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## THE UNREASONABLE RISE OF REASONABLE SUSPICION: TERRORIST WATCHLISTS AND *TERRY V. OHIO*

Jeffrey Kahn \*

I cannot inform you that you have been charged with anything or, rather, I do not know whether you have been or not. You have been arrested, that is a fact, and that is all I know.

—Franz Kafka, *The Trial*<sup>1</sup>

Falling under official suspicion is not a crime punishable by any law in the United States, nor may anyone be arrested merely on suspicion of having committed some other crime.<sup>2</sup> In 1968, however, the Supreme Court decided *Terry v. Ohio* and those assurances of liberty became less absolute.<sup>3</sup> After *Terry*, a “reasonable suspicion” of illicit activity has been enough for a police officer to briefly detain a person without triggering any constitutional protections.<sup>4</sup> Although not subject to arrest unless and until the officer has probable cause to believe that person has committed or is about to commit a crime, the person is not free to walk away from the officer.

Freedom of movement may not be the only liberty lost, as shown by even a brief survey of *Terry*’s trajectory in the opinions that followed it. For example, may police compel the detainee to provide information they seek during such detention? Chief Justice Warren avoided this question in his opinion for the Court in *Terry*;<sup>5</sup>

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<sup>1</sup> FRANZ KAFKA, *THE TRIAL* 12–13 (Mike Mitchell trans., Oxford World’s Classics 2009) (1925).

<sup>2</sup> William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 *YALE L.J.* 1, 12 (1960) (“There is no crime known as ‘suspicion.’ Nor is there any federal crime known as ‘holding for investigation.’”). Justice Douglas’s article is cited in Brief for Petitioner at 18 n.4, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67). Lest it be thought that “crime of suspicion” is merely a rhetorical device, a would-be companion case to *Terry* that was dismissed as improvidently granted seems to have involved this uncodified infraction. See *Wainwright v. City of New Orleans*, 392 U.S. 598, 613 (1968) (Douglas, J., dissenting) (“The circumstances of this case show that the arrest was no more than arrest on suspicion . . .”).

<sup>3</sup> See 392 U.S. 1 (1968).

<sup>4</sup> *Id.* Of course, the protections of the Fourth Amendment only became applicable to the conduct of state officials following *Wolf v. Colorado*, 338 U.S. 25 (1949) (holding that the Fourth Amendment applies to state searches and seizures, as well as the warrant requirement), and *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states).

<sup>5</sup> See 392 U.S. at 19 n.16 (“We thus decide nothing today concerning the constitutional

Justices Harlan and White answered it differently in separate concurrences on which, the opinion being 8–1, the holding did not depend.<sup>6</sup> In 1984, the Court noted “the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda* [*v. Arizona*]” in holding that *Miranda* warnings need not be given during a non-custodial traffic stop, which the Court analogized to a *Terry* stop.<sup>7</sup> In 1985, the Court recognized that the merely reasonably suspicious police officer may in some circumstances detain a person in order to obtain his or her fingerprints.<sup>8</sup> In 2004, the Court upheld a state law interpreted to compel a person to identify himself or herself during a *Terry* stop under threat of criminal conviction for giving an untruthful answer or remaining silent.<sup>9</sup> The law remains unclear about

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propriety of an investigative ‘seizure’ upon less than probable cause for purposes of ‘detention’ and/or interrogation.”).

<sup>6</sup> *See id.* Justice Harlan appeared to grant the police a right to compel at least some answers. *Id.* at 32–33 (Harlan, J., concurring) (stating that the officer’s “right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away”). Justice White believed that the detainee could stand silent. *Id.* at 34 (White, J., concurring) (“Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.”).

<sup>7</sup> *Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984) (“[T]he usual traffic stop is more analogous to a so-called ‘*Terry* stop’ . . . . The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not ‘in custody’ for the purposes of *Miranda*.” (internal citation omitted)).

<sup>8</sup> *See Hayes v. Florida*, 470 U.S. 811, 816–17 (1985) (“None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment. . . . There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect’s connection with that crime, and if the procedure is carried out with dispatch.”).

<sup>9</sup> *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187 (2004). The Court interpreted the state law narrowly: “Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.” *Id.* at 185. The Court was dismissive of Hiibel’s liberty interest: “As best we can tell, petitioner refused to identify himself only because he thought his name was none of the officer’s business.” *Id.* at 190. Hiibel thus lacked any “reasonable belief that the disclosure would tend to incriminate him” in a way that implicated his Fifth Amendment rights, leaving that question open for another day. *Id.* at 191 (“Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances. . . . Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here.”). Justice Stevens’s dissent, on the other hand, foreshadowed the world of terrorist watchlists, noting:

what other information the officer may compel, or by what means, in connection with a *Terry* stop.

*Terry*'s "reasonable suspicion" test was created in the context of domestic law enforcement, but it did not remain there. This Essay examines the effect of transplanting this test into a new context: the world of terrorist watchlists. In this new context, reasonable suspicion is the standard used to authorize the infringement on liberty that often results from being watchlisted. But nothing else from the case that created that standard remains the same. The government official changes from a local police officer to an anonymous member of the intelligence community. The purpose changes from crime prevention to counterterrorism. The technology changes from a police officer's notebook or filed report to a massive and remote computer databank. And, most significantly, the person who determines whether the reasonable suspicion standard has been met changes from a neutral and detached magistrate to the executive official who harbored the suspicion in the first place.

Forty years after *Terry v. Ohio*, lawyers and analysts at the FBI's Terrorist Screening Center (TSC) expressly drew from that case the reasonable suspicion test used to populate the many watchlists that are used to fulfill its national security mission. The repercussions of landing on a watchlist can be severe: access to commercial aircraft can be denied; visas can be revoked; a job can be lost. And intrepid politicians (not to mention the TSC itself) have not been shy about expanding the reach of watchlists to other areas of life with a pithy logic that is as tweetable as it is deeply flawed. "If you are too dangerous to fly, then surely you are too dangerous to . . ." fill in the blank: own a gun, obtain a hazmat license, attend the Super Bowl.<sup>10</sup>

In this short Essay, I make two points about this unusual legal transplant<sup>11</sup> from the world of crime-fighting to a world in which, once information about a person is entered into the system, "it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away."<sup>12</sup> The first point, as Yogi Berra once said, is that applying the reasonable suspicion standard to terrorist watchlists was a case of "*déjà vu* all over again": the same arguments made in support of lowering the standard for police to detain people they could not arrest were used to justify its application to the world of watchlists. We

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"A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases." *Id.* at 196 (Stevens, J., dissenting).

<sup>10</sup> See discussion *infra* Part III.

<sup>11</sup> See ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993). The use of Alan Watson's famous transplant metaphor, originally used in the context of comparative law, is deliberate (and, I suppose, ironic given my own transplant of his concept). When a legal rule is moved from its original context to a new environment, rarely is its effect predictable or even the rule itself left unchanged by the transplant. This is as true when a legal rule moves from one country to another as when it moves within a single country to address a different goal or problem.

<sup>12</sup> *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 928 (N.D. Cal. 2014).

shouldn't be surprised; the pragmatic pressures that justified lowering the standard in the context of law enforcement are no different in the context of national security.

