood Ten did, but once the U.S. Supreme Court held that criminalizing membership in the Communist Party did not offend the First Amendment, this course would also lead to a contempt citation.<sup>27</sup> Because admitting Communist Party membership could have criminal consequences, though, that decision opened an avenue for witnesses to invoke their Fifth Amendment privilege to refuse to testify. Finally, of course, witnesses could choose to testify about their

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22. “Fellow traveler” was used in the 1950s as a term (often disparaging) for one who sympathized with Communist doctrine but was not a member of the Communist Party. E.D. HIRSCH, JR. ET AL., *THE NEW DICTIONARY OF CULTURAL LITERACY* (3d ed. 2002), available at <http://www.bartleby.com/59/14/fellowtravel.html>. Fellow travelers were often members, along with Communists, of “popular front” organizations—political coalitions of antifascist groups.

23. There is a vast literature on the Cold War years of the late 1940s and 1950s. David M. Oshinsky, *McCarthyism in the America and the Communist Party's Value*, WASH. POST, Aug. 3, 1998, at D2 (“Few periods in American history have been as thoroughly mined by scholars and journalists . . .”). The following discussion does not aim to contribute to a deeper historical understanding of the period but only to put blacklists and the loyalty-security programs in a legal context.

24. See *supra* text accompanying note 1.

25. RALPH S. BROWN, JR., *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* 325 (1958).

26. Of the many personal accounts, see, for example, LILLIAN HELLMAN, *SCOUNDREL TIME* (1976); JOHN HENRY FAULK, *FEAR ON TRIAL* (1964).

27. *Barenblatt v. United States*, 360 U.S. 109, 134 (1959); *Dennis v. United States*, 341 U.S. 494, 516 (1951).

own activities and those of their associates. Unless accompanied by a full recantation, this too had negative consequences for witnesses, both socially and in their employment.<sup>28</sup>

After the Hollywood Ten's refusal to testify before HUAC, the major motion picture producers promptly produced a policy statement announcing, "We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the government of the United States by force or by illegal or unconstitutional means."<sup>29</sup> As subsequent witnesses before HUAC and its state counterparts resorted to the Fifth Amendment self-incrimination privilege, the studios and other employers applied this policy to them as well.<sup>30</sup> Derided as "unfriendly witnesses" or "Fifth Amendment Communists," these individuals formed the bulk of those on the blacklists.<sup>31</sup> Anyone named as a present or past Communist Party member who "did not rehabilitate himself by a 'friendly' appearance (the chief test of which was his willingness to name all the names he knew), his own employment became precarious and probably ended soon afterward."<sup>32</sup> While full cooperation saved a person from blacklisting, it still carried some public stigma and had its own social effects.<sup>33</sup> Those named by witnesses but never actually called before HUAC lived under the cloud of what was called a "graylist."<sup>34</sup>

The blacklist soon spread from motion pictures to radio and television. In those industries, and eventually in motion pictures as well, the blacklist was compiled and maintained not by the employers themselves but by private groups. The American Legion presented movie studios with a list of 300 employees, detailing the employees' "communist associations," to which the named employees were asked to respond.<sup>35</sup> In radio, a publication called *Red Channels* listed people with left-wing associations, leading to dismissals and non-hirings.<sup>36</sup> Formal and informal

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28. TED MORGAN, REDS 522-23 (2003); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 329-30 (1998).

29. BROWN, *supra* note 25, at 151. See also WILLIAM L. O'NEILL, A BETTER WORLD: THE GREAT SCHISM: STALINISM AND THE AMERICAN INTELLECTUALS 223 (1982) (describing the blacklist as "extremely effective").

30. SCHRECKER, *supra* note 28, at 329.

31. BROWN, *supra* note 25, at 152.

32. *Id.*

33. O'NEILL, *supra* note 29, at 224.

34. BROWN, *supra* note 25, at 186-87. See also M.J. HEALE, MCCARTHY'S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935-1965, at 7 (1998) (reporting that state "little HUACs" published reports listing names of suspected Communists).

35. BROWN, *supra* note 25, at 153.

36. JOHN COGLEY, REPORT ON BLACKLISTING 50-58 (1956). As one producer testified, "I maintain that everybody in the book has a label attached to him, and that we—our clients—we are not interested in using the people who are in the book." *Id.* at 51.

blacklists were used against suspected Communists and fellow travelers in other fields as well, especially education and the liberal professions.<sup>37</sup>

The impact of being on a blacklist varied, of course, with the individual. Some of those blacklisted were fired outright; most were denied future employment.<sup>38</sup> In the creative fields, a few people found work under other names at much reduced rates; others followed their craft in areas, such as the theater, where the blacklists were not applied as intently; a few moved abroad.<sup>39</sup> All suffered financially for years, and many never recovered their professional stature.<sup>40</sup> For most, years of creativity were lost forever.<sup>41</sup> The emotional and psychological harm is impossible to gauge; one indirect measure is the eleven suicides attributed to the blacklists among people in the movies, radio, and television.<sup>42</sup>

Was there a purpose to the blacklists beyond the venting of mass hysteria? Clearly, motion picture studios and radio and television producers and their sponsors were extremely sensitive to perceived public opinion.<sup>43</sup> Were they also concerned about preventing the injection of insidious “un-American” ideas into their productions? That possibility would support, at most, the inclusion on the blacklist of writers and directors but cannot explain the boycott’s extension to actors and actresses. A more comprehensive explanation of the blacklists is that they were punishment for activities, such as speech or association (and even invocation of the Fifth Amendment), that could not constitutionally be made the subject of civil or criminal sanction.<sup>44</sup> This retribution was carried out by private parties, but with the knowing connivance of state and federal legislators.<sup>45</sup> Moreover, it was accomplished without the slightest proce-

37. ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 10 (1986) (estimating that almost 20% of witnesses called before state and federal investigating committees were college teachers or graduate students).

38. SCHRECKER, *supra* note 28, at 329.

39. O’NEILL, *supra* note 29, at 236–40.

40. SCHRECKER, *supra* note 28, at 359–68.

41. LARDNER, *supra* note 1, at 192–94.

42. O’NEILL, *supra* note 29, at 239. *See also* SCHRECKER, *supra* note 28, at 359–410 (1998); SCHRECKER, *supra* note 37, at 283–307 (academics).

43. BROWN, *supra* note 25, at 159.

44. This is the conclusion even of writers, like William O’Neill, who contend that the fact “that they were penalized unfairly does not absolve show business Stalinists of political sin.” O’NEILL, *supra* note 29, at 251.

45. STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* 244 (1982) (“Fear and intolerance pervaded the citizenry as well as officialdom, and official initiatives worked in tandem with social demands.”). *See also* SCHRECKER, *supra* note 37, at 9 (“In most cases, it was a government agency which identified the culprits and private employer which fired them.”); Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 131 (2005) (“So influential was the FBI’s relationship with HUAC that one scholar characterized the hearings’ purpose as ‘publicizing information in FBI files.’” (citation omitted)).



dural protection; even those who recanted earlier left-wing activities had to struggle to find a forum in which to clear their names.<sup>46</sup> The McCarthy era blacklists thus combined punishment for constitutionally protected activity with blatant disregard of the rule of law.

### *B. Loyalty-Security Programs*

During the same period, federal, state, and local governments put into place much more comprehensive programs to screen workers for “loyalty” and possible threats to national security. These loyalty-security tests of the 1940s and 1950s affected far more people than the blacklists. They were most commonly used against public workers, but their extension to employees of firms with government connections, particularly defense contractors, gave them a wide scope.<sup>47</sup> In his 1958 study, Ralph S. Brown estimated that 13.5 million of the nation’s then 65 million member labor force had “taken a test oath, or completed a loyalty statement, or achieved security clearance, or survived some undefined private scrutiny.”<sup>48</sup> As of that year, Brown gave a cumulative total of 10,000–20,000 people dismissed, denied clearance, or otherwise excluded from employment.<sup>49</sup> Some 12,000 others quit their jobs rather than fight their investigation.<sup>50</sup>

Disqualification of employees in sensitive governmental positions was no doubt seen by many of its proponents as a means of dealing with actual threats and, more importantly, of nipping them in the bud. One perceived danger was the injection of Soviet agents or sympathizers into the machinery of government or defense; another was the indoctrination of the unsuspecting and vulnerable.<sup>51</sup> The aim of these measures, in this view, was prevention—forming what one contemporary observer called “a new system of preventive law.”<sup>52</sup>

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46. LARDNER, *supra* note 1, at 193; O’NEILL, *supra* note 29, at 225–28 (describing the efforts of actors Sterling Hayden and Edward G. Robinson and director Edward Dmytryk to get off the blacklist).

47. BROWN, *supra* note 25, at 61–73.

48. BROWN, *supra* note 25, at 179.

49. *Id.* at 180.

50. SELMA R. WILLIAMS, *RED-LISTED: HAUNTED BY THE WASHINGTON WITCH HUNT* xii (1993).

51. See NY BAR REPORT, *supra* note 21, at 34–35 (describing Communist threats to the internal security of the United States as including espionage, “subversion so as to influence national policy in a way helpful to the Communist cause; and, in all probability, propaganda to affect government policies both domestic and foreign,” while noting that Communism has not relied principally on known Party members for espionage work).

52. JOHN LORD O’BRIAN, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* 22 (1955). O’Brian saw this system as one focused on unorthodox political ideas, in contravention of traditional American ideals. *Id.* at 22–24.

A large bureaucratic apparatus was created to enforce loyalty-security standards. Security officers conducted investigations of both current employees and job applicants.<sup>53</sup> The latter could be turned down without any notice or hearing simply on the basis of the evidence gathered.<sup>54</sup> Employees facing dismissal or denial of security clearance, however, generally could request a hearing at which they could appear with counsel.<sup>55</sup> To that extent, labeling as “disloyal” or a “security risk” differed significantly from blacklisting.

These hearings, however, had several unique features skewing them against the individual. At the federal level, President Truman’s Loyalty Order of 1947 allowed dismissal if there were “reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States.”<sup>56</sup> In 1950 this already lax standard was amended to “reasonable doubt as to the loyalty of the person involved.”<sup>57</sup> As John Lord O’Brian observed at the time, “This alteration . . . shifted to the accused employee the burden of proof of establishing his loyalty and integrity beyond a reasonable doubt.”<sup>58</sup>

This burden was compounded by the delineation of what constituted “disloyalty.” Along with acts of treason, sabotage, or espionage, a finding of disloyalty could be based on “[m]embership in, affiliation with, or any sympathetic association” with a “totalitarian, fascist, communist or subversive” organization or group.<sup>59</sup> This language both institutionalized guilt by association and made a large share of the employee’s life fair game for the investigation and hearing. In practice, the most common charge was “not that of some connection with proscribed organizations, but of association with individuals who in turn are said to be subversive or connected with organizations named by the Attorney General”<sup>60</sup>—a sort of guilt by association once removed. Organizations deemed “subversive” included not only the Communist Party itself, but also a large number of so-called “front” or “fellow-traveler” organiza-

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53. BROWN, *supra* note 25, at 24–27.

54. *Id.* at 29.

55. Exec. Order No. 9835, at pt. II, ¶ 2.a., 12 Fed. Reg. 1935 (Mar. 21, 1947).

56. *Id.* at pt. V, ¶ 1.

57. Exec. Order No. 10241, 16 Fed. Reg. 3690 (Apr. 28, 1951).

58. O’BRIAN, *supra* note 52, at 29.

59. Exec. Order No. 9835, *supra* note 55, at pt. V, ¶ 2.f. *See also* Exec. Order No. 10450, at § 8(a)(5), 18 Fed. Reg. 2489 (Apr. 27, 1953).

60. ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 110 (1953). This conclusion was drawn from a study of 85 loyalty and security cases “gathered at random.” *Id.* at 101 n.1. *See also* ELLEN SHRECKER, THE AGE OF MCCARTHYISM 38 (1994) (“[P]eople could lose their jobs for merely being on the ‘wrong’ mailing lists, owning the ‘wrong’ books, or having politically suspect relatives or friends.”).

tions.<sup>61</sup> Because the government considered such groups as the ACLU and National Lawyers Guild to be “front” or “fellow-traveler” organizations, large numbers of left-leaning, but non-Communist, participants were included.<sup>62</sup>

Further, as just indicated, personal association with one of the entities on the Attorney General’s list of subversive organizations was a ground for a disloyalty determination.<sup>63</sup> The list itself was originally created and issued without notice or right to be heard on the part of the named organizations.<sup>64</sup> Moreover, employees charged with membership in or association with a listed organization could not challenge the organization’s listing in their loyalty hearings.<sup>65</sup> However, in *Joint Anti-Fascist Refugee Committee v. McGrath*,<sup>66</sup> the Court held that some sort of prior hearing had to be afforded the organizations placed on the list. The Subversive Activities Control Board, created in 1950, produced a list of Communist organizations but required a public hearing at which the organization could be represented by counsel, cross-examine adverse witnesses, and subpoena its own.<sup>67</sup>

Many of the disloyalty allegations came from sources or informants whose identity was not disclosed to the person whose loyalty was being questioned, a practice explicitly authorized in the orders creating the program.<sup>68</sup> The government rarely presented witnesses. Instead, “the government’s evidence in most cases consist[ed] solely of the investigative file concerning the charged employee,”<sup>69</sup> which was given to the loyalty board but not to the suspected employee or counsel. Where confidential informants’ names were kept secret, the agency was supposed to provide enough evidence about them for the board to assess their credi-

61. BONTECOU, *supra* note 60, at 157–73.

62. *See, e.g.*, SCHRECKER, *supra* note 28, at 40–41.

63. Exec. Order No. 9835, *supra* note 55, at pt. V, ¶ 2.f. The list was to include:

... any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

*Id.*

64. BONTECOU, *supra* note 60, at 168–73.

65. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 184 (1951) (Jackson, J., concurring) (citing Loyalty Rev. Bd., Memorandum No. 2, Mar. 9, 1948).

66. *Id.* at 126 (majority opinion).

67. Subversive Activities Control Act of 1950, ch. 1024, §§ 12–13, 64 Stat. 987, 997–1001 (repealed 1968). Listing produced substantial restrictions, including a ban of federal employment of members.

68. Exec. Order No. 9835, *supra* note 55, at pt. IV, ¶ 2.

69. BROWN, *supra* note 25, at 100.

bility and that of their information.<sup>70</sup> In some cases, this amounted to no more than a statement from the FBI that the informant was reliable.<sup>71</sup> An employee thus could be found disloyal and disqualified from governmental employment “[w]ithout trial . . . , without evidence, and without even being allowed to confront her accusers or to know their identity.”<sup>72</sup>

For many years the loyalty-security investigations seemed to exemplify the paranoia and overreaching of their period. In the last decade, the opening of government archives in the former Soviet Union and the release of the U.S. Army’s decrypted Soviet diplomatic cables (code named “VENONA”) have unleashed a flood of new histories of the period.<sup>73</sup> The extent to which these documents require any substantial revision of previous dubious assessments of the Communist threat has been hotly debated, but it is now clear that some Communists working in the United States government did aid the Soviet Union. For example, Martin Redish has concluded that a “large underground Communist network operating inside Washington during the 1930s and early 1940s, divided into small units that . . . in some cases pass[ed] secrets to the Soviet intelligence agencies.”<sup>74</sup> By 1946, however, before the bulk of the loyalty-security investigations, “both the ‘open’ and ‘secret’ networks of the Communist Party in America had been largely destroyed,”<sup>75</sup> although this may not have been clear at the time. The exact level of the threat from domestic espionage in the 1950s is unknown, but that issue need not be resolved here.

