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# ALLEVIATING THE POWER OF SECRET EVIDENCE: AN ANALYSIS OF NO FLY AND SELECTEE LIST DETERMINATIONS AND REDRESS PROCEEDINGS\*

## I. INTRODUCTION

The use of “watch lists” by national governments is not a new phenomenon.<sup>1</sup> Watch lists serve a critical role in a government’s ability to protect against potential threats to its citizens and institutions.<sup>2</sup> However, watch lists run the risk of being overinclusive; that is, including innocent individuals who did not belong on the list in the first place.<sup>3</sup> One of the most striking examples of such lists in U.S. history was the Subversive Activities Control Act (also known as the McCarran Act),<sup>4</sup> which was used to target suspected members of the Communist party or its sympathizers during the 1950s.<sup>5</sup>

In the 1980s, the United States once again turned to watch lists as a means of combatting the evolving threat of terrorism.<sup>6</sup> Some notable watch lists are the No Fly List (banning certain individuals from any type of air travel)<sup>7</sup> and the Selectee List (subjecting select individuals to enhanced screening whenever they

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\* Matthew Howell, J.D., Temple University Beasley School of Law, 2018. Thanks to all who were of tremendous help in the drafting and editing of this Comment, including Sam Lapin and Mayer Kohn. A special thanks to Professor Jane Baron, whose advice and suggestions were critically important to the formation of this Comment.

1. See *infra* Part II.A–B for a discussion of the McCarran Act’s authorizations for watchlists in the 1980s and how such authorizations served as a precursor to the No Fly List that was initially created in the 1980s.

2. See Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2152 (2006) (“Today’s transportation watchlist system, had it been in place at the time, might have prevented the 9/11 attacks. Watchlists not only provide an effective layer of security, but are also relatively cheap, efficient, and noninvasive. . . . Watchlists are becoming more effective as technological and policy innovations make the lists more difficult to evade.” (footnote omitted)).

3. See AM. CIVIL LIBERTIES UNION, U.S. GOVERNMENT WATCHLISTING: UNFAIR PROCESS AND DEVASTATING CONSEQUENCES 1–2 (2014); see also Eric Hedlund, Comment, *Good Intentions, Bad Results, and Ineffective Redress: The Story of the No Fly and Selectee Lists and a Suggestion for Change*, 79 J. AIR L. & COM. 597, 612 (2014) (discussing that the watch list procedures focus more on placing individuals on watch lists rather than removing any innocent persons discovered).

4. Subversive Activities Control (McCarran) Act of 1950, Pub. L. No. 831, 64 Stat. 987, *repealed in part by* FRIENDSHIP Act, Pub. L. No. 103–199, § 803, 107 Stat. 2317, 2329 (1993).

5. See *id.* at § 4(c).

6. 49 U.S.C. § 114(h) (2012) (granting Transportation Security Administration (TSA) the authority to collect information for security purposes); see Florence, *supra* note 2, at 2153 (noting that the No Fly List was originally created in the 1980s but only had sixteen names prior to the September 11, 2001 (9/11) attacks).

7. See Florence, *supra* note 2, at 2153. The TSA originally had control over the No Fly and Selectee Lists, but this was later changed following 9/11. See *id.* See *infra* Part II.B for a discussion of the creation of the No Fly and Selectee Lists and their developments over time.

attempt to travel).<sup>8</sup> These watch lists, while nominally used to keep track of the identities of certain individuals determined to be potential threats, are also used as a means to curtail certain freedoms, especially the freedom to travel.<sup>9</sup> After Omar Mateen's recent attack on the Orlando Pulse nightclub, for example, members of Congress considered using the No Fly List and Selectee List as tools to enforce gun control measures, known as "No Fly, No Buy" legislation.<sup>10</sup>

This Comment will examine the No Fly and Selectee Lists, including their creation and the redress procedures available to individuals placed on such lists. Part II.A discusses the creation and development of watchlists used in the twentieth century, how modern watch lists burden those who are placed on them, and potential redress proceedings for such persons. Part II.A also discusses the Supreme Court's recognition of a constitutional right to interstate travel. Part II.B provides background on the initial creation of both the No Fly and Selectee Lists, including the statutory requirements governing how an individual can be nominated for either or be listed in the more comprehensive Terrorist Screening Database (TSDB).<sup>11</sup> Part II.C addresses the jurisdictional hurdles inhibiting those placed on terrorist watch lists from removing themselves from those lists. Part II.D discusses the role of *Mathews v. Eldridge*<sup>12</sup> and the so-called stigma-plus doctrine in national security settings, which allows citizens to challenge certain public disclosures by the government that result in the denial of a tangible interest for the plaintiff.<sup>13</sup> Finally, Part II.E addresses the use of classified information in watch list proceedings, particularly the Classified Information Procedures Act (CIPA), the Foreign Intelligence Surveillance Act (FISA), and the state secrets privilege. Section III addresses issues that exist with current redress proceedings as well as solutions that have been proposed. Section III also suggests a recommendation to improve these proceedings moving forward, including using the Federal Arbitration Act as a framework for permitting the introduction of classified evidence in certain circumstances.

## II. OVERVIEW

This Section addresses the historical nature of the right to travel, the development of the No Fly and Selectee Lists, and the various procedures and regulations at play for individuals who contest their placement on such lists. The Section develops the historical backdrop, with a particular focus on the Attorney General's List of Subversive Organizations (AG's List). The AG's List, first

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8. See *infra* Part II.B.

9. See *infra* Part II.A for a discussion of the constitutional right to travel and the possible implications on international travel.

10. David M. Herszenhorn, *Bipartisan Senate Group Proposes 'No Fly, No Buy' Gun Measure*, N.Y. TIMES (June 21, 2016), <http://www.nytimes.com/2016/06/22/us/politics/senate-gun-control-no-fly-list-terrorism.html> [perma: <http://perma.cc/S68U-NRGW>].

11. See *infra* Part II.B for a discussion about the TSDB, which contains the names of all individuals who have been determined, through an agency-led nomination process, to meet a reasonable suspicion standard for terrorist activity.

12. 424 U.S. 319 (1976).

13. See *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1128 (W.D. Wash. 2005).

compiled in 1947,<sup>14</sup> plays an illuminating role because it shows how watch lists were used to curtail the freedoms of certain individuals, especially alleged Communists in the 1950s.<sup>15</sup> Due to both the changing nature of travel, as well as the events of September 11, 2001, watch lists have greatly expanded to impede or prevent individuals from air travel. This has included placing individuals onto watch lists upon meeting the relatively low evidentiary bar of reasonable suspicion.<sup>16</sup> With such an expanded list of individuals, the U.S. government created various administrative procedures to allow individuals to challenge their placement on such a list.<sup>17</sup> These procedures, however, are alleged to be inadequate by many individuals.<sup>18</sup> Their appeals to the federal court system were met with new burdens concerning classified evidence.<sup>19</sup>

A. *Cold War: Fundamental Right to Travel and Precursor to the No Fly List*

To understand the use of the No Fly and Selectee Lists as means of restricting various freedoms, it is helpful to recall the Cold War and the mechanisms by which the United States restricted the freedoms of suspected Communists and Communist sympathizers. One manner of restricting freedom was through the Subversive Activities Control Act of 1950 (also known as the McCarran Act).<sup>20</sup> The Act created the Subversive Activities Control Board and required Communist organizations to register with the U.S. Attorney General.<sup>21</sup> These organizations were then placed on the AG's List.<sup>22</sup> The AG's List was a means of tracking individuals and organizations, and it incentivized the passage of various laws intended to restrict additional freedoms.<sup>23</sup> Moreover, the AG's List led to the eventual creation of the No Fly and Selectee Lists, both of which

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14. See *infra* Part II.A for a discussion of the AG's list as the precursor to the No Fly and Selectee Lists.

15. See *infra* Part II.A for a discussion of the McCarran Act and constitutional challenges to the statute.

16. See *infra* Part II.B for a discussion on the reasonable suspicion standard for routine nominations and the emergency nominations process.

17. See *infra* Part II.C for a discussion of the Department of Homeland Security's administrative procedures regarding the No Fly and Selectee Lists.

18. See *infra* Part II.E.

19. See *infra* Part II.E for a discussion of the Classified Information Procedures Act and its use in relation to watch lists.

20. Subversive Activities Control (McCarran) Act of 1950, Pub. L. No. 831, 64 Stat. 987, *repealed in part by* Pub. L. No. 103-199, 107 Stat. 2329 (1993).

21. *Id.* § 7(a) ("Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.").

22. *Id.* § 8.

23. See *id.* §§ 4-8. Sections 4 and 6 of the McCarran Act most significantly curtailed freedoms. Section 4 dealt with specific activities prohibited by suspected Communists, and it stated that any person may be prosecuted for an offense within ten years of the activity. See *id.* § 4. Section 6 authorized the denial of passports for persons that were members of a registered Communist organization, *id.* § 6, the constitutionality of which was challenged in *Kent v. Dulles*, 357 U.S. 116 (1958). See *infra* notes 26-30 and accompanying text for a discussion of *Kent*.

are subsets of the TSDB.<sup>24</sup>

With respect to specific individual freedoms, Section 6 of the McCarran Act made it illegal for any known Communist even to apply for a U.S. passport.<sup>25</sup> Additionally, it made it illegal to use, or attempt to use, any passport previously granted.<sup>26</sup> The right to travel even domestically was not yet a constitutionally protected right; therefore, affected individuals could assert no protections under the Due Process Clause of the Fifth Amendment.<sup>27</sup> Due to the intense scrutiny surrounding members of the Communist party, several individuals sought to invalidate the McCarran Act's requirements. In *Kent v. Dulles*,<sup>28</sup> several members of the Communist party, who were U.S. citizens, brought a pre-enforcement suit challenging the constitutionality of the McCarran Act.<sup>29</sup> The *Kent* Court held, for the first time, that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."<sup>30</sup> However, the Court failed to address the extent to which the right to travel could be curtailed within the bounds of the Constitution, and instead determined whether Congress had authorized any curtailment in the present case.<sup>31</sup>

Upon concluding that the right to travel within the United States was constitutionally protected, the Court determined that, absent information to the contrary, Congress had not delegated to the Secretary of State "unbridled discretion to grant or withhold" such a right.<sup>32</sup> The Court noted that the primary function of a passport is the right to exit, and that any regulation of such a right must be done in accordance with the lawmaking functions of Congress or in accordance with delegation standards.<sup>33</sup>

Building upon that reasoning, the Supreme Court determined in *Aptheker v. Secretary of State*<sup>34</sup> that Section 6 of the McCarran Act was unconstitutional as it violated the now constitutionally protected right to travel within the United States.<sup>35</sup> Despite the lack of precedent regarding the constitutionality of

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24. See Hedlund, *supra* note 3, at 603.