The second point is more chilling. The watchlisters have consistently fought to adopt the reasonable suspicion standard while casting aside the structural check that the Supreme Court deemed essential to its constitutional use: the judiciary. In the crime-fighting world of *Terry*, the expected appearance of the accused before a magistrate was the norm used to minimize the impact of detention based on this lower standard. In the world of terrorist watchlists, however, appearance before a magistrate has always been an undesired end, to be avoided at all costs.<sup>13</sup>

In 1968, this same argument for autonomy was made by police regarding “the rapidly unfolding and often dangerous situations on city streets” that some characterized as a war on crime.<sup>14</sup> Back then, John Terry’s lawyers convincingly argued against “an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in ‘the often competitive enterprise of ferreting out crime.’”<sup>15</sup>

Less successful have been the litigants arguing for judicial supervision over the use of watchlists in what President George W. Bush (in whose administration they first proliferated) called the “war on terror.”<sup>16</sup> Their lawsuits provide insight into what government action looks like when the reasonable suspicion standard is freed from judicial oversight. The result is not pretty: this new context and technology only serve to magnify the pressures to which human nature are susceptible in an essentially unchanged “competitive enterprise of ferreting out”<sup>17</sup> real and perceived terrorists. The incentives (and fears) that promote watchlisting are often stronger for the analyst making a decision in front of a computer monitor.<sup>18</sup> Why would an analyst choose to err on the side of *not* putting someone on a watchlist?

The *Terry* Court could not have imagined the digital world of terrorist watchlists, but it did have the foresight to realize the danger presented by executive officials unconstrained by the separation of powers. Courts could enforce compliance with

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<sup>13</sup> See JEFFREY KAHN, *MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* 3–4 (2013).

<sup>14</sup> *Terry*, 392 U.S. at 10.

<sup>15</sup> *Id.* at 12 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

<sup>16</sup> President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript available at *A Nation Challenged: President Bush’s Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES (Sept. 21, 2001), <http://www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html>).

<sup>17</sup> *Terry*, 392 U.S. at 12 (quoting *Johnson*, 333 U.S. at 14).

<sup>18</sup> See Jeffrey Kahn, *Terrorist Watchlists*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW* 71, 87 (David Gray & Stephen E. Henderson eds., 2017) (quoting first TSC Director Donna Bucella that “to err on the side of caution, individuals with any degree of a terrorism nexus were included” in the Terrorist Screening Database).

the Fourth Amendment with an exclusionary rule that forbade use at trial of improperly obtained evidence because a courtroom was the inevitable last step in the process that started with an arrest. But that rule “is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”<sup>19</sup> The goal of terrorist watchlists is not prosecution or even law enforcement; watchlists are used to investigate, disrupt, and prevent terrorist activity in ways that do not inevitably (in fact quite rarely) lead to an open hearing in court.<sup>20</sup>

In the sections that follow, I briefly summarize the *Terry* case to highlight its essential features. I then provide an equally brief summary of the systems and institutions of terrorist watchlisting that emerged after the terrorist attacks of September 11, 2001, and document how the *Terry* reasonable suspicion standard was incorporated into them. I then make some predictions about how watchlisting systems will continue to use the reasonable suspicion standard, but not with a steadfast opposition to meaningful judicial supervision, which is not the way that its judicial originators intended.

### I. *TERRY V. OHIO*

*Terry v. Ohio* came to the Supreme Court because Cleveland Police Detective Martin McFadden suspected John Terry and two confederates of “casing a job, a stick-up” of a jewelry store in downtown Cleveland one afternoon.<sup>21</sup> After watching them walk up and down a city block for ten or twelve minutes, McFadden approached the trio and asked for their names.<sup>22</sup> Unsatisfied with the mumbled response, “McFadden grabbed petitioner Terry, spun him around . . . and patted down the outside of his clothing.”<sup>23</sup> Repeating the pat down on the others, two guns were found, leading to Terry’s conviction for carrying concealed weapons.<sup>24</sup>

The trial court denied a motion to suppress this evidence because, although McFadden lacked probable cause to arrest the men for carrying concealed weapons when he stopped and frisked them, “the defendants were conducting themselves suspiciously, and some interrogation should be made of their action.”<sup>25</sup> Ohio’s appellate courts declined to overturn the trial court on this point, and the United States Supreme Court affirmed the convictions by a vote of 8–1 (Justice Douglas dissenting).

The Court did so not by distinguishing a stop-and-frisk procedure from the searches and seizures governed by the Fourth Amendment, which was the approach of the lower courts.<sup>26</sup> Rather, the Court took a pragmatic view of what it euphemistically

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<sup>19</sup> *Terry*, 392 U.S. at 14.

<sup>20</sup> See generally KAHN, *supra* note 13.

<sup>21</sup> *Terry*, 392 U.S. at 6.

<sup>22</sup> See *id.* at 6–7.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> See *id.* at 7–8.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> See *id.* at 10 & n.3, 16 & n.12.

called “encounters between citizens and police officers [that] are incredibly rich in diversity.”<sup>27</sup> The Court did not wish to hobble the police by requiring probable cause for every such “encounter,” even the involuntary ones.

As a result, the *Terry* stop was born. This new standard required that the officer “be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>28</sup> So long as the stop was relatively brief, the Supreme Court held that the Fourth Amendment would not be violated by the officer’s interference with a person’s liberty in the name of “effective crime prevention and detection . . . .”<sup>29</sup> Nor did the Court think such a short-lived intrusion could deprive someone of liberty within the meaning of the due process clauses of the Fifth or Fourteenth Amendments.<sup>30</sup>

Why did the *Terry* Court think police could stop people like this?<sup>31</sup> Most of all, because if anything came of the police officer’s action, a judge would be interposed between the stop and any criminal sanction.<sup>32</sup> If no arrest resulted from the stop, no harm was done; the detention was a brief inconvenience necessary for “effective crime prevention and detection.”<sup>33</sup> But the Court believed that if the initial reasonable suspicion that permitted the *Terry* stop should develop into probable cause to arrest, then what was crucial was the inevitable intercession of a magistrate to independently assess the state’s actions—to police the police—and offer a remedy for any excesses.<sup>34</sup>

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<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.* at 21. In case of any doubt, Justice Harlan’s concurring opinion confirms his view that the Court has determined that the police officer “ha[s] constitutional grounds to insist on an encounter, to make a *forcible* stop.” *Id.* at 32. Justice White, separately concurring, agreed: “[T]he person may be briefly detained against his will while pertinent questions are directed to him.” *Id.* at 34.

<sup>29</sup> *Id.* at 22 (majority opinion). The second part of the opinion, concerning the frisk for purposes of officer safety, is not relevant to terrorist watchlists, although the reasonableness test is essentially the same as that permitting the initial stop: “[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Id.* at 27 (citation omitted).

<sup>30</sup> *See id.* at 30–31. In fact, although understandable given the Fourth Amendment context of a motion to suppress evidence of an unlawful arrest, no party or amicus brief even raised the broader liberty point, and the Court did not entertain the idea *sua sponte* either during oral argument or in its opinion. *See generally* 66 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 301–718 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>31</sup> Justice Douglas dissented, and clearly did not think the police had such a dominion: “To give power to the police to seize a person on some grounds different from or less than ‘probable cause’ would be handing them *more* authority than could be exercised by a magistrate in issuing a warrant to seize a person.” *Terry*, 392 U.S. at 36 n.3.

<sup>32</sup> *Id.* at 21 (majority opinion).

<sup>33</sup> *Id.* at 22.

<sup>34</sup> *See id.* at 21.