Whatever the degree of subversion, the scope and the operation of the loyalty-security programs were drastically out of proportion to any realistic characterization of the danger.<sup>76</sup> When state licensing boards concerned themselves with the loyalty of pharmacists, wrestlers, piano dealers, or holders of fishing licenses, something had gone terribly

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70. BONTECOU, *supra* note 60, at 131.

71. *Bailey v. Richardson*, 182 F.2d 46, 67 (D.C. Cir. 1950) (Edgerton, J., dissenting), *aff’d by an equally divided court*, 341 U.S. 918 (1951).

72. *Id.* at 66.

73. See Michael E. Parrish, *Review Essay: Soviet Espionage and the Cold War*, 25 *DIPLOMATIC HIST.* 105 (2001) (reviewing eleven books).

74. Redish, *supra* note 19, at 27. Redish goes on to state, “However, it does not necessarily follow, either as an empirical or logical matter that most American Communists actually engaged in spying.” *Id.* at 28. See also KATHERINE A.S. SIBLEY, *RED SPIES IN AMERICA: STOLEN SECRETS AND THE DAWN OF THE COLD WAR* (2004); HARVEY KLEHR ET AL., *THE SECRET WORLD OF AMERICAN COMMUNISM* (1995).

75. Parrish, *supra* note 73, at 116; Redish, *supra* note 19, at 22–32.

76. STANLEY KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* 244 (1982) (“There was some basis for the fears of the times, but the record of official reaction betrays a cavalier disregard for liberty and due process.”).

wrong.<sup>77</sup> Little or no effort was made to identify specific workers whose presence would actually pose some realistic threat to national security. Because Communist Party membership or “sympathetic association” with “subversive organizations,” even long in the past, were deemed to be adequate proxies for dangerousness, large numbers of people were labeled disloyal or security threats who factually were not.<sup>78</sup> In practice, these programs often amounted, instead, to widespread punishment for the exercise of rights of belief, speech, and association. More broadly, they were also about public shaming and enforcing societal ideological conformity.

### III. TERRORIST WATCH LISTS

Once again the American people live in fear of attack from within, and once again we have sought refuge in lists of the potentially dangerous. The General Accounting Office describes watch lists as “automated databases with certain analytical capabilities.”<sup>79</sup> Less abstractly, they appear to be lists of named individuals or entities to whom certain consequences are applied solely by virtue of their presence on the list. Watch lists are used for a variety of purposes, not just terrorism prevention, and have been around since long before September 11. This range of uses is accompanied by a similar variety of consequences. Watch lists are currently employed against countries and organizations in addition to their better-known uses with individuals.<sup>80</sup> This Part covers only watch listing

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77. BROWN, *supra* note 25, at 377; SCHRECKER, *supra* note 37, at 5.

78. This was the case with the most well-known loyalty-security proceeding of them all, that of J. Robert Oppenheimer, often called the father of the atomic bomb. Of the vast literature on the subject, see, for example, KAI BIRD & MARTIN SHERWIN, *AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER* (2005); Barton J. Bernstein, *The Oppenheimer Loyalty-Security Case Reconsidered*, 42 STAN. L. REV. 1383 (1990).

79. U.S. GEN. ACCOUNTING OFFICE, GAO-03-322, *TERRORIST WATCH LISTS SHOULD BE CONSOLIDATED TO PROMOTE BETTER INTEGRATION AND SHARING 3* (2003) [hereinafter GAO WATCH LIST REPORT].

80. See, e.g., *Developments in the Law—Jobs and Borders: II. The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180, 2190 n.78 (2005) (watch list of countries with certain levels of human trafficking); Philip S. Rhoads, *The International Traffic in Arms Regulations: Compliance and Enforcement in the Directorate of Defense Trade Controls U.S. Department of State*, in COPING WITH U.S. EXPORT CONTROLS 2003 EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW 501 (PLI Comm. Law & Pract., Course Handbook Order No. A0-001L, 2004) (Defense Department watch list of persons “debarred from exporting defense articles, and other parties whose activities raise proliferation, terrorism and law enforcement concerns, it is comprised of many other parties who are not necessarily engaged in objectionable activities, but whose listings are an alert to apply extra scrutiny in evaluating license applications in which the names appear. Companies defaulting on Department of Defense contracts and made ineligible to contract are an example of such entries.”); *Priority Foreign Countries and Watch List Countries Identified*, 8 COMPUTER LAW. 39 (1991) (U.S. trade representative § 301 watch list of countries denying effective and adequate protection of intellectual property rights).

of individuals. Although watch lists include, for example, persons wanted on criminal charges or aliens barred from entry for reasons unrelated to national security, the discussion will concentrate on terrorist watch listing.

### A. Description

It is now the official policy of the United States “to detect and interdict individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism (‘suspected terrorists’) and terrorist activities . . .” through terrorist-related screening.<sup>81</sup> Currently, there are twelve federal antiterrorism watch lists for individuals.<sup>82</sup> As of February 2006, over 230,000 individuals were included in the database of the National Counterterrorism Center (NCTC), the agency that decides on watch list inclusion.<sup>83</sup> An

81. Homeland Security Presidential Directive/HSPD-11 para. 1 (Aug. 27, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/08/20040827-7.html> [hereinafter HSPD-11]. Terrorist-related screening is defined as the “collection, analysis, dissemination, and use of information related to people, cargo, conveyances and other entities and objects that pose a threat to homeland security.” *Id.* at para. 3. See also the earlier version of this policy in Homeland Security Presidential Directive/HSPD-6, 2003 WL 22302258 (Sept. 16, 2003).

82.

Watch Lists Maintained by Federal Agencies		
Department	Agency	Watch list
State	Bureau of Consular Affairs	Consular Lookout and Support System
	Bureau of Intelligence and Research	TIPOFF
Homeland Security	U.S. Customs and Border Protection	Interagency Border Inspection System
	Transportation Security Administration	No-Fly List
		Selectee List
	U.S. Immigration and Customs Enforcement	National Automated Immigration Lookout System
		Automated Biometric (fingerprint) Identification System
Justice	U.S. Marshals Service	Warrant Information Network
	FBI	Violent Gang and Terrorist Organization File
		Integrated Automated Fingerprint Identification System
	U.S. National Central Bureau of Interpol	Interpol Terrorism Watch List
Defense	Air Force (Office of Special Investigations)	Top 10 Fugitive List

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-127, GUN CONTROL AND TERRORISM: FBI COULD BETTER MANAGE FIREARM-RELATED BACKGROUND CHECKS INVOLVING TERRORIST WATCH LIST RECORDS 9 (2005) [hereinafter GAO GUN CONTROL].

83. Walter Pincus & Dan Eggen, *325,000 Names on Terrorism List*, WASH. POST, Feb. 15, 2006, at A.01 (while the National Counterterrorism Center Database contains 325,000 names, because of aliases and multiple spellings, the actual number of distinct individuals is estimated to be

NCTC official claims that U.S. citizens make up “only a very, very small fraction of that number” but will not supply actual figures.<sup>84</sup>

The NCTC, in turn, supplies names to the Terrorist Screening Center (TSC), a multi-agency body responsible for combining these federal terrorist watch lists.<sup>85</sup> The TSC was established in September 2003 to consolidate the government’s approach to terrorism screening. It is the central contact for law enforcement agencies seeking to screen individuals for terrorist connections and helps those agencies confirm a suspect’s identity. In addition to consolidating ten of the twelve federal databases, the TSC controls what information in the terrorist-screening database will be made available for which types of screening purposes.

Use of a watch list involves obtaining the name of an individual and checking that name against the list or lists. While this can happen without personal contact, it occurs most frequently during designated forms of screening: air travel, visa application, and entry into the country, for example.<sup>86</sup> In order to determine the person’s identity with some assurance of accuracy, officials must demand identification. Therefore, the use of watch lists and the need for secure forms of identification are closely linked.<sup>87</sup> Screening with watch lists promotes an increase in official interactions between police and public, including stops, searches, and checkpoints.<sup>88</sup> Generally, the more watch lists are employed, the greater the need for secure identification tokens and the more frequent the official contact with the public.

Even with the current consolidation effort, agencies still begin their inquiry process with their own databases; for example, the NCIC for police officers or IBIS for immigration officers at a port of entry. Although such field officers cannot connect directly to the TSC database currently,

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something more than 200,000.). Cf. U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE TERRORIST SCREENING CENTER 49 (June 2005), available at <http://www.usdoj.gov/oig/reports/FBI/a0527/final.pdf> [hereinafter IG REVIEW OF TSC]. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) created the National Counterterrorism Center. 50 U.S.C.A. § 404o (West Supp. 2006).

84. Pincus & Eggen, *supra* note 83.

85. GAO GUN CONTROL, *supra* note 82, at 8–11.

86. IG REVIEW OF TSC, *supra* note 83, at 37–38 (“The first step in the process when a person is encountered domestically or at the border is that the identity of an individual is searched in a law enforcement system....”).

87. 9/11 COMMISSION REPORT, *supra* note 4, at 385–89. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-374T, AVIATION SECURITY: SIGNIFICANT MANAGEMENT CHALLENGES MAY ADVERSELY AFFECT IMPLEMENTATION OF THE TRANSPORTATION SECURITY ADMINISTRATION’S SECURE FLIGHT PROGRAM 38 (2006) [hereinafter GAO SECURE FLIGHT] (statement of Cathleen A. Berrick, Director, Homeland Security & Justice Issues, before the S. Comm. on Commerce, Science, and Transportation).

88. Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697 (2004).

“the TSC exports the consolidated watch list records to all supporting agency databases eligible to receive the information.”<sup>89</sup> If the queried identity appears to produce a match, the officer is told to contact the TSC by phone.<sup>90</sup> The TSC call center attempts to determine if there is indeed a positive match or not.<sup>91</sup> If a person is identified as being on a watch list or if the match is inconclusive, the TSC call screener forwards the call to the FBI’s Counterterrorism Watch Unit, which is responsible for coordinating the law enforcement response, including further confirmation of identity.<sup>92</sup>

For each person on the consolidated watch list, the record contains information about the law enforcement action to be taken when the person is encountered. This information is conveyed through a “handling code,” which reflects the level of threat posed by that individual.<sup>93</sup> Handling codes are expressed in a number, 1 through 4, with 1 being the most serious and 4 the least.<sup>94</sup> The exact effects for each handling code remain secret. Roughly 75% of persons in an audited sample of the consolidated watch list fell within code 4; only 0.3% were given the highest handling code.<sup>95</sup>

### *B. Basis for Inclusion*

Because the TSC database was initially an agglomeration of pre-existing terrorist watch lists, the grounds for inclusion were those of the contributing agencies.<sup>96</sup> There were no common selection criteria, and the bulk of the names currently on the watch lists still appear to derive from this hodgepodge of selection practices.<sup>97</sup> With the creation of the TSC and other anti-terrorism agencies since September 11, a more comprehensive process for adding names to the TSC database has been created. Consular offices, Interpol, intelligence agencies, the FBI, state and local police agencies, and foreign governments gather information about international terrorism and send it to the NCTC where it is “vetted.”<sup>98</sup>

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89. IG REVIEW OF TSC, *supra* note 83, at 38. However, TSC is developing a new system in which it would maintain the data and not export it. GAO SECURE FLIGHT, *supra* note 87, at 31. This system would not be accessible to the TSA, however, which would still need exported data. *Id.*

90. IG REVIEW OF TSC, *supra* note 83, at 38.

91. *Id.*

92. *Id.*

93. *Id.* at 28.

94. *Id.*

95. *Id.* at 30.

96. *Id.* at 20–24.

97. *Id.* at 49.

98. *Id.* at 24. The NCTC is charged to “serve as the primary organization in the United States Government for analyzing and integrating all intelligence possessed or acquired by the United States Government pertaining to terrorism or counterterrorism” except intelligence pertaining “exclusively”



Potential terrorists are “nominated” for inclusion on the consolidated watch list by these government agents,<sup>99</sup> usually through the NCTC or the FBI’s Terrorist Watch and Warning Unit (TWWU), which deals with domestic terrorism.<sup>100</sup> Staff members at those units make the decision on inclusion.<sup>101</sup> The names of those nominated are then forwarded to the TSC, which generally includes them in its database without further review.<sup>102</sup> Removals of names occur through a similar process.<sup>103</sup>

For each international terrorist name included in the TSC database, the NCTC assigns one of twenty-five different INA (Immigration and Nationality Act) codes.<sup>104</sup> This coding is designed to specify how “the individual is associated with international terrorism”<sup>105</sup> and seems to be the main indication for the person’s inclusion on the watch list. While the codes are not publicly available, they appear to correspond with the grounds for inadmissibility in the INA, e.g., criminal conviction, drug trafficking, and various kinds of connections to terrorism. Each INA code seems to be linked to one of the four handling codes. For example, eight of the INA codes indicate that the individual should be considered armed and dangerous.<sup>106</sup> For domestic terrorism records, which do not originate with INA codes (these apply only to aliens), the FBI automatically assigns one of three INA codes based on the existing handling instructions.<sup>107</sup>

There is no official explanation or publicly available criteria for the placement of individuals on a watch list.<sup>108</sup> A certain amount of anecdotal

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to domestic terrorism, 50 U.S.C.A. § 404o(d)(1) (West 2005), and even then may do so at the direction of the President, *Id.* § 404o(e)(1). One source of information is the “visas Viper” terrorist reporting program, in which a Visas Viper Committee at each overseas consular post recommends persons as known or suspected terrorists for watch list inclusion. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-859, BORDER SECURITY: STRENGTHENED VISA PROCESS WOULD BENEFIT FROM IMPROVEMENTS IN STAFFING AND INFORMATION SHARING 5 (2005) [hereinafter GAO BORDER SECURITY].

99. GAO BORDER SECURITY, *supra* note 98, at 41–43.

100. *Id.* at 41.

101. *Id.*

102. IG REVIEW OF TSC, *supra* note 83, at 41–42.

103. *Id.* at 43–44.

104. *Id.* at 52. Although the codes overlap, the TSDB does not allow for more than one code for each record, potentially limiting the amount of descriptive information. *Id.* at 53.

105. *Id.* at 52.

106. *Id.*

107. *Id.* at 53.