25. Subversive Activities Control Act § 6(a).

26. *Id.* § 6(b).

27. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

28. 357 U.S. 116 (1958).

29. *Kent*, 357 U.S. 116 (holding that the right to travel was part of the liberty interest protected by the Fifth Amendment, but not determining to what degree such right may be curtailed).

30. *Id.*

31. *Id.* at 127. The Court determined that the refusal of the passports at issue in the case fell into one of two categories. *Id.* First, whether an applicant had proper citizenship and allegiance to the United States, as determined by the Secretary of State. *Id.* Second, whether the applicant was participating in any action that violated U.S. law. *Id.*

32. *Id.* at 129.

33. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); see also *Mohamed v. Holder*, 995 F. Supp. 2d 520, 536–37 (E.D. Va. 2014) ("At some point, governmental actions taken to prevent or impede a citizen from reaching the border infringe upon the citizen's right to reenter the United States.").

34. 378 U.S. 500 (1964).

35. *Aptheker*, 378 U.S. at 514.

statutory restrictions upon the right to travel, the Court referenced “well-established principles by which to test whether the restrictions here imposed are consistent with the liberty guaranteed in the Fifth Amendment.”<sup>36</sup> Specifically, the Court cited *Shelton v. Tucker*,<sup>37</sup> in which it determined that an Arkansas statute requiring teachers to disclose all organizational and associational ties over the preceding five-year period was overly broad and therefore unconstitutional.<sup>38</sup> The Court stated that:

Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>39</sup>

In light of previous case law, the *Aptheker* Court determined that the overly broad restrictions placed on registered Communists, regardless of actual knowledge, could not pass constitutional muster under the Fifth Amendment absent extreme circumstances, such as war.<sup>40</sup> Justice Douglas, concurring, went further, stating:

This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.<sup>41</sup>

Since the development of the right to travel in the middle of the twentieth century, the nature of travel has changed dramatically, specifically the necessity to quickly travel abroad.<sup>42</sup> However, constitutional protections have failed to

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36. *Id.* at 507–08; *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 436 (1963) (holding that overly broad statutes curtailing group activity run contrary to the First Amendment and can be used as a “weapon of oppression”); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (holding that communication regarding the solicitation of money for philanthropic organizations did not represent a clear and present danger and the statute banning such conduct was overly broad); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (holding that ordinances banning the distribution of handbills were invalid because the ordinances abridged the “fundamental personal rights and liberties” of the individuals).

37. 364 U.S. 479 (1960).

38. *Shelton*, 364 U.S. at 490.

39. *Id.* at 488.

40. *Aptheker*, 378 U.S. at 514–17 (“The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual’s knowledge, activity, commitment, and purposes in and places for travel.”).

41. *Id.* at 520 (Douglas, J., concurring).

42. *See Latif v. Holder*, 969 F. Supp. 2d 1293, 1303 (D. Or. 2013) (“Although there are perhaps viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with Defendants’ contention that international air travel is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation.”), *modified*, 28 F. Supp. 3d 1134 (D. Or. 2014), *appeal dismissed*, (9th Cir. 2014).

keep pace.<sup>43</sup> Moreover, for many, travel has become a necessity for business or familial reasons.<sup>44</sup> However, the right to travel does not imply a right to travel by any specific means (such as air travel), especially with respect to travel within the United States,<sup>45</sup> demonstrating that the right to travel is not without limits.<sup>46</sup> In cases involving interstate travel, courts are more likely to permit state-imposed burdens due to the ease of using another form of transportation (like a car). Today, however, international travel is almost only feasible by airplane.<sup>47</sup> One court stated that “[w]hile the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for *international* travel, air transport in these modern times is practically the only form of transportation.”<sup>48</sup> Despite such dicta, individuals who are unable to demonstrate a substantial burden on international travel will not be granted relief.<sup>49</sup> Thus, there is a constitutional right to domestic travel that is subject to due process analysis under the Fifth Amendment, but, practically speaking, any right to international travel is subject to a less stringent form of scrutiny within the same due process parameters.<sup>50</sup>

*B. Creation of No Fly and Selectee Lists*

Due to the attacks on September 11, 2001 (9/11), the U.S. government developed (and still maintains) a database of individuals suspected of having terrorist ties.<sup>51</sup> One way of tracking such individuals is through the administration of two watch lists, the No Fly List and the Selectee List.<sup>52</sup> Prior to

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43. *Id.*

44. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1149–50 (D. Or. 2014) (concluding that “for many international travel is a necessary aspect of liberties sacred to members of a free society”).

45. *See Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) (holding that “burdens on a single mode of transportation do not implicate the right to interstate travel”).

46. *See id.*; *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005).

47. *Ibrahim v. Dep’t of Homeland Sec.*, No. C 06–00545 WHA, 2012 WL 6652362, at \*7 (N.D. Cal. Dec. 20, 2012).

48. *Id.*

49. *See Abdelfattah v. Dep’t of Homeland Sec.*, 787 F.3d 524, 539 (D.C. Cir. 2015) (holding that the petitioner did not allege sufficient facts that his freedom to travel internationally was curtailed).

50. Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1347–48 (2016) (“The Supreme Court has previously recognized a constitutional right to international travel. It held, however, that this right is not a fundamental one that will be protected by strict scrutiny; instead, it has stated that ‘the “right” of international travel has been considered to be no more than an aspect of the “liberty” protected by the Due Process Clause of the Fifth Amendment. As such this “right,” the Court has held, can be regulated within the bounds of due process.’” (footnote omitted) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981))); *see Haig*, 453 U.S. at 306 (“Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a ‘letter of introduction’ in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation. The Court has made it plain that the freedom to travel outside the United States must be distinguished from the right to travel within the United States.”).

51. *See Hedlund*, *supra* note 3, at 601.

52. *See id.* at 601–02.

9/11, the Federal Aviation Administration (FAA) maintained a No Fly List, but the List “generally did not contain” information from the FBI, CIA, or State Department.<sup>53</sup> While other government watch lists contained thousands of names, the FAA’s No Fly List contained relatively few.<sup>54</sup> By contrast, in March 2006, less than five years after 9/11, the No Fly and Selectee Lists contained 44,000 and 75,000 names, respectively.<sup>55</sup>

In 2003, President Bush ordered the Attorney General, through a presidential directive,<sup>56</sup> to create an organization that would enhance the efficiency of the federal procedures affecting watch lists.<sup>57</sup> The mission of this organization would be to “consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes.”<sup>58</sup> The No Fly and Selectee Lists subject certain individuals either to a complete ban on air travel within United States or to enhanced screening,<sup>59</sup> which is restrictive in its own right.<sup>60</sup> Both the No Fly and Selectee Lists are subsets of the Terrorist Screening Database (TSDB), which is maintained by the Terrorist Screening Center (TSC), a subdivision of the FBI.<sup>61</sup>

In order to determine who is placed within the TSDB, or any of its subsets, the TSC receives nominations from a variety of federal agencies including the FBI and the National Counterterrorism Center (NCTC).<sup>62</sup> Those nominations are accepted upon a showing of a “reasonable suspicion” that the individuals are known or suspected terrorists.<sup>63</sup> The reasonable suspicion standard requires “articulable facts which, taken together with rational inferences, reasonably

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53. *Id.* at 601.

54. *See id.* (reporting that the FAA’s No Fly List contained twelve names as of September 11, 2001, but other government lists contained thousands of names); *see also* Florence, *supra* note 2, at 2153 (reporting that the FAA’s No Fly List contained sixteen names as of September 11, 2001).

55. Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. 804, 809 n.13 (2007) (stating that there is no public accounting of names on the No Fly List but that a *60 Minutes* report in 2006 found 44,000 names on the No Fly List and 75,000 names on the Selectee List (citing *60 Minutes: Unlikely Terrorists on No Fly List* (CBS television broadcast Oct. 8, 2006))).

56. *See* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGISLATION 1, 6–7 (2002) (noting that presidential directives are very essentially identical to executive orders); Colin M. O’Brien, *Homeland Security Presidential Directive-12, Background Investigations, and Informational Privacy Rights*, 80 MISS. L.J. 299, 304 (2010) (discussing presidential directives).

57. Presidential Directive on Integration and Use of Screening Information to Protect Against Terrorism, 2 PUB. PAPERS 1174–75 (Sept. 17, 2003).

58. *Id.*

59. Manta & Robertson, *supra* note 50, at 1320–21.

60. *See* Gilmore v. Gonzalez, 435 F.3d 1125, 1130 (9th Cir. 2006) (“A ‘selectee’ search includes walking through a magnetometer, being subjected to a handheld magnetometer scan, having a light body patdown, removing one’s shoes, and having one’s carry-on baggage searched by hand and a CAT-scan machine.”)

61. Latif v. Holder, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014).

62. *Id.*

63. *Id.*

warrant the 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 or terrorist activities.’”<sup>64</sup> These nominations are seemingly presumed valid, as their acceptance rate has reached ninety-nine percent.<sup>65</sup> Additionally, the FBI has stated that it may consider race, religion, or speech in determining whether to include an individual in the database.<sup>66</sup>

The reasonable suspicion standard is used during a routine nomination process, but there is also an emergency nomination process, which forgoes the reasonable suspicion standard (or any standard) entirely.<sup>67</sup> The emergency process is intended for only imminent terroristic threats.<sup>68</sup> Under the emergency process, “the requesting agency may bring its information directly to the TSC, which creates a record in the master list and all supporting databases.”<sup>69</sup> The number of individuals who are added through this exception is not known, and the government has asserted the state secrets defense in order to halt possible disclosures.<sup>70</sup> While the state secrets defense is intended to protect the government from making disclosures that would endanger national security,<sup>71</sup> the lack of information regarding the emergency nomination process makes it difficult to determine its effectiveness.<sup>72</sup>

As names are proposed and approved for watch lists, TSC provides the No Fly List to the Transportation Safety Administration (TSA).<sup>73</sup> The list provided to the TSA “contains only sensitive, unclassified identity information, *not* the underlying classified intelligence information.”<sup>74</sup> The No Fly and Selectee Lists are compiled without informing any individual of their placement on such a list until the individual arrives at the airport, and even then that person may simply be told they cannot fly without being provided any additional reasoning.<sup>75</sup>

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64. *Id.*

65. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 10 n.21.

66. Manta & Robertson, *supra* note 50, at 1320. Michael Steinbah, the former Assistant Director of the FBI’s Counterterrorism Division, clarified that “nominations must not be based solely on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment. Declaration of Michael Steinbach at 6, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750-BR) (emphasis added).

67. Shane, *supra* note 55, at 816.

68. *Id.*

69. *Id.*

70. Manta & Robertson, *supra* note 50, at 1320. See *infra* Part II.E.3 for a discussion of the state secrets privilege and its role in disclosing information in evidentiary proceedings.