Immediately after stating the reasonable suspicion standard, Chief Justice Earl Warren wrote:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.<sup>35</sup>

Scholars point to historical practices that confirm that this could occur either at a criminal trial or through a civil suit by someone aggrieved by police conduct but deprived of a criminal justice forum in which to complain about it.<sup>36</sup>

Since 1968, the reasonable suspicion standard has crept into other aspects of criminal justice and the Fourth Amendment. A reasonable suspicion is now sufficient for public school authorities to search a student<sup>37</sup> and for a public employer to search for work-related offenses by an employee.<sup>38</sup> In 1983, the Court approved reasonable suspicion-based area searches beyond the detainee's person or reach at places where "investigative detentions" had occurred (e.g., the passenger compartment of a car);<sup>39</sup> building on that case seven years later, the Court permitted "protective sweeps" following arrests made at a person's home.<sup>40</sup> In 1995, the Court held that a reasonable suspicion, not probable cause, was sufficient for the no-knock aspect of an otherwise lawful warrant.<sup>41</sup> In 2001, the Court held that reasonable suspicion was sufficient to conduct a search of a probationer's house.<sup>42</sup> In many states, reasonable suspicion is the standard that sets the threshold for individuals required to report child abuse to a government official.<sup>43</sup> In every case, however, the

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<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g.,* Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1111 (1998) ("If officers searched with a valid warrant, they could not be sued for simply carrying out that warrant within its terms; however, if they lacked a warrant and nonetheless decided to search or seize, they risked a trespass lawsuit, in which a civil jury would typically decide whether their search or seizure was reasonable."); *see also id.* at 1119 ("The tort law model is not only evident from history, but also deducible from a close reading of text: It is, after all, tort law that generally secures persons against invasions of their persons, houses, papers, and effects.").

<sup>37</sup> *See generally* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>38</sup> *See generally* *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>39</sup> *See generally* *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>40</sup> *See generally* *Maryland v. Buie*, 494 U.S. 325 (1990).

<sup>41</sup> *See generally* *Wilson v. Arkansas*, 514 U.S. 927 (1995).

<sup>42</sup> *See generally* *United States v. Knights*, 534 U.S. 112 (2001).

<sup>43</sup> *See, e.g.,* CAL. PENAL CODE § 11166 (West 2017); N.M. STAT. ANN. § 32A-4-3 (West 2017); VT. STAT. ANN. tit. 33, § 4913 (West 2017).

judicial backstop that made constitutional protections “meaningful” in *Terry* stands ready to evaluate the reasonableness of that suspicion.

Terrorist watchlists are not run by local police and do not involve state or federal criminal law.<sup>44</sup> So with an eye to the next section of this Essay, one final word should be made about Chief Justice Warren’s placement of such a high value on access to a neutral, third-party magistrate. What held true in the criminal context for the role of the judiciary is just as “meaningful” in civil contexts.<sup>45</sup> Our administrative law state is premised on the idea that when government officials issue orders or make decisions that affect an individual’s liberty or property—e.g., by denying or revoking a license, imposing a fine, seizing property, or prohibiting some conduct—their initial judgment is rarely the end of the matter.<sup>46</sup> “Judicial review is essential to the legitimacy of the administrative process; it is the balance wheel of administrative law.”<sup>47</sup>

## II. TERRORIST WATCHLISTS

When someone’s name is placed on a terrorist watchlist—the most well-known of such things is the so-called No-Fly List<sup>48</sup>—there is no Fourth Amendment issue. No one is subject to a search (beyond the generally applicable, suspicionless administrative searches at airport security checkpoints) for being no-flieed.<sup>49</sup> And no one is seized; the hapless would-be traveler has broken no law. There is, however, a substantial deprivation of liberty that implicates procedural aspects of due process, if not the substantive component as well.<sup>50</sup> And, if the traveler is a citizen overseas,

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<sup>44</sup> See KAHN, *supra* note 13, at 166–72.

<sup>45</sup> Indeed, Chief Justice Warren emphasized that this holding (declining to find a Fourth Amendment violation) “should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.” *Terry*, 392 U.S. at 15.

<sup>46</sup> See 5 U.S.C. §§ 701–706 (2012).

<sup>47</sup> BERNARD SCHWARTZ, ADMINISTRATIVE LAW 470 (3d ed. 1991) (internal footnote omitted).

<sup>48</sup> There are many watchlists that involve many different government agencies and operations. This Essay focuses on the No-Fly List for reason of the more extensive litigation that has resulted from it. For a broader description of the universe of watchlists, see KAHN, *supra* note 13. An increasingly complete repository of watchlist litigation documents is available at my website, <http://www.watchlistlaw.com> [<https://perma.cc/ZU6N-QSP5>].

<sup>49</sup> Another watchlist, the Selectee List, does result in enhanced security screening at airport security checkpoints. These checkpoint searches have been held to be reasonable under the Fourth Amendment. See *United States v. Aukai*, 497 F.3d 955, 959–60 (9th Cir. 2007). To my knowledge, only one lawsuit has been attempted by someone placed on the Selectee List, a pilot named Erich Scherfen. See *Scherfen v. U.S. Dep’t of Homeland Sec.*, No. 3:CV-08-1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010). After delays that nearly cost Scherfen his job, DHS successfully moved to dismiss his complaint for lack of a continuing injury-in-fact. See KAHN, *supra* note 13, at 22–25.

<sup>50</sup> See *Latif v. Holder*, 969 F. Supp. 2d 1293, 1303 (D. Or. 2013). Until relatively recently, this fact was fiercely contested by the watchlisting community as defended by the Department

the *de facto* exile that may be accomplished by the No-Fly List has profound implications for the relationship between citizen and state.<sup>51</sup>

Understanding the current system requires a brief journey back in time. Aviation security was originally the responsibility of the Federal Aviation Administration (FAA).<sup>52</sup> An abrupt rise in hijackings in the 1960s, and more violent terrorist attacks in the 1970s and 1980s, led to an increasing array of tools to protect passengers.<sup>53</sup> The most significant of these tools was created after the 1988 bombing of Pan Am Flight 103 over Lockerbie.<sup>54</sup> The FAA began to issue what it called security directives whenever it could identify a “specific and credible threat” to civil aviation, a test that set a fairly high bar.<sup>55</sup> These were obligatory orders to airlines to take concrete security actions of various kinds, including barring a particular passenger from a flight.<sup>56</sup> Such name-based security directives were slow and cumbersome—they were sent by fax to airline security directors and required the sign-off of other federal agencies whose intelligence the FAA used.<sup>57</sup> But these security directives were the original “No Fly List,” and would be the vehicle for the future one.

On September 10, 2001, the latest FAA Security Directives identified twelve people deemed to pose a direct threat to civil aviation (none of them were among the nineteen terrorists who perpetrated the attack the following day).<sup>58</sup> This disturbing result was a function of two problems. First, a lack of interest in the FAA’s security role; an aircraft hadn’t been hijacked in the United States for ten years.<sup>59</sup> Second, a lack of intelligence sharing among the many federal agencies that tended to hoard their information, sources and methods of intelligence gathering. The agencies were more competitive than collaborative.<sup>60</sup>

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of Justice (DOJ). DOJ repeatedly characterized the alleged injury as an inconvenience to one mode of transportation, not a deprivation of freedom of movement. *See* discussion *infra* Conclusion. In more than one lawsuit, DOJ pointed to the existence of passenger and cargo ships, though often failing to mention the existence of a maritime watchlist, too. *See* Kahn, *supra* note 18, at 93–94, 93 n.95.

<sup>51</sup> *See* 49 U.S.C. § 44902 (2012).

<sup>52</sup> *See, e.g.*, KAHN, *supra* note 13, at 128–34 (discussing the FAA’s authority over air safety).

<sup>53</sup> *Id.* at 126–36 (detailing the FAA’s attempts to secure air safety).

<sup>54</sup> *Id.* at 132.