108. ELEC. PRIVACY INFO. CTR., DOCUMENTS SHOW ERRORS IN TSA’S “NO-FLY WATCH LIST” (2003), available at [http://www.epic.org/privacy/airtravel/foia/watchlist\\_foia\\_analysis.html](http://www.epic.org/privacy/airtravel/foia/watchlist_foia_analysis.html) (the names on the Transportation Security Administration “no-fly” and “selectee” lists are included on the basis of “secret criteria”).

tal evidence is available, however.<sup>109</sup> The TSC Director has stated, “to err on the side of caution, individuals with *any* degree of a terrorism nexus were included in the TSDB [Terrorist Screening Database], as long as minimum criteria was met (at least part of the person’s name was known plus one other identifying piece of information, such as the date of birth).”<sup>110</sup> In 2004, a transportation security official acknowledged, “the standards used to ban passengers because of terrorism concerns were ‘necessarily subjective,’” with “no hard and fast rules.”<sup>111</sup>

It is possible to infer something about the required evidence and standard of proof for watch list inclusion from some publicly known examples. Two of the September 11 hijackers were on the State Department’s TIPOFF watch list “in part because they had been observed at a terrorist meeting in Malaysia.”<sup>112</sup> In another instance, an instructor at a flight school attended by Zacarias Moussaoui has been unable to obtain approval to fly jets and other heavy aircraft.<sup>113</sup>

Another example is the saga of Maher Arar, a Syrian-born Canadian citizen whose name appeared in a watch list check when he passed through Kennedy Airport. He was then taken into custody and eventually flown to Syria where he claims he was tortured and interrogated for ten months.<sup>114</sup> One observer describes the reason for Arar’s inclusion on the watch lists as follows:

Arar had been placed on the terrorist watch list because intelligence agencies suspected that he might be a member of the group The Muslim Brotherhood. The tenuous link tying Arar to the organization was that nine years prior, well after he had moved to Canada with his family, Arar’s mother’s cousin had been a member of the group. Additionally, the United States had learned from the Royal Canadian Mounted Police that “the lease on Arar’s apartment had been witnessed by a Syrian-born Canadian who was believed to

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109. The following discussion ignores the mistaken identifications that cause people who are not actually on watch lists to be confused with those who are, often because of a similarity of names – which is a separate issue with the use of watch lists. See Daniel J. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 GA. L. REV. 1 (2005).

110. IG REVIEW OF TSC, *supra* note 83, at 30 (emphasis added).

111. Eric Lichtblau, *Papers Show Confusion as Watch List Grew Quickly*, N.Y. TIMES, Oct. 9, 2004, at A9.

112. PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 57 (2003).

113. See Ralph Blumenthal, *With Watch List, Pilot’s Career Is Stalled*, N.Y. TIMES, Mar. 28, 2005, at A1.

114. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253–56 (E.D.N.Y. 2006).

know an Egyptian-Canadian whose brother was allegedly mentioned in an al-Qaeda document.”<sup>115</sup>

If this account of the background for Arar’s watch list inclusion is correct, it may suggest a more general reliance by officials on very attenuated connections to confirmed terrorists in compiling the lists.<sup>116</sup>

Beyond these kinds of inferences, in the absence of publicly available guidelines it is hard to evaluate the bases for watch list selection. Similarly, there are no indications other than these anecdotal accounts of how any such guidelines are applied. It is therefore impossible to tell, for example, what standard of proof is employed or what levels of reliability or corroboration are demanded of informant testimony.

The degree to which racial or ethnic profiling might lie behind watch list inclusion is an especially important consideration because watch lists are, to some degree, touted as an alternative to racial and ethnic profiling.<sup>117</sup> In theory, watch lists should avoid the cruder and more offensive racial, ethnic, or religious bases often employed in profiling, and should rely instead on more concrete and individualized indicators of threat.<sup>118</sup> If watch lists themselves are compiled by such profiling, however, their asserted advantage in this regard disappears.

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115. Mana Mohapatra, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315, 340–41 (2004) (quoting Christopher H. Pyle, *Torture By Proxy: How Immigration Threw a Traveler to the Wolves*, S.F. CHRON., Jan. 4, 2004, at D1.).

116. Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim’s Long Ordeal in Syria*, N.Y. TIMES, May 29, 2005, at A10 (attributing Arar’s presence on the watch list to having been spotted walking with a pilot of Arab origin whom the U.S. believed had discussed crashing a hijacked plane into an American building, as well as other connections to Muslims in Ottawa).

117. For a suggestion that watch lists, coupled with face recognition software, be used for screening of subway passengers, see Matthew Brzezinski, *Fortress America*, N.Y. TIMES, Feb. 23, 2003, § 6 (Magazine), at 38.

118. David A. Harris, author of *Profiles in Injustice: Why Racial Profiling Cannot Work* (2002) and many articles on racial profiling, makes the following comparison between profiling and watch lists:

Watch lists can be an important alternative to racial and ethnic profiling. They offer an approach that is not nearly so crude (in the sense of being without an important degree of precision) and that does not have the potential for causing offense that profiling does. This is because of the bases for the two types of approaches. Profiles are a group of characteristics said, taken collectively, to have the potential for predicting certain types of behavior in which law enforcement or intelligence operatives might be interested—drug smuggling, terrorist operations, etc. It is fundamentally a tool for prediction—we use the characteristics that make up the profile, including at times racial or ethnic appearance, to predict behavior. This approach does not focus law enforcement personnel on the characteristics such as terrorist behavior; instead, it focuses them on proxy characteristics, such as racial appearance. There are strong reasons and considerable evidence to question whether or not these profiles do anything like a decent job of predicting any behavior with any acceptable degree of precision . . . Watch lists, on the other hand, are based not on group characteristics that are used to attempt to predict the behavior of some small

### C. Uses

The major current uses of anti-terrorist watch lists are for border security and air passenger screening, with incipient uses for employment in certain transportation positions, especially air transportation. Watch lists undoubtedly also serve in some unspecified way as a trigger for investigations and also are checked in the course of firearms sales and purchases. This section also discusses other watch list uses, both actual and potential. With none of these uses is a watch listed individual notified of her inclusion in advance of being placed on a watch list or before the list is used in a check of her name. Moreover, even when there is a positive match, watch listed individuals are usually not informed of that fact, being told instead only of the consequence.<sup>119</sup>

#### 1. Border Security

Watch lists are used at several stages of the border security process: when a person applies for a visa at a U.S. consulate, when a person attempts to enter the U.S. at an air or sea port of entry, and when a person leaves the country by plane.<sup>120</sup> The lists provide “information about individuals who are known or suspected terrorists and criminals, so that these individuals can be prevented from entering the country, apprehended while in the country, or apprehended as they attempt to exit the country.”<sup>121</sup> Some of these lists were in use prior to September 11, guarding against terrorists or other national security threats.<sup>122</sup> Since then, there has been statutory and administrative encouragement of sharing of information among agencies, including watch listings,<sup>123</sup> and the transition to the TSC consolidated watch list.

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group of individuals, but on the characteristics of individuals who may, themselves, be involved in the behavior in which we are interested. Watch lists can, obviously, suffer from imprecision; putting someone on a watch list just because he has a name that is the same as or similar to a person in whom the authorities are interested may lack precision. But watch lists are, fundamentally, about particular people, not groups. They focus on the right thing, instead of a whole group.

E-mail from David A. Harris, Eugene N. Balk Professor of Law and Values, Univ. of Toledo College of Law, to Daniel J. Steinbock, Harold A. Anderson Professor of Law and Values, Univ. of Toledo College of Law (June 23, 2006) (on file with author).

119. *See, e.g.*, *Green v. Transp. Sec. Auth.*, 351 F. Supp. 2d 1119, 1122 (W.D. Wash. 2005).

120. GAO WATCH LIST REPORT, *supra* note 79. Recently, complaints have arisen that watch lists are not being used routinely in naturalization processing. Eric Lipton, *U.S. Test Finds Passport Fraud Going Unseen*, N.Y. TIMES, June 29, 2005, at A1.

121. GAO WATCH LIST REPORT, *supra* note 79, at 6.

122. *Id.* at 2–8, 14.

123. USA PATRIOT Act, Pub. L. No. 107-56, §§ 203, 403 (2001) (codified in scattered sections of 8, 18, and 50 U.S.C.) (providing INS and State Department access to NCIC’s database); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 201–202

Watch list comparison has been incorporated in US-VISIT, the system of fingerprinting and photographing aliens entering the U.S. at airports and seaports.<sup>124</sup> The first 1.5 million passengers screened through US-VISIT produced “over 100 verified watch list hits,”<sup>125</sup> but hits do not automatically result in exclusion from the U.S. When positive matches occur, the border security officials “are to contact the appropriate law enforcement or intelligence organization (e.g., the FBI), and a decision will be made regarding the person’s entry and the agency’s monitoring of the person while he or she is in the country.”<sup>126</sup>

## 2. Passenger Screening

Watch lists are also currently used in passenger screening to identify higher risk airline passengers. The Transportation Security Administration (TSA) and its forerunner have had a computer-based airline passenger screening (CAPPS I) in place since the late 1990s.<sup>127</sup> The present system, soon to change, involves an airline’s personnel checking the passenger’s name record (PNR) against a set of “rules” (which appear to be a type of profile) and terrorist watch lists.<sup>128</sup> The watch lists contain

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(codified in scattered sections of 8 U.S.C.) (requiring a comprehensive database and the sharing of information used in immigration decisions); Homeland Security Act of 2002, 6 U.S.C.A. § 122 (West 2005).

124. Enhanced Border Security and Visa Entry Reform Act of 2002 §§ 303–304, 8 U.S.C.A. §§ 1732–33 (West 2005). For a description of US-VISIT, see ABA Immigration & Nationality Comm., *The Canada-U.S. Border: Balancing Trade, Security and Migrant Rights in the Post-9/11 Era*, 19 GEO. IMMIGR. L.J. 199, 229–30 (2004). Stewart Verdery, *Keynote Address: Changing the Face of Immigration A Year in Transition*, 19 ST. JOHN’S J. LEGAL COMMENT. 59, 67 (2004) (reporting that it takes about eight seconds to complete a watch list check).

125. Verdery, *supra* note 124 (citing cases in which fingerprint identification revealed a prior criminal or deportation record). See also DEP’T OF HOMELAND SEC., FACT SHEET: SECURE BORDERS AND OPEN DOORS IN THE INFORMATION AGE, available at <http://www.dhs.gov/dhspublic/display?them=43&content=5347&print=true>. Of the 45 million people processed by DHS through the US-VISIT system in 2004 and 2005, 970 people with prior or suspected criminal or immigrations violations were identified based upon biometrics alone. *Id.*

126. GAO WATCH LIST REPORT, *supra* note 79, at 7. The lists used were the State Department’s TIPOFF system of known and suspected terrorists and its Consular Lookout and Support System (CLASS) used to screen visa applicants; the Treasury Department’s Interagency Border Inspection System (IBIS) used by Customs and Border Protection personnel at ports of entry; and the former Immigration and Naturalization Service (INS) National Automated Immigration Lookout System (NAILS). IG REVIEW OF TSC, *supra* note 83, at 5–9.

127. Anita Ramasastry, *Lost in Translation: Data Mining, National Security and the “Adverse Inference” Problem*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 757, 785–93 (2006); Leigh A. Kite, Note, *Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPS II Meet the Constitutional Challenge*, 61 WASH. & LEE L. REV. 1385, 1394 (2004).

128. This and the following discussion are based on U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-356, AVIATION SECURITY: SECURE FLIGHT DEVELOPMENT AND TESTING UNDER WAY, BUT RISKS SHOULD BE MANAGED AS SYSTEM IS FURTHER DEVELOPED (2005) [hereinafter GAO AVIATION SECURITY]. See also GAO SECURE FLIGHT, *supra* note 87, at 8 n.5 (“CAPPS rules are

names of people barred from boarding a commercial aircraft unless they are cleared by law enforcement officers (“no fly” list) and those who are given greater security attention (“selectee” list).<sup>129</sup> These lists have been growing and, in April 2005, were reported to contain a total of 70,000 names.<sup>130</sup>

In March 2003, the TSA began to develop a second-generation screening system, called CAPPS II, which would collect a passenger’s personal information such as name, address, birth date, and credit card number. CAPPS II would then check this information against a more diverse set of governmental and commercial databases, including criminal history records, to produce a passenger security code of green, yellow, or red.<sup>131</sup> CAPPS II would have been a combination of identity authentication (through comparison with commercial databases), watch list matching, and data mining “by searching for patterns in an individual’s travel history that are indicative of terrorist activities.”<sup>132</sup> For a variety of reasons, including both public opposition and implementation delays, CAPPS II was cancelled in August 2004.<sup>133</sup> Although statistics are not available, anecdotal reports suggest that false positives—the singling out of innocent travelers—occur fairly regularly under CAPPS I<sup>134</sup> and were a concern in the design of CAPPS II.<sup>135</sup>

The TSA is currently at work on its next version of passenger screening, called Secure Flight.<sup>136</sup> It will include CAPPS I “rules analy-

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characteristics that are used to select passengers who require additional security scrutiny. CAPPS rules are Sensitive Security Information.”)

129. 49 U.S.C.A. § 114(h)(2)-(4) (West Supp. 2006).

130. Pam Fessler, *Morning Edition: Problems Plague No Fly List, TSA Considers Changes* (NPR radio broadcast Apr. 26, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4619602>.

131. See U.S. GEN. ACCOUNTING OFFICE, GAO-04-232T, AVIATION SECURITY: EFFORTS TO MEASURE EFFECTIVENESS AND ADDRESS CHALLENGES 18 (2003) (statement of Cathleen A. Berrick, Director, Homeland Security & Justice Issues, before the S. Comm. on Commerce, Science, and Transportation). See also Matthew L. Wald, *U.S. Agency Scales Back Data Required on Air Travel*, N.Y. TIMES, July 31, 2003, at A16 (TSA “will not use information of a passenger’s credit, like a returned check or an unpaid bill, nor any health records.”); Larry Abramson, *Morning Edition: Airport Screening Plan Scaled Down*, (NPR news radio broadcast Aug. 1, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1382289>.

132. GAO AVIATION SECURITY, *supra* note 128, at 10.

133. Ramasastry, *supra* note 127, at 787.

134. See *id.*

135. See Wald, *supra* note 131 (“The goal of CAPPS II, the department says, is to ‘significantly reduce the number of passengers who are misidentified as potential threats to passengers or airline security . . . .’”).

136. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-864T, AVIATION SECURITY: MANAGEMENT CHALLENGES REMAIN FOR THE TRANSPORTATION SECURITY ADMINISTRATION’S SECURE FLIGHT PROGRAM 2-8 (2006) (statement of Cathleen A. Berrick, Director, Homeland Security & Justice Issues, before the Subcomm. on Intelligence, Information Sharing, and Terrorism Risk

sis” and data matching against the consolidated terrorist watch list.<sup>137</sup> The plan for the Secure Flight program has been described as follows:

The Secure Flight program will automate the comparison of information in PNRs [passenger name records] from domestic flights to names in the Terrorist Screening Database (TSDB) maintained by the Terrorist Screening Center (TSC), including the expanded TSA No-Fly and Selectee lists, in order to identify individuals known or reasonably suspected to be engaged in terrorist activity.<sup>138</sup>

Its screening will be used not only for domestic air travelers, but also with applicants for the TSA’s domestic Registered Traveler program, which will pre-approve frequent travelers.<sup>139</sup> As of February 2006, however, many Secure Flight system features had not yet been decided upon, much less implemented, and it remains to be seen when the program will be operational.<sup>140</sup>

### 3. Employment

Watch lists already seem to be used in screening some workers in the air transportation industry,<sup>141</sup> and their use will be expanded to other positions deemed security sensitive.<sup>142</sup> It is distinctly possible that their use will be extended to employees in other areas of the private sector considered to be at higher than average risk of terrorism.