71. *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (“It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”).

72. See OFFICE OF THE INSPECTOR GEN. AUDIT DIV., REVIEW OF THE TERRORIST SCREENING CENTER 42 (2005) (discussing that the nomination process for including persons in the TSDB “was more of an acceptance than nomination.”).

73. *Latif v. Holder*, 686 F.3d 1122, 1125 (9th Cir. 2012).

74. *Id.*

75. Scherfen v. Dep’t of Homeland Sec., No. 3:CV-08-1554, 2010 WL 456784, at \*5 (M.D. Pa.



C. *Jurisdictional Hurdles: DHS TRIP and Appeals Process*

An individual who believes that they are improperly placed on one of the government watch lists may file an appeal with DHS's Traveler Redress Inquiry Program (TRIP).<sup>76</sup> DHS's TRIP was developed pursuant to 49 U.S.C. § 44926, which mandated that the TSA create "a timely and fair" appeal process for those who claim to be wrongly identified on the list.<sup>77</sup> TRIP proceedings are completely internal to DHS and the agency that nominated the individual for placement on a watch list.<sup>78</sup> Implicated individuals begin the process by filing a Traveler Inquiry Form and are issued a Redress Control Number, which can be used to track the status of the inquiry.<sup>79</sup>

Upon receiving an inquiry form, DHS reviews information submitted by an administrative agency (such as the FBI) to ensure that the traveler has not been misidentified.<sup>80</sup> If the traveler has been misidentified, then DHS updates and corrects the misinformation.<sup>81</sup> However, in the event that a traveler is correctly identified and is on a government watch list, DHS refers the inquiry to TSC.<sup>82</sup> Following this, TSC, "in consultation with other agencies in the intelligence community, including the FBI and [NCTC], will examine the underlying intelligence relating to the individual's watchlist status and make any necessary corrections or updates to the individual's watchlist status."<sup>83</sup>

At the conclusion of the administrative review, DHS sends a determination letter to the traveler who filed the inquiry letter.<sup>84</sup> The determination letter only notifies the individual that a review of his watch list status was completed.<sup>85</sup> The letter does not disclose "whether or not [the individual] was, or still is, included on a watchlist or if there is other government interest in the individual that may be considered law enforcement sensitive."<sup>86</sup> The letter will not even inform a

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Feb. 2, 2010) ("Because the government has classified the TSDB and its components as 'sensitive but unclassified,' the agencies and persons involved in the creation of the TSDB will neither confirm nor deny whether an individual is on a particular list or in the TSDB."); see Florence, *supra* note 2, at 2158 ("Sometimes, passengers are informed that they are on a security list when they arrive at an airport. Other times, passengers are detained at the ticket counter but not told why. For example, Senator Kennedy recalled an airline agent saying to him: 'We can't give [the ticket] to you, you can't buy a ticket.' After Kennedy asked why not, the agent responded simply, 'We can't tell you.'" (alteration in original) (footnote omitted)).

76. See 49 U.S.C. § 44926 (2012).

77. *Id.*

78. Hedlund, *supra* note 3, at 613 (noting that independent adjudicators do not take part in TRIP because redress requests are forwarded to the nominating agency for review).

79. Shearson v. Holder, 725 F.3d 588, 591 (6th Cir. 2013).

80. Hedlund, *supra* note 3, at 604–05.

81. Shearson, 725 F.3d at 591.

82. *Id.*

83. *Id.*

84. See *id.*

85. *Id.*

86. *Id.*; Latif v. Holder, 28 F. Supp. 3d 1134, 1142 (D. Or. 2014) ("In fact, DHS does not tell a complainant whether he or she is in the TSDB or a subset of the TSDB or give any explanation for inclusion on such a list at any point in the available administrative process.").

traveler that his placement on the watch list is incorrect and has been rectified.<sup>87</sup> The lack of disclosure is rooted in the inherent purpose of a government watch list: to provide the government with information regarding threats to security.<sup>88</sup>

While an individual may appeal DHS's determination to a U.S. court of appeals,<sup>89</sup> the individual must first exhaust all administrative measures under DHS TRIP.<sup>90</sup> The statutory requirement to exhaust all administrative proceedings applies to persons "disclosing a substantial interest in an order issued by the Secretary of Transportation."<sup>91</sup> The word "order" is critical because it applies to all TSA security directives, which include procedures such as identification<sup>92</sup> and screening policies.<sup>93</sup> In *Shearson v. Holder*,<sup>94</sup> for example, the court determined that the plaintiff's failure to pursue administrative remedies through DHS TRIP left the court with no administrative record and did not allow DHS TRIP to possibly correct any error.<sup>95</sup>

In determining what constitutes an order, the Ninth Circuit stated that an "[o]rder" carries a note of finality, and applies to any agency decision which imposes an obligation, denies a right, or fixes some legal relationship.<sup>96</sup> Thus, any security directives issued by the TSA, as well as DHS TRIP, are under the purview of § 46110, and all appeals must be filed in a U.S. court of appeals after all administrative measures are exhausted.<sup>97</sup>

However, if a petitioner is only challenging his placement on the No Fly List or Selectee List, then that challenge may be filed in a U.S. district court because those watch lists are created by the TSC, a subset of the FBI.<sup>98</sup> Neither the FBI nor TSC are mentioned anywhere in § 46110, creating a jurisdictional loophole

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87. *Shearson*, 725 F.3d at 591.

88. *Shearson v. Holder*, 865 F. Supp. 2d 850, 857 (N.D. Ohio 2011), *aff'd*, 725 F.3d 588 (6th Cir. 2013) ("The Government does not reveal whether or not an individual is on a watchlist because disclosing this information would undermine the purpose of terrorist watchlists, which is to provide the Government with information about security threats without alerting security threats of the Government's knowledge.").

89. 49 U.S.C. § 46110(a) (2012).

90. *Shearson*, 725 F.3d at 594 ("While there are deficiencies in the Redress Program process, we agree with the district court that Shearson should be required to exhaust her administrative procedures by submitting a traveler inquiry form through the Redress Program before she can proceed with this case.").

91. 49 U.S.C. § 46110(a).

92. *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (holding that a TSA security directive requiring airline operators to enforce an identification policy is an order under § 46110).

93. See *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1256–57 (9th Cir. 2008) (determining that the implementation of the No Fly List through a TSA security directive is an order under § 46110 that strips a district court of jurisdiction); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1124–25 (W.D. Wash. 2005) (holding that security directives provide a definitive statement on the position of the TSA and have an immediate effect on passengers).

94. 725 F.3d 588 (6th Cir. 2013).

95. *Shearson*, 725 F.3d at 595.

96. *Gilmore*, 435 F.3d at 1132 (quoting *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998)).

97. *Id.*

98. *Ibrahim*, 538 F.3d at 1256 ("The No-Fly List is maintained by the Terrorist Screening Center, and section 46110 doesn't apply to that agency's actions.").

for petitioners who are not challenging DHS TRIP and any of its alleged inadequacies.<sup>99</sup>

*D. Mathews and Stigma-Plus in National Security Settings*

In determining matters of procedural due process, courts apply the test articulated in *Mathews v. Eldridge*<sup>100</sup> as well as the stigma-plus doctrine.<sup>101</sup> The *Mathews* test determines whether the procedures put in place were sufficient for the alleged deprivation.<sup>102</sup> The *Mathews* test involves a balancing of three factors: (1) the private interest that is being deprived, (2) the risk of erroneous deprivation and the cost of additional safeguards, and (3) the government interest at stake.<sup>103</sup> Courts weigh the factors at stake in each case and, when the government's interest is high, as is typical with issues of national security, courts will generally permit greater deprivation of liberty than in other settings.<sup>104</sup> In addition to claiming that the *Mathews* test is not satisfied, individuals placed on a watch list may also invoke the stigma-plus doctrine to demonstrate that due process should prevent such placement, particularly in regard to the Selectee List.<sup>105</sup>

In the case of the No Fly List, the private interest that is deprived is rather clear: the fundamental right to travel,<sup>106</sup> particularly the ability to travel by air, which the Ninth Circuit recognized as part of the fundamental right of travel in *Ibrahim v. Department of Homeland Security*.<sup>107</sup> However, there is some concern as to whether *Ibrahim*'s broad recognition of the right to travel, as noted by the Ninth Circuit, will gain traction in other courts:

Historically, constitutional protections extended to aliens only while they were within the United States in order to promote trade, to grow the population, and to prevent international conflicts. . . . Additionally, the *Ibrahim* court's rule only provides constitutional protections to some subsets of aliens that have developed "significant voluntary

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99. See *Mokdad v. Lynch*, 804 F.3d 807, 815 (6th Cir. 2015) (determining that challenges to placement on the No Fly List are not inescapably intertwined with a TSA order and are therefore not subject to § 46110 jurisdiction); *Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012) (holding that the district court had jurisdiction over claims in which the government did not provide opportunity to contest placement on the No Fly List); *Ibrahim*, 538 F.3d at 1255 (deciding that placement on the No Fly List is an order by the FBI and therefore not subject to § 46110).

100. 424 U.S. 319 (1976).

101. *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

102. *Mathews*, 424 U.S. at 335.

103. *Id.*

104. Hedlund, *supra* note 3, at 619–20 (arguing that the No Fly List may not pass the *Mathews* test due to risk of erroneous deprivation but that the Selectee List may pass the same test).

105. *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1128–29 (W.D. Wash. 2005).

106. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

107. No. C 06–00545 WHA, 2012 WL 6652362, at \*7 (N.D. Cal. Dec. 20, 2012) (“While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for *international* travel, air transport in these modern times is practically the only form of transportation . . .”).

connections” with the United States.<sup>108</sup>

At least for U.S. citizens, courts have nearly clarified that a complete ban on air travel presents an immense deprivation of a significant private interest.<sup>109</sup> “The No Fly List would likely fail [the *Mathews*] test. The private interests, and the deprivation thereof, are significant, and the risk of erroneous deprivation is high with the current procedures.”<sup>110</sup> As stated above, there is a great deal of risk in the process of creating watch lists due to the high acceptance rate of nominations and the lack of administrative options to remove an incorrect name.<sup>111</sup> Still, the government’s interest (preventing a terrorist attack) is extraordinarily high and may sway a judge to decide otherwise.<sup>112</sup>

The Selectee List presents a unique problem for plaintiffs because it is difficult to ascertain the private interest deprived due to enhanced screening measures rather than a ban on air travel. Thus, many plaintiffs file claims relying on the stigma-plus doctrine rather than on the *Mathews* test.<sup>113</sup> In order to prevail under stigma-plus, plaintiffs must meet a two-prong test.<sup>114</sup> First, plaintiffs must demonstrate public disclosure of stigmatizing statements by the government, and that such disclosures are being contested.<sup>115</sup> Plaintiffs meet the first factor by demonstrating that regularly being pulled out of lines results in a public disclosure of placement on the Selectee List.<sup>116</sup> Second, plaintiffs need to show “the denial of some more tangible interest such as employment,[] or the alteration of[f] a right or status recognized by state law.”<sup>117</sup> The plaintiff’s tangible interest does not necessarily have to be a constitutional right,<sup>118</sup> but it

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108. Hedlund, *supra* note 3, at 618.