<sup>55</sup> *Id.* at 133.

<sup>56</sup> Private airlines, fearful of lawsuits, liked this approach. Even though Congress had given them statutory authority since 1961 to “refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety,” now codified at 49 U.S.C. § 44902(b), security directives provided a government determination that served to backstop any decision by the airline to take advantage of this exemption from its normal common carrier obligations. *Cf.* KAHN, *supra* note 13, at 133–34.

<sup>57</sup> KAHN, *supra* note 13, at 133–34.

<sup>58</sup> *See id.* at 136.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 136–37.

Correcting these two flaws became a central interest after 9/11. The little-known and under-used security directive was suddenly very popular.<sup>61</sup> Databases at the FBI, State Department, and elsewhere that had previously operated in separate silos, guarded by agencies unwilling to share intelligence with each other, were quickly consolidated to create the No-Fly List.<sup>62</sup> When the Transportation Security Administration (TSA) was created by Congress in November 2001, the power to issue these security directives was transferred from the FAA to the TSA.<sup>63</sup>

Within two months, sixteen names became 400 names; by December 2001, almost six hundred people were on what was now called the No-Fly List.<sup>64</sup> More and more FBI Special Agents were soon submitting names for watchlisting.<sup>65</sup> There was no reason not to do so—who wanted to explain after a terrorist attack why the perpetrator had *not* been watchlisted? Indeed, the FBI's dominating position in adding names to the No-Fly List sometimes made it hard to perceive who was in charge.<sup>66</sup> FBI agents expected their nominations to be quickly added to the list, while the fledgling TSA, flush with the attention of its carry-over security directive, sought to stake out its turf.<sup>67</sup> FBI agents quickly realized an ulterior use for watchlisting: not just to address a “specific and credible threat” to civil aviation, but to further their counterterrorism investigations.<sup>68</sup> The No-Fly List was a useful tool to coerce informants and question people abroad. Congress subtly recognized this expanded role for security directives, authorizing the use of databases to identify individuals “who may pose a risk to transportation or national security.”<sup>69</sup> The disjunctive meant that the old FAA security directive could now be used even when civil aviation, or even transportation generally, was not the subject of concern.

At the same time that the No-Fly List was expanding so rapidly, the Bush Administration sought to correct the other problem: the lack of intelligence sharing that hobbled the use of security directives by the FAA in the past. To do this, two new institutions were created within the Intelligence Community. First, what eventually became known as the National Counterterrorism Center (NCTC) was established with headquarters in McLean, Virginia.<sup>70</sup> Congress tasked the NCTC with responsibility for gathering in one place all intelligence on international terrorism held by

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<sup>61</sup> See *id.* at 173–84 (detailing the shift in usage of the security directive post-9/11).

<sup>62</sup> See *id.* at 136, 173–84.

<sup>63</sup> *Id.* at 139.

<sup>64</sup> See Kahn, *supra* note 18, at 88 tbl.3.2.

<sup>65</sup> See KAHN, *supra* note 13, at 154–66.

<sup>66</sup> *Id.* at 160–71 (discussing the list, its criteria, and the process).

<sup>67</sup> *Id.* at 140–45.

<sup>68</sup> See *id.* at 31, 46, 52, 175; see also Kahn, *supra* note 18, at 78, 90.

<sup>69</sup> Aviation and Transportation Security Act, Pub. L. 107-71, § 101(a), 115 Stat. 597, 599 (2001) (codified at 49 U.S.C. § 114(h)(1) (2012)).

<sup>70</sup> See History, OFF. OF THE DIRECTOR OF NAT'L INTELLIGENCE: NAT'L COUNTER-TERRORISM CTR., <http://www.dni.gov/index.php/nctc-who-we-are/history> [<https://perma.cc/B3AR-3GWL>] (last visited Dec. 4, 2017).

the United States Government.<sup>71</sup> (Intelligence on purely domestic terrorism would continue to be the province of the FBI.)

Second, and of particular importance to the subject of this Essay, a new organization within the FBI was created, the Terrorist Screening Center (TSC).<sup>72</sup> The TSC was not the product of any statute; its existence was and remains solely the product of a presidential order.<sup>73</sup> The job of the TSC was twofold. First, the TSC was tasked to create the Terrorist Screening Database, an unclassified sort of card catalog of the detailed and highly classified intelligence on international terrorism (at the NCTC) and purely domestic terrorism (at the FBI).<sup>74</sup> In the words of the man who designed the system, and who would later become one of the longest serving directors of the TSC, the Terrorist Screening Database was the “bucket that had them all in there.”<sup>75</sup> Second, the TSC would create from the Terrorist Screening Database a variety of watchlists that could be used by various federal, state, and local agencies with the 24/7/365 support of the TSC as liaison between front-line officials and the analysts and sources of intelligence they used.<sup>76</sup> Thus, the TSC would create the content of the No-Fly List that the TSA would then put into effect with a security directive.

### III. TERRY AND TERRORIST WATCHLISTS

As of September 2014, when the most recent official statement was made, the Terrorist Screening Database contained 800,000 identities and the No-Fly List contained 64,000 identities.<sup>77</sup> So how does a person wind up on these watchlists? In the panicked days after 9/11, the No-Fly List was flooded with names on the theory that it could all be sorted out later. It was better to err on the side of caution. But as the list grew, false positives made for embarrassing headlines (the singer Cat Stevens, the senator’s wife Cat Stevens, and plenty of veterans, toddlers and elderly found themselves barred from flights), and distance from September 11 allowed for a collective breath-catching and reassessment, a need to impose greater consistency was felt proper.<sup>78</sup>

Assuming sufficient biographical or biometric details to identify an individual, the watchlisting community established different substantive criteria for placing a person on a watchlist. These started out fairly low. In 2007, merely some “evidence

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<sup>71</sup> Intelligence Reform and Terrorism Prevention Act of 2004 § 1021, 50 U.S.C. § 3056 (Supp. II 2013–2015).

<sup>72</sup> See KAHN, *supra* note 13, at 147–48.

<sup>73</sup> Directive on Integration and Use of Screening Information to Protect Against Terrorism, 39 WEEKLY COMP. PRES. DOC. 1234–35 (Sept. 16, 2003).

<sup>74</sup> See KAHN, *supra* note 13, at 13, 147, 149.

<sup>75</sup> Interview with Timothy Healy, former Dir., Terrorist Screening Ctr., in Washington, D.C. (Dec. 4, 2009) [hereinafter Healy Interview].

<sup>76</sup> See KAHN, *supra* note 13, at 147–48.

<sup>77</sup> *Safeguarding Privacy and Civil Liberties While Keeping Our Skies Safe: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 113th Cong. 25 (2014) (statement of Christopher M. Piehota, Director, Terrorist Screening Center).

<sup>78</sup> See KAHN, *supra* note 13, at 27–32.

of a nexus to terrorism” was required to be nominated to the Terrorist Screening Database.<sup>79</sup> Other watchlists derived from this one used additional criteria that changed over time and in response to different threats.<sup>80</sup>

But how to evaluate whether these criteria were met? This required a standard, which the general counsel to the TSC, Jacqueline “Lyn” Brown, was instrumental in drafting.<sup>81</sup> As the reader will have long since guessed, she took her inspiration from *Terry*. Beginning in 2008, a working group was convened of subject-matter experts from more than a half dozen agencies. The guidance document that the group produced was approved by the Deputies Committee of the White House’s Homeland Security Council in January 2009 and issued as a guide to the watchlisting and intelligence communities for common definitions and standards in the watchlisting process.<sup>82</sup> As TSC Director Timothy Healy told Congress in December 2009, using *Terry*’s phrasing nearly verbatim:

[T]he facts and circumstances pertaining to the nomination must meet the “reasonable suspicion” standard of review established by terrorist screening Presidential Directives. Reasonable suspicion requires “articulable” facts which, taken together with rational inferences, reasonably warrant a determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities, and is based on the totality of the circumstances.<sup>83</sup>

New watchlisting guidance documents were issued in July 2010 and March 2013.<sup>84</sup> But the standard of review has remained constant.<sup>85</sup> The reasonable suspicion standard

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<sup>79</sup> *Id.* at 166.