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Assessment of the H. Comm. on Homeland Security) [hereinafter GAO AVIATION SECURITY CHALLENGES]; Ramasastry, *supra* note 127, at 790.

137. GAO AVIATION SECURITY CHALLENGES, *supra* note 136, at 5–7.

138. Mardi Ruth Thompson & Kapila Juthani, *Providing Smarter Security and Customer Service: TSA’s Secure Flight and Registered Traveler Programs*, 19 AIR & SPACE LAWYER 8, 9 (Spring 2005) (the authors are with TSA’s general counsel’s office).

139. GAO AVIATION SECURITY, *supra* note 128, at 11 nn.14, 17. *See also* Dep’t of Homeland Security, Privacy Act Notice, 71 Fed. Reg. 13,987–89 (Mar. 10, 2006) (proposing to add Registered Traveler applicants’ biographical and biometric data to system of records maintained); *TSA Announces Next Steps for Registered Traveler Program*, 83 INTERPRETER RELEASES 833 (2006) (TSA plans to have the Registered Traveler program operational at ten to twenty airports by the end of 2006).

140. GAO SECURE FLIGHT, *supra* note 87.

141. *See* Ralph Blumenthal, *With Watch List, Pilot’s Career Is Stalled*, N.Y. TIMES, Mar. 28, 2005, at A1. *See also* Privacy Act Notice, 71 Fed. Reg. at 13, 987–89 (adding individuals who work in secure areas of airports and seaports to ENFORCE/IDENT system of records).

142. GAO AVIATION SECURITY, *supra* note 128, at 11 n.14. The Secure Flight “platform” is planned to be used with “persons working at sensitive locations[,] serving in trusted positions with respect to the transportation infrastructure,” flight crews, “TSA Screeners and Screener applicants, commercial truck drivers with Hazardous Materials Endorsements, aviation workers with access to secure areas of the airports, [and] alien flight school candidates . . . .” *Id.*

#### 4. Other Uses

There are myriad other potential uses for watch lists. One obvious possibility is as a trigger for further surveillance. For example, it has been suggested that air travelers who have telephoned watch listed members in the past year would be useful subjects of investigation.<sup>143</sup> This is not impossible, but such a response would require vast and coordinated databases and thorough investigative methods. More generally, though, an individual's presence on a watch list presumably is based upon the same kinds of risk indicators that would make a person a likely candidate for additional investigation, so it is not unreasonable that watch lists would serve as a source of investigative leads.

Watch lists are now used for one kind of investigation. Under the Brady Act, firearm buyers must undergo background checks through the National Instant Criminal Background Check System (NICS). NICS now searches terrorist watch lists in the course of this process.<sup>144</sup> Interestingly, of the forty-four firearms transactions with valid matches to one of the watch lists during five months in 2004, thirty-five were allowed to proceed.<sup>145</sup>

The potential for other screening uses of terrorist watch lists is quite genuine. The recently enacted REAL ID Act<sup>146</sup> effectively preempts state laws regarding drivers' licenses with detailed federal standards set by the Act and the regulations that will be issued under it. A license meeting those criteria, or an equivalent card issued to nondrivers for identification purposes, will be needed by 2008 to enter federal facilities, to board commercial aircraft, and for "any other purpose" the Secretary of Homeland Security designates.<sup>147</sup> While the REAL ID Act does not so specify, it certainly leaves open the possibility that these standardized drivers' licenses could be matched against terrorist watch lists every time they are presented, much as drivers' licenses are now often run against criminal databases during traffic stops. Checking people's identification against terrorist watch lists would almost certainly be a feature of a true national identity card system, should one ever be implemented.<sup>148</sup>

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143. PHILIP B. HEYMANN, *supra* note 112, at 56 (citation omitted).

144. GAO REPORT ON AVIATION SECURITY, *supra* note 128, at 3.

145. *Id.* Apparently, presence on an anti-terrorist watch list was deemed insufficient to block the firearms sale where no statutory bar to firearms possession was shown. *See* 18 U.S.C. § 922(g), (n).

146. Pub. L. No. 109-13, div. B, 119 Stat. 231 (May 11, 2005).

147. *Id.* at § 202(a).

148. Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 735 (2004) ("[C]heckpoints [in a national identity system] would be used either to catch individuals already identified as terrorism suspects or to single out previously unknown persons who meet some kind of terrorist profile.").



A more remote, but still conceivable, possible use of watch lists is as a springboard to widespread preventive detention, or extensive use of material witness warrants, in the wake of another significant terrorist attack.<sup>149</sup> Currently, this is just a theoretical possibility, though the *Arar* case discussed above comes close, with its allegations that Arar's watch listing led to his deportation and ultimate confinement and torture in Syria.<sup>150</sup> Recent academic literature contains a vigorous debate about the propriety and constitutionality of mass roundups and detentions as a response to terrorist events.<sup>151</sup> But if large-scale preventive detention became a reality, its probable emergency nature would make terrorist watch lists the likely means to identify targets.<sup>152</sup>

Indeed, the initial selection of Japanese-Americans (and other "enemy aliens") for detention during World War II was based "almost entirely on a 'custodial detention list' of potentially dangerous persons prepared by the FBI at President Roosevelt's request."<sup>153</sup> In 1950, under the "Portfolio" program, the FBI assembled a list of almost 12,000 "dangerous persons" who would be detained in the event of an emergency.<sup>154</sup> By 1966, the FBI's "Security Index" had grown to 26,000 names and included anti-war and civil rights activists.<sup>155</sup> No detentions ever resulted from these programs, but their existence demonstrates that emergency roundups of the allegedly dangerous necessarily have to be predicated on a pre-existing target list. In the present era, terrorist watch lists would be the natural source.<sup>156</sup>

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149. Several Caribbean nations responded to the events of September 11 by issuing executive orders to freeze assets held in the names of the individuals and organizations on the terrorist watch list developed by the United States. Elwood Earl Sanders, Jr. & George Edward Sanders, *The Effect of the USA Patriot Act on Money Laundering and Currency Transaction Laws*, 4 RICH. J. GLOBAL L. & BUS. 47, 60–61 (2004).

150. See *supra* text accompanying notes 114–16.

151. Compare, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004), with David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004).

152. Bruce Ackerman defends the morality of this possibility in *This Is Not a War*, 113 YALE L.J. 1871, 1881–83 (2004).

153. DAVID COLE, ENEMY ALIENS 93 (2003). Similar lists were compiled for German and Italian Americans. *Id.* Although those persons taken into custody on the basis of this list were given a hearing of sorts, they were not informed of the charges or evidence against them or allowed to be represented by a lawyer. In practice, the hearing boards followed the FBI's list. *Id.* at 94.

154. *Id.* at 101. The Emergency Detention Act of 1950, ch. 1024, §103(a), 64 Stat. 1019 (repealed 1971), created a separate detention plan.

155. COLE, *supra* note 153, at 102.

156. Watch lists played a role in the detention of aliens in the immediate wake of September 11. Under the "hold until cleared" policy of the Department of Justice, 762 aliens arrested on immigration charges who were "of interest" to the investigation of the attacks were not released or deported unless cleared by the FBI. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION

## IV. THEN AND NOW: A COMPARISON OF BLACKLISTS AND WATCH LISTS

The McCarthy and post-September 11 periods are both characterized by widespread popular fear of subversion from within. The true extent of the relevant threat in both periods is not precisely known. Most observers (in part with the benefit of hindsight) would probably describe the danger to national security now as greater than in the late 1940s and 1950s. After all, believing that there are traitors in our midst who will turn over to our enemies even our most precious state secrets or undermine governmental programs differs from fearing that persons within U.S. borders will hijack planes, plant bombs, or unleash biological, chemical, or even nuclear weapons.

The most important commonality, though, is the notion that we should attempt to identify those people who are most likely to threaten us, to label them as such, and to bar them from the places and activities where they could do the most harm. This Part will compare the two periods along several different axes, both to examine their similarities and differences more closely and to discern what lessons have been learned and what has been lost in the area of individual rights. It will conclude with some thoughts on the nature of the relationship between the 1950s and 2000s in the realm of labeling, particularly the frequency of false positives and negatives in each era's mechanisms for labeling the dangerous. This review leaves one skeptical as to how much, if any, we have evolved over those fifty years in the preservation of individual rights in our national security architecture.

*A. State Action*

One particularly pernicious feature of McCarthy era blacklisting was the critical role played by private employers and individuals, as well as private pressure groups, in compiling and enforcing the blacklists.<sup>157</sup> At least initially, blacklisting occurred with little governmental involvement. In this sense, the blacklists were a direct expression of popular fear and the desire to punish (and distance the blacklisters from) certain po-

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CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2, 19, 37–71 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter INSPECTOR GEN. REVIEW]. The clearance process often involved “name checks” by the CIA, using its databases. *Id.* at 50–51, 58–62. While the report does not explicitly state that this included watch lists, that is a reasonable inference. Moreover, the FBI developed its own watch list “originally designed to identify potential hijackers who might be planning additional terrorist acts once air travel resumed.” *Id.* at 68. This list was distributed to airlines, rail stations, and other common carriers. This list never contained more than several hundred names and seems to have been culled and then abandoned within months. *Id.* at 68–69.

157. See *supra* text accompanying notes 35–37, 43–45.

litical beliefs.<sup>158</sup> As time went on, it became clear, though, that the state, particularly through its investigating committees, was consciously assisting private sector activists, both by uncovering names of alleged Communists and by impelling witnesses publicly to invoke their Fifth Amendment rights.<sup>159</sup> Those “revealed” by the public investigative process were then easily added to private blacklists. The loyalty-security programs, of course, were carried out through direct action by the federal and, to a lesser extent, state and municipal governments.<sup>160</sup>

The weeks after September 11 produced a wave of private, vigilante attacks on those perceived as Arab or Muslim. In the first eight weeks, over 1000 bias incidents occurred, including “fire bombings of mosques, temples, and gurdwaras; assaults by fist, gun, knife, and Molotov cocktail; acts of vandalism and property destruction against homes and businesses; and innumerable instances of verbal harassment and intimidation.”<sup>161</sup> As many as nineteen people were murdered.<sup>162</sup> Some people were the victims of private “profiling,” such as when Arab, Muslim, and South Asian passengers were removed from planes because flight attendants, pilots, or even other passengers objected to their presence on board.<sup>163</sup> Private attacks and security measures have diminished considerably since the immediate aftermath of September 11.

Federal passenger screening, now using watch lists, may actually discourage preventive measures of this kind by the general public. As with other facets of law, the existence of a regularized, comprehensive governmental response in which popular confidence resides may serve to displace self-help measures.<sup>164</sup> To that extent, the existence of governmental watch lists may, in contrast with the McCarthy era blacklists, be discouraging cruder forms of private profiling.<sup>165</sup> Governmental passen-

158. On the distinction between the two aims, see *infra* text accompanying notes 166–74.

159. See *supra* text accompanying note 45.

160. See *supra* text accompanying notes 47–49. See also HEALE, *supra* note 34 *passim* (“red scare” in states).

161. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1266 (2004).

162. *Id.*

163. *Id.* at 1270.

164. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 CHI. L. REV. 1, 16–17 (2003) (“A familiar consequentialist argument for retribution . . . is that law must accommodate the retributive sentiments of the public to prevent lynchings, blood feuds, and other ugly forms of self-help.”)

165. Implicitly disputing this point, Muneer Ahmed argues that governmental profiling of Arabs, Muslims, and South Asians after September 11 constituted a form of “public violence” that operated in tandem with private attacks. Ahmed, *supra* note 161, at 1267. While not stated explicitly, his argument seems to be that governmental targeting encourages similar behavior by private citizens.

ger screening, to take one example, makes the kind of ad hoc private profiling by passengers and airline personnel that occurred immediately after September 11 less likely. In addition, public watch lists are less random and are subject to standards and oversight, reducing the incidence of decisions based purely on ethnicity or religion. Governmental watch lists are also, however, more comprehensive and encompassing than private “screening.”

### B. Purposes

The blacklists and present day watch lists differ to some degree in their reasons for existence. As the brief account of the McCarthy era above describes, while prevention of Communist infiltration was the nominal purpose of that period’s blacklists and its loyalty-security programs, both contained substantial punitive elements.<sup>166</sup> Blacklisting, especially, seems to have been a form of punishment: first, for political activity and association (much of which was protected by the First Amendment), and, second, for invocation of the Fifth Amendment right against self-incrimination.<sup>167</sup> Loyalty-security programs, while in theory more directly related to preventing espionage and sabotage, were of such breadth, and were relied on in many cases with such flimsy evidence,<sup>168</sup> that it is hard to avoid the conclusion that they, too, were designed to punish past belief and association.

Anti-terrorist screening using watch lists is described as being conducted only for preventative purposes: in the words of a recent Homeland Security Presidential Directive, to “detect, identify, track, and interdict” persons and instrumentalities that “pose a threat to homeland security.”<sup>169</sup> This is part of a wider movement toward preventing terrorist acts before they occur, in contrast to punishing them afterwards.<sup>170</sup> Interestingly, this same conceptual development took place during the 1950s.<sup>171</sup>

So far, the injection of retributive aims into assertedly preventative efforts that marked the McCarthy era seems to have been rare, but there are some signs that expression and association have figured in the inclu-

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166. See *supra* text accompanying notes 44–46, 76–78.

167. See *supra* text accompanying notes 29–32.

168. See *supra* text accompanying notes 59–72.

169. HSPD-11, *supra* note 81, at para. 1(a).

170. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 21 (2005) (“[S]ince 9/11 the Justice Department has prioritized the prevention of future terrorist attacks above other institutional objectives . . .”). See also *id.* at 88 (“The United States by and large was reactive and traditional in its use of criminal law prior to 9/11 . . .”).

171. See O’BRIAN, *supra* note 52, at 22–24 (noting the shift from deterrence (through reaction) to prevention during the McCarthy era).

sion of certain people on anti-terrorist watch lists. Some listings on government “no fly” lists have raised suspicions of politically based retaliation,<sup>172</sup> but this does not appear to be a major issue. The anecdotal information about watch list formation described above,<sup>173</sup> however, certainly suggests that association with identified terrorists or terrorist suspects can land a person on a watch list. Decisions based on the suspect’s personal relationships constitute a marked similarity between present day watch listing and 1950s blacklisting and loyalty-security programs. In fact, this practice is one of the relatively unnoticed ways in which we have made guilt by association “the linchpin of the . . . war on terrorism.”<sup>174</sup>

### C. Process

Anti-terrorist watch lists are assembled through a one-sided and completely opaque process. No one knows she is on the list unless and until some consequence, such as denial of air travel, is imposed, and even then the person may not be told of the specific reason for the action.<sup>175</sup> No prior notice of intention to place a name on the list is given, and, obviously, no opportunity to learn the reason or attempt to refute it is provided. Watch lists represent a small but important part of a bigger pattern of legal unilateralism in response to the attacks of September 11 and the ensuing “war on terror.”<sup>176</sup>

While there are glimmerings of a procedure for correcting misidentifications,<sup>177</sup> no process exists to challenge inclusion of one’s name once it is discovered to be on a watch list. In this regard, current day watch lists resemble the early days of blacklists and security investigations when private employers constructed their own lists of subversives but never told their targets, whom would learn no more than that they had

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172. Bruce Zagaris, *EU and US Reach Interim Agreement on Airline Passenger Data Collection*, 19 INT’L ENFORCEMENT L. REP. 218 (June 2003).