109. See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1148 (D. Or. 2014).

110. Hedlund, *supra* note 3, at 619–20.

111. See *supra* Part II.B for a discussion on the reasonable suspicion standard for routine nominations and the emergency nominations process.

112. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (“Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order.”); *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964) (“That Congress under the Constitution has power to safeguard our Nation’s security is obvious and unarguable.”); *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) (“On the other side of the scale, the government’s interest in national security cannot be understated. We owe unique deference to the executive branch’s determination that we face ‘an unusual and extraordinary threat to the national security’ of the United States.” (quoting Exec. Order No. 13,224, 3 C.F.R. 786 (2002))).

113. *Shane*, *supra* note 55, at 841–42 (“Perhaps surprisingly, a significant number of watch lists may not technically trigger the *Mathews* inquiry as a constitutional mandate . . . It is well established that the mere inclusion of an individual’s name on a potentially stigmatic list, even if it puts the person’s reputation at stake, is not deemed to implicate a ‘liberty interest’ protected by due process. An individual must have something at stake beyond his or her reputation to invoke the protections of due process against unfair listing.”).

114. *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005).

115. *Id.*

116. *Id.*

117. *Id.* (quoting *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002)).

118. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437–39 (1971) (ruling that stigma-plus test was met when an individual was unable to purchase alcohol under state law without proper notice and hearing).

does have to amount to some “deprivation of liberty or property by the state that directly affects the plaintiff’s rights.”<sup>119</sup> Despite the effect of being placed on the Selectee List, the government’s interest generally outweighs the “inconvenience” of enhanced screening.<sup>120</sup> Indeed, “[t]he Supreme Court has held that reputation alone is not a fundamental interest, but it has left open the possibility that reputational stigma may rise to such a level when combined with other governmental action that curtails or denies individual rights.”<sup>121</sup>

In *Green v. Transportation Security Administration*,<sup>122</sup> the plaintiffs were subjected to enhanced security screening because their names were similar to names of persons on the No Fly List.<sup>123</sup> The plaintiffs argued that the enhanced security screening altered their status because they could not travel like other passengers.<sup>124</sup> However, the Western District of Washington held that the right to travel is not unduly restricted when only a single mode of transportation is burdened.<sup>125</sup> Someone subjected to the Selectee List must demonstrate “something at stake beyond his reputation to invoke the protections of due process against unfair listing.”<sup>126</sup> To demonstrate that plaintiffs meet this factor, organizations such as the American Civil Liberties Union (ACLU) have argued that the stigma associated with suspected terrorism is among the worst labels a government can place on an individual.<sup>127</sup>

Plaintiffs are presented with significant burdens when claiming their due process rights were violated by their placement on the No Fly or Selectee Lists. Although the *Mathews* test is intended to protect individual liberties, in the context of placing individuals on the No Fly or Selectee Lists, the overwhelming governmental interest in national security presumptively tips the scale in favor of government action—to the detriment of those deprived of private interests. Additionally, the stigma-plus doctrine requires that the plaintiff demonstrate some tangible interest beyond reputation, which is often difficult for those whose only hindrance is enhanced screening and an injury to reputation.<sup>128</sup>

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119. *Miller v. California*, 355 F.3d 1172, 1178 (9th Cir. 2004) (citing *Cooper v. Dupnik*, 924 F.2d 1520, 1533 (9th Cir. 1991)) (determining that being falsely labeled as a child abuser on an official government index is insufficient under the stigma-plus doctrine).

120. *Hedlund*, *supra* note 3, at 620 (“The risk of erroneous deprivation and cost of additional procedures are likely the same as the No Fly List. However, when weighing these factors in context of the Selectee List, the significant government interest outweighs the private interest, risk of erroneous deprivation, and the need for additional procedures.” (footnote omitted)).

121. *Manta & Robertson*, *supra* note 50, at 1348.

122. 351 F. Supp. 2d 1119 (W.D. Wash. 2005).

123. *Green*, 351 F. Supp. 2d at 1121–22.

124. *Id.* at 1130.

125. *Id.*

126. *Shane*, *supra* note 55, at 841–42.

127. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 6–8 (“Finally, the stigma, humiliation, fear, and uncertainty that come with the knowledge that one has been placed on watchlist can hardly be overstated. Stigmatization as a suspected terrorist is one of the worst labels our government can place on an individual—it is one of the cruelest consequences of inclusion on a watchlist.”).

128. *See Green*, 351 F. Supp. 2d 1129–30.

E. *Classified Material—State Secrets, CIPA, and FISA*

Information regarding government watch lists, particularly the No Fly List and Selectee List, typically receives a designation of sensitive security information or another category of classification.<sup>129</sup> These designations hinder an individual's ability to access and review documents that may be used against him or her during administrative and judicial proceedings, a fact that runs contrary to core tenets of the American judicial system.<sup>130</sup> Individuals filing appeals often are not permitted to view any classified material that may subject them to continued placement on watch lists.<sup>131</sup> Instead, government agencies retain access to all the information and may, at times, submit parts of a classified file to the judge *ex parte* for *in camera* review.<sup>132</sup>

Traditionally, the American judicial system has been wary of any one-sided review of documentation.<sup>133</sup> The Supreme Court has noted that “[t]he heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”<sup>134</sup> However, under various circumstances, particularly in matters relating to national security, the government is permitted to utilize *in camera* review during judicial proceedings involving classified information.<sup>135</sup> In certain situations, the government “enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality.”<sup>136</sup> In the context of judicial proceedings regarding the

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129. See Sara Bodenheimer, Comment, *Super Secret Information? The Discoverability of Sensitive Security Information as Designated by the Transportation Security Administration*, 73 UMKC L. REV. 739, 742 (Spring 2005). (“As a result of the Homeland Security Act, the FAA lost its SSI designation authority to the TSA and the DHS. The designating authority now bestowed on the TSA allows the withholding of SSI if the TSA determines that such disclosure would . . . [b]e detrimental to the security of transportation.” (alteration in original) (footnote omitted) (quoting 49 U.S.C. § 114(s) (2003))).

130. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 137–42 (1951) (determining that the government violated the Fifth Amendment’s Due Process Clause by designating certain organizations as Communist without providing notice and an opportunity to be heard).

131. See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, No. C 06–00545 WHA, 2012 WL 6652362, at \*2 (N.D. Cal. Dec. 20, 2012); *Scherfen v. Dep’t of Homeland Sec.*, No. 3:CV–08–1554, 2010 WL 456784, at \*4–5 (M.D. Pa. Feb. 2, 2010).

132. See Ellen Yaroshefsky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1069 (2006) (discussing how the government has the ability under the Classified Information Procedures Act to present information *ex parte* to determine whether documents are discoverable in the context of the litigation).

133. See *McGrath*, 341 U.S. at 170.

134. *Id.*

135. 8 U.S.C. § 1189(a)(3)(B) (2012). This statute authorizes the Secretary of State to designate foreign terrorist organizations. *Id.* § 1189(a)(1). It also permits the use of classified information in that designation. *Id.* § 1189(a)(3)(B). The use of classified information does not have to be disclosed to the organization and may be reviewed by the courts *ex parte*. *Id.*

136. *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (citing *United States v. Yunis*, 867 F.2d 617, 623–24 (D.C. Cir. 1989)) (holding that the government

No Fly List and Selectee List, the statutory requirements for judicial review under § 46110 do not directly address ex parte or in camera procedures.<sup>137</sup>

### 1. Classified Information Procedures Act

Under the Classified Information Procedures Act (CIPA),<sup>138</sup> the government is permitted to introduce classified information in Article III criminal trials in some situations.<sup>139</sup> Prior to the passage of CIPA, the Supreme Court required lower courts to use balancing tests to determine whether or not disclosure of national security information was proper on a case-by-case basis.<sup>140</sup> CIPA was developed to provide a greater structural framework for classified information proceedings.<sup>141</sup> Specifically, CIPA's original goal aimed to prevent graymail.<sup>142</sup>

Graymail entails the threat of revealing state secrets to manipulate the legal process, which creates a “disclose or dismiss” conundrum for prosecutors and judges.<sup>143</sup> Graymail often occurs in cases of espionage, where insiders possess national security information and create an “irreconcilable conflict” for the government, in which it must choose between its obligations to prosecute potential violators of the law and its desire to prevent disclosure of national security secrets.<sup>144</sup> In order to prevent graymail, courts use CIPA to determine whether classified information should be disclosed to a defendant, how that material may be provided, and to whom the information must be provided.<sup>145</sup> CIPA itself does not directly apply to individuals challenging their watch list status, but the structure of CIPA has provided guidance in some cases involving the No Fly List.<sup>146</sup>

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should provide organizations with notice of unclassified portions of the administrative record when labeling organizations as terrorist entities, but leaving open the possibility to skip this step in the event of an emergency).

137. 49 U.S.C. § 46110(c) (2012) (“Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.”).

138. Classified Information Procedures Act, 18 U.S.C. app. 3 (2012).

139. *Id.* § 6.

140. *Roviaro v. United States*, 353 U.S. 53, 62 (1957). According to one author, *Roviaro* held that a claim to executive privilege cannot completely override a defendant's right to a fair trial. Arjun Chandran, Note, *The Classified Information Procedures Act in the Age of Terrorism: Remodeling CIPA in an Offense-Specific Manner*, 64 DUKE L.J. 1411, 1414 (2015).

141. Ian MacDougall, Note, *CIPA Creep: The Classified Information Procedures Act and Its Drift into Civil National Security Litigation*, 45 COLUM. HUM. RTS. L. REV. 668, 669–70 (2014).

142. *Id.*

143. *Id.* at 670.

144. Chandran, *supra* note 140, at 1415. Chandran also discusses adjusting CIPA's application from insider cases, which involve persons in possession of national security information, to outsider cases involving those being prosecuted on the basis of classified information held by the government. *Id.* at 1432. “When prosecutors use CIPA in terrorism cases, outside its drafting context, the governmental interests against disclosure are altered, and may or may not justify the level of deference to executive privilege warranted in espionage cases.” *Id.* at 1416 (footnote omitted).