<sup>80</sup> *Id.* at 166–71.

<sup>81</sup> *Id.* at 303 n.11.

<sup>82</sup> *Id.* at 303 n.12.

<sup>83</sup> *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 91 (2009) (statement of Timothy J. Healy, Director, Terrorist Screening Center). The standard was essentially unchanged as of the latest known watchlisting guidance, dated March 2013, and leaked by *The Intercept*. Jeremy Scahill & Ryan Devereaux, *The Secret Government Rulebook for Labeling You a Terrorist*, THE INTERCEPT (July 23, 2014, 2:45 PM), <https://theintercept.com/2014/07/23/blacklisted> [<https://perma.cc/K32M-WT4R>].

<sup>84</sup> NAT’L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE para. 4.3 (2013), [https://www.eff.org/files/2014/07/24/2013-watchlist-guidance\\_1.pdf](https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf) [<https://perma.cc/8CLV-RU6Z>].

<sup>85</sup> The terms “known terrorist” and “suspected terrorist” have also been defined, with a weird result in applying this standard. A “suspected terrorist,” for example, is defined as someone “who is *reasonably suspected* to be, or ha[s] been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on an articulable and *reasonable suspicion*.” See Healy Interview, *supra* note 75. This led one judge to conclude

had the advantage of appearing to impose limits while allowing greater breadth of discretion.<sup>86</sup> Of course, like the TSC itself, it was entirely a creature of executive discretion. No statute mandated this or any other standard. The watchlisting guidance in which it was found was never meant to be public. There were, and are, no notice-and-comment regulations to govern watchlisting.

The adoption of the *Terry* stop standard by the watchlisting community is a fascinating legal transplant. In an interview, Ms. Brown told me that her working group was well aware of the criminal investigative context that was at the heart of *Terry*. And there was concern expressed about how it might be applied in the intelligence context. As a result, there is no mention of the case by name in their watchlisting guidance and the working group was careful to refer to the “Reasonable Suspicion Standard” and not the “*Terry* Standard.”<sup>87</sup>

There is no reason to think that Ms. Brown consulted the briefs filed in the *Terry* case; she emphasized to me that she and her working group colleagues were careful to use *Terry* only as their inspirational starting point. So it is unlikely that she read Solicitor General Erwin Griswold’s brief for the United States, filed as an *amicus curiae* in *Terry*.<sup>88</sup> But General Griswold’s brief is Cassandra-like in its forecast of the arguments that were to come for the extension of the *Terry* stop into a technological world that hadn’t even been conceived at the time.<sup>89</sup> Referencing the history of England and the colonies, the United States described “a system of watchmen dating back to the Norman kings.”<sup>90</sup> These watchmen, precursors to a modern police force, “ha[d] the power to detain persons, at least at night, until they could account for their presence.”<sup>91</sup> The United States described the system as further support for a distinction between arrest to answer criminal charges—requiring probable cause—and

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that “an American citizen can find himself labeled a suspected terrorist because of a ‘reasonable suspicion’ based on a ‘reasonable suspicion.’” *Mohamed v. Holder*, 995 F. Supp. 2d 520, 531–32 (E.D. Va. 2014).

<sup>86</sup> See *Alabama v. White*, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”).

<sup>87</sup> Interview with Jacqueline Brown, Gen. Counsel, Terrorist Screening Ctr., in Washington, D.C. (Mar. 8, 2010). As Shirin Sinnar reports, then-TSC Director Timothy Healy confirmed that *Terry* was used as “a baseline” in his 2010 testimony to a congressional committee. See Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1598 (2016). Sinnar also describes what she terms occasional “disingenuous” backpedaling on the connection with *Terry*. *Id.*

<sup>88</sup> See Brief for the United States as Amicus Curiae at 6–7, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67).

<sup>89</sup> See *id.*

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

<sup>91</sup> *Id.* at 7.

“[a] limited detention in the course of a police investigation [that] does not contemplate the bringing of an individual into court to answer to specific charges.”<sup>92</sup>

The United States argued that this power finds a “strong justification in the needs of our society,” just as the role of watchmen were necessary centuries before.<sup>93</sup> What is more, the United States asserted, no citizen should feel anything less than civic-minded if stopped pursuant to this authority, which amounted (assuming no wrongdoing) to only a modest inconvenience:

Moreover, it seems appropriate to add that the citizen called upon to respond to such limited inquiry does not suffer the obloquy which may be associated with an arrest. Rather, he is performing the ordinary civic duty, familiar in all organized societies, to provide information in aid of law enforcement.<sup>94</sup>

These were very similar to the motivations and justifications for a broad watchlisting system that would be offered decades later. Interestingly, however, the Solicitor General’s Office took a more limited view of this police power in 1968 than Lyn Brown in 2009. For *Griswold*’s brief invited the courts to take an active role in overseeing its use:

The power of limited detention which we support is one which must be carefully circumscribed, and it is the function of the courts, in keeping with their tradition, to confine it within proper bounds—to chart the course between the recognized danger of police abuse on the one hand and the not insignificant danger of police paralysis on the other.<sup>95</sup>

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<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.* at 10. Indeed, this earlier willingness of the United States to limit the use of the “reasonable suspicion”-based detention would seem to run against the very nature of terrorist watchlists:

[T]he constitutional standard must be one of reasonableness under the circumstances. When the suspected offense is not serious and a modicum of essential information (*e.g.*, the suspect’s identity and address) has been obtained, so that the police would suffer little more than inconvenience if the citizen were permitted to go his way, it is reasonable to restrict the allowable period of the detention to very narrow limits. Conversely, where the person is unknown to the police, the offense under investigation is serious, and the suspect’s explanation is equivocal, a detention for a somewhat longer (though not protracted) period would seem proper, at least where the questioning is on the scene.

*Id.* at 13. Nothing in this description fits watchlisting, in which the “suspect’s identity and address” or other biographical details are necessarily known and there is no offense to investigate.

The Court recognized that the exclusionary rule would be the most obvious mechanism of enforcing these boundaries, but went out of its way to state further that “our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.”<sup>96</sup>

The view of the watchlisting community was just the opposite. When forced into a courtroom, the Justice Department fought for the watchlisters’ near complete autonomy, and did so by arguing for near complete deference to its expertise and its procedures, while seeking to shield the actual decision makers from judicial, not to mention public, scrutiny. If a lawsuit was filed against the TSC, the Justice Department moved to dismiss on the grounds that the TSA was an indispensable party that could not be joined in the district court.<sup>97</sup> This was accomplished by arguing that an old statute (first established for the FAA) required legal challenges to TSA orders (such as the security directives that put the No-Fly List into effect) to be brought in one of the U.S. courts of appeals.<sup>98</sup> This provision was almost certainly intended for standard FAA administrative actions—license revocations, permits, etc.—the sort of matters in which an administrative record really would constitute the universe of information necessary to adjudicate the dispute. (There is no record of anyone subject to a pre-9/11 security directive challenging that placement in court or anywhere else.) But in the new context of terrorist watchlists, in which the record was very much in dispute, this had the effect of preventing discovery, witness testimony, and other forms of testing the reasonableness of the agency’s suspicion by limiting review to the agency’s administrative record, which was often sealed for national security reasons.<sup>99</sup>

The value of that adversarial process, presumed so essential in the original *Terry* case, was brought home in the only No-Fly List case to overcome these impediments and receive an actual bench trial. Rahinah Ibrahim fought for her day in court for eight years after she found herself placed on numerous watchlists and stripped of her

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<sup>96</sup> *Terry*, 392 U.S. at 15.