173. See *supra* text accompanying notes 109–16.

174. Cf. Cole, *supra* note 6, at 2, 8 (referring to laws against material support for terrorism).

175. The resulting feelings of insecurity invoke, on a much smaller scale, the anxiety produced by terrorism itself. See Nassim Nicholas Taleb, Op-Ed., *Scaring Us Senseless*, N.Y. TIMES, July 24, 2005, § 4, at 13 (“It is hard to avoid feeling vulnerable to this invisible enemy who does not play by known or explicit rules.”).

176. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (overturning indefinite detention of citizen-detainees held in “war on terror”); INSPECTOR GEN. REVIEW, *supra* note 156, at 19, 37–71 (2003) (incarceration of aliens, even after deportation orders issued or voluntary departure granted, under the “hold until cleared” policy immediately following 9/11). See generally Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 73 (2005) (describing unilateral extrajudicial killings, detentions without trial, degrading treatments, torture, and renditions as “lawless”).

177. 49 U.S.C.A. § 44903(j)(2)(C)(iii)(l) (West Supp. 2006).

been turned down for employment.<sup>178</sup> Those persons suspecting their blacklisting would have no remedy but to admit their Communist associations, cooperate, and beg for removal from the lists.<sup>179</sup>

To date, inclusion on a watch list has far less serious consequences than failure to satisfy the 1950s era loyalty or security boards. On the other hand, a person's ability to challenge the labeling is also much weaker. As described above, an individual facing loss of government employment or a security clearance was entitled to a hearing, albeit one without disclosure of witnesses against her or cross-examination, in which the burden of proof rested heavily with the accused.<sup>180</sup> Nevertheless, some people were exonerated.<sup>181</sup> The system of anti-terrorist watch lists includes no such procedure and no formalized relief from mislabeling.<sup>182</sup>

Informants played an important role in the loyalty-security process, as noted above.<sup>183</sup> While there is no information one way or the other about informants as sources for terrorist watch lists, it would be surprising if they were not being used. One of the stated reasons for holding so-called illegal combatants is for interrogation purposes; this is also true for terrorist "renditions" to other countries.<sup>184</sup> Information obtained this way, and from voluntary informants, could certainly make its way onto watch lists. Indeed, given the aim of creating "comprehensive, coordinated procedures that detect, identify, track and interdict people . . . [who] pose a threat to homeland security,"<sup>185</sup> the government would be remiss if it did not add names supplied by informants. However, informants often can be of questionable credibility, especially those facing unpleasant consequences themselves if they do not identify their associates.

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178. See *supra* text accompanying note 53. See also LARDNER, *supra* note 1, at 138–39 (describing the initially puzzling inability of Lardner's wife, Frances Chaney, to find work during the height of the blacklist).

179. See *supra* note 46; SCHRECKER, *supra* note 28, at 330. See also VICTOR S. NAVASKY, *NAMING NAMES* (1980).

180. See *supra* text accompanying notes 53–58, 68–72.

181. Lloyd K. Garrison, Some Observations on the Loyalty-Security Program, Speech at the Third National Conference of Law Reviews (Apr. 1, 1955), in 23 U. CHI. L. REV. 1, 4 (1955). See also *infra* text accompanying notes 247–48.

182. Again, this concern is different from that of misidentification resulting from the confusion of a person's name with that of a watch listed individual.

183. See *supra* text accompanying notes 68–72.

184. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537–38 (2004) (referring to government's assertion that military interrogations are a "critical source" of "timely and effective intelligence"); Editorial, *Revising the Patriot Act*, N.Y. TIMES, Apr. 10, 2005, § 4, at 11 (describing rendition as the secret transfer of suspected terrorists to foreign countries for interrogation, sometimes by torture).

185. HSPD-11, *supra* note 81, at para. 1(a).

### D. Accuracy

The primary justification for administrative due process is its contribution to decisional precision, and the absence of process poses a serious threat to watch list accuracy.<sup>186</sup> In the context of identifying the dangerous, two kinds of inaccuracy arise: false positives and false negatives. The former involves an innocent person being incorrectly included on a blacklist or watch list; the latter occurs when a dangerous person is left off such a list. The aim of any sensible use of lists for preventative purposes is to minimize both kinds of error, as well, of course, as the administrative costs of doing so.<sup>187</sup>

#### 1. False Positives

To what degree did blacklists and loyalty-security screening run the risk of mistakenly including the “innocent”? In the sense of wrongly including those without Communist Party membership or associations, the answer appears to be not often. Looking back, Ring Lardner wrote, “H.U.A.C., at least in the later years of its witch-hunting work, did a reasonably accurate job of identifying those who had actually belonged to the Party.”<sup>188</sup> This is the conclusion, too, of more systematic research.<sup>189</sup>

There were, of course, factual mistakes in the 1950s, but the main kind of false positive was one produced by the nature of the system itself, in particular its substantive standards. Listing those with membership in or “sympathetic association” with the Communist Party or other “subversive” organizations swept in thousands of people who posed no threat, even of the relatively attenuated harms attributed to such members. As Ralph Brown said in 1958, “[L]oyalty programs tend . . . to overflow narrow channels, either because suspicion replaces conviction as the

186. *Mathews v. Eldridge*, 424 U.S. 319 (1976), the current cornerstone of due process analysis, made this point in its three factor balance. The Court held that the critical issue for whether a procedure is required is “the risk of an erroneous deprivation of [a private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . .” *Id.* at 335. *But see* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004) (arguing that participation is an essential prerequisite for the legitimate authority of legal norms independent of its effect on the accuracy of outcome). *See also* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Value*, 61 B.U. L. REV. 885 (1981) (exploring the significance of a dignitary theory of process).

187. Where the purpose of the listing, whether explicitly stated or not, is really punishment, the danger of false positives remains, but the existence of false negatives—failing to punish some of the “guilty”—is presumably of less serious concern.

188. LARDNER, *supra* note 1, at 193.

189. SCHRECKER, *supra* note 28, at xii (“[M]ost of the men and women who lost their jobs or were otherwise victimized were not apolitical folks who had somehow gotten on the wrong mailing lists or signed the wrong petitions. . . . Whether or not they *should* have been victimized, they certainly were not misidentified.”)

standard of judgment, or because there is no visible standard.”<sup>190</sup> The limited opportunity to test whether the government’s evidence met even these minimal standards and the placement of the burden of proof on the individual no doubt also played a role in encompassing the harmless.

Although it is hard to prove empirically, current watch lists are also likely to produce a large number of false positives. One kind of false positive is the confusion of one person with another whose name (or a similar one) is on a terrorist watch list. This is the kind of misidentification that has drawn the most public attention and complaint. Who hasn’t heard of Senator Ted Kennedy’s difficulties in boarding airplanes after that name turned up on a watch list?<sup>191</sup> Some of the problem appears to be with the name matching software used by the airlines, systems designed decades ago to find passenger records without having a full name or precise spelling.<sup>192</sup> Efforts are under way to reduce this type of false positive by, for example, using additional identifying information, such as date of birth.<sup>193</sup> Mistaken identification at the point a person’s name is run against a watch list is probably a technical problem that can be reduced to manageable proportions.<sup>194</sup>

The more serious issue, and one that has received much less attention, is the placement of people on watch lists who, in an objective sense, should not be there. There is no way to know how prevalent a problem this might be. The “standard of proof,” if one is explicitly employed in listing decisions, is apparently quite low, as indicated by the “when in doubt, list” approach of the TSC director.<sup>195</sup> Whatever standard is used, officials administer it in a completely *ex parte* process. Bureaucratic risk avoidance undoubtedly pushes toward inclusion of questionable “candidates,” for no one would want to be known as the official who kept off the watch list a person later involved in a terrorist incident. Even more than the earlier blacklist and loyalty-security determinations, the combination of substantive breadth and non-adversarial process makes a sub-

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190. BROWN, *supra* note 25, at 357.

191. Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES, Aug. 20, 2004, at A1.

192. Timothy Noah, *No-Fly Like Me*, SLATE, Apr. 7, 2004, <http://www.slate.com/id/2098427/>; Bob Davis, *Why a ‘No Fly List’ Aimed at Terrorists Delays Others*, WALL ST. J., Apr. 22, 2003, at A1.

193. Sec’y Michael Chertoff, Remarks at U.S. Dep’t of Homeland Security Second Stage Review (July 13, 2005), *available at* [http://www.dhs.gov/dhspublic/interapp/speech/speech\\_0255.xml](http://www.dhs.gov/dhspublic/interapp/speech/speech_0255.xml).

194. This depends on (1) the passenger information that air carriers will be required to collect, (2) the name-matching technologies used to compare this information with data supplied by TSC, and (3) the margin of error used in designating a match. GAO SECURE FLIGHT, *supra* note 87, at 33–35. The TSA had not finalized decisions on these factors as of February 2006. *Id.*

195. See *supra* text accompanying note 110.



stantial number of false positives inevitable.<sup>196</sup> The costs are borne, of course, by those persons who are wrongly identified as posing a threat.

## 2. False Negatives

Neither blacklists nor watch lists have ever come close to including all the individuals who meet the lists' respective definitions of dangerousness. In other words, both lists produce false negatives—a failure to list and thus identify people who factually come within the selection criteria. McCarthy era blacklists did not ever purport to be complete.<sup>197</sup> Loyalty-security proceedings did attempt to be comprehensive, and a huge governmental investigative apparatus was created to that end.<sup>198</sup> Nevertheless, they undoubtedly missed some of their targets. In retrospect, most observers would probably conclude that false negatives in 1950s listings had little actual effect. The grounds for inclusion in the loyalty-security screening were so broad that the number of actual security threats among those listed was probably disproportionately small. Certainly, few instances of espionage, sabotage, or other acts of disloyalty by people omitted from blacklists ever surfaced.<sup>199</sup>

Current terrorist watch lists will result in many false negatives, quite possibly a larger proportion than their 1950s counterparts. Watch lists are still in the early stages of composition and consolidation, and even their staunchest advocates would not describe them as even close to complete. Many of their targets are not based within the U.S., which makes the collection of intelligence much more difficult. The creation of “terrorists” and terrorist threats is a highly dynamic process, with new participants joining and old ones leaving all the time. Because intelligence gathering will only ever be partially successful and will always lag behind events, watch listing, however defined, will be far from completely accurate in identifying potential terrorists. The July 2005 London bombings suggest that terrorists may consciously use (or emerge from)

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196. Such appears to be the case with the more serious, but somewhat analogous, detention of suspected terrorists at Guantanamo Bay. Tim Golden et al., *Voices Baffled, Brash and Irate in Guantanamo*, N.Y. TIMES, Mar. 6, 2006, at A1 (describing alleged instances of misidentification based on name similarity, guilt inferred from possession of a watch allegedly favored by al Qaeda, and other cases of detention based on attenuated evidence). Commenting on these records of the Guantanamo prisoner hearings, the *New York Times* concluded, “Far too many show no signs of being a threat to American national security.” Editorial, *They Came for the Chicken Farmer*, N.Y. TIMES, Mar. 8, 2006, at A22.

197. As described above, blacklists were more prevalent in some industries than others and were the product of a haphazard collection of information and speculation. See *supra* text accompanying notes 35–39.

198. See *supra* text accompanying notes 53–55.

199. The passing of secrets to the Soviet Union by U.S. government employees had ended by the time the post-WWII loyalty-security programs began. See *supra* text accompanying note 75.

what the British call “cleanskins” or “lily-whites”—persons previously unknown to the security services.<sup>200</sup> In fact, by testing the watch list system, a calculating group of terrorists could determine which of their members were not on it.<sup>201</sup>

The cost of these false negatives is potentially huge, and the margin of error is small. As stated in a recent review of the TSC, “There is little room for error because a single name omitted from the [watch list] could result in a suspected terrorist successfully applying for a visa, being admitted to the United States, or failing to be identified when stopped for a traffic violation.”<sup>202</sup> False negative costs, then, would fall on those affected by any subsequent terrorist attack, including the nation as whole. These dangers of incompleteness, however, do not mean that terrorist watch lists are worthless. Rather, they suggest that every effort be taken to make watch lists as comprehensive as possible, and, more importantly, that watch lists be just one component of a layered anti-terrorist strategy.<sup>203</sup> The fact that a watch list may produce false negatives is possibly a cause for objection on policy grounds, but not, as with false positives, on legal grounds.

### *E. Effects*

So far, one significant difference between blacklists and watch lists is in their consequences for the listed individuals. As described above, being named on an industry blacklist or having a negative finding in the loyalty-security process during the 1950s usually had career-ending effects.<sup>204</sup> To date, the most common uses of terrorist watch lists have been for air passenger and visa applicant screening. Denial of air travel is serious, but it is not at the level of employment rejection. The cumulative effect of access denials might approach that level if watch lists were to be used with other transportation or facility access controls.<sup>205</sup> Visa proc-

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200. CNN, *Fresh Raid in Police Bomber Hunt*, (July 14, 2005), <http://www.cnn.com/2005/WORLD/europe/07/13/london.attacks/index.html>.

201. Peter P. Swire, *A Model for When Disclosure Helps Security: What Is Different About Computer and Network Security*, 3 J. TELECOMM. & HIGH TECH. L. 163, 172 (2004) (“Persons who are on the list will then be on notice to avoid enforcement officials or to mask their identity. Persons who are not on the list will learn not to associate publicly with their colleagues on the watch list. Persons who are not on the list will also learn that they are ‘safe’ and thus can fly on airplanes or otherwise get through screening processes. These ‘safe’ people can then infiltrate defenses more effectively to spy or launch an attack.”).

202. IG REVIEW OF TSC, *supra* note 83, at 48.

203. 9/11 COMMISSION REPORT, *supra* note 4, at 392–95. BENJAMIN & SIMON, *supra* note 5, at 258–60.

204. *See supra* text accompanying notes 38–42, 48–52.

205. IRTPA directs the Department of Homeland Security to report on “the implications of applying [selectee and no fly lists] to other modes of transportation.” IRTPA § 4012(b)(2)(B). *See*

essing, especially for immigrant visas, does have life-changing consequences for the applicants.<sup>206</sup> Public concern over erroneous visa denials does not extend very far beyond visa applicants and their lawyers, however, and there are essentially no due process rights in the visa application process.<sup>207</sup>

Differences between the effects of blacklists and those of watch lists virtually disappear, however, if the latter come to be used for licensing and employment certification in certain occupations or industries.<sup>208</sup> While this function is still in its very early stages, the possibility raises the same due process concerns as 1950s employment disqualifications. Widespread use of watch lists in employment or licensing decisions would repeat some of the worst features of McCarthyism. Needless to say, some kind of emergency detention based on lists of the “dangerous” would elevate their effects to an unprecedented level.