145. MacDougall, *supra* note 141, at 678–80.

146. See Florence, *supra* note 2, at 2175 (discussing *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), wherein the court used CIPA for guidance in understanding possible remedies, even

In order to determine what information can be disclosed to a defendant, courts can authorize prosecutors to alter material through redaction or summarization to reduce either the amount of classified information revealed or its impact outside of the case.<sup>147</sup> Section 4 of CIPA permits the prosecution to present classified information *ex parte* and *in camera* to the trial court.<sup>148</sup> Defense counsel is not present for this hearing, so the judge and prosecutor alone determine if any classified information is relevant to the defense's case theory.<sup>149</sup> This situation leads to clear concerns regarding both due process under the Fifth Amendment and effective assistance of counsel under the Sixth Amendment.<sup>150</sup> When making determinations for materiality and relevance, "the court either balances the need for the information against the claim of government privilege or imposes a heightened standard of relevance to determine whether the information is discoverable."<sup>151</sup>

If the information is deemed discoverable, the court may instruct the prosecution to alter the classified documents in one of three ways: (1) "delete specified items of classified information from documents," (2) "substitute a summary of the information for such classified documents," or (3) "substitute a statement admitting relevant facts that the classified information would tend to prove."<sup>152</sup> If the government moves to substitute either (1) a statement admitting facts that the classified information itself would prove or (2) a summary of classified information, the "court must grant the motion if the requested substitution would not substantially detract from the defendant's ability to mount a defense."<sup>153</sup>

Upon determining that the classified information should be disclosed to the defense without modification, the Attorney General may submit an affidavit to quash disclosure, which is reviewed *in camera* and *ex parte*.<sup>154</sup> The affidavit must argue and demonstrate that an unmodified disclosure "would cause identifiable damage to the national security of the United States."<sup>155</sup> If the affidavit is

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though the Act did not apply directly to the case); *see also* Chandran, *supra* note 140, at 1426 ("The Fourth Circuit's decision in *Moussaoui*—that CIPA's procedures for written substitutions of witness testimony can adequately preserve a defendant's Sixth Amendment rights—has come under criticism.").

147. MacDougall, *supra* note 141, at 679–80.

148. Classified Information Procedures Act § 4, 18 U.S.C. app. 3, § 4 (2012).

149. Chandran, *supra* note 140, at 1443–44.

150. *See id.* at 1443 ("Forbidding defense counsel from participating in determinations of materiality and relevance is indefensible in an adversarial criminal-justice system—no one but defense counsel, who has conferred with her client and developed a legal strategy, could possibly know what is material and relevant to the defense.").

151. Yaroshefsky, *supra* note 132, at 1068–69 (citing *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (determining that the government's protection of classified information requires a higher threshold of materiality before any disclosure is made)).

152. 18 U.S.C. app. 3, § 4; *accord* MacDougall, *supra* note 141, at 679–80.

153. Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 827 (1985).

154. 18 U.S.C. app. 3, § 6.

155. *Id.*



submitted, “the court must dismiss the prosecution and enjoin the defendant from disclosing the classified information.”<sup>156</sup> This action illustrates the original purpose of CIPA, which was to prevent a defendant from revealing classified information, even to the extent that a court would dismiss pending indictment accounts against such defendant.<sup>157</sup>

When a court determines that classified information is discoverable, and the United States, through the Attorney General, permits such disclosure, a protective order may be issued to limit such disclosure only to individuals with proper security clearances.<sup>158</sup> The defendants in these cases do not, in all likelihood, possess proper security clearance, and their attorneys may not have proper clearance either. In this situation, judges are permitted to allow a replacement or supplemental attorney to act on the defendant’s behalf.<sup>159</sup> When defense counsel does possess the proper security clearance, counsel must still sign a memorandum of understanding, agree to review classified evidence in a secure compartmented information facility (SCIF), and “refrain from discussing the classified information with anyone not included in the order, *including the defendant himself*.”<sup>160</sup> One author suggests that the compensatory counsel system permitted through CIPA should be used in No Fly List proceedings in general, rather than only on occasion.<sup>161</sup>

## 2. Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA) governs the process by which the U.S. government may authorize electronic surveillance to acquire foreign intelligence information for up to a year.<sup>162</sup> FISA warrants authorize the government to obtain information through methods such as wiretapping, and allowing law enforcement to gather and store an incredible amount of information, most of which is classified due to national security concerns.<sup>163</sup> FISA and its processes remained relatively unknown to Americans for many years until disclosures by Edward Snowden revealed the breadth of the government’s metadata surveillance program.<sup>164</sup> The electronic surveillance process occurs through the Attorney General, who certifies in writing (1) that the electronic surveillance is directed solely at information from foreign nationals or property, (2) that there is not a substantial risk that a U.S. citizen will be a party to the communication that is being monitored, and (3) that the

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156. Fein, *supra* note 153, at 827.

157. *Id.* at 826–27.

158. MacDougall, *supra* note 141, at 679–80, 682.

159. *Id.* at 680.

160. Chandran, *supra* note 140, at 1418.

161. *See, e.g., United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); Florence, *supra* note 2, at 2177–79.

162. Foreign Intelligence Surveillance Act of 1978 § 102, 50 U.S.C. § 1802 (2012).

163. *See Yaroshefsky, supra* note 132, at 1078.

164. Manta & Robertson, *supra* note 50, at 1323; *Wikileaks*, <http://wikileaks.org/> [perma: <http://perma.cc/E9RA-6H44>] (last visited Nov. 6, 2018).

proposed minimization procedures comply with regulations within FISA.<sup>165</sup> The Attorney General is required to inform both the House and Senate Intelligence Committees, and the Attorney general must do so at least thirty days prior to commencing surveillance, or immediately in the case of an emergency.<sup>166</sup>

In addition to informing necessary committees in Congress, the Attorney General must also submit a copy of the certification from a Foreign Intelligence Surveillance Court (FISC), which are established under the statute.<sup>167</sup> The Chief Justice of the United States appoints eleven district court judges, from at least seven of the judicial circuits in the country, to the FISC to hear certain claims regarding electronic surveillance.<sup>168</sup> The FISC may hear applications for and grant orders to approve electronic surveillance for those within the United States.<sup>169</sup>

Under FISA, the federal government may obtain warrants for foreign intelligence purposes without demonstrating that a crime is likely, or even probable, to occur.<sup>170</sup> The government must only demonstrate (1) probable cause that the target of such surveillance is a foreign power (or agent of a foreign power) and (2) that the information acquired will be foreign intelligence information.<sup>171</sup> FISA does not require that the person whose communications are intercepted be informed of such action unless the government intends to use the intercepted communications at trial.<sup>172</sup>

When a defendant challenges a communication obtained through FISA warrants, he is generally met with a barrage of hurdles to access that evidence. According to one scholar, the “FISA court’s judicial approval process remains secret with rare exception. Rarely is a government application rejected. . . . [T]he defendant is not entitled to obtain the underlying warrant, nor is the defendant entitled to receive all of the FISA wiretaps of his own conversations.”<sup>173</sup> The Attorney General maintains power to assert that disclosure of FISA applications, orders, or other materials in court would harm national security.<sup>174</sup> If the Attorney General makes such a claim, then the court must review the FISA application, order, and other materials relating to surveillance in camera and ex parte.<sup>175</sup> The judge reviews the documents to determine whether the

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165. 50 U.S.C. § 1802(a)(1). The “minimization procedures” that are referred to in the Act speak to actions that will prevent nonpublic information from being disseminated to those without proper clearance. *Id.* § 1801(h).

166. *Id.* § 1802(a)(1).

167. *Id.* § 1802(a)(3); Shane, *supra* note 55, at 853–54.

168. *Id.* § 1803(a)(1).

169. *See id.* (establishing “a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States”).

170. *See* Shane, *supra* note 55, at 834–35.

171. *Id.*

172. Beryl A. Howell & Dana J. Lesemann, *FISA’s Fruits in Criminal Cases: An Opportunity for Improved Accountability*, 12 UCLA J. INT’L L. & FOREIGN AFF. 145, 154 (2007).

173. Yaroshesky, *supra* note 132, at 1078.

174. Howell & Lesemann, *supra* note 172, at 156.

175. Foreign Intelligence Surveillance Act of 1976 § 106, 50 U.S.C. § 1806(f) (2012).

surveillance was lawfully authorized and conducted.<sup>176</sup>

FISA provides judges with discretion to disclose certain information to defendants so long as the disclosure occurs “under appropriate security procedures and protective orders” and the disclosures are “necessary to make an accurate determination of the legality of the surveillance.”<sup>177</sup> In other words, the defendant must convince the judge that their counsel’s presence is required to make a sufficiency determination regarding the FISA surveillance documents.<sup>178</sup> However, the prevailing situation is that a defendant requests disclosure of certain documents, which the Attorney General opposes, and the court denies the defendant’s request.<sup>179</sup> As of 2007, no court had permitted a defendant or his counsel access to FISA documentation.<sup>180</sup>

When compared to other classified documentation statutes such as CIPA, FISA provides very limited options to judges to present information to defense counsel.<sup>181</sup> It also does not allow for any opportunity to challenge the accuracy of the Attorney General’s certification that the surveillance’s purpose was to gather foreign intelligence.<sup>182</sup> Defense counsel is placed in a difficult situation where, in order to unseal FISA documents to determine sufficiency, they first need to see the application to ascertain its basis.<sup>183</sup> Therefore, defense counsel is never able to see FISA documents, rendering it impossible to know how the contents may affect defense strategy or the government’s case against his client.<sup>184</sup>

### 3. State Secrets: *Reynolds* and Civil Litigants

The state secrets privilege is one of the most powerful tools the government can use to prevent disclosure of classified documents. By invoking the privilege, the government prevents the disclosure of classified material in any form, effectively halting the discovery process in any trial.<sup>185</sup> Unlike criminal defendants, who possess certain rights to access through statutes previously discussed like CIPA, civil litigants have little to no right of access to classified information.<sup>186</sup>

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176. *Id.*

177. *Id.*

178. Howell & Lesemann, *supra* note 172, at 160–61.

179. *Id.* at 156.

180. *Id.* at 156–57. This information is accurate as of 2007. *Id.*

181. *Id.* at 155–56; Yaroshefsky, *supra* note 132, at 1078.

182. See Howell & Lesemann, *supra* note 172, at 156.

183. *Id.* at 160–61.

184. Yaroshefsky, *supra* note 132, at 1074 (“Perhaps, the only viable result of the appropriate balancing of the defendant’s constitutional rights against the government’s national security concerns may be to provide access to the information to security cleared defense counsel who is not permitted to share the information with his client.”).

185. Classified Information Procedures Act § 3, 18 U.S.C. app. 3, § 3 (2012) (“Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.”).