<sup>97</sup> *See, e.g.*, Ibrahim v. Dep’t of Homeland Sec., 62 F. Supp. 3d 909, 911 (N.D. Cal. 2014).

<sup>98</sup> *See* 49 U.S.C. § 46110 (2012).

<sup>99</sup> A peripheral but important point is worth mentioning here: law trails technology. Thus, there is a certain pernicious quality to applying a doctrine like the one developed in *Terry v. Ohio*—a world that lacked portable radios (let alone camera-equipped cell phones) or even a 911 telephone system—to a world of near ubiquitous electronic surveillance in most major urban areas. *See* James J. Fyfe, *Terry: A[n Ex-]Cop’s View*, 72 ST. JOHN’S L. REV. 1231, 1232 (1998); Reuben M. Payne, *The Prosecutor’s Perspective on Terry: Detective McFadden Had a Right to Protect Himself*, 72 ST. JOHN’S L. REV. 733, 736 (1998). Similarly, there is a danger in the unexamined shift of an old FAA statute designed for a quite standard administrative law context to apply in the novel administrative law context of multi-agency shared action often reliant on classified national security information.

student visa.<sup>100</sup> After two trips to the Ninth Circuit to battle against jurisdictional defenses, she was finally able to force the FBI Special Agent who nominated her to these watchlists to sit for a deposition, where the truth of his incompetence was revealed.<sup>101</sup> In the words of Judge Alsup:

At long last, the government has conceded that plaintiff poses no threat to air safety or national security and should never have been placed on the no-fly list. She got there by human error within the FBI. This too is conceded. This was no minor human error but an error with palpable impact, leading to the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler. That it was human error may seem hard to accept—the FBI agent filled out the nomination form in a way *exactly* opposite from the instruction on the form, a bureaucratic analogy to a surgeon amputating the wrong digit . . . .<sup>102</sup>

It is worth pausing to explore the effect of structuring a nomination form in the way the TSC structured this one. The approach taken in this nomination form was to assume that a person should be nominated to *all* available watchlists.<sup>103</sup> The instructions to the FBI Agent filling out the form were to opt out of any watchlists *not* desired, rather than to select the one (or more than one) that *was* desired.<sup>104</sup> (Thus, this agent's error seemed to be a failure to read the directions: he ticked the boxes with the mindset of opting *in* to each one individually, not opting *out* of automatic inclusion in all.<sup>105</sup>) These instructions are further evidence of the importance of a structural check in the person of a neutral, third-party magistrate.<sup>106</sup> The instructions are not written to facilitate an FBI Agent (in the words of *Terry* and its parroting by TSC Director Healy) who sought to “be able to point to specific and articulable facts [that] . . . reasonably warrant that intrusion” caused by nomination to each watchlist.<sup>107</sup> Rather, the instructions encouraged a sweeping approach that took extra effort to individualize based on the actual facts known or surmised.<sup>108</sup> It is hard to square a nomination form designed with such a blanket approach with the intent to limit the intrusion of watchlists to what the facts “reasonably warrant” in each particular case.

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<sup>100</sup> See generally *Ibrahim*, 62 F. Supp. 3d at 915–27. Full disclosure: I testified as an expert witness for the plaintiff in this case.

<sup>101</sup> *Id.* at 911–12, 916.

<sup>102</sup> *Id.* at 927–28.

<sup>103</sup> See *id.* at 916.

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*; *Terry*, 392 U.S. at 21–22.

<sup>107</sup> See *Terry*, 392 U.S. at 21.

<sup>108</sup> See, e.g., *Ibrahim*, 62 F. Supp. 3d at 916 (discussing the process of selecting an individual for the No-Fly List).

One more amicus brief filed in *Terry* is worth mentioning in this context: the one authored by Jack Greenberg and other lawyers for the NAACP.<sup>109</sup> This was a classic Brandeis brief designed with one purpose in mind: to represent the views of “the potential victim both of crime and of law enforcement” who, due to racial prejudice, was more likely to suffer police abuse of a “reasonable suspicion” standard than police protection from it.<sup>110</sup> The essential problem that the NAACP found with the flexible reasonable suspicion standard is just what made it so appealing to the watchlisters:

For the native quality of “reasonable suspicion” . . . consists precisely in judicial recognition of the trained police “hunch” or “intuition,” without more, as the basis for legitimating police action. All of the mysticism of police expertise, of police “feel” for a street situation, is invoked here. Judges are not expected to detach themselves from the reasoning processes of the police. They are not to take an independent view of police logic. They are to assimilate police logic and appraise the officer’s work product by its lights. They are to accept the attitudes of police intelligence for the purpose of adjudging the soundness of police guesswork—exclusively in cases, of course, where that guesswork has already proved itself right.<sup>111</sup>

Past and present directors of the TSC have repeatedly vowed that a mere “hunch” is insufficient to pass their version of the reasonable suspicion test.<sup>112</sup> But the nature of watchlisting, of course, is not scientific. Much like the policeman on the beat, the analysts at the TSC are making “predictive judgments” about future conduct. The reasonable suspicion standard, however, implies a certain gloss of expertise, especially when stripped of any meaningful judicial oversight. This gloss was punctured by Justice Marshall during oral argument in *Terry*:

MR. JUSTICE MARSHALL: Mr. Payne, in this case this arresting officer testified, did he not, that he had never seen anybody “case a joint”?

MR. PAYNE [for the Respondent]: That is correct; he did so testify.

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<sup>109</sup> Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67) [hereinafter Brief for NAACP Legal Defense & Educ. Fund].

<sup>110</sup> *Id.* at 7.

<sup>111</sup> *Id.* at 41–42 (internal citations omitted).

<sup>112</sup> It should be noted that the 2013 Watchlisting Guidance confirmed suspicions that numerous exceptions existed to the reasonable suspicion standard. *See, e.g.*, NAT’L COUNTER-TERRORISM CTR., *supra* note 84, at paras. 1.58, 1.59, 3.15.2; *see also* Sinnar, *supra* note 87, at 1593–96.

MR. JUSTICE MARSHALL: He also testified that he had been on that same area for some thirty years, doing the following things: Checking for pick-pockets, and shoplifters?

MR. PAYNE: That's correct.

MR. JUSTICE MARSHALL: So, where did he get his expertise about somebody about to commit a robbery?

MR. PAYNE: I think that he would get his expertise by virtue of the fact that he had been a member of the police department for forty years, and by being a member of the police department for forty years I am quite sure that, even if by osmosis, some knowledge would have to come to him of the various degrees of crimes—

MR. JUSTICE MARSHALL: Now we're getting intuition by osmosis? [Laughter.]<sup>113</sup>

Under the heading “The Genius of Probable Cause,” Greenberg emphasized in his brief the crucial role of “the interposition of *judicial judgment* between the police decision to intrude and the allowability of intrusion.”<sup>114</sup> The judicial role for which the NAACP argued in the context of the Fourth Amendment applies with equal strength in the Fifth Amendment context of terrorist watchlists (even if probable cause might not be the appropriate standard).<sup>115</sup> Greenberg quoted Justice Jackson on the point:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.<sup>116</sup>

The brief made particularly clear the unequal application of police practices on the basis of race and socio-economic class. And here it is worth making a final point about that factor in watchlisting, too. Study of the Supreme Court's opinion in *Terry v. Ohio* will reveal no indication of the different races of the parties.<sup>117</sup> But as both the

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<sup>113</sup> Transcript of Oral Argument at 13, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67).