#### F. Evolution or Devolution?

It is sometimes said that in matters of national security, especially those which may have consequences on civil liberties, an evolution takes place from one crisis period to the next.<sup>209</sup> If “evolution” is meant to imply “improvement,”<sup>210</sup> this brief account of the listing of the dangerous in two periods fifty years apart hardly shows it. Yes, we have not employed a vigilante labeling system as in the McCarthy era, nor is watch listing now being used to punish speech, belief, or association at a scope anything like the earlier extent. But the notion that we as a society can recognize those who threaten the fabric of society remains, as does the idea that labeling them in an administrative process is a fair and sensible way to make that determination. Guilt by association and the (probable) use of informants are other features common to blacklisting and watch listing. Most remarkably, even the limited procedural protections of the McCarthy era are wholly absent from twenty-first century listing. The result, in all likelihood, is a glut of both false positives and false nega-

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also 9/11 COMMISSION REPORT, *supra* note 4, at 387 (recommending a “network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors”).

206. Even the denial of a nonimmigrant visa can have permanent consequences, as, for example, with a student visa.

207. See *infra* text accompanying note 276.

208. See *supra* text accompanying notes 141–42.

209. Cole, *supra* note 6, at 2 (“[W]e have offset the decline of traditional forms of repression with the development of new forms of repression. A historical comparison reveals not so much a repudiation as an evolution of political repression.”).

210. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/64/E0256400.html> (“Evolution” means a process in which “something changes into a different and usually more complex or better form.”).

tives, perhaps greater in both categories than under the labeling mechanisms of the 1950s. The absence of procedural protection also contrasts unfavorably with other designations of the dangerous.<sup>211</sup>

Mark Tushnet has advanced the idea that, through a form of social learning, the “threat to civil liberties posed by government actions has diminished in successive wartime emergencies.”<sup>212</sup> In one way that progression is true here: thus far, watch lists have not had the same degree of consequences as blacklists. Perhaps watch lists’ current level of effects is indeed a result of the last fifty years of jurisprudence, including the so-called “due process revolution.”<sup>213</sup> Nevertheless, watch lists are inching toward more consequential uses, and it will be interesting to see if Tushnet’s thesis holds even in this regard. In other ways, as just suggested, we have experienced devolution rather than evolution.

There is another possible explanation for the current shape of the watch list regime, one that sees it as largely oblivious of our social and constitutional history, neither learning from that experience nor consciously disregarding its lessons. Watch lists in their current form are a response to two specific aspects of the events of September 11: first, some of the hijackers were previously known to American intelligence, and second, their weapons of choice were airplanes. Aviation, of course, is a particularly fragile mode of transportation, one for which we had already attempted to screen out the dangerous.<sup>214</sup> A third factor—that all the hijackers were non-citizens— could also be added.<sup>215</sup> Perhaps any one of these elements would have been enough. But once it was realized that screening for access to those very fragile vehicles could be improved, that there were sources of information available for that screening, and that some of the perpetrators were not here legally anyway, watch lists became almost inevitable. It is doubtful anyone involved in the lists’ recent consolidation and expansion gave much thought to history, or even legality, either way. The absence of any formal means to challenge misidentification, let alone erroneous listing, evidences the

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211. See *supra* text accompanying notes 10–17.

212. Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS L. REV. 273, 294–95 (2003). But see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 622–25 (2003) (critiquing this contention on various grounds).

213. While there is no one definition of the phrase “due process revolution,” the reference here includes that of Richard J. Pierce, Jr.; for a description of the due process revolution as an extension of due process protections to government benefits that previously had been regarded as mere privileges beyond the protections of due process, see Richard J. Pierce, Jr., *The Due Process Counter-revolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1980 (1996).

214. See *supra* text accompanying notes 127–30.

215. 9/11 COMMISSION REPORT, *supra* note 4, at 215–41.

lack of thought given to legality.<sup>216</sup> Here simply was a problem and a possible way to address it, or at least a way that some perceived to address it. The very fact that in some sense watch listing is “fighting the last war” only confirms this point.<sup>217</sup>

#### V. WATCH LISTS: WHERE TO GO FROM HERE

Should watch lists be saved and, if so, in what form? The first part of the question asks about the benefits of watch lists and whether those benefits outweigh their costs. The second part speaks to reducing those costs. Watch lists’ most critical deficiencies are the questionable grounds on which they are assembled, their absence of process, and, above all, their resulting inaccuracy. This Part considers solutions—or at least partial fixes—to these problems, as well as the identification and preservation of watch lists’ useful aspects. One possible change would be revising the substance of watch list selection—in other words, tightening the criteria and standards for inclusion. A second change involves improving the process for making or correcting those decisions. A third approach would be to limit the consequences of watch listing, to emphasize (or reemphasize) the *watch* aspect of watch lists.

This Article ends by arguing for the third approach. As triggers for surveillance, investigation, and other minimally intrusive security measures, watch lists are a reasonable means of resource allocation. To that degree, they should be continued. When they become a decisional tool in themselves, as was the case of McCarthy era blacklists, they pose threats to liberty and due process. For watch lists to be of much value, the substantive standards may need to be fairly loose and substantial improvement in the way of procedural guarantees may often be impractical. If so, then the consequences of being placed on a watch list must be moderate indeed.

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216. One of the few reported invocations of McCarthy era blacklisting in reference to post-September 11 security measures came from Attorney General John Ashcroft, but it was made while defending the Justice Department’s refusal to release the names of hundreds of aliens rounded up on immigration charges immediately after the September 11 attacks. Ashcroft “claimed that secrecy was necessary to protect the identities of those detained, ‘to prevent the creation of [a] McCarthy-style blacklist.’” N. Alejandra Arroyave, Comment, *Preserving the Essence of Zadvydas v. Davis in the Midst of a National Tragedy*, 57 U. MIAMI L. REV. 235, 265 n.217 (2002) (quoting Adam Cohen, *Rough Justice: The Attorney General Has Powerful New Tools to Fight Terrorism. Has He Gone Too Far?*, TIME, Dec. 10, 2001, at 30).

217. Cf. John Tierney, *Fighting the Last Hijackers*, N.Y. TIMES, Aug. 16, 2005, at A15.

### A. Substantive Restrictions

If blacklists and watch lists are overinclusive, their substantive selection criteria must bear some of the blame. For both practices, the preventative aim of listing is the identification of people who will commit serious anti-social acts: espionage or sabotage in the case of loyalty-security screening, and terrorist plotting or attacks in the case of watch lists.<sup>218</sup> Designated agencies create and apply “decision rules” for the agency personnel implementing these aims.<sup>219</sup> In both cases, however, there seems to be a serious lack of what Colin Diver calls “congruence” between these selection rules and their underlying policy objective.<sup>220</sup>

The link between a person’s past “[m]embership in, affiliation with, or any sympathetic association” with a “totalitarian, fascist, communist or subversive” organization or group—the loyalty standard in the 1950s—and that person being a realistic threat to national or industrial security was attenuated in the extreme.<sup>221</sup> Much of the criticism of the McCarthy era loyalty-security programs, then and now, made this point. The upshot was that many people with past communist or “subversive” associations who posed no real danger were barred from employment. One response was a call for clearer and more restrictive standards.<sup>222</sup>

A similar lack of congruence between decision rules and programmatic aims seems to characterize terrorist watch listing. The Presidential Directive authorizing terrorist watch lists mandates that they include persons “known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities.”<sup>223</sup> The actual criteria for watch list selection are

218. This categorization puts to one side the punishment aspect of private blacklists. *See supra* text accompanying notes 29–32.

219. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626–30 (1984) (contrasting decision rules with “conduct rules” addressed to those whose behavior is sought to be regulated). Colin Diver makes a similar distinction between “internal” and “external” rules. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 76–77 (1983). Watch list selection criteria are clearly decision, not conduct, rules. They are created and used solely by those responsible for deciding who is to be included on the lists. Because they are not made public, they embody no intention to influence behavior, by, for example, discouraging personal associations or travel that might cause listing.

220. Diver, *supra* note 219, at 67 (defining congruence as “whether the substantive content of the message communicated [by the rule] produces the desired behavior”). *See also* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1748 (2005) (referring to a liability rule that captures cases “not justified by its social purpose” as involving a “definitional spillover”). *See also id.* at 1754–56.

221. *See supra* text accompanying notes 59–63.

222. BONTECOU, *supra* note 60, at 242 (approving of the British bar from certain government posts of members of the Communist Party or those “so closely associated with it as to be unreliable”).

223. HSPD-11, *supra* note 81.

not publicly known. However, they appear to be quite loose and undemanding, and officials appear to interpret the Directive expansively.<sup>224</sup>

Would adjustments to the substantive standards be a sensible way to reduce the incidence of watch list false positives, independent of any other changes to the listing process? Could, for example, the decision rules for watch list inclusion be stated with greater precision? One way to do so might be to specify more exactly just what behaviors or combination of behaviors is indicative of terrorist threat.<sup>225</sup> An examination of this sort seems to be in the works. As a result of a congressional mandate, the new Director of National Intelligence is to conduct a study of watch lists, including the criteria for placing a person on them, the minimum standards for reliability and accuracy of identifying information, their degree of information certainty, and the range of threats they should address.<sup>226</sup>

Without access to the current criteria, it is impossible to fully assess the prospect of improvement by this route. Because these guidelines must remain secret so that they are not circumvented, it appears unlikely a public debate on this issue will ever take place. Given the great variety of information and behaviors that might provide legitimate grounds for suspicion, revising the substance of watch list selection is probably not too promising a means to a major reduction in false positives. Even attempting to create standardized guidelines embodying current practice would probably result in rules of such flexibility and inclusiveness that the chance of false positives would not be greatly diminished. In this regard, the almost laughably malleable drug courier profiles of the 1970s and 1980s provide a cautionary role model.<sup>227</sup> Striking the ideal balance between the general goal of terrorism prevention and the precise specification of watch list criteria is a tremendously difficult task.<sup>228</sup> This is par-

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224. See *supra* text accompanying notes 108–16.

225. Even substantial indicia of terrorist threat can be wrong, of course, but, presumably, less often.

226. Intelligence Reform and Terrorism Prevention Act, 50 U.S.C.A. § 4012(c)(2) (West Supp. 2006). The resulting report is to be in unclassified form “[t]o the greatest extent consistent with the protection of law enforcement-sensitive information and classified information.” *Id.* § 4012(c)(1), (3).

227. *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (referring to “the profile’s ‘chameleon-like way of adapting to any particular set of observations’” and citing cases that find suspicion in an air passenger’s deplaning from the front, the rear, and the middle of an airplane (citations omitted)).

228. On the balance generally between legislative goal-setting and specification of administrative instrumentalities or techniques, see Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 408–15 (1989).

ticularly true because terrorist watch listing is, in any event, an exercise in prediction, not retrospective fact-finding.<sup>229</sup>

Another alternative for reducing the possibility of erroneous watch list inclusion would be a more demanding standard of proof, or what the Intelligence Reform and Terrorism Prevention Act (IRTPA) calls “information certainty.”<sup>230</sup> For example, if the NCTC were to recommend for listing only persons for whom there was the familiar stop and frisk standard of “reasonable suspicion”<sup>231</sup> of terrorist involvement, two things would likely happen: fewer people would be on the watch list and fewer innocent people would be subject to listing’s consequences.<sup>232</sup> Similar effects would follow from narrowing the working definition of terrorist acts or reducing reliance on selected types of evidence, such as an individual’s associations or information from certain kinds of informants.

However, revisions in the substantive criteria, the standard of proof, or the kinds of evidence considered—even if practicable—would reduce, if not eliminate, the value of watch lists, at least for certain kinds of uses. To the extent that watch lists are employed to initiate further investigation, surveillance, or other kinds of enhanced scrutiny, a high threshold of proof is self-defeating. Even ordinary criminal investigators do not require reasonable suspicion to *begin* an investigation; reasonable suspicion may arise along the way or it may never develop at all. Insisting upon reasonable suspicion (or probable cause itself) before a person could be watch listed would eliminate potentially fruitful investigative opportunities.<sup>233</sup> Investigation (be it of visa applicants, air passengers, transportation workers, etc.), must start somewhere, and especially when seeking to head off possible terrorists, that threshold should not be set too high. A higher standard not only reduces the chance of false positives but increases the risk of false negatives.<sup>234</sup> Tinkering with the substantive standards for watch list inclusion, then, would change the nature of

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229. See *infra* text accompanying notes 256–60.

230. See *supra* text accompanying note 226.

231. This standard originated with *Terry v. Ohio*, 392 U.S. 1, 26–27 (1968).

232. This assumes that the reasonable suspicion standard would be administered as it is in ordinary police work, an admittedly questionable assumption when dealing with the opaque process that produces watch list candidates.

233. Using a standard such as probable cause would cause watch lists to revert to something like the National Crime Information Center (NCIC), a computerized index of criminal justice information that contains a list of criminal convictions and outstanding warrants. Federal Bureau of Investigation, *National Crime Information Center (NCIC)*, <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (last visited July 10, 2006).

234. For a discussion of the relationship between the threshold for finding a name match in air passenger screening and the corresponding risk of false negatives, see GAO SECURE FLIGHT, *supra* note 87, at 34–35.



watch lists and make them less effective as a convenient trigger for further investigation, in exchange for some indeterminate reduction in false positives.

### B. More and Better Process

A second means of reducing false positives would be to require more process before a name could be added to a watch list. The additional procedure would not necessarily need to be adversarial; it could, for example, involve additional layers of internal review or more searching demands for corroboration.<sup>235</sup> Such internal review might make considerable sense for watch listings, especially if used in response to complaints by people who have discovered their likely presence on a watch list.

The usual method for minimizing the likelihood of false positives in outcome, however, is some form of notice and opportunity to be heard on the part of the person whose interests are at stake.<sup>236</sup> In this instance, additional process serves the same aim as substantive standards that are more congruent with the goal of identifying actual terrorists—greater accuracy.<sup>237</sup> Adversarial process with notice and response opportunities would also satisfy some dignitary and participation concerns, which are values in themselves. Right now watch listings are added in a completely opaque and one-sided process. The individual is not told she is on the

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235. Peter Shane makes a strong case for a “front-end fairness system” that seeks accuracy in the inclusion of individuals on government watch lists. Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists* 1, 25–26 (Ohio State Univ. Moritz Coll. of Law Pub. Law & Legal Theory Working Paper Series No. 55; Ctr. for Interdisciplinary Law & Policy Studies Working Paper Series No. 36, 2006), available at <http://ssrn.com/abstract=896740>. The main elements of his proposal are written standards governing the inclusion of targets, a uniform process for the addition of names, internal monitoring for accuracy, and promotion of accuracy in the system architecture. *Id.* “[T]he greater the government’s front-end investment in fairness, the less compelling will be the case for highly formal adjudicative mechanisms to redress the possibility of individual errors.” *Id.* at 32.

236. See, e.g., *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (“The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions.”).

237. In this context, then, procedural and substantive reforms work hand in hand and are, at least potentially, mutually reinforcing. For a discussion of procedure working counter to substance, see Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1156–58 (2005) (summarizing literature on how in plea bargaining defendants trade their procedural rights for reductions in substantive liability, thus undermining substantive goals).

list, often even when the list is being used against her.<sup>238</sup> As far as fair procedure goes, watch lists have nowhere to go but up.