186. See *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (recognizing that the rationale for

*United States v. Reynolds*<sup>187</sup> was the first case in which the Supreme Court recognized the state secrets privilege, and its decision established a basic procedural framework for how the process should function.<sup>188</sup> Essentially, only the government may claim the privilege, and the head of a specific department must claim the privilege after “actual personal consideration.”<sup>189</sup> The court still has the power to determine whether the privilege is properly invoked under the circumstances, but it can only do so “without forcing a disclosure of the very thing the privilege is designed to protect.”<sup>190</sup> Even as the Court provides judges with some power to investigate the invocation of the privilege, *Reynolds* discouraged the use of in camera or ex parte review by the judge due to the risk such disclosure could pose to national security.<sup>191</sup> Additionally, the Court stated that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”<sup>192</sup>

Following *Reynolds*, courts developed a new standard for the privilege against disclosure—reasonable danger.<sup>193</sup> In civil trials, if a court determines that the government satisfies the reasonable danger standard, then the court must uphold the privilege claim regardless of whether it harms the opposing party seeking disclosure.<sup>194</sup> The result of a reasonable danger inquiry appears to be binary, unlike balancing tests like *Mathews*.<sup>195</sup> In sum, the *Reynolds* Court provided that courts should grant a great degree of deference to the government when it invokes the state secrets privilege in civil litigation.<sup>196</sup> Even outside of

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providing criminal defendants with classified information does not exist in civil cases).

187. 345 U.S. 1 (1953).

188. *Reynolds*, 345 U.S. at 7–10. (1953). The Court determined that the state secrets privilege was present through common law, rather than through the Constitution, so a future Supreme Court decision elevating the privilege to constitutional status could dramatically alter its power. See Matthew N. Kaplan, *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review*, 18 NOVA L. REV. 1787, 1818 (1994).

189. *Reynolds*, 345 U.S. at 7–8.

190. *Id.* at 8.

191. *Id.* at 10 (“When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”).

192. *Id.* at 11.

193. Kaplan, *supra* note 188, at 1818–21 (noting that future Supreme Court decisions could elevate the state secrets privilege to constitutional status in a dramatic change to the independent counsel doctrine).

194. *Reynolds*, 345 U.S. at 10; see *Halkin v. Helms*, 690 F.2d 977, 1001 (D.C. Cir. 1982) (determining that the state secrets privilege permits the government to refuse to respond to constitutional claims even if the refusal may result in unconstitutional actions being concealed); Kaplan, *supra* note 188, at 1821; MacDougall, *supra* note 141, at 684–85.

195. Compare *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), with Kaplan, *supra* note 188, at 1821. “In a civil trial, if the court is satisfied that a ‘reasonable danger’ exists that disclosure of the information at issue would adversely affect the national security, then the court must uphold the government’s claim of privilege, even if it harms the parties seeking disclosure.” Kaplan, *supra* note 188, at 1821 (footnotes omitted).

196. See Fein, *supra* note 153, at 829 (discussing the power of the *Reynolds* decision, as illustrated in *Halkin*, 598 F.2d 1). In *Halkin*, the circuit court determined that “the state secrets privilege entitled the government to refuse any response to the plaintiffs’ constitutional claims, even if

litigation, the TSC invokes the state secrets privilege to avoid disclosure of the individuals added to watch list databases through the emergency exception to the reasonable suspicion standard.<sup>197</sup>

Despite safeguards present in both CIPA and the administrative review process within DHS TRIP, there is still concern when evaluating an individual's possible redress through strictly ex parte and in camera review. As one court stated:

Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations. To the extent that an unclassified summary could provide helpful information, such as the subject matter of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable.<sup>198</sup>

The current system of review for those placed on watch lists is fraught with possibilities for both factual errors as well as outright discrimination. Due to the ever growing presence of classified information in this field, it is critically important that the law seeks to protect those attempting to vindicate their constitutional rights.

### III. DISCUSSION

In order to rectify clear risks of error and discrimination, the process for reviewing watch list decisions, including the use of classified evidence, needs to be amended to protect litigants who seek vindication of constitutional rights but are met with significant procedural hurdles due to classified information. The risks for error and discrimination are amplified because evidence used to place certain individuals on watch lists like the No Fly and Selectee Lists is inherently susceptible to classification due to national security concerns. At present, numerous statutes and common law notions, such as CIPA, FISA, and the state secrets privilege, converge when national security issues arise in the courtroom. In particular, CIPA has morphed into a shield allowing the government to refuse disclosure of classified information.<sup>199</sup> This contravenes the original intent behind CIPA—to prevent a defendant from disclosing such information.<sup>200</sup> If DHS TRIP or federal appellate review are to provide genuine relief for plaintiffs

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that refusal resulted in concealment of unconstitutional actions." Fein, *supra* note 153, at 830.

197. Manta & Robertson, *supra* note 50, at 1320. See *supra* notes 69–74 and accompanying text for a discussion of the emergency nomination process.

198. Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 982–83 (9th Cir. 2012) (holding that the *Mathews* test for adequate process requires additional safeguards despite the fight against terrorism representing an extreme circumstance). The court highlighted a minimum of three factors to consider in determining whether to disclose classified information: (1) "the nature and extent of the classified information," (2) "the nature and extent of the threat to national security," and (3) "the possible avenues available to allow the designated person [or plaintiff] to respond more effectively to charges." *Id.* at 984.

199. Yaroshefsky, *supra* note 132, at 1067–69.

200. *Id.*

in these proceedings, then CIPA needs to be returned to its original meaning rather than be used as a means of preventing disclosure of any evidence the government chooses to label as important to national security. In order to reconcile these competing interests, the redress system for individuals placed on watch lists needs to be remodeled to adequately protect state secrets and national security while ensuring that those who are challenging their placement on watch list are entitled to a full and fair process compliant with *Mathews*. One way to accomplish this balance is to provide plaintiffs with compensatory counsel who will be able to advocate for their client during in camera proceedings concerning classified evidence.<sup>201</sup> This would at least provide some sort of adversarial proceeding, even if the compensatory counsel cannot discuss the evidence with his client directly. Additionally, this Comment recommends using another federal law, the Federal Arbitration Act,<sup>202</sup> to create a system where all parties' interests can be represented despite concerns regarding classified documents.

A significant part of this proposed process requires that the adverse party gain some access to the information that is used against him to place him on a watch list. There are several currently enacted statutes that theoretically permit adverse parties access to information, but none provide the full ability to combat erroneous additions to a watch list. To resolve these problems, this Comment uses the Arbitration Act as a model to propose a new system to enable both the security of information and equal access to such information.<sup>203</sup> Implementation of the Arbitration Act in this setting will relieve the pressures placed on courts in assessing classified information and place the decision of disclosure in the hands of qualified and wholly independent parties.

#### A. *The Restriction of Due Process Through Watchlists*

In implementing the No Fly and Selectee Lists, the government utilizes standards, such as reasonable suspicion, that result in a nomination process that is all show and no substance.<sup>204</sup> The current process requires little evidence to place someone on a watch list and most nominations are placed on a list.<sup>205</sup> This strategy of "overlisting" benefits the government.<sup>206</sup> However, it vastly increases

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201. Bodenheimer, *supra* note 129, at 770–71.

202. Federal Arbitration Act of 1947, 9 U.S.C. §§ 1–16 (2012).

203. *Id.*

204. OFFICE OF THE INSPECTOR GEN. AUDIT DIV., *supra* note 72, at 42; Manta & Robertson, *supra* note 50, at 1355 (arguing that the reasonable suspicion standard may violate rational basis review because evidence indicates that the current procedures of the No Fly List do not assist the government in preventing terrorist attacks).

205. See AM. CIVIL LIBERTIES UNION, *supra* note 3, at 10 n.21.

206. Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 473 (2013) ("Overlisting also has institutional benefits. A large list of terrorist suspects suggests that terrorist activities are likely. That, in turn, suggests that more resources should be devoted to agencies that deal with terrorism."); see also Manta & Robertson, *supra* note 50, at 1317–18 ("[L]aw enforcement agencies at times choose not to place some of the most dangerous people on the list because it would disrupt investigative efforts to share this information with the airlines whose charge it

the chances of erroneous placements that wrongly restrict individuals' ability to travel.<sup>207</sup> These errors cause persons to be placed on a watch list and subjected to enhanced security screening or a complete ban on air travel, just because their name is similar (or identical) to a suspected individual.<sup>208</sup> One of the most glaring problems for persons placed on a watch list is that they may be unaware of such placement because the TSA is not required to disclose any placements, even if the placement is contested.<sup>209</sup>

After an individual determines that he may erroneously be on a watch list, the person must jump through several administrative hoops to receive any modicum of information regarding his possible placement on a watch list.<sup>210</sup> This information can include how the TSA considered the suspected individual's race, religion, or speech.<sup>211</sup> However, "nominations must not be based solely on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment."<sup>212</sup> Regardless, it is unlikely that individuals attempting to challenge their watch-list placement will be able to receive any of this information through the DHS TRIP.

If an individual seeks redress through DHS TRIP, the process goes through an administrative review that remains murky and also does not develop a sufficient evidentiary record for subsequent review.<sup>213</sup> These issues are

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is to prevent the members of the list from boarding. All this has resulted in a no-fly list that is both arbitrary in scope and ineffective to protect national security." (footnote omitted); *see also* Hedlund, *supra* note 3, at 607 ("Some proponents of the watch lists, however, argue that a dragnet approach is proper. Under such an approach, the more people you have on the list the more likely you are to catch an actual terrorist." (footnote omitted)).

207. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 10 n.21. ("Neither the TSC nor the National Counterterrorism Center (NCTC), which consolidates terrorism-related intelligence, is positioned to assess the credibility of the intelligence underlying nominations to watchlists. The GAO has reported that both NCTC and TSC generally treat an agency's designation of a watchlist nominee as presumptively valid. . . . [T]he TSC accepted 99 percent of the nominations it received." (citation omitted)).

208. *See* Shaina N. Elias, Essay, *Challenges to Inclusion on the "No-Fly List" Should Fly in District Court: Considering Jurisdictional Implications of Administrative Agency Structure*, 77 GEO. WASH. L. REV. 1015, 1015 (2009) ("Alex Harris likes to travel with his family. In fact, Alex's family, who live in New York City, recently took a trip to London. Upon their return to John F. Kennedy International Airport from London, however, Alex Harris and his family were placed in a holding room because Alex's name matched a name on the 'No-Fly List.' 'Look at him,' Alex's mother shouted during the detainment, 'He's clearly not a terrorist. He's 7!' Over two hours later, airport officials decided that Alex Harris was not a federal terrorist and permitted Alex and his family to leave the airport's holding room." (footnote omitted)).

209. *Id.* at 1021–22. *But see* Hedlund, *supra* note 3, at 614 (arguing that observant travelers can likely deduce their placement on a list because of restrictions in regard to boarding passes and enhanced security screening).