<sup>114</sup> Brief for NAACP Legal Defense & Educ. Fund, *supra* note 109, at 21.

<sup>115</sup> *See id.* at 25–26.

<sup>116</sup> *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)).

<sup>117</sup> Indeed, the opinion makes only a brief and general allusion to “[t]he wholesale harassment

NAACP brief and later scholarship on the case make clear, race was likely a central factor: Officer McFadden was white; John Terry and his partner were black.<sup>118</sup> The Supreme Court opinion states that McFadden “was unable to say precisely what first drew his eye to them.”<sup>119</sup> But he did testify that “when I looked over they didn’t look right to me at the time.”<sup>120</sup> One wonders why. Some have sharply criticized the TSC for making watchlisting determinations that seem to rely on highly questionable proxies, such as religion or national origin, often submerged in loose labels.<sup>121</sup> The TSC has always denied such accusations,<sup>122</sup> but the opacity of their operations make such denials hard to confirm. Anecdotal evidence suggests that the problem is a persistent one.<sup>123</sup>

### CONCLUSION

During oral argument in the *Terry* case, Justice Marshall put his finger on the police interest in a lower, “reasonable suspicion” standard for detaining citizens. The police were interested in a useful tool for people that “beared watching.”<sup>124</sup> Terrorist

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by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.” *Terry*, 392 U.S. at 14.

<sup>118</sup> See, e.g., Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. (SPECIAL ISSUE) 423, 429, 432–33 (2004).

<sup>119</sup> *Terry*, 392 U.S. at 5.

<sup>120</sup> *Id.*; see also John Q. Barrett, *State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN’S L. REV. 1387 app. at 1456 (1998) (reproducing cross-examination of Detective McFadden at one of the criminal trials, at which he testified: “Some people that don’t look right to me, I will watch them. Now, in this case when I looked over they didn’t look right to me at the time.”). *But see* Payne, *supra* note 99, at 734–35 (asserting from his personal experience with the *Terry* case, that McFadden’s statement “I didn’t like them” was not racially charged: “Knowing McFadden, that statement had not one single thing to do with their race. It had to do with his previous observations studying people in general, as well as people who commit crimes and people who are involved in criminal activity. His statement referred to the classification of people which his duty called for him to be on the lookout for when he said he didn’t like them.”).

<sup>121</sup> See, e.g., Sinnar, *supra* note 87, at 1594–95.

<sup>122</sup> See *id.* at 1585, 1595–96.

<sup>123</sup> See, e.g., Petula Dvorak, *A Retired Police Chief Is Detained at JFK for One Reason: His Name Is Hassan*, WASH. POST (Mar. 20, 2017), [http://www.washingtonpost.com/local/a-retired-police-chief-is-detained-at-jfk-for-one-reason-his-name-is-hassan/2017/03/20/2c618fe2-0d7d-11e7-9b0d-d27c98455440\\_story.html](http://www.washingtonpost.com/local/a-retired-police-chief-is-detained-at-jfk-for-one-reason-his-name-is-hassan/2017/03/20/2c618fe2-0d7d-11e7-9b0d-d27c98455440_story.html) [<https://perma.cc/ZF4A-5ZDU>]. Thus, it was equally newsworthy, but for opposite reasons, when a person who was not one of the usual suspects—a fourteen-year-old white, middle class, New Hampshire resident—found himself entangled in the watchlists. See Jason Schreiber, *Keene Family Tries to Clear Up Terror Watchlist Confusion*, N.H. UNION LEADER, Mar. 1, 2017, 2017 WLNR 6871522.

<sup>124</sup> Transcript of Oral Argument at 14, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67). In a letter to Chief Justice Warren that accompanied a proposed, revised draft of the opinion, Justice Brennan recognized the same pressure:

I’ve become acutely concerned that the mere fact of our affirmance in *Terry* will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present “aggressive surveillance”

watchlists, of course, are defined by that purpose. But to reference an old saying, who watches the watchers?

Justice Douglas was the sole dissenter in *Terry v. Ohio*. He could not have imagined a world of terrorist watchlists (although he himself was subject to the caprice of the State Department's infamous Passport Office, the analog precursor to the digital No-Fly List).<sup>125</sup> But his concluding words are prescient:

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime.<sup>126</sup>

That "hydraulic pressure" does not lessen in the context of counterterrorism. On the contrary, terrorist watchlists are symptomatic of that "new regime," oddly one that the majority in our society seem to support, when they even reflect on its existence. First, the appetite for expanding watchlists is unabated. In a PowerPoint presentation

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techniques which the press tell us are being deliberately employed in Miami, Chicago, Detroit + other ghetto cities.

John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 825 (1998) (quoting a Letter from Justice William J. Brennan, Jr. to Chief Justice Earl Warren (Mar. 14, 1968)). Brennan noted the effect of political pressure in an election year, as well as "the already white heat resentment of ghetto Negroes against the police" before concluding "I am truly worried." *Id.* at 826. According to Professor Barrett's research into the unpublished papers of the justices in and following their conference, *Terry* was substantially "ghost-written" for Chief Justice Warren by Justice Brennan, its "shadow author." *Id.* at 838, 843.

<sup>125</sup> See KAHN, *supra* note 13, at 124.

<sup>126</sup> *Terry*, 392 U.S. at 39. Citing these words, Justice Marshall reflected bitterly on the results of *Terry* in a dissenting opinion four years later:

It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.

*Adams v. Williams*, 407 U.S. 143, 162 (1972).

to Congress in 2009, TSC Director Timothy Healy encouraged expansive use of the Terrorist Screening Database to include restrictions on government benefits, licenses, access to mass sporting events, passports, and a wide range of other government benefits and staples of modern American life.<sup>127</sup> Police making routine traffic stops may now check to see if the driver of a car is identified on a terrorist watchlist. Following the mass shooting at an Orlando nightclub in June 2016, renewed calls came for a “No-Buy” List that would prohibit those on the Terrorist Screening Database from access to guns.<sup>128</sup> Eighty-five percent of registered voters favored such a use of watchlists.<sup>129</sup>

Second, the “hydraulic pressure” to resist judicial review continues unabated. Although the *Ibrahim* case in California was the only No-Fly List litigation to receive a bench trial, the long-running litigation in *Latif v. Holder* (and then *Lynch*, and now *Sessions*) in Oregon has been the bellwether for establishing greater due process and judicial review for watchlists.<sup>130</sup> The thirteen plaintiffs in this seven-year-long lawsuit alleged that their procedural and substantive due process rights had been violated by their secret placement on the No-Fly List.<sup>131</sup> In a series of opinions, Judge Anna Brown found that the current procedures for resolving challenges to the No-Fly List violated the Fifth Amendment by its combination of a low-threshold reasonable suspicion test and a one-sided, often closed administrative record that failed to give the plaintiffs a meaningful opportunity to challenge (or even know) their status.<sup>132</sup> She ordered the TSA to reveal to the plaintiffs whether they were, in fact, on the No-Fly List and to “fashion new procedures that provide Plaintiffs with the requisite due process . . . without jeopardizing national security” to challenge that status if they believed it to be wrong.<sup>133</sup> Judge Brown was willing to tolerate continued use of the reasonable suspicion standard if the government provided “(1) a statement of reasons that is sufficient to permit such Plaintiff to respond meaningfully and (2) any material exculpatory or inculpatory information in Defendants’ possession that is necessary for such a meaningful response.”<sup>134</sup>

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<sup>127</sup> PowerPoint on file with author.