There is an increasing recognition of errors in watch list usage and a growing interest in doing something about them. IRTPA requires the TSA to “establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system.”<sup>239</sup> This procedure should “ensure that Federal Government databases that will be used to establish the identity of a passenger under the system will not produce a *large* number of false positives.”<sup>240</sup> It should be “timely and fair”<sup>241</sup> and include a “record of air passengers and other individuals who have been misidentified and have corrected erroneous information.”<sup>242</sup> It appears that this system will address only identification errors, however.<sup>243</sup> If that is the case, it will do little to correct the inclusion on terrorist watch lists of those who in some objective sense do not belong there.<sup>244</sup>

As noted above, the McCarthy era loyalty-security programs did provide an adversarial hearing, albeit one with the burden of proof on the individual, who was, additionally, often denied the opportunity to cross-

238. *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1122 (W.D. Wash. 2005). Plaintiffs alleged that they were mistakenly identified by airport personnel, often in full view of co-workers and the general traveling public, as individuals whose names appeared on the No-Fly List. *Id.*

239. 49 U.S.C.A. § 44903(j)(2)(C)(iii)(I) (West Supp. 2006). *See also* Department of Homeland Security Appropriations Act, 2005, Pub. L. No. 108-334, § 522(a)(1), (2), 118 Stat. 1298, 1319 (2004) (making funding for Secure Flight contingent on “a system of due process” and avoidance of “a large number of false positives that will result in a significant number of passengers being treated mistakenly or security resources being diverted”).

240. 49 U.S.C.A. § 44903(j)(2)(C)(iii)(II) (emphasis added).

241. *Id.* § 44903(j)(2)(G)(i).

242. *Id.* § 44903(j)(2)(G)(ii). To “prevent repeated delays of misidentified passengers,” the TSA record “shall contain information determined by the Assistant Secretary [of TSA] to authenticate the identity of such a passenger. *Id.*”

243. *See* Thompson & Juthani, *supra* note 138, at 10 (“[N]ational security concerns restrict TSA’s ability to disclose classified intelligence or law enforcement investigative information surrounding an individual’s inclusion on a watch list.”). Moreover, IRTPA does not apply to the other federal watch lists. Lee & Schwartz, *supra* note 19, at 1470.

244. There is at least one statutory precedent that a watch list be corrected to reflect true information. Section 601(c) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5075 (1990), required the Attorney General to develop protocols for updating lookout books of inadmissible aliens to ensure a person a chance to challenge a listing even without applying for admission. Recent allegations suggest that inaccuracies in terrorist watch lists also interfere with the admission of otherwise admissible aliens. *See* Second Amended Complaint, *Rahman v. Chertoff*, No. 05-C-3761 (N.D. Ill. June 19, 2006), available at <http://www.aclu-il.org/news/press/rahman%20amended%20complaint%20-%20final>.

examine informants.<sup>245</sup> These hearings did result in a substantial number of “clearances,” however. Under Executive Order 9835,<sup>246</sup> of 26,236 persons referred to loyalty boards, 16,503 were cleared.<sup>247</sup> Anecdotal evidence also shows some people being exonerated at loyalty-security hearings.<sup>248</sup> The precise numbers are less important than the general point that an opportunity to respond, refute, explain, and in some cases cross-examine, resulted in the dismissal of charges. Eleanor Bontecou’s close examination of a number of hearing records particularly illustrates the benefits of adversarial participation, which allowed the employees to put actions and affiliations in context or offer alternative explanations.<sup>249</sup> The hearings thus undoubtedly reduced false positives, though it must be recognized that, given the tenuous connection between Communist Party membership and actual threat to national security, even those correctly identified as falling in the first category did not necessarily fall into the second.

Despite this history, there are several reasons to believe that notice and opportunity to be heard in response to watch listing or prospective watch listing would be highly impractical. The most telling are the large number of listings and the fact that most will never have any impact on the named individuals. Notice and a chance to respond prior to being listed would, in most cases, involve much process unconnected with any later effect on liberty or property. Most importantly, prior notice of prospective watch listing would reveal to the subject the government’s investigative interest.<sup>250</sup>

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245. See *supra* text accompanying note 68.

246. Exec. Order No. 9835, *supra* note 55.

247. NY BAR REPORT, *supra* note 21, at 219–20. There are no comparable statistics for security cases. BONTECOU, *supra* note 60, at 145.

248. Bontecou concludes, “[L]oyalty boards have been able to resolve all questions in favor of the employees on the basis of the evidence in the files in a little more than one-fifth of the cases which have come before them. In about two-thirds of the remaining cases the record has been cleared following the employee’s written reply to formal charges or interrogatories.” BONTECOU, *supra* note 60, at 117–18.

249. *Id.* at 114–35. In one case, a “shortsighted” witness had apparently mistaken a Socialist Party membership book for a Communist Party one. *Id.* at 132–33. Bontecou based her review on 75 cases from 25 different agencies for which a fairly complete file was available. *Id.* at 101–02, n.1. These cases were not a statistically random sample: the employees tended to have legal representation, and the “percentage of cases resulting in dismissal is also higher than that for the whole program.” *Id.*

250. 17 C.F.R. § 16.96(r), (s) (2006) (exempting Terrorist Screening Records System from the Privacy Act) (“Revealing [information about a record subject] could reasonably be expected to compromise ongoing efforts to investigate a known or suspected terrorist by notifying the record subject that he/she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area . . .”).

There are other practical problems. Much of the information underlying a decision to add a person to a watch list, if not formally classified, is likely to come from confidential informants or other sources that the government desires to keep secret. Precedent supports denying access to classified material to organizations facing a listing as designated foreign terrorist organizations, a labeling decision that currently has much more immediate and serious effects than being placed on a terrorist watch list.<sup>251</sup> It is likely, then, that much information relevant to watch listing would not be disclosed at a hearing. Also, in contrast to the 1950s hearings, which turned totally on activities and associations within the United States, a good deal of the data underlying watch listing decisions comes from outside the country<sup>252</sup> and derives from sources, secret or not, who would be difficult to produce for testimony or cross-examination.

Loyalty-security determinations of the McCarthy era used past Communist Party membership as a proxy for a person's risk to national security.<sup>253</sup> As a result, the hearings turned on retrospective fact-finding (often in ludicrous detail) similar to that of most civil and administrative litigation.<sup>254</sup> With terrorist watch listing, the issue seems to involve whether someone is "known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities."<sup>255</sup> Labeling a person as one who has committed a certain kind of act—theft, for example, or plagiarism, or violation of the securities laws—differs from labeling someone as being "suspected" of engaging in conduct "related" to terrorist activities. Because the labeling in the former cases is based upon a retrospective factual finding in the context of a definite standard, it carries a certain degree of specificity. An adversarial process that allows the accused to meet and refute the proposed designation of dangerousness has a great deal of value in assuring accuracy in that kind of determination. The second kind of labeling—as a future threat—is less capable of being made

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251. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2001) (deprivation of previously held right to hold bank account). Designation results in the blocking of the organization's U.S. assets, 18 U.S.C.A. § 2339B(a)(2)(A) (West 2005 & Supp. 2006); barring its representatives or members from entering the U.S., 8 U.S.C.A. § 1182(a)(3)(B)(i)(IV), (V) (West 2005); and criminalizing the knowing provision of material support to the designated organization, 18 U.S.C.A. § 2339B(a)(1) (West 2005 & Supp. 2006).

252. *See supra* text accompanying note 98.

253. *See* discussion *supra* Part II.B.

254. *See, e.g.,* BONTECOU, *supra* note 60, at 96 (Derogatory information considered by the loyalty and security boards "may include views on racial relations, marriage, religion, sympathy for Russia or its people, partisanship on the side of labor, criticism of the Un-American Activities Committee . . . and the parking of one's car in the neighborhood of a Communist front meeting." (citations omitted)).

255. *See supra* text accompanying note 81.

accurate through adversarial process. In fact, because terrorist watch listing deals in probabilities, “accuracy” is less applicable a concept.

Preventative labeling of the dangerous *by its nature* entails large numbers of false positives. Prediction of violent behavior in general is far from an exact science. At best, all it can do is identify increased probabilities of violence.<sup>256</sup> While seldom expressed this way, the decision to use preventive measures necessarily assumes a willingness to apply them to many people who will turn out not to pose any threat. As with other kinds of prediction of wrongdoing, such actions are necessarily overinclusive, encompassing many people whom are factually innocent—not only of past wrongdoing but of any intention of causing future harm.

The criminal investigation analogies of stops and frisks premised on reasonable suspicion and searches on probable cause illustrate this point. As predictive measures, both deal only in probabilities.<sup>257</sup> They can turn out to be “wrong” in the sense that the predicted act of criminality may never occur or be proved, but in neither case does that necessarily make the action illegal.<sup>258</sup> The only question is whether the stop, frisk, or search was properly founded at its inception.<sup>259</sup> Frisks or arrests are not expected to discover fruits, instrumentalities, or evidence of crime 100% of the time. Also, it is worth noting that no adversarial process precedes stops, frisks, searches or arrests.

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256. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 408–09 (2006) (“In the past several years . . . a number of risk assessment tools have become available, and courts as well as legislatures have become remarkably receptive to their introduction in evidence. The promise of actuarial prediction of violence appears finally to have arrived.”). Monahan describes ten risk factors common to most assessment instruments: age, gender, race, personality, mental disorder, personality disorder, substance abuse, history of crime and violence, pathological family environment, and victimization. *Id.* at 414–27. From what is known of terrorist watch listing, it is virtually inconceivable that information on all, or even most, of these factors would be available to decision-makers. Moreover, these are predictors of violent behaviors by individuals in domestic society, not of violence undertaken for ideological reasons. See also Alexander Scherr, *Daubert & Danger: The “Fit” of Expert Predictions in Civil Commitments*, 55 HASTINGS L. J. 1, 2 (2003) (“Scientific studies indicate that some predictions [of dangerousness] do little better than chance or lay speculation, and even the best predictions leave substantial room for error about individual cases.”).

257. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (describing probable cause as “incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”). The same, of course, is true of the reasonable suspicion standard of proof.

258. This is so both because probable cause and reasonable suspicion only require a certain probability of finding fruits, instrumentalities, or evidence of crime, see, e.g., *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause requires a “fair probability”), and because civil liability arises only when a reasonable officer should have known the requisite degree of proof was lacking, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

259. *Cf. Terry v. Ohio*, 392 U.S. 1, 20 (1968).

All of this suggests that an adversarial process to determine whether someone is “known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities” will be less valuable than it may first appear. To be sure, in some cases the individual could provide a satisfactory explanation of the facts or data that got her onto the watch list.<sup>260</sup> Such a hearing could as easily involve an admission of some or all of the reported facts by the listed individual, coupled with a denial that they show conduct or preparation for “terrorism or terrorist activity.” The decision maker would be left to determine whether the suspicious inference was justified. In many cases, that reasoning process might not be furthered very much by denials or explanations from the person herself, either because the decision maker chose to disbelieve her or because, as a matter of predictive probability, the person still fell within the watch list parameters.

While more process may reduce watch list overinclusiveness to some degree, it would also compromise other logistical, financial, and security interests. Adversarial procedure prior to initial watch listing is inconceivable given the absence of any immediate effect of being placed on a watch list, that the potential number of hearings would number in the tens of thousands, and that notice would undermine the lists’ purposes. Notice and response procedure might make some sense for those whom have been affected by their inclusion on a watch list and wish to challenge it.<sup>261</sup> Nevertheless, given the predictive nature of the watch listing decision and the other concerns described in this section, better process may not be the correct solution and is certainly not the sole solution.

### *C. Putting the “Watch” Back in Watch Lists*

If more demanding substantive criteria will make the watch lists less valuable for certain purposes, and additional process will not significantly reduce false positives at reasonable cost, is there any way to deal

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260. Cf. David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 287 (2000–2001) (“Secret procedures allow the government to advance inferences and charges that once challenged in open court are shown to have no basis in fact, but that absent adversarial testing, may seem reasonable. This may explain why so many immigration judges in the secret evidence cases have first found that aliens pose a threat to national security, but have then reversed themselves when the alien has been afforded an opportunity to confront the specific charges against him in open court.”).

261. Discussed in Steinbock, *supra* note 109, at 69–75. See also Shane, *supra* note 235, at 38–51; Paul Rosenzweig & Jeff Jonas, *Correcting False Positive: Redress and the Watch List Conundrum*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 17 (Heritage Found., Wash., D.C.) June 17, 2005.

with watch lists' relative inaccuracy short of scrapping them? The answer, I contend, is to restrict the consequences that follow from watch listing—in other words, to put the *watch* back in watch lists. It is simply unfair, and probably unconstitutional, to impose serious harms on the basis of an ex parte process of labeling, especially one with a bias toward inclusion in cases of doubt.<sup>262</sup> Instead, watch lists should be reserved for triggering further investigation, for visa and immigration processing (due to those processes' historically different treatment in our legal system), and for other minor impositions on liberty, such as enhanced security inspections.

### 1. Investigation

Even as imperfect a process as terrorist watch listing can separate the more threatening from the less threatening, the possibly dangerous from the almost certainly not dangerous. As more and more locales and modes of transportation are recognized as possible terrorism targets, this is an increasingly valuable function. We simply do not want to devote the staffing necessary to screen all of the people much of the time. Watch lists have a certain efficiency, then, in directing scarce governmental resources.<sup>263</sup>

As a ground for screening mass transit, for example, focusing on watch listed targets is certainly more efficient than searching every passenger or a randomly selected sample. Using watch lists involves a smaller percentage of the total number of passengers, and one, presumably, with a greater likelihood of catching a culprit. Watch lists also have an advantage over ethnic profiling by being more accurate, less offensive, and less likely to discourage cooperation by other members of the profiled groups.<sup>264</sup> Because of the inevitability of substantial numbers of false negatives, however, sole reliance on watch lists would be a mistake.

Nevertheless, watch lists have a role to play as a centralized source of information, and for this aggregation of data to have any value there needs to be occasions when that information is used. The question is when and, particularly, for what. One acceptable function for watch lists

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262. See Steinbock, *supra* note 109, at 69–75.

263. The Registered Traveler program does this not by focusing on the most suspicious but by relaxing scrutiny of the least suspicious. See *supra* text accompanying note 139.

264. Editorial, *Terrorism and the Random Search*, N.Y. TIMES, July 26, 2005, at A16 (urging that subway searches be continued and conducted in “an evenhanded manner,” while noting that “[f]inding a way to treat people fairly and still pursue any real threat is a particularly difficult and important task”). Watch lists are a less discriminatory alternative, of course, only if racial and ethnic profiling do not play a significant role in their compilation. On that possibility, see *supra* text accompanying notes 117–18.

is as a sorting mechanism, designating who may be exposed to certain investigative or security procedures. The Fourth Amendment and the Due Process Clause provide rough measures of the allowable degree of intrusion into one's personal affairs that one's presence on watch lists might instigate in the absence of any other proof of wrongdoing. The simple placement of a name on a watch list offends neither constitutional provision. Once the list is assembled, it may be used to trigger investigative and administrative measures that do not constitute Fourth Amendment searches or seizures or infringements of life, liberty, or property under the Due Process Clause. These include:

- conducting public surveillance: following the individual;
- performing electronic monitoring: installation of a radio transmitter on his/her belongings;
- collecting publicly available documentary and physical evidence;
- interviewing the individual and her associates and other witnesses;
- requesting consent to search;
- compelling the individual to appear before a grand jury; and
- imposing other burdens, such as enhanced security screening, that do not significantly affect liberty or property interests or are acceptable administrative searches and seizures under the Fourth Amendment.