210. *See* Manta & Robertson, *supra* note 50, at 1315.

211. *Id.* (noting that it is not even possible to determine if religious views or affiliations are used in watch list determinations because complaints filed with the DHS and TSA only result in an inquiry into whether the complaint is based on a positive match to the No Fly List).

212. Declaration of Michael Steinbach at 6, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750-BR).

213. *Latif*, 28 F. Supp. 3d at 1149–50 ("Thus, the fundamental flaw at the administrative-review

compounded by the fact that an appeals court is unable to take in additional evidence if an appeal were filed.<sup>214</sup> The challenger completes the Traveler Inquiry Form, sends additional information to DHS, and receives his Redress Control Number.<sup>215</sup> Upon sending the form and additional information, the challenger is left out of the entire administrative review process, which is taken up by DHS, TSDB, and the nominating agency.<sup>216</sup> One author summarizes the vast issues with DHS TRIP succinctly:

Ultimately, watch list passengers are at a disadvantage when challenging their likely inclusion on the No-Fly List because they possess no factual or administrative record regarding their possible placement on the watch list, have no understanding of whether their likely placement on the list is based on simple error or actual information, and have no understanding of the procedures that have denied them the ability to travel by air.<sup>217</sup>

Even after completing DHS TRIP, and exhausting all possible administrative relief, an individual still remains unsure as to whether he was ever placed on a watch list.<sup>218</sup> Instead, the individual receives a determination letter, which makes no reference to whether that person is currently or ever was placed on a watch list nor any of the criteria used to make the decision.<sup>219</sup> Despite the lack of information provided to the challenger, some courts maintain that the existence of the program itself creates a record that can be reviewed by a judge on appeal.<sup>220</sup> Regardless, DHS TRIP remains an ineffective redress procedure because it inherently limits the ability for individuals to actually receive information regarding their presence on a watch list even after going through an entire administrative review process.

To further compound the issues of inadequate administrative review, challengers who appeal to federal courts are often prevented from obtaining disclosure orders due to a deference to the government or an assertion of the

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stage (the combination of a one-sided record and a low evidentiary standard) carries over to the judicial-review stage.” *Id.* at 1153); *see also* Ibrahim v. Dep’t of Homeland Sec., 538 F.3d 1250, 1256 (9th Cir. 2008) (“For all we know, there is no administrative record of any sort for us to review. So if any court is going to review the government’s decision to put Ibrahim’s name on the No-Fly List, it makes sense that it be a court with the ability to take evidence.” (citation omitted)). *But see* Shearson v. Holder, 725 F.3d 588, 863 (6th Cir. 2013) (requiring a challenger to pursue DHS TRIP redress so that an administrative record can be formed).

214. *Latif*, 28 F. Supp. 3d at 1153.

215. *See DHS TRIP Application Process FAQ*, DEP’T OF HOMELAND SEC.: DHS TRAVELER REDRESS INQUIRY PROGRAM (DHS TRIP), <http://trip.dhhs.gov/FAQ.aspx> [perma: <http://perma.cc/7JN6-6NHB>] (last visited Nov. 16, 2018).

216. Hedlund, *supra* note 3, at 613.

217. Elias, *supra* note 208, at 1022.

218. *See* Part II.C for a discussion of DHS TRIP.

219. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 8.

220. Shearson v. Holder, 725 F.3d 588, 594–95 (6th Cir. 2013) (“While the Redress Program’s determination letters do not provide a direct answer for travelers about whether the terrorist watchlist has included or continues to include them, the Redress Program review process creates a record that may be reviewed by a judge *in camera*.”).



state secrets privilege under the auspices of national security.<sup>221</sup> In reviewing the government's decision to place an individual on a watch list, a judge is often left with a relatively barren administrative record and a statutory inability to consider the full evidentiary record even in camera or ex parte.<sup>222</sup> Under the state secrets privilege, the government is able to invoke the privilege to prevent any disclosure of national security information so long as there is a reasonable danger.<sup>223</sup>

The argument against any disclosure relies on the notion that state secrets and classified information contain complex concepts, and therefore disclosure decisions should not be left up to judges who find themselves on uncertain terrain.<sup>224</sup> However, this argument fails to hold water if one considers that judges are often required to assess complex matters that are not necessarily in their field of expertise, which is the whole basis for concepts such as expert testimony or amicus briefs. Even accepting such a view of judges, and their inability to determine whether full disclosure is proper, the binary system of the state secrets privilege does not reflect the reality of many situations.<sup>225</sup> Instead of incorporating the danger of disclosure into traditional judicial determinations, through an assessment of the danger and benefits of disclosure, the state secrets privilege requires determinations to be made even if there is a known harm.<sup>226</sup> One manner of rectifying this requires courts to adjust the interpretation of the state secrets privilege. Such a dramatic change is unlikely and, instead, courts look to statutes such as CIPA and FISA for guidance in proceedings where the government is asserting national security as a means of refusing disclosure.<sup>227</sup>

CIPA in its original creation was a shield: it prevented defendants from disclosing classified information while not allowing the government to refuse to disclose classified information it already possessed.<sup>228</sup> In its new form CIPA is a sword: the government manages to refuse disclosure through statutory provisions or through the overpowering state secrets privilege.<sup>229</sup> Even in the context of CIPA, courts are left with the difficult determination of the risks posed to national security through any manner of disclosure, although there is

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221. Elias, *supra* note 208, at 1026.

222. Manta & Robertson, *supra* note 50, at 1335–36.

223. Kaplan, *supra* note 188, at 1821.

224. *See id.* at 1835–36.

225. *Id.*

226. Kaplan, *supra* note 188, at 1821.

227. Florence, *supra* note 2, at 2176 (arguing that the principles of CIPA can apply beyond the letter of the statute, as demonstrated in *U.S. v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004)).

228. Yaroshesky, *supra* note 132, at 1067–68 (“In this expanding category of cases there is no possibility of ‘gray-mailing’; the defendant cannot reveal classified information other than that provided in discovery.”); Chandran, *supra* note 140, at 1434 (“CIPA was *not* designed to relieve the government from deciding whether to prosecute or avoid disclosure; on the contrary, it was designed to facilitate that decision by ensuring open information.”).

229. Chandran, *supra* note 140, at 1432 (“Indeed, the type of evidence at issue in CIPA cases today rarely concerns the vital state secrets that graymailers threatened to expose in CIPA’s infancy.”).

slightly more freedom than under the state secrets doctrine.<sup>230</sup> Under CIPA, the government is immediately entitled to an in camera hearing to determine the use of classified information, and the government is able to supply a statement or summary of classified information so long as it does not detract from the defendant's ability to mount a defense.<sup>231</sup> This requirement inherently restricts the ability of defendants to effectively defend themselves because it is the role of neither the prosecutor nor the judge to zealously advocate for the defendant, and they therefore cannot (and should not) know exactly what is materially relevant to a defense.<sup>232</sup> To rectify this defect, one author suggests multiple changes to CIPA so that it can be drafted in an offense-specific manner, enabling defense counsel to have a voice in the determination hearings.<sup>233</sup>

In the unlikely event that a court denies the government's motion for a substitute or summary of classified information and demands full disclosure, the Attorney General can still assert that disclosure would cause damage to national security.<sup>234</sup> This assertion, if accepted by the court, requires the court to dismiss the prosecution and any potential disclosure of classified information.<sup>235</sup> As one author stated, "[t]hus, the essential conflict remains: the government defendants object to disclosing the full range of evidence used to place the plaintiffs on the no-fly list, and the plaintiffs argue that they cannot defend against this decision without knowing the scope of the evidence against them."<sup>236</sup>

#### B. *Security-Cleared and Compensatory Counsel: Successes and Limitations*

Another solution involves a model that would allow litigants' attorneys to have access to certain classified information, even if disclosure of that information were not possible.<sup>237</sup> Attorneys in this setting would need to receive security clearances at the necessary levels to be able to review any information, and protective orders would be issued to prevent any disclosure by the attorney.<sup>238</sup> This would also require that defense counsel be permitted to attend the hearing in which classified information is discussed.<sup>239</sup> Obtaining security clearances could follow a similar path as under CIPA, where one security

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230. *See id.* at 1412–13.

231. Fein, *supra* note 153, at 826.

232. Chandran, *supra* note 140, at 1444.

233. *Id.* at 1444–45 (arguing that § 4 of CIPA should be revised so that defense counsel has a statutory right to object in the hearing setting).

234. Fein, *supra* note 153, at 827.

235. *Id.* at 826–27.

236. Manta & Robertson, *supra* note 50, at 1340.

237. Florence, *supra* note 2, at 2170. In his article, Florence also argues that individuals should be provided advance notice that they have been placed on a watch list, in addition to any compensatory counsel model. *Id.* at 2167. Florence notes that advance notice rectifies some *Mathews* test problems because it would prevent passengers from being detained immediately before a flight and reduce the risk of erroneous deprivation because a challenge could occur prior to adverse action; moreover, the requirement places a minimal administrative burden on the government. *Id.* at 2169.

238. Bodenheimer, *supra* note 129, at 770–71.

239. Chandran, *supra* note 140, at 1444–45.

clearance permits the attorney to review documents at all levels of classification.<sup>240</sup> The protective order would likely be necessary because the TSA is generally unwilling to release any information to the public.<sup>241</sup> An unseemly side effect of this system is that a client would still not have access to information, and his attorney would be barred from disclosing any information to him.<sup>242</sup>

If an attorney cannot discuss any of the potential classified information with her client, then it will remain difficult to mount a viable defense because strategy will be limited.<sup>243</sup> This situation would also place attorneys in a difficult ethical dilemma, because an attorney would be forced to refuse disclosure of information while also crafting a strategy based on that classified information.<sup>244</sup> It would appear that the implementation of any strategy could lead to an inadvertent disclosure. As one author notes:

There is no simple resolution of this ethical dilemma. Perhaps, the only viable result of the appropriate balancing of the defendant's constitutional rights against the government's national security concerns may be to provide access to the information to security cleared defense counsel who is not permitted to share the information with his client.<sup>245</sup>

One way to resolve this ethics problem is to remove the adversary nature of the defense counsel from the proceeding and instead implement an independent counsel that is paid for by the government.<sup>246</sup> Similar to the security-cleared defense counsel mentioned previously, this independent counsel would possess proper security clearance and could “view and challenge [the] classified evidence on behalf of his client.”<sup>247</sup> The client would retain his own attorney, but the compensatory counsel acts as a substitute advocate during in camera hearings to determine whether or not classified information is pertinent to the defense's case and should therefore be disclosed.<sup>248</sup> This setting would work in a similar manner to the Alien Terrorist Removal Court (ATRC), which reviews the deportation of resident aliens in cases involving secret evidence, often involving terrorism claims.<sup>249</sup> In that setting, special attorneys receive security clearance to

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240. Yaroshefsky, *supra* note 132, at 1070 (noting that obtaining a security clearance under CIPA permits defense lawyers to review top secret, secret, and confidential documents).