<sup>128</sup> See Jeffrey Kahn, Opinion, *A ‘No Buy’ List for Guns Is a Bad Idea*, N.Y. TIMES, July 1, 2016, at A23.

<sup>129</sup> CNN/ORC INTERNATIONAL POLL (June 16–19, 2016), [https://i2.cdn.turner.com/cnn/2016/images/06/20/cnn\\_orc\\_poll\\_june\\_20.pdf](https://i2.cdn.turner.com/cnn/2016/images/06/20/cnn_orc_poll_june_20.pdf) [<https://perma.cc/9YYF-6FND>].

<sup>130</sup> See, e.g., *Latif v. Sessions*, No. 3:10-cv-00750-BR, 2017 WL 1434648 (D. Or. Apr. 21, 2017); *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 WL 1239925 (D. Or. Mar. 28, 2016); *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014). A more detailed description of this case is provided in Kahn, *supra* note 18, at 93–96.

<sup>131</sup> See Third Amended & Supplemental Complaint for Injunctive & Declaratory Relief at paras. 5–6, 26–27, 145–46, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Jan. 11, 2013), ECF No. 83.

<sup>132</sup> *Latif v. Holder*, No. 3:10-cv-00750-BR, 2015 WL 1883890, at \*1 (D. Or. Apr. 24, 2015).

<sup>133</sup> *Latif*, 28 F. Supp. 3d at 1161–62.

<sup>134</sup> *Latif*, 2016 WL 1239925, at \*2.

The Justice Department returned to Judge Brown with revised procedures for citizens and lawful permanent residents seeking to challenge their No-Fly List status.<sup>135</sup> These were not the product of any notice-and-comment rulemaking by any of the agencies involved, nor were the new rules published anywhere in a complete and unchanging form.<sup>136</sup> The new procedures promised no more than an “unclassified summary of reasons” to the challenger and a “summary . . . [that] does not necessarily include all underlying documentation” to the TSA administrator who would now issue “a final order . . . [that] will state the basis for the decision [to remove or maintain a person on the No Fly List] to the extent possible without compromising national security or law enforcement interests.”<sup>137</sup>

That “final order” was the key to the next step in the litigation. At the start of 2017, the Justice Department filed another motion to dismiss this long-running lawsuit from the district court’s jurisdiction.<sup>138</sup> The revised procedures to challenge a No-Fly List determination now resulted in a final order from the TSA Administrator.<sup>139</sup> Under the old FAA statute, the Justice Department argued, only the court of appeals could review that decision.<sup>140</sup> That April, Judge Brown issued an opinion upholding the revised procedures and concluding, “in the unique procedural posture of this case that jurisdiction over Plaintiffs’ remaining substantive claims explicitly lies in the Ninth Circuit Court of Appeals pursuant to § 46110[.]” the old FAA statute used previously to strip jurisdiction.<sup>141</sup> Thus, unless another appeal is made (which seems likely), the participation of a trial court empowered to take evidence and evaluate the reasonableness of the watchlisters’ suspicion was lost again. The reasonable suspicion standard transplanted into this new context was again without the essential structural protection that Chief Justice Warren and seven of his brethren thought essential to its legitimate operation.

The Justice Department’s aggressive effort to reach this conclusion reveals the watchlisters’ particularly chilling insistence that, in the words of the NAACP brief in *Terry v. Ohio*, judges “are not to take an independent view of police logic.”<sup>142</sup> Such zealous guarding of the watchlisters’ view of the facts, insulated from cross-examination or discovery by a would-be litigant, fails to recognize the value in Chief Justice Warren’s requirement that a lower standard for police action be matched with “the more detached, neutral scrutiny of a judge . . . .”<sup>143</sup> The danger of institutional bias

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<sup>135</sup> See Joint Stipulations Regarding Jurisdiction at paras. 10–11, *Latif v. Lynch*, No. 3:10-cv-00750-BR (D. Or. Dec. 20, 2016), ECF No. 347.

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

<sup>137</sup> *Id.* at paras. 15, 18, 21.

<sup>138</sup> See Memorandum in Support of Defendants’ Motion to Dismiss for Lack of Jurisdiction at 4, *Latif v. Lynch*, No. 3:10-cv-00-750-BR (D. Or. Jan. 18, 2017), ECF No. 348.

<sup>139</sup> *Id.* at 9–10.

<sup>140</sup> See *id.*

<sup>141</sup> *Latif v. Sessions*, No. 3:10-cv-00750-BR, 2017 WL 1434648, at \*7 (D. Or. Apr. 21, 2017).

<sup>142</sup> Brief for NAACP Legal Defense & Educ. Fund, *supra* note 109, at 41.

<sup>143</sup> *Terry*, 392 U.S. at 21.

(which is not to suggest malice) is too real. What is more, the tradition of this important separation-of-powers check on the state's power is a long one, integral to our system of government, which one might think would be adequate response to the watchlisters' implicit insistence to "trust us" to self-police.<sup>144</sup> In the words of Justice Douglas, "[w]e should not let those fences of the law be broken down."<sup>145</sup>

But even well-established fences can be blown down by strong winds of fear; as Douglas knew, "passions often carry the day."<sup>146</sup> Consider the working environment created for the analysts and other staff working at the TSC. Outside the TSC, a three-story tall remnant of the distinctive architecture from the base of one of the World Trade Center towers is placed as a sculpture outside the entrance to the TSC. In a television interview conducted with the Director of the TSC, Christopher Piehota, pictures of that artefact, and images of artefacts from the bombing of the U.S.S. Cole, the attempted bombing of Northwest Airlines Flight 253 (the "underwear bomber" attack), and the Oklahoma City bombing, are shown from displays outside and within the building. As they are shown, Director Piehota described their importance in a voice overlay:

This means to me that the Terrorist Screening Center's mission will never be done. And it reminds us daily of the importance of what we do. The threat is ever-present. And the remnants were put here to remind our staff of our mission, which is to prevent acts of terrorism. It keeps us mindful of the threat that is still out there. Each remnant or each artifact shows you the evolution of terrorism.<sup>147</sup>

In front of a remnant of the point of impact of one of the airplanes into the North Tower of the World Trade Center on display within the TSC building, CNN correspondent Pamela Brown asked Director Piehota, "Every day you come in and say: 'We're not going to let this happen again.'"<sup>148</sup> Director Piehota responded: "This, that, cannot ever happen again."<sup>149</sup>

Who would want anything less than such a zealous devotion to the mission of preventing terrorist attacks? But who, valuing liberty, would think it reasonable to give that voice the final word?

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<sup>144</sup> Cf. KAHN, *supra* note 13, at 186.

<sup>145</sup> *Wainwright v. City of New Orleans*, 392 U.S. 598, 614 (1968) (Douglas, J., dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> *Exclusive Interview with Terrorist Screening Center Director Christopher Piehota*, CNN (Apr. 6, 2016), <http://www.cnn.com/videos/politics/2016/04/06/exclusive-interview-with-terrorist-screening-center-director-christopher-piehota-origwx-allee.cnn> [https://perma.cc/TH2L-TKL8].

<sup>148</sup> *Id.*

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