In addition, other more intrusive actions, such as stops, frisks, searches, or arrests, may be employed if the information behind a watch listing contains the requisite level of proof.<sup>265</sup> This seems to be the thrust of the "handling codes" assigned to each name on the TSC's consolidated terrorist watch list.<sup>266</sup> This kind of "watching"—employing the full range of constitutionally and statutorily permitted investigative and surveillance powers—is certainly allowable simply on the basis of watch listing.<sup>267</sup> Obviously, if the investigation turns up additional indications of wrongdoing, other measures become available.

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265. *United States v. Koubriti*, 199 F. Supp. 2d. 656, 664 (E.D. Mich. 2002) (occupant's presence on FBI terrorist watch list justified protective sweep of apartment on September 17, 2001). *Cf. Birnbaum v. United States*, 436 F. Supp. 967, 971–72 (E.D.N.Y. 1977) (presence of name of mail recipient or sender on FBI or CIA watch list of "suspect persons" does not constitute probable cause to seize and search mail).

266. *See supra* text accompanying notes 93–95. The author has a Freedom of Information Act request for a description of the handling codes pending.

267. As with other governmental investigations, those triggered by watch lists can erroneously fail to detect criminality. For an example, see SIBLEY, *supra* note 74, at 121–24 (reporting the case of Gregory Silvermaster, a Communist spy on the Dies Committee's list of suspected government employees who was cleared after several investigations and who continued to supply documents to the Soviet Union while employed by the U.S.).



The main drawback of this suggested limitation, of course, is that many of these permissible methods are labor-intensive. Without a vast increase in law enforcement staffing, these methods could not be applied to more than a small fraction of those individuals on current watch lists.<sup>268</sup> Even if accurate, a terrorist watch list that does not instigate some governmental action will not prevent anything. Nevertheless, surveillance or other kinds of investigation of some of those on the watch lists, especially those in the U.S. who have the most serious handling codes, would be one possible approach. If more agents are needed, then so be it; many security costs have increased drastically since September 11.

Increasing the number of encounters during which a person's name is checked against the watch list is one way to enhance the usefulness of watch lists.<sup>269</sup> A step in that direction is contained in IRTPA, which calls for consideration of the possibility of using watch lists for other modes of transportation besides air travel.<sup>270</sup> Subway rider searches, instigated in London and New York after the July 2005 London bombings, are not currently based on watch lists,<sup>271</sup> but watch list use could become the next stage in this practice. Effective checking of names against watch lists, however, requires that every person carry an accurate and secure form of identification. Thus, the greater the reliance on watch lists, the more likely will be the demand for a national identity card that everyone must carry.<sup>272</sup> As air travelers' experience has demonstrated, expansion to other transportation modes would increase the number of identification checkpoints and their attendant delays, as well as diminishing the feeling of living in a free society. Regular identity checks would also drive those without lawful identification further into the shadows.<sup>273</sup>

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268. HEYMANN, *supra* note 112, at 76.

269. *Cf.* Swire, *supra* note 201, at 172 (2004) ("Putting the watch list into the hands of more defenders increases the likelihood of spotting and capturing the attacker.").

270. *See supra* note 205.

271. *MacWade v. Kelly*, No. 05CIV6921, 2005, 2005 WL 3338573, at \*5-6 (S.D.N.Y. Dec. 7, 2005) (passengers' containers searched according to a predetermined random frequency, e.g., every fourth passenger).

272. *See, e.g.*, DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR 71-72 (2003) (advocating comparisons of national identity cards with terrorist watch lists); AMITAI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT? FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM 98 (2004) (arguing that current means of establishing identification in the U.S. are "woefully inadequate"); Editorial, *A National ID*, N.Y. TIMES, May 31, 2004, at A16 (advocating that a commission be established to study "how to create a card that helps identify people but doesn't rob them of a huge swath of their civil liberties in the process."). *Cf.* BRUCE SCHNEIER, BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN INSECURE WORLD 204-06 (2003) (analyzing a possible national identity card system and concluding that it would not be worth the cost).

273. Patrick McGeehan, *A Week of Random Backpack Searches Yields Little Drama*, N.Y. TIMES, July 30, 2005, at B1 (reporting that Hispanic immigrants were avoiding the New York subways during the random searches for fear of being asked to document their presence in the U.S.).

## 2. Visa and Admissions Processing

In addition to the investigative methods listed above, the only other acceptable use of watch lists as presently constituted would be visa and immigration admissions processing. This is not because the consequences of visa or admissions denial are slight; they can be quite serious, especially with respect to immigrant applicants.<sup>274</sup> Rather, this conclusion relies on two factors. First, there is the long-standing deference to consular discretion and the traditional absence of formal administrative review of visa denials.<sup>275</sup> Due process rights do not apply, and judicial review is generally unavailable, in visa processing, even when factual errors in visa denial are alleged.<sup>276</sup> Using watch lists in consular visa decisions, then, is consistent with our legal culture and, implicitly, with a historically greater tolerance for false positives in the visa denial process.

Second, visa and admissions screening is both an enormous task and one with an immediate impact on anti-terrorism efforts. All September 11 hijackers were non-Americans,<sup>277</sup> and many (though not all) of those in recent European bombings were not citizens of those countries.<sup>278</sup> It will be impossible to prove, but some of the reason why the U.S. has not suffered further attacks may lie in the enhanced anti-terrorist screening of visa applicants and the generally greater difficulty in obtaining visas since September 11.<sup>279</sup> Applications for non-immigrant visas (e.g., tourists, students, and other temporary visitors) come in greater numbers than immigrant applications and generally involve lesser private interests, especially on the part of U.S. citizens or residents. An unwillingness to rely on watch lists in making those decisions would be very expensive, very time-consuming, and not particularly protective of U.S. interests.

However, the mere fact of listing alone, resting as it often would on a chain of hearsay, should not be enough to sustain a finding of inadmis-

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274. U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 180–82 (1997) (noting the interests at stake for the visa applicant and U.S. petitioners), available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf>.

275. Immigration and Nationality Act § 104(a), 8 U.S.C. § 1201(g) (2000).

276. See, e.g., *Loza-Bedoya v. INS*, 410 F.2d 343, 347 (9th Cir. 1969) (discussing that a claim to overturn a visa denial based upon erroneous information in records was nonjusticiable).

277. 9/11 COMMISSION REPORT, *supra* note 4, at 215–41.

278. Renwick McClean, *Unsent E-Mail Helped Plotters Coordinate Madrid Bombings*, N.Y. TIMES, Apr. 30, 2006, at A12. Most of the 29 suspects were from North Africa. *Id.*

279. BENJAMIN & SIMON, *supra* note 5, at 115. See Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 175–76 (2005) (summarizing the country-specific strategies, the injection of the Department of Homeland Security into the visa process, and the heightened screening and delay since September 11).

sibility on terrorism-related grounds if challenged at a hearing. On the other hand, the information *underlying* the person's watch listing might very well be considered sufficient for a such a finding.<sup>280</sup> Although non-resident aliens have no constitutional due process right to a hearing, watch list instigated allegations of inadmissibility at a U.S. port of entry would usually entitle an alien to a removal hearing by statute.<sup>281</sup> A watch listing is usually based on multiple hearsay, and although hearsay is acceptable in a removal proceeding if it is material and relevant,<sup>282</sup> reliance on multiple, unreliable hearsay may violate due process.<sup>283</sup> Listing should, however, be enough to *trigger* such a hearing.

Beyond visa processing, criminal or national security investigation, and some minor impositions on liberty or property such as enhanced searches, watch list matches should not carry automatic effects. The process of watch listing is both insufficiently discriminating and too one-sided to result in denial of important liberty or property rights, such as the right to take certain forms of transportation (e.g., air, bus, and subway) or the right to engage in certain occupations. I have argued elsewhere that imposing these harms by reason of matching a name with a watch list violates the Due Process Clause.<sup>284</sup>

### 3. Employment

The improper denial of important liberty and property rights due to one's inclusion on a blacklist is one of the lessons of the McCarthy era, especially regarding employment. Even during the 1950s, the Supreme Court held that disqualification from government employment for membership in a listed subversive organization offended due process, unless, at the least, the employee was shown to have been aware of the organization's activities and purposes.<sup>285</sup> The Court recognized early on that in addition to being denied the job itself, such disqualification imposed a "badge of infamy."<sup>286</sup> Where that effect on reputation was not present,

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280. *Cf. Mapother v. Dep't of Justice*, 3 F.3d 1533, 1542-44 (D.C. Cir 1993) (assuming that the *evidence* underlying the watch listing of Kurt Waldheim as a Nazi war criminal and barring him from the United States (and not just the fact of listing) would be offered in any exclusion proceeding).

281. Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2000).

282. 8 C.F.R. § 1240.7 (2006).

283. *See, e.g., Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405-08 (3d Cir. 2003); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988).

284. *Steinbock, supra* note 109, at 59-60. *But see Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (holding that No Fly impediments to air travel do not violate due process liberty interests).

285. *Wieman v. Updegraff*, 344 U.S. 183, 218-19 (1952).

286. *Id.* at 218.

the Court, however, allowed what amounted to dismissal on security grounds without a hearing.<sup>287</sup> Denial of a license to practice an occupation was also held to implicate due process rights.<sup>288</sup>

In the intervening years, the right to a hearing before being disqualified from public employment has only increased.<sup>289</sup> While whether a hearing must be held before or after suspension from work is an issue,<sup>290</sup> there is no question that notice and an opportunity to be heard are constitutionally required before a person can be removed permanently from employment that is not held at will.<sup>291</sup> A public employee could not, therefore, ordinarily be dismissed from a job for no more than her inclusion on a watch list.<sup>292</sup> The same would apply to licensing. Dismissal from public employment or denial of occupational licensing based on anonymous and un-cross-examined allegations appears to be an abandoned relic of the McCarthy era.<sup>293</sup> This is as it should be, given the substantial private interest at stake and the high risks of error. Incipient steps toward using watch lists to bar people from licenses or employment in the transportation industry<sup>294</sup> or other fields considered special terrorist targets, therefore, should be rejected on both policy and constitutional grounds.<sup>295</sup>

## VI. CONCLUSION

The McCarthy and post-September 11 eras are times of menace, and perhaps more importantly, fear of menace. Though the nature and

287. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 898–99 (1961) (finding that dismissal on “security” grounds from food service position on military base, without further specification, did not impair other employment opportunities.)

288. *Schwabe v. Bd. of Bar Examiners*, 353 U.S. 232, 238–39 (1957).

289. *See Bd. of Regents v. Roth*, 408 U.S. 564, 573–74 (1972).

290. *Compare Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), *with Gilbert v. Homar*, 520 U.S. 924, 934 (1997), *and Barry v. Barchi*, 443 U.S. 55, 65 (1979).

291. *Loudermill*, 470 U.S. at 542; *Roth*, 408 U.S. at 569–70.

292. The information underlying the watch listing, of course, could be the basis for employment termination under relevant standards if presented in a hearing. If the government chooses not to disclose confidential information that would prove the grounds for the dismissal, then it, rather than the employee, should suffer the loss. The opposite seems to be the case when the dismissed employee sues the government. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (referring to the need “to balance [an employee’s] need for access to proof . . . against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission”); *Sterling v. Tenet*, 416 F.3d 338, 348–49 (4th Cir. 2005) (dismissing former CIA officer’s Title VII case because it would require disclosure of state secrets concerning CIA operations).

293. *See supra* text accompanying notes 70–72.

294. *See supra* text accompanying notes 141–42.

295. These conclusions apply to watch lists as they now operate. They would change if, for example, watch listing were preceded by an adversarial process. A fundamental corollary of the three factor balance of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is that an increase in process will allow a greater impact on private interests, just as the reverse is also true.

degree of their threats may differ, the two periods share an intense public desire to identify and apprehend those individuals who are bent on undermining our most basic security *before* they act. Our enemies, while few in number, attempt to lurk among the population at large. How then are we to find these dangerous few needles in a vast haystack of the innocent? In particular, what should the process to designate these suspicious individuals entail?

In both periods, the country turned to administrative measures to label those perceived to be the greatest risks.<sup>296</sup> The blacklisting and loyalty-security investigations of the McCarthy era are now widely viewed as, if not completely unnecessary, at least wildly overinclusive and trenching on First Amendment and due process rights.<sup>297</sup> Have we learned from the excesses of that time as we ramp up anti-terrorist watch lists—the blacklists of today?

On the one hand, the private sanctions of the McCarthy era, most strikingly embodied in industry blacklists, largely have been avoided. On the other hand, watch listing has both repeated some of the failings of the McCarthy era and moved on to develop some new ones of its own. In the former category lies the use of vague and overbroad standards for labeling people as dangerous. This practice seems to be coupled (“seems” in the case of watch lists because their criteria are not public) with the use of behavioral proxies for threat, often in the form of personal associations. All of this amounts, in both cases, to a net cast so widely that it catches many, many dolphins along with, perhaps, a few sharks.

The McCarthy era employed a vast apparatus to separate these two categories in its loyalty-security investigations. Although the procedures did not totally mitigate the effects of their vague criteria, and although they were skewed against the individual, the loyalty-security determinations did provide the accused some opportunity to respond to allegations of security risk. Nevertheless, many people who posed absolutely no peril to U.S. security suffered grievous harm. Anti-terrorist watch listing has regressed in that it involves opaque, completely *ex parte* labeling—a technique that is quicker and cheaper than that used in the 1950s but even less fair. As a predictive method that appears to tolerate fairly low probabilities of accuracy, watch listing assumes—and, so far, accepts—a high number of false positives. This problem could be mitigated somewhat by more restrictive criteria or by adding some adversarial process,

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296. Cole, *supra* note 6, at 3 (marking on the resort to administrative sanctions in reaction to the attacks of September 11).

297. See, e.g., Redish, *supra* note 19, at 15 (concluding that “the American government was responsible for wholly unjustified political repression of an unpopular ideology, in a manner ominously reminiscent of a totalitarian regime”).

but the costs of both are not inconsiderable. Under these circumstances, the critical issue with watch lists and other designations of the putatively dangerous is just what consequence that label should carry.

As this Article has shown, anti-terrorist watch lists can serve some useful functions, such as separating individuals deserving of increased investigative attention from those who are not. Watch lists will never be complete, or completely accurate, but they serve as a place to start. They should not, however, be the ground for consequences more serious than the denial of a visa, the initiation of an investigation, or minor impositions on liberty involving delay, but not denial, of access to locations or transportation. If their role is seen as one of limitation as well as opportunity, watch lists can and should be preserved. Their restriction to these uses would avoid the McCarthy era's insidious combination of a vague standard, little process, and serious consequences. Designating a list of people to *watch* is an acceptable part of a larger anti-terrorism strategy—a component that can help protect the country without repeating one of its darker chapters.