241. Bodenheimer, *supra* note 129, at 769.

242. Classified Information Procedures Act § 3, 18 U.S.C. app. § 3 (2012) (“Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.”); Yaroshefsky, *supra* note 132, at 1070.

243. Yaroshefsky, *supra* note 132, at 1073–74.

244. *Id.*

245. *Id.* at 1074.

246. Florence, *supra* note 2, at 2170.

247. *Id.*

248. *Id.*

249. Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §§ 1531–37 (2012). The ATRC was established within the Antiterrorism and Effective Death Penalty Act (AEDPA). Florence, *supra* note 2, at 2178.

access classified information and those attorneys agree to represent permanent resident aliens when looking at the information.<sup>250</sup> Attorneys with clearance in the ATRC are prohibited from disclosing any information to the client or to any attorney representing the client in the matter, subject to fines and imprisonment.<sup>251</sup>

The development of either security-cleared attorneys or a compensatory counsel system would rectify many of the issues in applying the *Mathews* test to watch list proceedings.<sup>252</sup> Attorneys who are able to be present during in camera proceedings could question contentions made by the government or point out factual errors that have led to watch-list placement. Additionally, these attorneys are much more likely to zealously advocate for their client's interests, at least more so than a judge or prosecutor would under a statute like CIPA.<sup>253</sup> However, the notion of state secrets continues to loom over the proceedings even if there is sufficient counsel for a litigant in a No Fly List proceeding. Indeed, the assertion of state secrets, or of national security, may force a judge's hand in determining that disclosure of information is not proper in a specific case.

### C. *Using the Federal Arbitration Act*

To relieve judicial burden, the Arbitration Act should be adapted to this setting—a setting for which it was not enacted, but one that it may be uniquely able to solve.<sup>254</sup> The Arbitration Act allows decisions to be removed from the

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250. 8 U.S.C. § 1532(e) (“The removal court shall provide for the designation of a panel of attorneys each of whom—(1) has a security clearance which affords the attorney access to classified information, and (2) has agreed to represent permanent resident aliens with respect to classified information . . .”).

251. Florence, *supra* note 2, at 2179.

252. See, e.g., 8 U.S.C. § 1534(e)(3)(F)(ii) (“A special attorney receiving classified information . . . (I) shall not disclose the information to the alien or to any other attorney representing the alien, and (II) who discloses such information in violation of subclause (I) shall be subject to a fine under Title 18, imprisoned for not less than 10 years nor more than 25 years, or both.”).

253. See MODEL RULES OF PROF'L CONDUCT, *Preamble: A Lawyer's Responsibilities* (Am. Bar Ass'n 2014) (“Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”).

254. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); see also Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (summarizing the history of arbitration, the Arbitration Act of 1925 and how it has since been adapted beyond its initial construction). In her article, Moses notes that the Arbitration Act was originally enacted to resolve “ordinary disputes between merchants as to questions of fact . . . [and] [i]t has a place also in the determination of the simpler questions of law.” *Id.* at 111 (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 28 (1926)). The goal of the Arbitration Act was to enforce arbitration agreements and enhance their efficiency among merchants. *Id.* at 112. As initially enacted, the law was not meant to preempt state law, but following numerous Supreme Court cases, the law became much more

hands of a single judge and placed with a group of independent arbitrators, whose decision is binding on the parties pending court approval.<sup>255</sup> This is not to argue that complex national security decisions should be removed to a similar forum as contractual disputes. Instead, the model of arbitration should be adopted to this setting, namely the use of an independent panel of qualified persons to determine contested issues, as a means of remedying the difficult claims placed in front of judges in No Fly and Selectee List proceedings.

These proceedings generally contain classified information, which quickly complicates matters due to state secrets and other statutory applications against disclosing the information. A panel of qualified and security-cleared personnel would have the ability to make a clear recommendation to a judge as to whether classified information can be disclosed within the guidelines set forth in CIPA. Like the establishment of FISA Courts, which are made up of judges who have expertise in the field and are qualified to review classified information,<sup>256</sup> this new Classified Information Panel would be able to make succinct recommendations to judges and would do so in a much more independent fashion than as currently constructed.

Under the Arbitration Act, the parties in the proceeding can either follow a prescribed method to appoint an arbitrator to hear the dispute or the court can appoint an arbitrator if no method is provided.<sup>257</sup> However, a single arbitrator may not be sufficient for these proceedings.<sup>258</sup> Under this new system for reviewing classified information in watch-list proceedings, a panel of three arbitrators would be selected to the Classified Information Panel. An arbitrator would need to go through all the necessary qualifications to receive security clearance at the required level for the case (confidential, secret, top secret).<sup>259</sup> Arbitrators would be permitted only to hear disputes at their highest security level and lower, and the panel's decision would constitute a recommendation to the judge presiding over the matter.<sup>260</sup>

Three arbitrators would make up the panel for each dispute, with each party selecting one and a third that is either mutually agreed upon or selected by the presiding judge. This selection of arbitrators and experts in the fields of classified information and national security allows disputes to have multiple parties that

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impactful and granted arbitrators power not considered by Congress in 1925. *Id.*

255. 9 U.S.C. §§ 3, 9.

256. Foreign Intelligence Surveillance Act of 1978 § 103, 50 U.S.C. § 1803.

257. 9 U.S.C. § 5 (“[U]pon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein . . .”).

258. *Id.*

259. It is easier to receive clearance for lower level classification rather than top secret clearance. This relative ease of access will create a greater number of arbitrators for disputes that will revolve around relatively low-classified documents, facilitating speedier dispute resolution, particularly in matters where simple errors have been made.

260. This procedure can function similarly to the government making a recommendation to a judge under CIPA. See *supra* Part II.E.1 for a discussion of CIPA and its effect on judicial proceedings.

retain independence and provides ownership to the parties in the dispute because of their selection powers.<sup>261</sup> In lieu of compensatory counsel, arbitrators offer protection for all parties, and the inherent expertise of an arbitrator will ward off concerns that a single person cannot process necessary information while keeping all parties' goals and interests in mind. Due to the selection process, there would be at least one arbitrator selected by the government to represent national security interests, and another arbitrator who may have a stronger affinity for an individual's access to classified information.<sup>262</sup> This solution seeks to eliminate due process concerns for plaintiffs who are either without access to classified information or who must rely on outside counsel to support their case in front of a judge during in camera proceedings.<sup>263</sup>

To efficiently and effectively determine the use of classified information, arbitrators will utilize the framework of CIPA in watch-list cases.<sup>264</sup> By using CIPA, arbitrators retain the ability to adjust classified information to the degree necessary for an independent case.<sup>265</sup> Rather than allowing government attorneys to invoke privilege for national security purposes, arbitrators can make a final recommendation to the judge looking at each case through the lens of both the government's interests as well as the private individual's interest.<sup>266</sup>

Additionally, because all arbitrators are required to pass security clearances, the panel can review any classified documents in camera and ex parte,<sup>267</sup> and the panel will not require the presence of a government attorney. If a government attorney is permitted to be present during a proceeding, the arbitrators will also seek the presence of the adverse party's counsel so that it is clear what role classified information may play in either party's case before the judge. If counsel cannot be present for in camera proceedings, counsel will file a brief with the arbitrators outlining his concerns with the use of classified information and how counsel hopes to use it for his client's case moving forward.

The arbitrators could analyze the information related to the proceeding and make a recommendation to the judge as to whether information should be disclosed to the nongovernmental party under CIPA's requirements. This adjustment will allow the panel to recommend a full disclosure, a redacted disclosure, or a statement of the classified information so that the

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261. These selection powers will empower plaintiffs who are seeking access to qualified information and will encourage a notion of impartiality by the arbitration panel.

262. See *supra* Part II.D for a discussion on the use of national security in due process contexts.

263. See *supra* notes 158–61 and accompanying text for a discussion of supplemental counsel.

264. See *supra* Part II.E.1 for a discussion of CIPA and its effect on judicial proceedings.

265. See *supra* Part II.E.1.

266. See *supra* Part II.E.1 for a discussion of CIPA and its effect on judicial proceedings. See also *supra* Part II.E.3 for a discussion of the state secrets privilege and its role in evidentiary proceedings.

267. See Classified Information Procedures Act § 4, 18 U.S.C. app. 3, § 4 (2012) (authorizing the court to supply classified information for defendant and hold ex parte hearings). The arbitration panel would act in a similar manner to CIPA's procedures, reviewing classified information ex parte, but without the need for a government attorney due to the panel's national security knowledge and expertise.

nongovernmental party will not be significantly hindered by the use of classified information in the proceeding.<sup>268</sup> Thus, all parties involved will be protected by a layer of expertise that is able to represent a broad spectrum of interests, rather than a single judge who may review classified documents in camera and ex parte with only the governmental attorney present.<sup>269</sup>

#### IV. CONCLUSION

To rectify the many problems with litigating improper placement on the No Fly or Selectee Lists, there needs to be wholesale change to the entire process. These changes need to start at the very beginning when individuals are placed on a watch list with a relatively low standard of proof, all the way through the administrative appeals process and review in federal court. Currently, the number of persons placed on watch lists is unknown, and the placement processes are murky at best.<sup>270</sup> Even when a person determines that he is erroneously on a watch list, the individual is faced with significant procedural hurdles through DHS TRIP.<sup>271</sup>

Watch lists serve a necessary and crucial role in the governance of a country in the twenty-first century, where international travel is easier than ever before, and the number of threats appears to grow exponentially. However, without careful monitoring of watch lists, the country runs the risk of enacting discriminatory practices that give the appearance of safety without any of the supposed benefits of security.<sup>272</sup> The United States was a proponent of these actions in the 1950s in its fight against Communism, and the constant growth of watch lists today strikes a similar chord of concern. The recommendation in this Comment provides only a small fix to an overwhelming problem regarding the use of watch lists in the twenty-first century. This small fix, however, will significantly assist individuals filing claims and finding themselves stymied by classified information or the opaque claim of state secrets.

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268. See *supra* notes 149–53 and accompanying text for a discussion of defense counsel being shut out from in camera and ex parte classified information proceedings.

269. This solution works to restore CIPA to its original goal as a means of preventing disclosure of sensitive national security information through graymail, rather than its use today by the government as a means of removing classified information from numerous judicial proceedings.

270. See *supra* Part II.B.

271. See *supra* Part II.C.

272. Additionally, we risk “over-watchlisting” to the point that the actual use of terrorist watch lists is hindered because so many individuals are placed on them. See Bernstein, *supra* note 206, at 473.